Private Enforcement of Consumer Law: A Sketch of the Japanese Landscape

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1. Introduction

1.1 Scope of Analysis

The purpose of this paper is to outline the role and limits of private enforcement of consumer law in Japan[1]. In particular, this paper focuses on two areas of consumer law. The first is the area of regulation of product safety. The second is the area of regulation/policing of consumer transactions which encompasses both substantive policing (*i.e.*, policing of unfair contract terms) as well as procedural policing of consumer contracts (*i.e.*, policing of the contracting process such as when there is deceptive behavior by one party). These are the areas where redress of consumers has traditionally been a grave concern in the Japanese society.

The meaning of the term “private enforcement” should also be clarified at the outset. In this paper, this term is used to describe en-

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[1] See also, Tsuneo Matsumoto, Privatization of Consumer Law: Current Developments and Features of Consumer Law in Japan at the Turn of the Century, 30 Hitotsubashi Journal of Law and Politics 1 (2002); Masami Okino, Recent Developments in Consumer Protection in Japan, 4 UT Soft Law Review 10 (2012) for an overview of the development of Japanese consumer law.

forcement of norms or rights *by* private parties. It is not necessarily limited to enforcement of private law rules. It can also be enforcement of public law rules, if not criminal law in most jurisdictions. Although this paper will limit the analysis to private enforcement through courts, other channels such as mobilization of the media can also be a form of private enforcement.

1.2 Two Dimensions of Consumer Law: Micro and Macro

There are two dimensions to consumer law. I borrow the distinction of "micro consumer law" and "macro consumer law" from the work of Atsushi Omura[2]. This distinction is important especially to clarify whether the interest being protected is an "individual interest" of a specific consumer, or whether it is a "general interest" of the public (*i.e.*, interest that is not apportioned to any particular person and which belongs jointly to a larger mass).

Micro-consumer law focuses on individual interests or aggregation thereof, *i.e.*, collective interests. This is the area of consumer law that tries to resolve individual consumer disputes. The focus is on balancing the interest of the consumers and business in each given case. The issue tends to be *ex post* redress such as compensation and thus it employs a *retrospective* perspective.

Macro-consumer law focuses on the general interest. It focuses on the maintenance of a *reliable* market, by which I mean a market where parties can rely that the products or contracts provided in that market are safe. There is also general interest in a *competitive* market where consumers are presented with the possibility of options (competitive choice) resulting from competition. In contrast to micro-consumer law, the focus is not on *ex post* redress such as compensation of any harm but rather on *ex ante* prevention or deterrence of harms and on shaping of the market. Thus it employs a *prospective* perspective.

I will be using this macro/micro consumer law distinction throughout this paper.

[2] Atsushi Omura, *Shohishaho* [Consumer Law], 4th ed., 2011.

2. Product Safety

1950s-1960s

In the history of product safety, regulation started with that of safety of food and pharmaceuticals. In the early 1950s and 1960s, there were series of consumer harm incidents caused by poisonous food and medicine with serious side effects[3].

With respect to food, the *Morinaga Powdered Milk* case (1955) marked the beginning of concerns for mass harms caused by unsafe food. In that case, infants who consumed powdered milk manufactured by a food producer Morinaga were poisoned with arsenic which were mixed into the product during its production. *Kanemi Oil PCB Poisoning* case (1968) followed. In that case, there was a leak of polychlorinated biphenyl (PCB) in a factory producing rice oil. Death or serious illness happened to people who consumed the rice oil. For pharmaceuticals, there were the *Thalidomide* cases (1961) where babies with severe disabilities were born from mothers who took, during their pregnancy, regularly sold drugs for sleeplessness or cold containing a substance known as thalidomide. Thalidomide later was determined to be the cause of the disability. Another is the so-called *SMON* cases (1970). In this case, substance called chinoform contained in drugs for *inter alia* diarrhea, caused a neuropathy known as sub-acute miero optical neuropathy (SMON).

