

International Municipal Lawyers Association
2013 Mid Year Seminar
Washington, DC

Special Session - I
Special Session on Local Government Standing Issues

Sunday, April 14, 2013

EXPANDING LOCAL ENFORCEMENT OF STATE AND FEDERAL CONSUMER PROTECTION LAWS

By:

Professor Kathleen S. Morris
Golden Gate University
San Francisco, California

©2013 International Municipal Lawyers Association. This is an informational and educational report distributed by the International Municipal Lawyers Association during its 2013 Mid Year Seminar, held April 14-16, 2013 in Washington, DC. IMLA assumes no responsibility for the policies or positions presented in the report or for the presentation of its contents.

WORKING DRAFT -- IMLA CONFERENCE ONLY – PLEASE DO NOT CIRCULATE

"EXPANDING LOCAL ENFORCEMENT OF STATE AND FEDERAL CONSUMER PROTECTION LAWS"

Kathleen S. Morris[1]

The nation's consumer protection regime is broken. The problem is not a lack of good law: The federal and state legislatures have enacted far-reaching consumer protection[2] statutes, most notably the substantively expansive Federal Trade Commission Act ("the F.T.C. Act" or "the Act")[3] and its state statutory counterparts ("the little Acts").[4] The problem is that due to insufficient funding and staffing,[5] industry capture,[6] or some combination of both,[7] these potentially powerful bodies of consumer protection law are woefully under-enforced.[8]

---

[1] Associate Professor of Law, Golden Gate Law School, 2012. Visiting Lecturer, Yale Law School, Spring 2008. Visiting Assistant Professor, Rutgers-Camden Law School, 2009-2010. Deputy City Attorney for the City and County of San Francisco, 2003-2012.

[2] I use the term "consumer protection" broadly to mean any unlawful, unfair, or fraudulent practice by a corporation that harms consumers, investors, or competitors. This essay assumes that consumer protection laws should be enforced in a manner that maximizes the "public interest," by which I mean not only the physical but also economic health and safety of consumers. *See* Amy Widman, *Advancing Federalism Concerns In Administrative Law Through A Revitalization Of State Enforcement Powers: A Case Study Of The Consumer Product Safety And Improvement Act Of 2008*, 29 Yale L. & Pol'y Rev. 165, 189 (2010) ("[d]efining 'public interest' is difficult. . . . In the context of consumer protection, the public interest largely consists of the health and safety of consumers, and anti-public-interest behavior is the absence of regulation or enforcement") (citing the "activist theory of regulation" described in Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment Of Citizen Suits Under Federal Environmental Laws*, 34 Buff. L. Rev. 833, 884-89 (1985)).

[3] *See* the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) ("F.T.C. Act" or "the Act") (prohibiting all "unfair methods of competition" and "[unlawful], unfair or deceptive acts or practices"). The Act makes "unfair" or "deceptive" acts or practices unlawful (illegal acts or practices are per se "unfair"). California's version of the F.T.C. Act, Cal. Bus. & Prof. Code § 17200, similarly prohibits "any unlawful, unfair or fraudulent business act or practice."

[4] Every state has a so-called "little F.T.C. Act." Some use general language, like the Act, while others have a specific laundry list of unfair practices. For a list of little F.T.C. Acts in every state, *see* appendix of little F.T.C. laws, *see* appendix [currently on file with author).

[5] *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Texas L. Rev. 15, 65 (2010) (describing the federal Consumer Products Safety Commission ("CPSC"), which Congress created more than forty years ago, as "chronically underfunded and understaffed"); *see also* Philip G. Schrag, *On Her Majesty's Secret Service: Protecting The Consumer In New*

At present, the F.T.C. Act is enforced almost exclusively by the F.T.C. itself.[9] The Act does not provide for a private right of action or public rights of action by state or local governments.[10] Similarly, among the fifty little Acts, only seven permit municipal enforcement, and only ten permit district attorney enforcement. This essay calls for Congress and the state legislatures to grant general-purpose localities – such as cities and counties – standing to seek injunctive and other relief under the F.T.C. Act and little Acts.[11]

Consumer advocates and legal scholars have long called for a more effective consumer protection regime. Nearly half a century ago, Ralph Nader's book *Unsafe At Any Speed* spurred broad efforts to protect consumers.[12] Ten years after Mr. Nader published his book, Ann Marie Tracey pointed out that "[c]onsumer laws are not self-executing," and called for local criminal

---

York City, 80 Yale L.J. 1529, 1530 (1971) (as of that writing, "[i]nadequate funding, understaffing, weak legislation, lack of public support, overbureaucratization and the absence of any real sense of mission conspired to render government agencies ineffective or, in some cases, servants of industry, while consumer fraud flourished.").

