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I've conferred with a variety of people knowledable about consumer law. Among them are the chief of litigation of San Francisco Neighborhood Legal Assistance Foundation, a former member of Mayor Lindaay's consumer affairs staff, a present legislative assistant to Senator Tydings and two persons who have worked with Tydings (all lawyers), a lawyer who helped draft the Eckhardt-Tydings bill (with Professor Black of Yale, a close friend of Eckhardt's), and indirectly (i.e. through some of the above people) the California Rural Legal Asistance expert's on consumer law and full-time consumer law people in New Yokk.

All of these people share a propconsumer point of view. All feel that the balance of advantage between consumers and producers should be readdressed. Furthermore, all have been to some extent involved in the negotiations on the shape of the Echkardt-Tydings bill. Thus, to some extent, all may have reasons to be slightly wedded to that bill. At the same time, the central concern of each was the practical advancement of consumer interests. All were ready to make political compromises if that seemed necessary to defeat the Administration bill. And all were intrigued with the possibility of providing funds for consumer research and education groups.

Here, quickly summarized, are the reactions to the proposal to allow non-profit consumer groups to initiate consumer class action suits:

Problems and Disadvantages:

1. In rural or less sophisticated, less politically aware, and less liberal areas, it may be difficult to form consumer groups. Thus many regional and local consumer abuses might be shielded from suit.

Related to this is the comment from the San Francisco Neighborhood Legal Assistance lawyer that it has been their experience that consumer groups are very difficult to organize and practically impossible to organize among lower-income minority groups. The problem, he reports, is primarily that the dramatic consumer abuses happen only once in a great while to most people. So that, unlike for example rent, maintenance of continuing vitality and interest in a consumer group is difficult to achieve.

2. Similarly, the proposal would probably have the effect of largely taking the ordinary general practitioner of law out of the consumer field. There are mixed reactions to this effect, but several people feel that the ordinary neighborhood lawyer does stumble across a number of significant consumer problems and that his ability to bring class suits would be significant for consumers. The other side of the coin is that the proposal would probably tend, even more than the Eckhardt-Tydings bill, to create or promote the develppment of a highly specialized consumer's bar. None of the people I talked with objects to this, of course, but many felt that this is the sort of thing that the NAM, J.C. Penney's, General Electric and the other big lobby interests against the bill are really worried about. So the proposal, if this were true, would probably fail to mitigate their opposition. See below.

3. In thinking about the definition of the groups which would have the right of initiating class actions, a number of persons were concerned that political consumer groups not be excluded, as they are under the tax exemption standards. Good drafting might allay these objections. The primary thing most persons felt consumer groups ought to be able to do in the realm which is now considered political is draft legislation and give opinions as to the merits of proposed legislation or other proposed government action. (e.g. proposed rules or acts by the FTC). Under the present definition of "political"--roughly, attempting to influence legislation, such work could not be carried out by non-profit consumer groups.

4. At the same time, defining a consumer group broadly would presumably not at all appease the opponents of the Eckhardt-Tydings bill. Thus, for example, SFNLAF (San Francisco....Legal Assistance) would not object to the proposal simply because in their primary litigation (and any class action is major litigation) they represent only groups now. They represent regularly 114 groups in the Bay Area and whenever an individual plaintiff walks into their office with a grievance, they simply refer him to one of the groups which then may in turn ask the Foundation to represent the group in an action based on that grievance. The N.A.M. would of course be quick to charge that a broad definition does them no good at all because anyone energetic enough to bring a class action would have little trouble either attaching himself to an established group or putting together a number of names for his own group. (The charter flight group problems comes to mind.) Of course, the larger the minimum membership of a qualifying group the more difficult this would be to

do, but the impediment might not amount to much if the minimum size were, say, 500 persons. For example, the group might be Berkely Students Against X or subscribers to I F. Stones Weekly or Mayday or, now, the National Welfare Rights Organization.

I might note here a related issue we discussed. The question of how many members (or what percentage) of the group would itself have to be directly affected by the abuse at issue to initiate the action. At the outer limits this would be a problem of standing and reach constitutional proportions to the extent it raised questions of whether there was an actual "case or controversy" within the Meaning of Article III. This would, of course, be primarily a drafting problem, but at the same time it does suggest that the most natural group in many cases might be one that formed around a particular abuse and had no other raison d'etre and thus was really very little different from the class brought by individual plaintiffs under the Eckhardt-Tydings bill.