There were huge public outcries for such serious life threatening and severe bodily harm cases[4].

[3] See Tsuneo Matsumoto, Recent Developments in the Law of Product Liability in Japan, 25 Hitotsubashi Journal of Law and Politics 15, 16-18 (1997); Luke Nottage, Products Safety and Liability Law in Japan: From Minamata to Mad Cows (2004), at 40 *et seq*. for an overview of what Nottage dubs the "'Big Four' PL mass injury cases ".

[4] In 1956, around the same time as the *Morinaga Powdered Milk* case, a disease which turned out to be caused by mercury poisoning was discovered in the fishing village of Minamata in Kyushu. In that case, a chemical plant run by the Chisso Corporation released industrial wastewater contaminated by mercury into the Minamata bay, and the villagers who ate fish from that bay became victims of

The victims resorted to tort law damages claims which are typical private enforcement. Apart from the length of time the victims had to wait until they received retribution, they were generally successful in the end, as far as monetary compensation is concerned[5]. Some cases resulted in judgments, some in settlements. The victims in many cases sued not only the producers but also the government for nonfeasance. On this front, with the exception of the *SMON* law suits, the consumers were generally unsuccessful in the courts against the government. However, the government in many cases agreed to settlements, and also acted as mediators in settlement negotiations between consumers and the business.

It is often pointed out that one characteristic of Japanese consumer law, especially in the field of safety during this era, is the heavy reliance on *ex ante* government interventions by way of setting safety regulations (the Food Sanitation Act and the Pharmaceuticals Affairs Act being the most relevant legislations) and also informal administrative channels such as that described above[6]. It perhaps is true that the government has played a significant role in achieving consumer redress in this area. However, it is important not to downplay the reliance of private parties on civil litigations, which sometimes facilitated settlements, in the 1950s and 60s.

a neurological syndrome. The syndrome was later named the *Minamata disease*. This is rather a pollution case than a consumer case, but it is important to see that perils of industrial harm to the public were a grave social issue in the 1950s and 1960s. See Frank Upham, Law and Social Change in Postwar Japan (1987) pp. 28 *et seq*. for more account of the Minamata disease incident.

More recent cases of public harm in non-consumer cases involve contaminated blood products (HIV and Hepatitis cases). For an account of the HIV infected blood products cases in Japan, see Eric Feldman, The Rituals of Rights in Japan: Law, Society and Health Policy (2000).

[5] However, see Upham, supra note 4, at 37-53 for a more contextual analysis of Minamata litigation which goes beyond compensation.

[6] For such view, see *e.g.*, Tsuneo Matsumoto, *Shohishaho-ni okeru Koshi-kyodo-to Sofuto-ro* [Collaboration of Private, Public and Soft Laws in Consumer Law and Policy: A Role of Law in Building Consumer Citizenship], 2 Hokkaido Journal of New Global Law and Policy 81, 82 (2009). Reliance on government intervention, however, is not necessarily deep-rooted in Japanese culture. See, John Owen Haley, The Spirit of Japanese Law (1998) 25-30 arguing that private law continued in pre-war Japan to be the primary mechanism for social ordering by law.

1990s

The 1990s was a decade of deregulation. Accordingly, that decade witnessed a clear strengthening of private law regulation or the private enforcement of safety, which focuses on *ex post* relief rather than *ex ante* regulation.

Civil Liability

In addition to the traditional general tort law regime which is based on fault liability (Article 709 Civil Code), the Products Liability Act (hereinafter referred to as the “PL Act”) was enacted in 1994. It provides for manufacturer’s no-fault liability for defective goods (movables). This has been a heavily relied upon legislation since then[7].