[6] Rachel Barkow has called consumer protection in particular "a breeding ground for capture." *See* Barkow, *supra* note 5, at 16.

[7] *See id.* at 65 (blaming both industry capture and lack of funding and staffing for failures of the federal banking and consumer agencies).

[8] *See id.* at 65-72 (detailing forty years of failed efforts by the Consumer Products Safety Commission); *see also* Widman, *supra* note 2; Philip G. Schrag, *On Her Majesty's Secret Service: Protecting The Consumer In New York City*, 80 Yale L.J. 1529, 1530 (1971). *See also* National Consumer Law Center, *Restore The States' Traditional Role As 'First Responder*,'" Sept. 2009 (arguing that over time the credit marketplace – in such areas as mortgages, overdraft fees, and overall lending -- has developed a "culture of deception" fueled in part by federal preemption of state law).

[9] The Office of the Comptroller of the Currency is charged with enforcing the F.T.C. Act against the banking industry. *See* Fredric J. Bendremer, *Applicability of Section 5 of the Federal Trade Comm'n Act To National Banks*, 22 Ann. Rev. Banking & Fin. L. 189 (2003).

[10] *See Dreisbach v. Murphy*, 658 F. 2d 720, 730 (9th Cir. 1981) (noting the absence of a private right of action under the F.T.C. Act); *Baum v. Great Western Cities, Inc.*, 703 F. 2d 1197, 1209 (10th Cir. 1983) (same); *Alfred Dunhill, Ltd. V. Interstate Cigar Co.* 499 F. 2d 232, 237 (2nd Cir. 1974) (same). In sharp contrast, the federal civil rights statute provides for a private right of action against. *See* 42 U.S.C. § 1983. And the Natural Gas Pipeline Safety Act and Clean Air Act provide for not only for private but a public – including municipal -- rights of action. *See* National Gas Pipeline Safety Act, 42 U.S.C. §§ 60121, 60101(a)(17); Clean Air Act, 42 U.S.C. §§ 7602(e), 7604(a)(1).

[11] Local government enforcement of state and federal law raises unique standing questions. I discuss those questions and others in a forthcoming article entitled *Local Government Standing*.

[12] Ralph Nader, UNSAFE AT ANY SPEED (1965).

prosecution of consumer rights violations.[13] In the nearly four decades since then, politicians[14] and scholars[15] have joined consumer rights advocates to rally for better and stronger consumer protection.

Unfortunately, our national efforts to protect consumers, law-abiding businesses, and our nation's economic stability have fallen far short.[16] As Rachel Barkow has written:

> Though select public interest advocacy groups, such as Public Citizen, have had some success representing consumer interests, they are no match for the resources and political clout of the industries that oppose consumer protection laws.[17]

Unlawful, unfair, and/or fraudulent corporate acts and practices are becoming more widespread, complex, and dangerous to our national, state, and local economies.[18] Human greed is of course inevitable and the corporate form will continue to provide a filter for it. Our governments can never change that, but surely they can do a better job of policing it. This essay posits that permitting local civil enforcement of the F.T.C. Act and the little Acts would be a step in the right direction.

This essay is not the first to discuss whether and when legislatures should allow disaggregated enforcement of statutes designed to protect the general public. In the fast few years alone, several legal scholars – including Amy Widman, Rachel Barkow, Gillian Metzger, and Margaret Lemos -- have written either about state enforcement of federal law in general[19] and/or state enforcement of consumer protection statutes.[20] And as early as 2006, Kathleen Engel was calling for disaggregated enforcement of state lending laws.[21] This essay joins that discussion by arguing that Congress and the state legislatures

---

[13] *See* Ann Marie Tracey, *Consumer Protection: An Expanded Role For The Local Prosecutor*, 44 U. Cinn. L. Rev. 81, 81-82 (1975).