5. Several persons consulted were bothered by the notion of giving the right to bring suits to a particular group of private plaintiffs. Some felt that the uneasiness about this resulted primarily from the lack of precedent for it; others felt that such a proposal would face a strong constitutional challenge. The constitutional argument might be roughly that the right to access to the federal constitutional courts is a privileged rights (like, for example, voting, travel...) and imposing impediments on certain classes of persons in exercising that right can only be justified under the Equal Protection by a compelling interest in so classifying people. (This is the argument the Supreme Court employed in striking down the state welfare requirement that persons have lived

within the state for a certain period of time before they became eligible for welfare). In any event, we were hard pressed to think of a truly analagous precedent for extending such a privilege to only certain groups.

6. Another possible problem with the proposal is simply its timing. The Eckhardt-Tydings bills has been worked over with a fine-tooth comb by everyone. Senator Tydings office feels that an acceptable and winning compromise position has been found. (I.e., Strike suiters are stopped by the possibility of a preliminary hearing into the merits of their claim and the statutory empowering of a judge to assess punitive damages against plaintiffs who he concludes are strike suiters; each member of the class must have a claim of at least $10; no suit may be settled without the approval of the assigned judge) Thus, some persons feel that the proposal would only slow things down and might offer a tactical excuse for delay to the opponents of a strong consumer class action bill.

8. Finally, some persons were concerned about the solicitation of legal-business problem. Under the canons of ethics lawyers are not allowed to solicit their own business. A layman middleman soliciting for them has traditionally been considered even more objectionable. Consumer groups might be seen as a middleman solicitor of business. I'm inclined to think this problem exists in all class action suits and is not too substantial because there has been an easing of these rules for groups like the NAACP Legal Defense Fund.

9. Related to the point that this proposal would not satisfy the opponents was the conclusion of many persons consulted that there are many more effective ways to stop strike suiters. In addition to those in the Tydings bill which are mentioned above are bonding requirements, a percentage limitation on attorney's fees, and (less to the point) an aggregate minimum of claims amounts.

Recovery to Consumer Groups

The objective of providing funds for a variety of non-profit private consumer groups is excellent. The means are somewhat difficult to work out and the political feasibility of any such scheme is doubtful.

The means which seem most practical is the earmarking of unclaimed recoveries for consumer research (and possibly consumer education). Even if the disposition of the monies was controlled by the FTC, the proposal would have some merit. Another possibility would be to give such funds to consumer groups who brought the suits.

The notion of allowing consumer groups who initiate actions to take a percentage of the recovery conflicts somewhat with the objection of full compensation of individuals for damage done. This problem might however be resolved on the theory that the consumer group was recovering (as does a lawyer) for a service done. The groups' service would be a sort of finder's fee for identifying the problem, getting the class together, finding the lawyer etc. In fact, it even seems possible that such a solution could be achieved without legislating it. Further thought on this possibility might be fruitful. There is a problem, however, of lack of precedent for such a recovery.

There are problems of conflict of interest which arise in this situation that are worthy of consideration. If the lawyer represented the group, he might in certain situations not be the best representative of the individual's interests. For example, to enlarge group membership certain dramatic events might be desirable, whereas the largest recoveries for individuals might be secured through quiet negotiation and settlement.

Problems of which defendants were represented through the group and which weren't would arise. The labor union problem of some riding the coattails of the group's efforts would need to be considered.

But of course none of these details are insuperable. The biggest problem is political. The people I talked with seriously doubt that any bill designed at promoting the development of consumer groups could be passed.

Status of Tydings Bill

My friend in Tydings office, Dan Lewis, reports that the Senate Commerce Committeexxhx has completed action on the consumer class part of the Federal Trade Bill. The rest of the Bill will require about two more meetings and probably will be reported out in a month.

There has been a request that the Judiciary Committee also be given the opportunity to consider the bill. This request will probably be acceded too, but the current hope is that there will be a stipulation that the bill must be reported out within 30 days. The stipulation would prevent the Committee from killing the bill by letting it die in Committee. It is expected that Administration supporters, especially Senator Hruska, will take swipes at the bill while it is with the Judiciary Committee.