From the 1990s on, we see a strengthening of private law scheme which gives redress to consumers who are harmed by defective or unsafe products. For example, in 2007, the Supreme Court rendered an interesting decision which effectively expanded the spirit of PL Act to cases involving defective “buildings” (immovables) which fall outside the scope of the PL Act. The Supreme Court held that designers and constructors bear a duty of care to secure the fundamental safety necessary for a building, and that such duty of care extends to residents, neighbors, and passersby even when they are not in a contractual relationship with the designer or constructor. Breach of such duty of care will result in general tort liability based on Article 709 Civil Code. Technically, this is still a fault-based liability, but the court also held that providing a building lacking fundamental safety *per se* amounts to a breach of duty of care, thus effectively making this liability tantamount to no-fault liability.

Administrative Interventions

Despite deregulation, it should be pointed out that the role of ad-

[7] See generally, Nottage, supra note 3, at 154 *et seq*.

ministrative interventions still remains strong especially in the area of safety when life or bodily injury of consumers is at stake. The immediate push for the establishment of the Consumer Affairs Agency in 2009 was a series of deadly incidents involving consumer products: *e.g.*, *Paloma Gas Oven* case involving carbon monoxide poisoning caused by defective installment of gas ovens[8] and the *Konnyaku Jelly* case involving suffocation of children and elderly who consumed sticky jelly product[9].

These safety issues, however, are easy cases because these are personal injury cases or property damages cases where damage is caused to property other than the chattel itself. These are damage to the *integrity* of the consumers. In such cases, there is good justification for intervention by the government. This is in contrast to consumer transaction cases where the harms are *economic* harms. To this, we turn next.

3. Consumer Transactions: Damages

3.1 Micro-Consumer Law Perspective

From a micro-consumer law perspective, the purpose of damages is *compensation*. In consumer disputes regarding product safety, the amount of consumer loss tends to be high thereby giving consumers incentive to resort to court. In contrast, in consumer transaction disputes, the amount of loss for each individual consumers can be small, although widespread. Realistically speaking, in order to allow proper private enforcement of consumer law, there will be a need for collective actions or group actions which aggregates the small claims[10].

[8] In this case, the defect was caused by an alteration to the product at the time of installment. Although the manufacturer Paloma was aware that such practice was prevalent and that such alteration may cause deadly results, it did not take any action to stop such practice or to warn the danger thereof. There is a series of private litigations pursuing the liability of the manufacturer. However, only one case so far has held the manufacturer liable. Sapporo District Court Judgment, March 24, 2011, LEX/DB 25443860.

[9] Kobe District Court Himeji Branch Judgment, November 17, 2010, 2096 Hanrei Jiho 116, however, denied the manufacturer's liability based on the PL Act.

3.2 Macro-Consumer Law Perspective

In macro-consumer law, the focus shifts from individual compensation to general deterrence.

Punitive Damages

If deterrence is the issue, punitive damages would be an obvious option. However, under the current Japanese law, damages are limited to compensation of actual loss. There is even a Supreme Court decision that rejected recognition of a Californian court judgment that ordered a Japanese corporation to pay punitive damages[11]. The reasoning of the Supreme Court was that punitive damages is contrary to the compensatory principle of Japanese tort law, and therefore it is a violation of public policy (cf. current Article 118, Number 3, Code of Civil Procedure). Accordingly, under the present Japanese legal system, only limited deterrence can be expected from damages claims[12].

Disgorgement of Profits

Another mechanism that will help in deterrence is an order to disgorge profits. This can take the shape of damages, and is allowed under Japanese law only in some limited areas such as infringement of intellectual property. For example, Article 102 of the Patent Act provides

[10] This paper was presented at the conference mentioned in footnote * following two presentations on collective actions or group actions. See, Soraya Amrani-Mekki, *Shohishaho-ni okeru Shudansoken* [L'action de groupe en droit de la consommation], Hiroki Hatano trans., 15 Hokkaido Journal of New Global Law and Policy 211 (2011) and Seiji Ikeda, *Shohishaho-ni okeru Shijin-ni yoru enfosumento-toshiteno Dantaisosho* [Collective Action as Private Enforcement of Consumer Law], 15 Hokkaido Journal of New Global Law and Policy 241 (2011).

