LAWYERS AND CONSUMER PROTECTION LAWS

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The conventional model of the practice of law views lawyers as those who apply legal rules in the service of client interests, checked only by the constraints of the adversary system. A study of the impact of consumer protection laws on the practice of Wisconsin lawyers shows this to be an oversimplification. Lawyers for individuals tend to know little of the precise contours of consumer protection law. They most often serve as mediators between buyer and seller, relying on general norms of fairness and good faith. Lawyers for businesses are more likely to make use of the law, but they are seldom called on to deal with particular disputes. Lawyers' own values and interests are reflected in the way in which they represent clients. As a result, reform laws which create individual rights are likely to have only symbolic effect unless incentives are devised to make their vindication in the long-range interest of members of the bar. Moreover, an understanding of the many roles played by lawyers also requires a more expanded picture of practice. The picture of the lawyer as litigator in the adversary system may itself serve largely symbolic functions.

I. INTRODUCTION

Towards a New Model of the Practice of Law

In Western culture the lawyer has been regarded with both admiration and suspicion for centuries. Both judgments seem

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to rest on a widely held image of what it is that lawyers do or ought to do. On one hand, the profession paints a picture of itself defending individual liberties by advocacy and facilitating progress by creative social engineering (see, e.g., Bloomfield, 1976; Nash, 1965). Novels, plays, motion pictures, and television programs have reinforced this view. On the other hand, a debunking tradition—recently revived by the Watergate episode—shows lawyers as people who profit from the misfortunes of others, as manipulators who produce results for a price without regard to justice, and as word magicians who mislead people into accepting what is wrong. Fiction supports this view too. Yet much of this writing may cost us understanding because the debunkers accept the classic stereotype of good lawyering as a yardstick, measured against which actual practice falls short.

In this classical model of practice, *lawyers apply the law*. They try cases and argue appeals guided by their command of legal norms. They negotiate settlements and advise clients largely in light of what they believe would happen if matters were brought before legal agencies. Of course, it is this mastery of a special body of knowledge, certified by success in law school and passing a bar examination which gives one the status of being a lawyer and justifies the privileges which come with being a member of the profession (see Abel, 1979a). In the common law version of the model, *lawyers represent clients in an adversary system*. They take stock of a client's situation and desires and seek to further the client's interests as far as is possible legally. The lawyer is a "hired gun" who does not judge the client but vigorously asserts all of the client's claims of right, limited only by legal ethics. Lawyers place the interests of clients ahead of their own. A high place in the legends of the profession, for example, is awarded to the heroic and lonely advocate for an unpopular client, who battles for justice in the face of threats to person and pocketbook. However, even these aggressive lawyers cannot go too far because of the operation of the adversary system. An aggressive lawyer on one side will be matched on the other, and from this kind of advocacy a proper outcome will emerge. As a result, lawyers need not, and should not, be influenced by their own ethical judgment of the client's cause. (For a recent criticism of this positivist theory of practice, see Simon, 1978.)

Only the most innocent could think that this classical model describes professional practice. The model may reflect

of governmental agencies at both the state and federal level, and the threat of more drastic laws which might be passed in the future. Instead, the subject of the present study is lawyers, and the focus on consumer laws serves as a way of looking at the behavior of various types of attorneys.

A Description of the Research

The research on which this article is based began as a study of the impact of the Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-12 (Supp. V 1975) in Wisconsin. This statute, which became effective on July 4, 1975, was heralded as an important victory for the consumer protection movement, and was given national news coverage (see, e.g., *Business Week*, 1975; *Consumer Reports*, 1975; Fendell, 1975; *Ladies Home* Journal, 1976; Rugaber, 1974; *Time*, 1976) and prompted an outpouring of law review articles (see, e.g., Brickey, 1978; *Cornell Law Review*, 1977; Eddy, 1977; Fahlgren, 1976; Fayne and Smith, 1977; *Indiana Law Journal*, 1976; Roberts, 1978; Rothschild, 1976; Saxe and Blejwas, 1976; Schroeder, 1978; Wisdom, 1979.)

As our research developed, it quickly became apparent that the focus of the study was too narrow. We found that most lawyers in Wisconsin knew next to nothing about the Magnuson-Moss Warranty Act—many had never heard of it. When asked about the statute, they tended to respond with comments on consumer protection in general. It was extremely difficult to find lawyers who knew much about any specific consumer protection law other than the Wisconsin Consumer Act [WCA], Wis. Stat. §§ 421-427 (1975), a law largely concerned with procedures for financing consumer transactions and collecting debts. A few lawyers were well informed about the WCA, but most knew only of "atrocity stories" (see Dingwall, 1977) about debtors who had used the statute to evade honest debts. However, we also found that, in spite of this ignorance of the specific contours of consumer protection regulation, most lawyers had techniques for dealing with complaints voiced by clients, or potential clients, who were dissatisfied with the quality of products or services or could not pay for what they had bought. These techniques will be the major focus of this article.

What follows is based on in-person and telephone interviews conducted by a research assistant and me during the summer of 1977. We talked with about 100 lawyers in five

Wisconsin counties and with representatives from each of the state's ten largest law firms, from the legal services programs in Milwaukee and Madison, from Wisconsin Judicare—a program for paying private lawyers to handle cases for the poor in the northern and western parts of the state (Brakel, 1973; 1974)—and from all the group legal service plans registered with the State Bar of Wisconsin. (For discussions of group legal service plans, see Alpander and Kobritz, 1978; Case, 1977; Colvin and Kramer, 1975; Conway, 1975; Freedman, 1977; Harris, 1977.) In addition, a questionnaire concerning experiences with the Magnuson-Moss Warranty Act was sent to all lawyers who had attended an Advanced Training Seminar dealing with that statute, sponsored by the State Bar of Wisconsin. While in no sense is this study based on a representative sample of all lawyers in Wisconsin, there was an attempt to seek out lawyers whose experiences might differ. The great consistency in the stories that this very diverse group of lawyers had to tell suggests that almost any sample would have served for the study. Even at points where very divergent interpretations were offered by the lawyers interviewed, their description of practice was consistent. Moreover, the information I gathered was consistent with, and helps explain, the findings about lawyers and consumer problems of the American Bar Association-American Bar Foundation study of the legal needs of the public (Curran, 1977). This ABA-ABF study was based on a random sample of the adult population of the United States, excluding Alaska and Hawaii.

However, my study has some obvious limitations. I cannot offer percentages of the lawyers who have had certain experiences or who hold particular opinions. Often the lawyers themselves could say no more than they get a certain kind of case "all of the time," or that they "almost never" litigate. Since lawyers have no reason to compile statistics, usually they offered only general estimates of their caseload. Many informal contacts and telephone calls never appear in lawyers' records, and lawyers are unlikely to have a very precise memory of them. Moreover, many of the attorneys interviewed were former students of mine, and others seemed glad to aid a University of Wisconsin law professor's research. This effort to be helpful, while appreciated, may have introduced some distortion. On one hand, these lawyers may have been willing to go along with the interviewer's definition of the situation, which was implicit in the questions asked, rather than

challenge the entire basis of the inquiry. On the other hand, a few may have modified a fact here and there to present a good story to entertain their old professor or to make themselves look good. While I cannot be sure that this did not happen, again the consistency of the stories across 100 lawyers suggests that this was not a major problem.