[14] In 1985, the late Senator Howard Metzenbaum of Ohio introduced a bill providing for state attorney general enforcement of the F.T.C. Act. *See* Thomas W. Queen, *Recent Developments in Federal Antitrust Legislation*, 54 Antitrust Law Journal 383, 394 (1985). That bill was never enacted into law.

[15] *See, e.g.*, Tracey, *supra* note 13, at 81-82.

[16] *See* Charles Gasparino, THE SELLOUT: HOW THREE DECADES OF WALL STREET GREED AND GOVERNMENT MISMANAGEMENT DESTROYED THE GLOBAL FINANCIAL SYSTEM (HarperCollins 2009).

[17] Rachel E. Barkow, *supra* note 5, at 65.

[18] The debacle involving securitization of mortgages is a classic example of how complicated and truly dangerous corporate malfeasance has become.

[19] *See* Gillian E. Metzger, *Federalism and Federal Agency Reform*, 111 Colum. L. Rev. 1 (2011); Margaret H. Lemos, *State Enforcement Of Federal Law*, 86 N.Y.U. L. Rev. 698 (2011).

[20] *See* Barkow, supra note 5, at 65; Widman, *supra* note 2.

[21] *See* Kathleen C. Engel, *Do Cities Have Standing? Redressing The Externalities Of Predatory Lending*, 38 Conn. L. Rev. 355, 359-60 (2006).

should grant general purpose localities standing to enforce the F.T.C. Act and the little Acts.

Taking this step would be a bold move both practically and politically. On a practical level, even if you limited enforcement to localities with a population of more than 100,000, it would add nearly three hundred potential corporate watchdogs[22] to the national and state scenes. On a political level, it is reasonable to expect local enforcement of federal and state consumer protection law to provoke controversy, as have proposals for state enforcement of federal law.[23]

But while this move would be bold, it would not be truly radical, for several reasons. First, localities nationwide have a history of seeking injunctions against corporations to abate economically harmful business practices, including in complex cases.[24] Second, localities already have standing to enforce, and have been successfully enforcing, various federal and state laws designed to protect the general public.[25] Third, a few California localities[26] have been running a kind of "pilot project" by enforcing Business & Professions Code section 17200 -- whose language and court interpretations mirror the F.T.C. Act -- for many decades, with impressive results.[27] The example of California allows Congress and the state legislatures a palpable sense of how well local enforcement can work. Fourth, those who write in consumer enforcement have reached a point where they[28] are pushing for increased *criminal* prosecution of corporate malfeasants. This essay contemplates only robust civil enforcement, which is a

---

[22] I say "potential corporate watchdogs" because no locality would be obliged to engage in consumer protection enforcement, but they could if they were willing and able to do so.

[23] *See* Widman, *supra* note 2.

[24] A frequently used legal "hook" at the local level is the common law of public nuisance.

[25] To take two federal examples, localities have statutory standing to enforce the federal Clean Air Act (*see* 42 U.S.C. §§ 7602(e), 7604(a)(1)); and the Natural Gas Pipeline Safety Act (*see* 15 U.S.C. § 45(a)(1)). And in seven states, localities have statutory standing to enforce little F.T.C. Acts. (*See* attached index; the states are California, Mississippi, Missouri, New Jersey, South Carolina, Texas, and Virginia).

[26] Only some localities – measured by population -- have standing to enforce section 17200.

[27] *See* Kathleen S. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, in WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY (Ed. K. Claussen, A. Grogg, R. Deutsch, E. Frechette) (2010).

[28] *See* James J. Pulliam, *Good Cop, Bad Cop: Market Competitors, UDAP Consumer Protection Laws, And The U.S. Mortgage Crisis*, 43 Loyola L.A. L. Rev. 1251, 1285 (2010) (urging state legislatures to eliminate the "injury in fact" standing requirement when a business competitor of the defendant seeks to bring a representative consumer claim for unfair business practices). In this essay, Professor Pulliam called on state legislatures to grant standing under state consumer protection statutes to business competitors, arguing that competitors are more likely than either individuals or governments to learn of unfair business practices and be in a position to sue.

considerably more modest approach. Fifth, local enforcement of unfair business practices laws makes a certain amount of practical sense since localities are so hard-hit by unfair business practices.[29]

From a theoretical perspective, local enforcement of the F.T.C. Act and little Acts would carry serious concerns relating to federalism and localism. Federalism concerns include (1) the possibility that multiple enforcers of the Act and little Acts would disrupt the existing uniformity of federal and state consumer protection law; and (2) a worry that those laws would end up being "over-enforced," which is to say, enforced beyond an optimal level.