[11] Supreme Court Judgment, July 11, 1997, 51-6 Minshu 2573.

[12] Compensatory damages too, can have deterrent effects. For example, it is reported that there were various changes to manufacturer's behavior following the enactment (or even prior to enactment) of the Products Liability Act in 1994. See, Nottage, supra note 3, 191 *et seq*.

that the amount of damages for patent infringement is presumed to be the amount that the infringer profited by the infringement. This probably is possible in intellectual property legislations because there tends to be only one (or a few number of) claimants. This is very different from consumer law cases where there tends to be a mass number of claimants which raises the difficult issue of distribution of the disgorged profit. This might not work well in consumer law area.

Administrative Surcharge (*kachokin*)

Another mechanism that might similarly help in deterrence is administrative surcharges. There are such mechanisms in the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (better known as the Anti-Monopoly Act) and the Financial Instruments Transactions Act (formerly the Securities Exchange Act). However, there is no channel for private parties to enforce this surcharge.

Thus there is a limit to what private enforcement can do in deterrence.

4. Consumer Transactions: Policing of Unfair Contracts

4.1 Micro Substantive Control of Unfair Contracts

Since consumers usually do not dictate individual contract clauses, the challenge for micro-consumer law is how to effectively control unfair contracts. One possibility is to control the "incorporation" of standard forms into consumer contracts. However, there is little control/regulation over incorporation; in most cases, incorporation is automatic under Japanese law. This is an area where there is ample room for further development[13]. Other possibilities include substantive control of the contract terms and procedural control by way of invalidation of the unfair contract or contract clauses. I now turn to these issues.

Civil Code Remedies

For "substantive control", one may rely on Article 90 Civil Code which provides that contracts against public policy are void. Contracts involving "excessive profiting" (or "gross disparity") are often regarded to be in violation of public policy[14]. Case law originally required both that (i) one party has taken advantage of the other party's distress, thoughtlessness, or inexperience and that (ii) the contract gives excessive profit to one party. Recent trend deemphasize the second requirement, and this is now more a tool for procedural policing rather than substantive policing[15].

However, Article 90 being a general clause, predictability is not guaranteed[16].

[13] However, the court may utilize general contract interpretation techniques to exclude incorporation of standard forms. One possibility was demonstrated in the Supreme Court Judgment, December 16, 2005, 1291 Hanrei Jiho 61 (holding that a clause in a residential lease contract obligating the lessee to pay restoration fee does not become part of a contract unless clearly agreed at the time of the contract). See, Okino, supra note 1, at 11.

[14] This reasoning led to an important case law development although these are not necessarily consumer law cases: it often happened that in monetary loan contracts, the lender would insert into the contract a clause providing that, in case of default, the lender has the option of receiving transfer of ownership of a specific immovable from the borrower, in lieu of repayment of the debt. That option could be registered, and by registration, it achieved a security agreement status. However, since there tends to be disparity between the amount of outstanding debt and the value of the immovable, these contracts were considered to be highly problematic. Case law developed a "settlement duty" which requires the lender to settle the balance. The legislature also followed up with the case law development by a legislation in 1978 of the Act on Contract for Establishment of Security Interests by Use of Provisional Registration.

[15] For example, in a case where an inexperienced 52 years old housewife was lured into futures trading, the Supreme Court ruled that the contract was concluded in a grossly unfair manner, and thus is void as being against public policy. Supreme Court Judgment, May 29, 1986, 1196 Hanrei Jiho 102.

[16] A rare and more predictable provisions exists in the Civil Code. Article 572 provides that disclaimer/limitation of warranty in a sales contract is void if the seller puts it into the contract knowing that there is defect in the goods and if it withheld that information from the buyer.