Finally, it should be noted that this article reports the author's interpretations of what he was told. Not all of the attorneys were asked exactly the same questions since, as the study progressed, the responses dictated a change in the focus from the Magnuson-Moss Warranty Act to consumer protection laws and then finally to the practice of law itself. This article, then, is an empirical description of a corner of the legal world that my assistant and I explored in some depth rather than a report of quantifiable data from a survey of a random sample of the bar. It should be read as a report from a preliminary study, offering suggestions the author thinks are true enough to warrant reliance until someone is willing to invest enough to produce better data and lucky enough to find a way to get them.

II. THE IMPACT OF CONSUMER PROTECTION STATUTES ON THE PRACTICE OF LAW

Heinz and Laumann (1978: 1114) tell us that "the tendency of lawyers' work to address congeries of problems associated with particular types of clients organizes the profession into types of lawyers: those serving corporations, and those serving individuals and individuals' small businesses." They point out that corporate work is likely to involve "symbol manipulation," while work for individuals will carry a heavy component of "people persuasion." My study offers additional confirmation of these observations. Certain members of the Wisconsin bar were much more likely to see an individual with a consumer complaint, while others were much more likely to be asked to lobby against consumer protection legislation, to draft contracts to cope with such laws, and to plan defensive strategies for dealing with consumer complaints. We will deal with these two types of lawyers separately.

Lawyers for Consumers

Lawyers see but a small percentage of all of the situations where someone might assert a claim under the many consumer protection laws (see Mayhew and Reiss, 1969). Some claims

are never asserted because consumers fail to recognize that the product they receive is defective, that the forms used in financing the transaction fail to make the required disclosures, or that the debt collection tactics used by a creditor are prohibited (Best and Andreasen, 1977). Other claims are recognized but resolved in ways not involving lawyers. Some consumers see the cost of any attempt to resolve a minor consumer problem as not worth the effort. Resolving never to buy from the offending merchant or manufacturer again, they just "lump it" (Best and Andreason, 1977; Haefner and Leckenby, 1975; Mason and Himes, 1973; Warland, Herrmann and Willits, 1975). Some fix a defective item themselves, while others complain to the seller or the creditor and receive an adjustment which satisfies them. It is likely that most potential claims under consumer protection statutes are resolved in one of these ways (Curran, 1977: 109-10, 140, 196).

Some consumers go directly to remedy agents without consulting lawyers. For example, they may turn to the Better Business Bureau in Milwaukee or to one or more of several state agencies which mediate consumer complaints (cf. Steele, 1975; Thompson, 1979).[1] A few may go directly to a small claims court. Others contact the local district attorney who, at least in

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[1] In Wisconsin many state agencies attempt to mediate disputes between consumers and businesses (see Ladinsky, Macaulay, and Anderson, 1979). The Department of Agriculture, Trade and Consumer Protection issues regulations to control unfair trade practices. (see Wis. Stat. § 100.20 [1975]). In order to gain information about business practices which might indicate the need for new or amended regulations, the Department is eager to receive consumer complaints. After a written complaint form is filed, the agency sends a standard form letter to the complained-against business. Often the business responds with an offer to settle. If it does not, the agency must drop the matter unless its investigators determine that an unfair trade practice has been committed. One agency investigator is very active in mediating consumer disputes in the northern and central parts of the state, but the agency is much less involved in Milwaukee.

The Office of Consumer Protection of the Department of Justice mediates consumer complaints by sending out standard letters on the Attorney General's letterhead. Usually, this will prompt an offer by a business to make some adjustment (see, generally, Jeffries, 1974). There has been some conflict between Agriculture and Justice about which agency has jurisdiction to deal with consumer complaints. At times officials of Justice have viewed people at Agriculture as insufficiently aggressive in championing the consumer; those at Agriculture have not been pleased by Justice's "invasion" of what they view as their territory.

The Department of Motor Vehicles Dealer Inspection Unit mediates complaints about automobiles, particularly those involving used cars. It is given authority to enforce the requirement that used car dealers disclose on a standard sticker placed on the window of cars on their lot all defects they know about (see McNeil, Nevin, Trubek, and Miller, 1979). It has 14 field investigators, most of whom are former members of the state highway patrol. These investigators frequently mediate, dispensing justice based on their view of the condition of the car and the degree of compliance with the sticker law. (See [Madison] *Wisconsin State Journal*, Feb. 11, 1979.)

The Commissioner of Insurance also processes complaints by consumers (see Whitford and Kimball, 1974), as does the Public Utilities Commission.

the smaller counties in Wisconsin, often offers a great deal of legal advice or even a rather coercive mediation service to consumers who are potential supporters in the next election.

Many lawyers in private practice reported to us that they never saw a case involving an individual consumer. Those who represented businesses and practice in the larger firms were likely to say this, but some business lawyers reported that they answered questions about consumer matters from clients and friends. Other lawyers talked about encountering consumer cases only now and then. Lawyers did see what they called "products liability" cases where a defective item had caused personal injury. However, these cases typically do not fall under consumer protection statutes, and the fact of personal injury opens the door to the chance of a substantial recovery. A specialized group of attorneys is expert in the techniques of asserting or defending products liability cases. Most lawyers knew these specialists and many referred cases to them. No similar network of access to specialists in consumer protection law seemed to exist. Several attorneys mentioned one lawyer whom they thought was an expert in consumer protection, but when I interviewed him, he said that he now tried to avoid such cases.

Those few dissatisfied consumers who survive the screening process and come to lawyers may have special characteristics or kinds of problems. First, some people will bring cases to lawyers that others would see as trivial but which they see as a matter of principle. Second, when regular clients appear with minor consumer problems, a lawyer may attempt to handle them in order to keep a client's good will; one lawyer called this a kind of "loss-leader" service. For example, a lawyer in a small county had drafted a wealthy farmer's estate plan and set up a corporation to handle some of his dealings in land development. The farmer, dissatisfied with a Chevrolet dealer's attempts to make a new car run satisfactorily, called his lawyer and told him to straighten out matters. The lawyer successfully negotiated with the dealer and sent the farmer a bill for only a nominal amount. Third, debtors who cannot pay are sometimes pushed into a lawyer's office by the actions of a creditor. The debtor or the lawyer may see consumer protection law as offering a way to lift some or all of the burden of indebtedness for an expensive item such as a car, a recreational vehicle, or a mobile home. Problems which the consumer might have been willing to overlook may

now become the basis for a legal attempt to rescind the sale (cf. Landers, 1977).

Consumer cases also are brought to the attention of lawyers through informal social channels. Officers of a corporation which has retained a lawyer to deal with business problems may also ask for personal advice about how to deal with an expensive purchase about which they are dissatisfied. Many lawyers pointed out that they had friends, relatives, and neighbors who asked for advice informally. People who might not make a visit to a lawyer's office about a consumer matter will raise their problem with a lawyer they see at a church supper, a PTA meeting, or a cocktail party. One lawyer noted that it was hard to have a drink at a bar in Madison on a football weekend without being called on for free legal advice. Few of these problems ever become cases, but occasionally lawyers find one that demands more than a few minutes of talk.