The most serious localist concern is that enforcement of state and federal consumer protection laws does nothing to further local autonomy, and may even undermine it. "Autonomy" has been a major theme in local government scholarship since Gerald Frug revived the field in 1980.[30] This essay takes autonomy seriously; and offers two points on the relationship between local government autonomy and local enforcement of federal and state consumer protection laws.

The first point is that the traditional account of local autonomy seems to focus, *sub silentio*, on legislative autonomy. That is, by "autonomy" local government scholars seem to mean the ability to declare what the law is at a local level and seal the locality off from state and federal interference.[31] But not all acts of local autonomy are expressed legislatively. Localities can also exercise executive autonomy.[32] In the context of civil law enforcement, local executive autonomy could encompass the exercise of prosecutorial discretion, filing and pursuing corporate fraud cases, and negotiating settlements in the public interest. Viewed this way, local enforcement of federal and state consumer protection law *is* a form of local (albeit executive) autonomy.

Needless to say, if "localism" means local legislative autonomy, then local enforcement of consumer protection laws would do nothing to advance it. But if "autonomy" also embraces executive autonomy, it is worth considering whether in some areas – such as consumer protection – it might be worth giving up autonomy on one side of local government to gain more autonomy on the other.

---

[29] *See* Engel, supra note 21, at 359-60.
[30] *See* Gerald Frug, *The City As A Legal Concept*, 93 Harv. L. Rev. 1059 (1980).
[31] *See* Gerald Frug, *Decentering Decentralization*, 60 U. Chi. L. Rev. 253, 254 (1993) (noting that the traditional account of decentralized power "presents localities as being able to do whatever they want: they can act in their own self-interest, cooperate with others on their own terms, and cause harm to those who disagree with them. The political term for this form of autonomy is 'sovereignty.'"). *See also* David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255, 2257 (2003) (equating Home Rule with "autonomy").
[32] Local executive autonomy often expresses itself through the ability to move freely in the marketplace by entering into private and public contracts. *See* Cristina M. Rodriguez, *The Significance Of The Local In Immigration Regulation*, 106 Mich. L. Rev. 567 (2008) (dissecting local "section 287g" agreements with Immigrations and Customs Enforcement).

Local enforcement of federal and state consumer protection laws may undermine local legislative autonomy, but it strengthens local executive autonomy.

A second (related) theoretical point is that the traditional account of localism seems to equate autonomy and power: As autonomy rises, the thinking goes, so does power.[33] That assumption deserves to be questioned. I began to address this point in a recent article defending local government enforcement of state and federal constitutional norms,[34] but it deserves more scholarly attention. Power can exist without autonomy, and vice-versa. And more to the point, there are practical and constitutional limits on how much local legislative autonomy is actually possible in a tri-level, fifty-one constitution democracy.

This tension may partly explain why local government theory has reached a cul-de-sac. It may be time for scholars to seek an alternative theoretical path for local government law built around the notion of local power rather than local legislative autonomy.[35] This essay embodies the kind of proposals that would emerge once scholars and advocates and local public lawyers shift their attention towards increasing local power to serve the public interest.

---

[33] *See, e.g.*, Richard Briffault, *Our Localism: Part I – The Structure Of Local Government Law*, 90 Colum. L. Rev. 1 (1990) (impliedly equating autonomy and power).

[34] *See* Kathleen S. Morris, *The Case for Local Constitutional Enforcement,* 47 HARV. C.R.-C.L. L. Rev. 1 (2012).

[35] Heather Gerken has posited that vertical federalism is in a similar cul-de-sac, and urged a new theory that accounts for local governments in our federalist system. *See* Heather K. Gerken, *Federalism All The Way Down*, 124 Harv. L. Rev. 4 (2010).