Consumer Contract Act (CCA)

In 2000, the Consumer Contract Act (hereinafter referred to as the "CCA") was enacted. It includes a very limited "black list" of clauses it considers to be void (Article 8 on business operator's exemption/limitation of liability clause, and Article 9 on consumer's liquidated damages clause). It also has a general clause which provides that any derogation from non-mandatory provisions of the Civil Code/Commercial Code are void if (i) the derogation unilaterally impairs the interest of consumers and (ii) if the derogation was entered into in violation of the principle of good faith (Article 10 CCA). This innovation has the potential of becoming a powerful tool for consumers. The Supreme Court recently applied Article 10 CCA in a series of decisions concerning the validity of an "automatic deduction clause" ("*shikibiki*" clause) in residential lease contracts[17]. It is customary in Japan that lessees will pay a security deposit (known as "*shikikin*") when entering into a lease contract. The security deposit will be returned to the lessee at the end of the lease after deducting all outstanding payments such as unpaid rents and restoration fees. However, in the Kansai region, there is a twist to this *shikikin* agreement. Usually, there is an agreement to automatically deduct a fixed sum even when there are no outstanding debts. With respect to such automatic deduction agreement, the Supreme court ruled in effect that if the clause is expressly made available to the lessee at the time of contract, the clause is not in violation of good faith and is thus valid, unless the amount of deduction is excessively higher in comparison to the rent etc. In the immediate case, the court upheld the validity of the automatic deduction clause.

[17] Supreme Court Judgment, March 24, 2011, 65-2 Minshu 903 and Supreme Court Judgment, July 12, 2011, 2128 Hanrei Jiho 43. See also Supreme Court Judgment, July 15, 2011, 65-2 Minshu 2269 for a similar decision upholding the validity of a "renewal fee" clause in a residential lease contract. For an overview of these cases, see Okino, supra note 1, at 12-13.

4.2 Micro Procedural Control

Civil Code

With respect to procedural control of the contracting process, we have already seen above that Article 90 Civil Code is one tool which consumers may employ. In addition, there are traditional invalidating rules of mistake, fraud and duress (Articles 95 and 96 Civil Code). However, the rigid requirements of these rules have made it difficult for consumers to rely on them. For procedural control, we have to turn to other legislative responses.

Statutory "Cooling-off Periods"

Starting in the 1970s, there is a series of legislations that provide a "cooling-off period" within which time consumers have a right to cancel the contract without showing any cause. The first of such legislation was the Installment Sales Act of 1972, but let's take the Act on Specified Commercial Transactions, originally enacted in 1976 as the "Door-to-door Sales Act", as an example. The Act allows, for example, consumers to cancel the contract in door-to-door sales for no cause, if the cancellation right is exercised within eight days from the day of receiving a written contract. The Act provides similar rules for other types of contracts with different length of "cooling-off periods" ranging from 8 to 20 days. In 2008, the Installment Sales Act and the Act on Specified Commercial Transactions were amended to expand the scope of this cancellation right. Other Acts which provide for similar rules include the Building Lots and Buildings Transaction Business Act, Financial Instruments and Exchange Act, and the Insurance Business Act. Although this cancellation right is a private law remedy, it is interesting that all of these legislations are basically administrative regulatory laws.

These are powerful tools for the consumers.

Consumer Contract Act (CCA)

Article 4 CCA enacted in 2000 provides for consumer's rescission rights which expand the fraud and duress provisions of the Civil Code. However, the expansion is available only in limited situations making it an inconvenient tool for consumers. Expansion of rescission for fraud is allowed only when the consumer's mistake was caused by

"misrepresentation of an important matter"; by "providing conclusive evaluation of an uncertain matter"; or by "non-disclosure of an important matter that is unfavorable to the consumer" (Article 4, paras 1 & 2). Expansion of rescission right for duress is allowed for example when the consumer's distress was caused by the business operator's "refusal to leave" (Article 4, para 3).