Decisions about whether or not to contact a lawyer are affected by personal factors. One lawyer remarked that many people seem to need reassurance that it is legitimate to complain and make trouble for others (cf. Sniderman and Brody, 1977). Many people are hesitant about admitting that they were cheated by a retailer or manufacturer when they think they should have known better. Some lawyers said that most of their clients—both those who come to their office and those who ask for advice during informal contacts—come to them through friendship networks. A former client may talk with a friend at work or at a bar and end up sending the friend to see the lawyer (see Curran, 1977: 202, 203). Some people seem to need the encouragement of friends before they can take the plunge (Ladinsky, 1976; Lochner, 1975).[2] There seems to be a "folk culture" that defines, among other things, which kinds of cases one should take to a lawyer, which call for solutions not involving lawyers, and which should be just forgotten. Those facing aggressive debt collection procedures are likely to be told to see lawyers; those with complaints about the quality of products are usually advised just to forget it.

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[2] In a poll of a sample of the population of Wisconsin, eighteen years and older, the State Bar of Wisconsin LawInfo Program reports that about 34 percent of the population thought that an ordinary person would get poor legal service on small matters. Forty-four percent of those who expected poor service had experienced consumer problems; 67 percent had family income below $15,000 per year. Nearly 70 percent of the sample, on the other hand, disagreed with the statement that "most lawyers aren't really interested in getting middle-income and working people as clients . . . they really prefer to work with wealthy people and business" (State Bar of Wisconsin, 1979).

Many lawyers seek to avoid taking clients with consumer protection problems (Curran, 1977: 204). Firms that specialize in representing businesses discourage individuals from bringing their personal problems to the firm by the expensive elegance of their offices and often by the location of those offices. Everything about these firms tends to tell potential clients that these are expensive professionals who deal only with important people on important matters. One who is not to the manor born would hesitate to waste the time of this professional establishment with a mere personal matter.

Even lawyers who look more approachable have techniques for avoiding cases they do not want to take. Receptionists try to screen cases so that minor personal matters will not waste their bosses' time (cf. Hosticka, 1979). Lawyers engage in techniques of conversion or transformation of attitudes. Some try to brush off individuals by talking to them briefly on the telephone in order to keep them from coming to the office.[3] Some listen to people who come to the office for only a few minutes and then interrupt to spell out the cost of legal services. These attorneys see their role as that of educating would-be clients to see that they cannot afford to pursue the matter. The lawyer serves as a gatekeeper, keeping people from burdening the legal system.

If the potential client with a consumer matter is not rejected out of hand, lawyers may still limit their response to nonadversary roles. One part played fairly often might be that of the therapist or knowledgeable friend. The client is allowed to blow off steam and vent anger to a competent-seeming professional sitting in an office surrounded by law books and the other stage props of the profession. By body language and discussion, the lawyer can lead the client to redefine the situation so that he or she can accept it. What appeared to the client to be a clear case of fraud or bad faith comes on close examination to be seen as no more than a misunderstanding.

The lawyer may then "help" the client consider the practical options open in the situation. It may be against the client's interests to pursue the matter: legal action may cost more than it is worth, either directly or indirectly in terms of

[3] One lawyer told us that "I am in an office with three lawyers, and we opened last November, breaking away from a larger firm. We have three secretaries and a half-time bookeeper, and they keep good records of every activity of the office. We take over 50 telephone calls every morning up to 1:00. Seven out of ten of these calls will involve a client who wants to shoot the breeze on some off-beat problem or idea. We do not bill in these cases, and I do not think that most lawyers would. A lot of free advice is available to anyone who will call. There is no real crisis in the delivery of legal services. The middle class can afford them, but it just doesn't want to pay."

the client's long-run interests. The client may also have adopted too narrow—perhaps too legalistic—a view of the case. The client's grievance may be one which the lawyer could translate into a perfectly legitimate—indeed compelling—legal argument, but the "law" may not be the only standard by which the merits of each party will be judged. Such arguments, needless to say, may anger the potential client; or they may make the client feel foolish for being upset and bothering a lawyer. On the other hand, by helping the client see the case in a new light, the lawyer may be indulging in a kind of therapy.

Perhaps the lawyer will take a further step and combine the therapist role with that of an information broker or a coach, hearing the complaint and then referring the client elsewhere for a remedy. This gets the would-be client out of the office less unhappy than had the lawyer just rejected the case and offered nothing. People can be sent to state agencies which mediate consumer claims or to private organizations such as the Better Business Bureau. Some lawyers go further and try to coach clients on how to complain effectively to a seller or creditor or how to handle a case in a small claims court without a lawyer. Sometimes this information and coaching may be of more help than formal legal advice. Consumers may need to be reassured that they have a legitimate complaint, to be given the courage to complain, to learn where to go and whom to see, and to be given a few good rhetorical ploys to use in the process of solving their problems. Sometimes the coaching does not help the client. The referral only prompts the client to give up. Few lawyers know what happens when they tell a client to complain to the seller or go to a state agency. Clients rarely report back to the lawyer unless they are friends or neighbors. On the other hand, such referrals may serve to help lawyers see themselves as helpful people.

Attorneys who become more involved in a case may find themselves playing the part of go-between or informal mediator. They may telephone or write the seller or creditor to state the consumer's complaint. The very restatement of that complaint by a professional is likely to make it a complex communication. On one level, the attorney is reporting a version of the situation which may be unknown to the seller or creditor even in cases where consumers have complained before seeing a lawyer. The lawyer may be able to organize a presentation so that the basis of the complaint is more understandable, and transform it so that it is more persuasive. The fact that the report comes from a lawyer is likely to give

the complaint at least some minimal legitimacy. The lawyer is saying that he or she has reviewed the buyer or debtor's story, that the assertions of fact are at least plausible, and that the buyer or debtor has reason to complain if these are the facts.

The lawyer is more likely than the consumer to get to talk to someone who has authority to do something about a problem. For example, the consumer may have gotten no farther than the sales person, while the lawyer may gain access to the manager or owner of the business. The lawyer is likely to speak as a social equal of the representative of the seller or debtor, though such may not be the case for the consumer. This may be important. A retailer, for example, may care little about the opinions of a factory worker complainant, but wish to avoid having a professional judge him or her as foolish or unreasonable. Finally, the attorney's professional identification conveys a tacit threat that an unsatisfactory response could be followed by something the seller or creditor might find unpleasant. Indeed the unstated and vague threat of further action may be coercive precisely because it is vague. If sellers and creditors were aware of the cost barriers to litigation, and if they knew, or appreciated, just how much of a paper tiger most attorneys are in consumer matters, they would be less easily intimidated.

