The Long Arc of Consumer Protection

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These days, when I *think*, I get tired. But now and again, I feel compelled to write a "think piece." This is one of those.

One advantage of having practiced law since before the invention of fire is that I have the ability to look back down the mountain I've climbed and perhaps see some things that aren't as visible to those whose time at the bar has been shorter than mine.

That happened to me a few weeks ago when I found myself thinking about an event from the early '90s. The American Bar Association's Business Law Section does its work through committees, and one of those committees, the Consumer Financial Services Committee, was meeting in Boston. One of the highlights scheduled for the meeting was a debate between my partner, Robert Cook, and one of the nation's leading consumer advocates (and a very good friend of ours), Kathleen Keest.

The question being debated was, "Do we need more substantive consumer protection legislation and regulation, or are disclosure and consumer responsibility the answer?" I'm sure the title was catchier, but that was the gist of the debate.

Kathleen, of course, took the "more substantive laws" side, and Robert had the "disclosure is the answer" side. I believe that Robert won the debate handily, which was no mean feat against Kathleen, who is (1) a true believer in protecting consumers, (2) bright as a new penny, and (3) as acid-tongued as they come. I think my assessment that Robert had carried the day matched that of most of the observers, except for a few academics and die-hard consumer advocate types.

Looking back, though, it's pretty clear that Robert had won only a battle and not a war. For the next couple of decades, the consumer advocates kept pushing for more substantive regulation – and every time they did, dealers and finance companies cooperated by participating in various abuses, providing the fuel that stoked the legislative fires. I can draw a pretty clear line from that debate to the housing abuses, payday/title lending abuses, economic collapse, and Lizzy Warren's success in launching the Consumer Financial Protection Bureau. The consumer advocates had clearly gained the upper hand.

But then things took an interesting turn. Warren, when setting up the Bureau, decided that while more laws and regulations were nifty, those laws and regulations were just temporary roadblocks that, she claimed, lawyers would just work their way around.

Nope, she had something a great deal more powerful than black and white regulations. She had UDAP, UDAAP, and discrimination – gray areas where the creditor's obligation varies depending on the whim and agenda of the enforcer. Why provide bright lines that creditors can actually see and rules they can actually follow when you can have a "we know bad acts when we see them" standard in the hands of an aggressive federal regulator?

So we've gone from a standard developed through the '80s and early '90s ('disclose and let the consumer take care of himself') to the pre-CFPB consumer advocate position ('more laws will tame the predatory marketplace') to where we are today: 'We don't need no stinkin' laws; we've got UDAP, UDAAP, and superior moral judgment.'

Just my take on the last 43 years of consumer protection.