5. Consumer Transactions: Can Consumers be Enforcers of General Interest?

I now turn to macro-consumer law in the field of consumer transactions. Since we are concerned with the economic interest of consumers as an aggregate, the question is posed in this way: can consumers be enforcers of the general interest?

5.1 Injunction of Unfair Contract Terms

In 2006, the CCA was revised to allow injunction suits, but not damages claims, by certified consumer associations (Articles 12 *et seq.*). The right to injunction was originally allowed against acts violating Articles 4 CCA (see above), and was expanded in 2008 to acts violating certain prohibitions in the Act against Unjustifiable Premiums and Misleading Representations and the Act for Specified Commercial Transactions. This injunctive relief will allow certified consumer associations to prohibit use of standard contract terms including unfair contract terms. There currently are 10 certified consumer associations nationwide.

5.2 Damages for Impeding Fair Competition

Damages based on Article 25 Anti-Monopoly Act

If a business create impediment to fair competition, can consumers sue for damages? First of all, Article 25 the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter referred to as the "Anti-Monopoly Act" or the "AMA") allows damages claims if anyone, including consumers, is injured by anti-competitive behaviors. However, this is allowed only when there is a final ruling of

the Japan Fair Trade Commission (JFTC), the commission charged of the enforcement of AMA, declaring that there was violation of the AMA (cf. Article 26 AMA).

This provision is seemingly generous to consumers, but in reality, courts had not been forthcoming. In the 1979 *Matsushita Price-Fixing* case[18], several consumers relied on Article 25 AMA and brought a damages claim against the electronics manufacturer Matsushita for fixing price of television sets. The Tokyo High Court, which is the court charged with exclusive first instance jurisdiction to hear claims based on Article 25 AMA, recognized that the consumers had a damages claim under Article 25 AMA. However, it dismissed the claim for the reason that the amount of damage was not proven. This imposed a prohibitive requirement on the consumers to prove the exact amount of damage, *i.e.*, the amount the consumer paid in excess due to price fixing.

Damages based on the Civil Code: General Tort Liability

Another example of a damages claim for impeding fair competition is the *Tsuruoka Kerosene Cartel* case[19]. In this case, consumers sued several oil suppliers for forming a cartel and thus charging excessive prices for kerosene. The consumers did not rely on Article 25 AMA as the JFTC had not made any ruling (cf. Article 26 AMA). Instead they claimed damages based on Article 709 Civil Code, the general tort liability provision. The Supreme Court held that consumers may, in addition to Article 25 AMA, rely on Article 709 Civil Code for damages caused by acts violating the AMA. This opens the possibility for consumers to claim damages in cases where the JFTC has not made any reaction to an alleged anti-competitive behavior.

However, the court continued that the end-consumer must

[18] Tokyo High Court Judgment, September 19, 1977, 30-3 Kominshu 247.

[19] Supreme Court Judgment, December 8, 1989, 43-11 Minshu 1259. See generally, John O. Haley, Antitrust in Germany and Japan (2001), at 154-157. Mark Ramseyer, Japanese Antitrust Enforcement after the Oil Embargo, 31 Am. J. Comp. L. 395, 417-426 (1983) also analyses the development up until the first instance decision in 1981.

prove that the "estimated purchase price had there been no cartel" would be lower than the actual purchase price. Again, the court was requiring the consumers to prove the exact amount of loss. The unstable price of oil caused by the "energy crisis" in 1972 made it difficult for consumers to provide an exact price estimate.

Legislative Response to Difficulty of Proving Amount of Damages

With respect to the problem of difficulty of proof, the current Code of Civil Procedure of 1996 contains a provision which provides that whereas it is clear that loss has been caused, if the nature of damage renders it extremely difficult to prove the exact amount thereof, the court may determine a reasonable amount as damages. In essence, once it is clear that damage have occurred, the valuation of damages can be left to the court, relieving consumers from the burden of proving the amount of damages by themselves. This is a great help to the consumers which is likely to have changed the outcome in the *Matsushita Price-Fixing* and *Tsuruoka Kerosene* cases.[20]

Private Enforcement of General Interest?