At this point, a seller or creditor may assert that the client has just misunderstood the situation or has told the lawyer only part of the story. At this stage lawyers often discover that a client's case is not as clear-cut as the client claimed. However, sellers and creditors still are more likely to make conciliatory responses to lawyers than to buyers or debtors, as long as the lawyers do not ask for too much. And it is part of a lawyer's stock in trade to know how much is too much (cf. Ross, 1970). One lawyer told us:

> I enjoy negotiation. Of course, what happens is not determined by the merits . . . One has a discussion about what is best for everyone. You do not make an adversary matter out of it. It is a game, and it is funny or sad, depending on how you look at it. You call the other side and tell him that you understand that he has a problem satisfying customers but that you have a client who is really hot and wants to sue for the principle of the thing. Then you say, "Maybe I can help you and talk my client into accepting something that is reasonable." The other side knows what you are doing. It is a game. You never want to get to the merits of the case.

The seller or creditor is likely to make some kind of gesture so that the lawyer will not have to return to the client empty-handed. The simplest gesture the seller or creditor can make is a letter of apology, explaining how the problem occurred and accepting some or all of the blame. A supervisor may attempt

to blame an employee with whom the consumer dealt, perhaps remarking that it is difficult to find good sales people or mechanics. Manufacturers often blame dealers, and dealers, in turn, seem eager to pass the blame on to manufacturers. In addition to an apology, the merchant may also offer token reparations such as minor repairs or free samples of its products.

More rarely, the lawyer may be able to persuade a seller or manufacturer to offer the consumer a refund or replacement for a defective product. Sometimes a lawyer can gain a refund or replacement even where the flaw in the thing purchased was not so material as to warrant "revocation of acceptance" under Section 2-608 of the Uniform Commercial Code. New car dealers or fly-by-night merchants are unlikely to do this; new car dealers are tightly controlled by manufacturers, who seem to value cost control more than consumer goodwill (see Whitford, 1968); fly-by-night operators seldom worry about repeat business. But Sears, Montgomery Ward, J.C. Penney, and many other large department stores, have an announced policy of consumer satisfaction. One can get his or her money back without having to establish that there is something materially wrong with the product (see Ross and Littlefield, 1978). Other retailers and manufacturers do not announce this as their policy, but will grant refunds or replacements selectively when their officials think that the customer has reason to complain or if repeat business is valued. In such cases, a telephone call from a lawyer may be enough to swing the balance in favor of the complainant—it probably seems easier to make a refund than to argue with a lawyer. Occasionally, a lawyer may be able to persuade a new car dealer who has sold a client a used car to pay some percentage of the cost of repairs of a major item such as a transmission, provided the work is done in the dealer's shop. A lawyer may be able to persuade a creditor to give a client more time in which to pay rather than repossessing the item in dispute. But lawyers are seldom able to persuade a seller or creditor to pay a large sum as damages to an aggrieved buyer or debtor.

The lawyer's view of the adequacy of the remedy offered by the merchant or lender will necessarily turn on a reappraisal of the client's case in light of the other side's story, the ease of taking further action, the likelihood of success of such action, and the client's probable reaction to what has been offered. The lawyer may have to persuade the client to see the situation in a new light. The response of the merchant or lender must

also be considered. The axiom that "there are two sides to every story" now becomes a reality for the client. An important part of the lawyer's task now is to persuade the client to see the problem as an adjustment between competing claims and interests, rather than as one warranting a fight for principle. From the lawyer's perspective, the client must now be guided to the view that what the merchant or lender has offered is probably the best that could be expected. Anything more may require legal services more costly than the client can afford or is prepared to pay.

In this context, lawyers are often pushed into a role Justice Brandeis described as "counsel for the situation." Geoffrey Hazard (1978: 64-65) notes that such a lawyer must be advocate, mediator, entrepreneur, and judge all rolled into one. He or she is called on to be expert in problem solving and asked to produce a solution which will be acceptable over time rather than only an immediate victory for the client. This often means persuading or coercing both the other party and the client to reach what the lawyer sees as a proper solution, often "translating inarticulate or exaggerated claims . . . into temperate and mutually intelligible terms of communication." At all levels of law practice, this is a difficult task. The client tends to want vindication, while the lawyer is talking about costs balanced against benefits. It is an especially difficult task when the client is angry but has what the lawyer sees as a questionable case that involves too little money to warrant even drafting a complaint—let alone litigating. Clients in consumer protection cases often find it hard to believe that they cannot do better than the lawyer says they can. Curran (1977: 214) reports that "persons consulting lawyers on . . . consumer difficulties . . . are more likely to be negative about the lawyer-client exchange." The client may leave the lawyer without obtaining satisfaction, but the client leaves.

Only in rare instances will lawyers go further than conciliatory negotiation in a consumer matter. If the antagonist fails to offer a satisfactory settlement, the lawyer may counter with more explicit threats of unpleasant consequences. But some lawyers report that once overt threats are made, one is likely to have to draft and file a complaint before any offer of settlement will be made by the other side. One reason is that serious threats from a lawyer are likely to prompt sellers or creditors to send the matter to their lawyers. But even at this point, the lawyers for both sides have every reason to settle rather than litigate. Some consumer cases do go to trial—we

can find appellate opinions to put in law school casebooks[4]—but they are unusual and atypical of the mass of consumer complaints.

There are a number of reasons why lawyers either refuse to take consumer protection cases or tend to play only nonadversarial roles when they try to help a client with such a complaint. The most obvious explanation is that the costs of handling these cases in a more adversarial style would be more than most clients would be willing to pay. Few consumers can afford many hours of lawyers' time billed at from $35 to $75 an hour just to argue about a $400 repair to their car or even a repossession of a $5,000 used car. Few lawyers can afford to spend time on cases that will not pay. One lawyer in northern Wisconsin emphasized that "after all, I am self employed." Another lawyer from one of Wisconsin's important firms commented,

> A lawyer in private practice has to earn money. He has to take a very hard look at the cases that are brought to him, and he must reject those which will not pay. It is very hard to have to tell a potential client that she or he has a meritorious case and would likely win but that there is not enough involved to make it worth taking. As you get older, you have to carry your part in covering your share of the

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[4] White (1977: 1272) found that the warranty and warranty disclaimer sections of the Uniform Commercial Code were heavily cited in reported cases from California, New York, and Ohio published in the late 1950s and early 1960s, and that these sections comprised a substantial plurality of all the citations to the Uniform Commercial Code from each of the three states he studied. He explained this result by noting that "many of these warranty cases are brought by an allegedly injured consumer-buyer against the seller, with whom he has no continuing relationship. Unlike the businessperson, the consumer-buyer pays no added litigation cost in the form of injured or severed business relationships" (cf. Macaulay, 1963). However, White does not indicate how many of the warranty cases he found involved consumer-buyers and how many of the cases involving consumer-buyers reflected situations where the consumer-buyer alleged that a personal injury had been caused by a defective product. While a consumer's litigation costs might be lower than a business-buyer's in terms of severed or injured relationships, the potential benefits of litigation to a consumer-buyer are also likely to be less in cases where there was no personal injury to support a large claim for damages, if only because consumer purchases seldom cost as much as a business purchase.

Jane Limprecht, my research assistant, collected all of the reported cases in 1977 which involved a breach of warranty theory from the *Modern Federal Digest*, the *U.C.C. Reporter*, and *West's General Digest*. Of the 147 cases she discovered, 82 involved business purchases and 65 involved consumer-buyers. Thirty of the consumer cases had personal injuries prompting substantial damage claims; of the 35 that did not involve personal injuries, 16 involved new or used cars or pick-up trucks, and six involved mobile homes, with claims running from $1,050 to $14,395, where reported. Four more cases involved boats and yachts, with claims running from $950 to $37,000. The other consumer-buyer cases without personal injury involved such things as an inflatable mammary prosthesis, a vault for a child's casket, a home sewage treatment system, and a stove which exploded and destroyed a house. These reported decisions suggest that consumer product quality cases involving no personal injury that get to the appellate courts are likely to be prompted by certain kinds of products—particularly yachts, cars, and mobile homes—and we might guess that they are likely to involve consumers who can afford both these products and lawyers.

> overhead. When I was younger, I could take just about any case. The firm could always chalk it off to training a young lawyer. Now I am an experienced lawyer, and I must invest my time where there is enough money involved to help the firm.

Consumer product quality cases are very similar to products liability litigation except for the factor of personal injury. But this factor in products liability offers the chance for recovering very large damages and prompts lawyers to work for contingent fees.

Not only are consumer protection cases unlikely to warrant substantial fees (Curran, 1977: 208), but they usually require a major investment of professional time if litigation is to be considered seriously. Those most expert about consumer laws tend to be the lawyers who counsel businesses and draft documents in light of these laws. Yet these are the lawyers least likely to see an individual consumer's case—except, perhaps, as a favor to a friend. Most other lawyers in Wisconsin know very little about any of the many consumer protection laws, and it is difficult for most attorneys to master all of the relevant statutes, regulations, and cases in this area. Most of them did not study consumer law in law school. Either they graduated before most of it was passed or they did not take elective courses in this area when they were in law school. Moreover, since consumer protection cases worth an investment of time come up so infrequently, a lawyer is not even likely to know whom to call for help. Most lawyers in Wisconsin lack easy access to the text of consumer protection law. Most are unlikely to own the necessary law books themselves. The folk wisdom of private practice dictates that one should buy only those law books that are likely to pay for themselves. Most lawyers have access to the Wisconsin statutes, the decisions of the state courts, and at least some of the state administrative regulations. Fewer have access to federal materials dealing with statutes such as Truth in Lending (15 U.S.C. § 1601, *et seq.* [1970]) or the Magnuson-Moss Warranty Act; and only a very few have ready access to loose-leaf services dealing with trade regulation. Many lawyers rely heavily on practice manuals and on continuing legal education handbooks for most of their legal research. However, there are not many of these in the area of consumer protection. Lawyers in Milwaukee and Madison have access to relatively complete law libraries. Lawyers in other areas could travel to these cities to do research or hire a lawyer who practices there to do the work. But this is not practical if the potential recovery in a case is small. Even those in Milwaukee or Madison would have

to leave their offices to use the libraries located there, and the time invested in doing this might be too much for a client who can pay only a modest fee.

Furthermore, consumer protection law is complex and involves many qualitative concepts, such as "reasonable" or "unconscionable." This uncertainty makes the law hard to apply; even an expert cannot be sure how a court would decide a particular case. For example, suppose a consumer were dissatisfied with a newly purchased car and wanted to return it for a refund. Approached legally, one probably would have to overturn the warranty disclaimers and limitations of remedy found on the form contracts under which the car was sold. To do this, a lawyer would have to apply the Uniform Commercial Code and the Magnuson-Moss Warranty Act, arguing such things as whether "circumstances [had] cause[d] a . . . limited remedy to fail of its essential purpose. . . ." This concept is not well defined in the Code or in the cases interpreting it (see Eddy, 1977b). A lawyer might also have to argue about whether the remedy limitations were "unconscionable," and whether the regulations governing remedy limitations issued by the Federal Trade Commission under the Magnuson-Moss Warranty Act applied in a breach of warranty action brought in a state court by an individual or were limited to enforcement by the FTC in federal court (see Schroeder, 1978). One might seek to cast the cause of action as one for innocent misrepresentation but couple that action to all of the UCC's remedies for breach of warranty under the little-known section 2-721. These legal strategies are all matters of debate, and any decision won before a trial court would be vulnerable to an appeal. Many other consumer protection laws present similar problems.

Apart from the nature of the law itself, consumers often face difficult burdens of proof under these laws. The buyer who wants to return the car, in our example, would have to establish that the car was defective when it was delivered or that the seller or manufacturer was in some way responsible for a defect that appeared later. This kind of evidentiary problem is faced often in products liability litigation where personal injury puts several hundred thousand dollars at issue, and there the matter usually is established by expert testimony (Rheingold, 1977). Products liability supports a high degree of specialization. For example, a recent issue of the *Trial Lawyers Quarterly* (Winter, 1978) carried an advertisement for a consulting service which claimed "a quarter century's

experience" in testifying in cases where a client had been "maimed by a lawn mower." However, experts are expensive, and one cannot afford to use them in the typical action arising under a consumer protection statute or regulation. One office offering legal services to the poor was able to use expert testimony in cases involving complaints about automobiles because it could call on a program which trained poor people to be automobile mechanics, but this kind of access to experts is rare.

We were told about a case where all of these difficulties were surmounted, and it can serve as an example of how rarely one might expect a consumer case to be taken as far as the complaint stage on the way toward litigation. A wealthy doctor ordered a $500,000 custom-made yacht from a boat yard. He refused to accept delivery, asserting that the boat was defective in many respects. He sued to recover his down payment, and also asked for a large sum as damages. His complaint reflected a high degree of creativity in the blending of traditional and newly developing contract and consumer protection theories. Only the wealthy can afford to pay for such creativity as well as the expert testimony that was called for. The example suggests that consumer protection law may most benefit an unintended population—the wealthy who can afford to pursue individual rights in dealing with the purchase of yachts and other luxury goods. The reformers may have aimed an inadequate weapon at the wrong target (cf. McNeil, *et al.*, 1979).

Problems of cost and difficulty in litigation have not gone completely unnoticed by those who draft consumer protection legislation. Some of these statutes seem based on the assumption that the individual rights they create will be reinforced by provisions for lawyers at low or no cost—either as part of an antipoverty program or as a benefit of membership in a particular group. Other statutes award attorneys' fees to consumers who win, and many of these newly created rights open the way for class action suits. Magnuson-Moss even makes a bow toward encouraging suppliers of consumer goods to set up informal arbitration schemes. All of these approaches may have had some effect, but neither singly nor all together do they offer an adequate solution to the problems of cost and difficulty in consumer litigation. There are a number of reasons why this is so.

Low-cost or free legal service plans employ lawyers who are willing to deal with consumer problems. Legal Action for Wisconsin (LAW), a program to supply legal services to people

with low incomes in Milwaukee and Madison, probably sees as many consumers as any group of nongovernmental lawyers in the state. However, LAW's services are limited and must be rationed carefully. LAW's attorneys may make a telephone call or write a letter seeking relief if either strategy looks appropriate, but most often its lawyers refer clients to the consumer mediation service of the Department of Justice or to the Concerned Consumers' League, a private organization which trains low-income consumers to complain effectively or to use the Small Claims Court. Occasionally, LAW lawyers will make an appearance in the Small Claims Court on a consumer matter, but they try to avoid this so that they can devote their time to what they see as more important matters. Sometimes, the LAW lawyers will attempt to work out a complicated consumer financing problem that looms large in the life of a poor client, and they frequently attempt to use the federal Truth-in-Lending law or the Wisconsin Consumer Act to strike down a transaction. Sometimes they assert a highly technical defense based on these statutes as a surrogate for bankruptcy or to fight a breach-of-warranty claim. For example, it may be easier to find a clause in a form contract which violates statutory requirements than to prove that the goods were defective and that the seller is responsible for the defects (see Cerra, 1977; Landers, 1977).