The Supreme Court in the *Tsuruoka Kerosene Cartel* decision held that parties can rely on Article 709 CC for violation of the AMA. However, my question is, is this really an Anti-Monopoly case; and is the AMA relevant at all? I ask this because the Court is not enforcing the AMA as such. The AMA is designed to be enforced by the JFTC pursuant to its own procedures. Courts are only involved in judicial review of JFTC's rulings and in private damages suits pursuant to JFTC's ruling. True, a revision to the AMA in 2000 added a private injunction right against certain AMA violations (Article 24 AMA), which somewhat changes the nature of the AMA. However, only competitors, not consumers, are allowed to resort to this right. In any event, the JFTC was not involved in the *Tsuruoka Kerosene* case. Therefore, although there is reference to the AMA in the decision, what the court actually did was that it protected consumers' interest under the Civil Code. It is a Civil Code interest, which pre-dates the AMA. At most, the legal rules under AMA lend support to the justification of allowing damages, but it serves only as a surrogate justification.

This is similar to safety cases. There are administrative regulations that provide safety standards for consumer products. When consumers bring tort law claims for personal injury caused by products which violates the safety standards, it is not making a claim based on violation of the administrative regulation. It is simply enforcing a Civil Code interest, although the violation of the safety standards will make it easier for the court to decide that there was a breach of duty of care.

In this sense, consumers can in effect be enforcers of general interest but that is possible only when there is infringement of general interest, collateral to infringement of individual consumer interests.

5.3 Injunctive Relief

Can consumers rely on injunctive relief for general interest violations? There is a famous1978 Supreme Court decision called the *Shufuren Juice* case[21] This technically is not an injunction case but the claimant is requesting specific compliance with the AMA. In this case, *Shufuren*, a consumer association sued the JFTC to repeal JFTC's authorization of juice traders' Fair Competition Code (*koseikyosokiyaku*). Fair competition codes are in essence cartels, but traders are allowed to agree on certain standards in order to promote fair competition provided that there is authorization of the JFTC. This system is based on the Act against Unjustifiable Premiums and Misleading Representations of 1962 which is a legislation that supplements the AMA. The Act does not directly provide for consumers right to request repeal of authorization. The Fair Competition Code in the *Shufuren Juice* case provided standards for

[20] Article 248 Code of Civil Procedure has been successfully utilized in several bid rigging cases concerning government construction contracts where residents of municipalities sued either the municipality or the bid-riggers for damages. *E.g.*, Osaka High Court Judgment, October 30, 2007, 1265 Hanrei Taimuzu 90; Tokyo High Court Judgment, October 19, 2006, 57 Tokomin Jiho 13; Tokyo High Court Judgment, May 28, 2009, 2060 Hanrei Jiho 65.

[21] Supreme Court Judgment, March 14, 1978, 32-2 Minshu 211.

labeling of juice products. The standards allowed products containing less than 5% fruit juice to be labeled as "additives included". This can give consumers the impression that the major portion of the product is made of fruit juice. *Shufuren* argued that the Fair Trade Code allowed misleading labeling of products and the authorization should be repealed. The court held that only those whose rights or legally protected interests are infringed by the authorization, *i.e.*, competitors but not consumers, may file a complaint pursuant to Article 10, Paragraph 6 of the Act. It further held that the interest protected by the Act is a public interest that should be distinguished from individual interest of consumers. Thus consumers may not file a complaint to repeal an authorization. Here we see a clear distinction of public law and private law.

5.4 Collateral Damages Approach

How should we analyze this status quo? Here I would like to introduce the concept of "collateral damages rule". The cases which seemingly allow private enforcement of public interests are cases where infringement of general interest occur collateral to infringement of individual interests. As we have seen, in the damages cases, individual loss was proven whereas the complaint in the *Shufuren Juice* case was structured in a way that demonstrated infringement of general interest alone.