Wisconsin Judicare pays private lawyers to take cases for the poor in northern and western Wisconsin. However, poor people rarely bring consumer protection cases to these lawyers. Lawyers who take Judicare cases say that they usually refer consumer complaints to officials of the state Department of Agriculture, Trade, and Consumer Protection who ride circuit around the state to mediate complaints. Occasionally Judicare lawyers write letters to retailers or businesses which repair cars, snowmobiles, or mobile homes; but they say that Judicare fees for consumer matters are so low that they often do not bother submitting a bill to Judicare for giving advice over the telephone or dictating a short letter and that they are unlikely to consider doing much more than this with a poor person's consumer problem, since it just would not pay.

Members of a number of labor unions, condominiums, cooperatives, and student organizations are entitled to the benefit of legal services under various plans. However, under almost all plans the amount of service is limited and carefully defined. Usually a member is entitled to a specified number of telephone calls or office visits. If a legal problem warranting

more service is discovered, the member can retain a plan lawyer at a reduced rate. The use of these plans by members with consumer disputes varies, but few lawyers working for plans see many of these matters.

Members of cooperatives and of primary and secondary school teachers' unions almost never bring consumer matters to the lawyers who serve those plans. Lawyers employed by these plans believe that members face few consumer disputes which they cannot resolve by their own actions. One lawyer reports that members of his plan tend to read *Consumer Reports*, to shop carefully both for price and the cost of financing, to be able to borrow from a credit union rather than paying high rates to a loan company or an automobile dealer, and to buy goods that would need servicing only from businesses likely to be able to provide it. In short, they are model consumers who need little legal advice. Another lawyer suggests that they are the type of people who are unwilling to admit it when they do make a bad purchase or allow themselves to be fooled or cheated. Those who deny they have problems also have little need for legal advice.

The members of the condominium group plans also bring few consumer protection problems directly to their lawyers. However, these lawyers attend condominium association meetings and often make presentations on how to avoid common consumer frauds and what to look for in consumer contracts. Before or after these meetings, individual members often ask for informal advice about consumer matters, and this may be the extent of the legal service needed by these condominium owners.

When we turn to student plans we see a very different picture. Students at several campuses of the University of Wisconsin are entitled to legal service, and many of them use these benefits. Typically, plan employees train the students to handle their own case before a small claims court or tell them how to invoke the complaint procedure of the state agency that mediates consumer complaints in the area in question. Students often prefer to assert their rights rather than compromise. Some students seem to delight in battling local landlords and merchants in whatever forum they can find. But students tend to have the time to devote to such battles, and landlords and retailers tend not to value student patronage enough to remedy complaints voluntarily. When a pattern of unfair practice by a particular retailer or landlord is discovered,

the plan's lawyers attempt to find a general remedy for the students to prevent future abuses.

Members of plans that benefit industrial unions fall somewhere between cooperative members and the students in terms of using their services in the consumer area. Industrial union plans usually are framed so that the lawyers cannot get rich off them, and often have problems of overload. As a result, their services are strictly rationed. One firm which provides legal services to many union locals' plans will write letters to merchants or refer members with consumer complaints to a small claims court or the mediation service of a state agency, but little more. One of their attorneys says that he only writes letters and will not telephone sellers, because if he telephoned, he would have to listen to the seller's side of the story and there is never time to do this. This lawyer sees consumer matters as less important than the many other kinds of cases that plan members regularly bring to him.

One law firm representing several union plans does sometimes pour much time and effort into consumer protection matters. The firm member who handles most of these cases negotiates with manufacturers, retailers, sellers of services, record and book clubs, health and dance studios, and the like. If he cannot get a good settlement, he takes the case himself to a small claims court. He does not think that clients can handle cases by themselves before legal agencies. This lawyer has a good working knowledge of consumer protection law and ready access to the firm's large law library which has the materials needed for this work. However, this firm is not typical. Group legal services are viewed as a cause by its partners; and though there may be long-run benefits to the firm, in the short run they are not being paid fully for all of the services they provide. One can wonder how long the firm will be able to devote this much energy to individual cases and whether we can expect other firms to follow their pattern. Moreover, it is not clear how popular group legal service plans generally are with union leaders and members. Even if a law firm can offer a high level of service, union locals may not continue to bargain for legal services as a fringe benefit.

Some consumer protection statutes have followed the pattern set by civil rights acts and allowed successful consumers to recover reasonable attorneys' fees. One might expect this to be an incentive for lawyers to handle these matters. However, few lawyers know about the attorney's fee provisions in consumer protection statutes, and those who do

know about them point out that these really are contingent fees because one must win the case in order to benefit. As a result, these statutes are unlikely to be very attractive in close cases, since they do not give lawyers the opportunity to win very large fees in some cases to offset the cases they lose, where they will have invested their time for no return. Furthermore, most statutes leave the amount of recovery to the discretion of the trial judge. Many trial judges do not like awarding bounties to lawyers who bring certain types of cases. These judges often will award fees at a rate far below that usually paid in the community for attorney's services. In one recent Wisconsin civil rights case won by the complainant, the size of the lawyers' fees requested was the subject of critical newspaper comment (Kendrick, 1978). A large award of fees acts as a penalty, and many judges do not see the conduct regulated by consumer statutes as warranting punishment. Moreover, elected judges may worry about the reaction of the voters to awards of large sums as attorneys' fees.

The economic barriers to claims made under consumer statutes might be overcome to some extent if many small claims could be aggregated into a class action. For example, all those buyers of Oldsmobiles who discovered that they had received cars equipped with Chevrolet engines could be a powerful class. However, this is not a technique suited to most consumer problems, which turn on the facts of individual cases and present no common problem to aggregate. Moreover, class actions are hard to manage successfully. A lawyer must discover that the problem is common to many consumers and then find them so that the constitutionally required notice can be given to each one. This costs more money than lawyers are usually able to invest on the mere chance of winning a large judgment. The general belief among Wisconsin lawyers is that those lacking experience in handling class actions should not attempt them.

There may be other important factors besides the economic ones we have discussed that make Wisconsin lawyers reluctant to take consumer cases, and that affect the way they handle the ones they do take. Some of the information gained in our interviews suggests that problems with an individual rights strategy in the consumer area would not be solved if these cases were made only a little more attractive economically. Many of the attorneys interviewed represent banks, lenders, local car dealers, or even the major automobile manufacturers when they are sued in local courts. These lawyers would face a

pure conflict of interest if they were to take a consumer protection case against one of their regular clients (cf. Hagy, 1977; Paul, 1976).[5] Other lawyers have less direct but nonetheless important ties to the business community. Although these ties to a segment of that community may enable a lawyer to be more effective in working out reasonable settlements or at least gaining a gesture, an over-aggressive pursuit of a consumer claim might risk the goodwill of existing and potential clients or endanger a whole network of contacts. Even lawyers who would face no direct conflict of interest think it important to avoid offending business people unnecessarily (cf. Brakel, 1974). One lawyer in northern Wisconsin stressed that, "you can always get a merchant's name in the newspaper just by filing a complaint. However, this will make him bitter, and you will pay for it in the future." Lawyers' contacts are part of their stock in trade. They know, for example, where to get financing or who might want to invest in a business deal their client is interested in. Lawyers also often get clients through referrals and recommendations, and bankers and retailers frequently serve as experts who can tell others where to find a good lawyer. In short, most lawyers in private practice must work hard to become and stay members in good standing of the local business and political community if they are to prosper.

We cannot expect lawyers concerned with the reaction of business people to take a tough approach to solving consumer problems; they have too much to lose and little to gain. It is safer to refuse these cases or refer them to a governmental agency which mediates consumer complaints against business. It is safer to call an influential business person to try to work out matters in a low-key conciliatory manner than to file complaints. If the lawyer handles the situation skillfully, a conciliatory approach can even gain the appreciation of the business person against whom the consumer is complaining. A dissatisfied customer can be transformed into a person with much less sense of grievance. Whether or not the consumer is persuaded that a conciliatory approach is the best one, considering the whole picture, the consumer's lawyer serves at least the short-run interest of the business complained against if the client is persuaded to drop the matter and go away.

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[5] A conflict of interest problem does not always stop a lawyer from acting as a mediator. One lawyer told us that "in one case a customer came to the office, and he had a complaint against a store we represent. Clearly, the store should have made good on the matter, and so I called the store and told them to fix things up. They did without question, and the man left my office happy."

The local legal community recognizes legitimate and not so legitimate ways of resolving problems. For example, most lawyers feel strongly that one should not escalate a simple dispute into full-scale warfare which will benefit neither the parties nor the lawyers. Lawyers interested in the good opinion of other members of the bar and bench will follow accepted, routine, and simple ways of dealing with consumer problems. Only when one is doing a public service by going after a fly-by-night company or some other disreputable firm is a tough adversary stance seen as appropriate. There is also a segment of the legal community that is hostile to consumer protection law and to those who assert their rights under them. They view business people—at least local business people—as honest and reasonable. While misunderstandings are always possible, these lawyers doubt that serious wrongs are ever committed by the local bank, automobile dealer, or appliance store. Consumers who complain often are seen as deadbeats trying to escape honest debts or as cranks who are unwilling to accept a business' honest efforts to make things right. For example, one lawyer who practices in a large city states:

> Most of the fraud now is against the lenders. Debtors, especially the young kids, are wise to the tricks. They know that it costs money and takes time to get the wheels in motion, and it isn't worth the trouble if there isn't too much money involved. Recently a young woman bought a brand new car and financed it through a bank. She got a job delivering photographic film and put over 100,000 miles on that car within a year. Then when she was tired of making payments, she just left the car in the bank's parking lot and put the keys and all the papers into the night deposit slot with a note saying, "Here's your car back." What can the bank do realistically? They may be entitled to a deficiency judgment, but it is not worth the trouble to get it under the new laws. . . .
>
> The hallways outside small claims courts are crowded with little old people, crying because of the way young kids have screwed them out of several month's rent. . . . A judgment is just a piece of paper and the Wisconsin Consumer Act has made collection procedures so difficult that a judgment is almost worthless.

Two other lawyers who practice in a small town, and were interviewed together, express similar views:

> There has to be some way of handling the deadbeats, who are the only ones who benefit from all the consumer laws anyway. The administrative costs of consumer protection laws are a major cost of business to firms out here in smaller communities because they are always operating on a shoestring.
>
> We feel sort of grimy representing consumer clients. In one recent case, a young man was being sued for a legitimate $700 debt. We negotiated in light of consumer protection laws and got the guy a settlement for $500. It was really a $200 robbery, just as if the guy had gone into the store with a gun.

As Abel (1979b: 27) puts it, "Lawyers inevitably identify with those they serve; law practice would be intolerable otherwise, whatever we may say about the importance of

objectivity. . . ." And most lawyers serve business interests or relatively well-off individuals who run businesses. Undoubtedly, the quotations are accurate descriptions of some consumers whom lawyers encounter. On the other hand, some lawyers view the average consumer-client more positively. Another lawyer in the same small town as the two interviewed together says, "local people are being ripped off by local merchants every day. . . . Attorneys in town can't believe that these guys whose fathers went to the country club with their fathers could be dishonest. They consider these ripoffs just 'tough dealing.' But the local merchants have absolute power—people have to deal with them, and merchants just can't resist the temptation to use this power for all they're worth."

Many lawyers also have personal reasons for hostility to consumers and consumer protection laws. Lawyers are engaged in small businesses themselves. They may face problems when they try to collect fees from clients (see Granelli, 1979). They see and read about dissatisfied clients who have been bringing enough malpractice suits to drive up the malpractice insurance rates for all lawyers. Moreover, they themselves are unlikely to face serious consumer problems. Attorneys tend to be affluent enough and sufficiently well connected that the businesses they have personal dealings with will make efforts to keep them happy. Some lawyers make many major purchases from or through clients. Lawyers generally understand the consumer contracts that they sign. While they may not read a particular contract, the provisions of, say, a conditional sales contract will involve variations on a well-known theme. Lawyers pay their debts or know how to negotiate with their creditors to avoid collection procedures and trouble. And if there is a problem, lawyers tend to be assertive people who complain directly to the seller and get their defective stereo or camera fixed or replaced. Lawyers are more likely to personally experience consumer problems that flow from computer and data processing errors, but these tend to be viewed as frustrating annoyances and not as major problems. One attorney reflects a common position in saying:

> I am not sympathetic to consumer complaints. I refer them to the Department of Agriculture Consumer Protection Office, and I have no desire to hear how they come out. *People should find a reputable place to trade instead of bargain hunting. They ought to know better than to trust fly-by-nights.* [Emphasis added]

As I have suggested, a lawyer who holds such a negative view of consumer laws and consumers who complain is likely to find wholly inappropriate an aggressive pursuit of the

remedies granted by these laws. A number of attorneys suggested that a lawyer has an obligation to judge the true merit of a client's case and to use only reasonable means to solve problems. These lawyers seemed to be saying that an attorney should not aggressively assert good cases under ill-advised or unjust statutes, but no one went so far as to say this explicitly. A reasonable approach in the consumer area was seen as a compromise. For example, several attorneys were very critical of other members of the bar who had used the Wisconsin Consumer Act so that a lender who had violated what they saw as a "technical" requirement of the statute would not be paid for a car which the consumer would keep. While this might be the letter of the law, apparently a responsible lawyer would negotiate a settlement whereby the consumer would pay for the car but would pay less as a result of the lender's error. Several lawyers said that if a lawyer for a consumer offered an honest complaint about the quality of a product or service, it would be resolved in a manner that ought to satisfy anyone who was reasonable. A lawyer who sued in such a matter would be only trying to help a client illegitimately wiggle out of a contract after he or she had a change of heart about a purchase, particularly if the case was one a manufacturer or retailer could not afford to defend on the merits. A lawyer who represents Ford in actions brought in certain areas of Wisconsin commented, "The economics are not only a problem for consumers. How many $200 transmission cases can Ford defend in Small Claims Court? Lots of suits are bought out only because it is easier to buy them off than defend them. A lot of people forget that there are cost barriers to defending cases too. Ford cannot bring an expert from Detroit and pay me to defend product quality cases, and a lot of lawyers for plaintiffs know this and count on it when they file a complaint."