Suitability Principle

Another example of the collateral damage approach can be seen in the "suitability principle" provision of the Financial Instruments and Exchange Act (FIEA). Suitability principle in general, in its strongest form, requires that certain players who are not suited to engaging in certain transactions should be excluded from engaging in such transactions. In one sense, this principle can serve as a protection for consumers who are not fit for certain transactions. Article 40 FIEA provides for prohibition of "solicitation ... in a manner that is found to be inappropriate in light of the customer's knowledge, experience, [assets] or the purpose of concluding [the contract], which results in or is likely to result in insufficient protection of the investors." This statutory suitability principle, however, is designed to protect the market, not individual consumers (cf. Article 1 FIEA). And therefore, the FIEA does not provide for any private law remedy. Non-compliance only results in cease and desist orders by the Securities and Exchange Surveillance Commission (SESC) or criminal monetary penalties.

Nonetheless, the Supreme Court Judgment of July 14, 2005[22] ruled that solicitation which grossly deviates from the suitability principle results in tort liability. It confers a private cause of action to consumers for violation of the suitability principle which was originally designed for protection of public interests. What does this judgment enforce? Is it enforcing the "statutory suitability principle" or is it enforcing a "general principle of suitability"?

In line with analysis above with respect to private law litigation seemingly enforcing the AMA, I would say that the 2005 Supreme Court decision is not enforcing the statutory suitability principle under the FIEA. The court has created and is enforcing a general suitability principle under the general Civil Code. Again, this is a collateral damage case because the court is trying to protect individual interest although it has the effect of protecting the general interest which happens to be a collateral damage.

6. Concluding Remarks: Tension between Individual and General Interests

I have so far been talking about cases where individual interests and general interests are not in conflict with each other. There can be cases where there can be tension between the two. Let me borrow from an interesting analysis shown by Hatsuru Morita[23].

In the *NOVA* case[24], one consumer cancelled a language school contract and claimed reimbursement of advance payment. To make it

[22] 59-6 Minshu 1323.

[23] Hatsuru Morita, *Shohishaho-wo tsukuru Hitobito* [Making Consumer Law: A Preliminary Analysis of Incentive Mechanism of Law Making Process], 15 Hokkaido Journal of New Global Law and Policy 259, 263 (2012).

[24] Supreme Court Judgment, April 3, 2007, 61- 3Minshu 967.

simple, the school (NOVA) sold tickets which the consumers can use to attend classes (or to purchase a right to attend a specific class). The regular rate for the tickets is ¥1350/class, but the advance purchase for those tickets was made at a discounted rate (¥1200/class) applicable to a large volume contract. After using some of the tickets, the consumer sought cancellation of the remaining tickets. The cancellation itself is allowed under Article 48 of the Act for Specified Commercial Transactions which gives rights to consumers to terminate the remainder of long term service contracts. The question was the amount of reimbursement. The school argued that the value of education already received by the consumer should be deducted at a rate applicable to a smaller volume contract (*e.g.*, ¥1350/class). If the consumer bought only the tickets which she actually used, that would have been the rate she would have paid. The court rejected this argument and ruled that "the value of service already received shall be deducted at the rate at which the purchase was made (*i.e.*, ¥1200)." This is a decision favorable to the individual consumer who brought this claim. But what consequence will follow from this contract is that the school will stop or limit the use of large volume discounts. It will be too risky for them to continue this discount because consumers will no longer purchase the tickets at the full rate even if they have no intention of using all the tickets they purchase. The probable consequence of this case is that general interest (*i.e.*, the availability of a large volume discount) will be diminished.

A protection of individual interest can result in a loss to the consumer as a mass. This is an example where there is tension between individual and general interest. This is something we have to be careful about when we try to enforce consumer law through private enforcement.