Those attorneys who often press consumer rights are called such things as members of the "rag-tag bar" who have no rating in Martindale-Hubbel and who ignore the economic realities of practice. An older lawyer comments that many younger lawyers are very consumer minded and seem to be "involved emotionally with clients when the word consumer comes up." One attorney who characterizes himself as an "establishment lawyer" explains that in Madison and Milwaukee there now are many lawyers who do not depend on practice for their total income or who live life styles in which they need far less than most people. He is particularly

concerned about women lawyers who, he believes, live off their husband's income and thus are freed to play games and crusade without recognizing the economic realities of practice. Still another attorney points out that consumer cases are often brought by young lawyers just beginning practice. Since they have few cases and want to gain experience, these beginners often refuse to accept reasonable settlements and file complaints. Similar objections are made to some legal services program lawyers who fail to go along with the customs of the bar about the range of reasonable settlements, and who are seen as far too aggressive in asserting questionable claims against established businesses. Some older "establishment" lawyers are annoyed by the mavericks, while others view the younger lawyers with amusement, predicting that they would learn what to do with such cases as they grew up.

Not all lawyers are tied to the local business and legal establishments. Yet even those lawyers who are not in the club face disincentives to using consumer lawyers. Of course, these lawyers are not free to treat every potential client who walks in from the street as the bearer of a major cause. They must ration their time among the worthwhile cases that come to them and balance their good works with enough paying clients so that they can meet payrolls and pay the rent and utility bills. Many who call themselves "movement" lawyers and who are engaged in representing various causes do not honor consumerism any more than do establishment lawyers. Consumer protection is viewed by many of these "progressive" lawyers as only a middle-class concern. It just is not as important as criminal defense of unpopular clients or battling local government authorities on behalf of migrant laborers. Even some who see themselves as radicals seem to have internalized many of the norms of capitalist society about paying debts and avoiding trouble by being careful at the outset of transactions. This attitude is reflected in the following comments of a person who regards himself as a progressive lawyer and who has represented a number of unpopular clients:

> You want to avoid filing complaints and trying consumer law suits. Partly this is economic, but we cannot overlook another important reason. What have you done when you win one of these cases? You have saved a guy a couple of bucks in a minor rip-off. It just isn't fun. It would be a boring hassle. If you win, the client gets only a marginal benefit, and he won't be grateful. So this kind of case will fall to the bottom of the pile of things to do. There are many cases that are far more satisfying. We take consumer cases sometimes, but they are not the things we really enjoy.
>
> You may feel funny about even negotiating consumer cases. A

> lawyer often can get his client something he is not really entitled to. For example, one client had a contract with a health club. There was nothing really wrong with it. The client was just tired of the club. We wrote a letter on our letterhead, and the club folded and let him out of the deal. This isn't the way the case should have come out, but it is the way it works. You do not get a great deal of satisfaction out of such a case, and you will try to avoid doing this sort of thing when you can.

Even "movement" lawyers report that they must distrust consumer clients who complain. They say that many are "flaky" or "freaks" who simply do not understand the situation or who will omit or make up "facts" and get the lawyer out on a limb. Many of them have mistaken ideas about their legal rights and will not accept the lawyer's attempt to tell them that they are wrong. It is not worth the time it takes to argue with them about what the statutes say. Many are seen by the lawyers as people projecting their anger onto a single dispute in an attempt to get even. "You just have to try to ward off those potential clients who are overreacting or are crazy."

A number of lawyers report that many Wisconsin judges and their clerks are not sympathetic to an adversary handling of consumer protection laws. One lawyer explained that the local judges are all experienced lawyers who understand how such cases should be handled, and so he could end consumer cases without much difficulty by simple motions; the judges just were not going to let these cases go to juries or even to trial. Judges and clerks will see that their time is not wasted by cases which they think never should have been brought to them. Many judges will help consumers handling their own cases in a small claims court reach some kind of settlement, but if a consumer wants to try the case, some judges respond by applying the rules of procedure and evidence very technically so that they will not have to reach the merits. These lawyers tell stories about trial judges who refuse to enforce individual claims based on Wisconsin administrative regulations designed to protect consumers. The judges, it is said, seem to view these regulations as illegitimate enactments by liberal reformers in Madison who are out of touch with conditions in the rest of the state.

Judges are also likely to be unfamiliar with these regulations and with federal materials, and they may lack ready access to copies of these laws or to articles in law reviews explaining various provisions. A lawyer for a local retailer, it was reported, successfully defended a consumer case, in which his client had violated a state regulation, on the ground that the Wisconsin Administrative Code lacked a good index; the lawyer for the consumer had not played fairly when

he raised a law with which lawyers in the community and the judge were not familiar. Another lawyer remarked that he would not use the Magnuson-Moss Warranty Act in a case brought in a state court, although this is just what the drafters of that act planned, because "as soon as you throw federal law at a state judge, they freak out since they have no familiarity with federal law. You would have to spend an hour and half convincing them that they had jurisdiction." Still another attorney commented "judges hate consumer cases because they simply do not understand the new law. The courts are just now getting used to the Uniform Commercial Code [the UCC became effective in Wisconsin in 1965]. If you try to use consumer laws, you are letting yourself in for a lot of briefing to educate the judges." One trial judge gained some measure of local fame among the bar by threatening to declare the Uniform Commercial Code's provisions on unconscionable contracts void for vagueness. Other trial judges, or their clerks, flatly tell lawyers that consumer cases just will not be tried in their courts. Of course, a lawyer who wanted the formal state or federal law to penetrate into a county in which such a judge sat would always be free to appeal, but the cost barriers placed before this route assure trial judges a large degree of freedom to do what they see as justice in the teeth of consumer protection laws which displease them.

Perhaps "atrocity stories" (see Dingwall, 1977) about judges are exaggerated, but insofar as they are repeated among lawyers, they are likely to affect the strategy any attorney will pursue. For example, few lawyers would look forward to arguing that a contract was "unconscionable" under Section 2-302 of the Uniform Commercial Code before the trial judge who was so unhappy about the open texture of this provision of the UCC. Young lawyers who have mastered the administrative regulations designed to protect consumers will learn to hesitate to display their wisdom before a trial judge who has never heard of such laws and who is unlikely to sympathize with their goals. Reformers and law professors often assume that laws published in the state capital automatically go into effect in all the county courthouses in the state. Experienced lawyers know better.

Lawyers for Business

In contrast to lawyers for individuals, attorneys for business play fairly traditional lawyer's roles when they deal with consumer law: they lobby, draft documents, plan