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EDITORIAL POLICY STATEMENT

Advancing the Consumer Interest is designed to appeal to professionals working in the consumer field. This includes teachers in higher and secondary education, researchers, extension specialists, consumer affairs professionals in business and government, lawyers, students in consumer science, and other practitioners in consumer affairs.

Manuscripts may address significant trends in consumer affairs, education, and law, innovative consumer education programs in the private and public sector, reasoned essays on consumer policy, and application of consumer research, theories, models, and concepts.

Suggested content may include but is not necessarily limited to:

1. Position papers on important issues in consumer affairs, education, and law.
2. Description and analysis of exemplary education, extension, community, and other consumer programs.
3. Research reported at a level of technical sophistication applicable to practitioners as well as researchers. The emphasis of this research should be on its implications and applications for consumer education, policy, law, etc. The primary question of the reported research should be, "What does this research mean for practitioners?"
4. Application of theories, models, concepts, and/or research findings to problem solutions for target audiences.
5. Articles summarizing research in a given area and expanding on its implications for the target audience.

The *Guidelines for Authors Submitting Articles* are printed inside the back cover.

Advancing the Consumer Interest
Department of Consumer Science
University of Wisconsin-Madison
1300 Linden Drive
Madison, Wisconsin 53706-1575
USA

608-265-6515 fax 608-262-5335
email aci@macc.wisc.edu

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Call for Papers

The editors of *Advancing the Consumer Interest* are now soliciting manuscripts for inclusion in their fall 1996 special issue on:

> The Federal Government and Consumers: A Report on Legislative and Administrative Action and Agency Practice in the 90s.

We welcome articles providing in depth analysis of any of these areas including, but not limited to, their implications for consumer sovereignty in the market place. Particular actions and practices for analysis might include NAFTA, supermandate proposals for cost benefit analysis on all newly proposed health and safety regulations, and performance or practice of specific consumer agencies.

For consideration for this special issue, submit 4 copies of your manuscript by
March 1, 1996.
Guidelines for submission of manuscripts have been published in the spring and fall 1995 issues of *Advancing the Consumer Interest*. Copies are available from the Editorial Office.

Send manuscript, head-note, $10 processing fee, and cover letter to:

Advancing the Consumer Interest
Department of Consumer Science
University of Wisconsin-Madison
1300 Linden Drive
Madison, WI 53706-1575

If you have further questions, send email to:
aci@macc.wisc.edu
or phone:
(608) 265-6515

Letter to the Editor

After having attended ACCI's annual conference last March, I believe that ACCI is in an excellent position to bring together several groups that so far have not enjoyed a meaningful dialogue.

First, the people in the trenches dealing with consumers on a first hand basis, namely the legal services offices throughout the United States and the city and county consumer agency administrators, many of whom belong to the National Association of Consumer Agency Administrators (NACAA).

NACAA is closely affiliated with the National Association of Attorneys General, which is the second group that needs to be joined. All AG offices have consumer protection units, and knowing what the enforcers are doing and thinking is valuable. I would also include the Federal Trade Commission, Consumer Product Safety Commission, Food and Drug Administration, and other federal consumer organizations in this second group of top level government anti-fraud pro-consumer enforcers.

Government officials find it difficult to share the enforcement stage with the third group, namely the private enforcers in the form of consumer class action attorneys, but that is all the more reason for bringing them all together. In a world of fewer assets, government cannot do it all and in many cases the private bar through class actions can impose substantial discipline on the market place for the benefit of many consumers, freeing up government to prosecute and obtain injunctions against companies and individuals who cannot reimburse consumers for the damage they have caused.

There is also a need for a dialogue between legal service attorneys and the consumer class action bar, which is one of the reasons we recently initiated the National Association of Consumer Advocates to bring the legal services providers and class action attorneys into the same room, because we are fighting the same enemy, on the same issues, and with virtually the same tools, with the only major difference being the size of the units being engaged. This issue is one that will present itself whenever and wherever private consumer attorneys are participating, and it will happen here as well, so it is good to get it out on the table promptly.

Fourth, state and national consumer advocacy and grass roots organizations are also on the cutting edge of the latest scams and consumer needs. They play an enormously valuable role in reporting what is happening in the field and where government is not serving, or incapable of serving, consumers.

Finally, the expert theorists and researchers represented by ACCI are critical players in providing litigation support services as behind-the-scene consultants and as expert witnesses in court and in addition as researchers capable of documenting the nature and extent of consumer frauds reported by the field. It is one thing for a group of aggrieved citizens to complain. It is an extremely more potent weapon to have those grievances further documented, validated, and well articulated by rigorous academic researchers.

Beginning with the proposition that nobody has a monopoly on the truth and wisdom, I am proposing that at ACCI's next annual meeting the organization spotlight a special forum to stimulate everyone's thinking in response to Richard Feinberg's article "Some Thoughts On Our Struggle To

Survive" in the *Consumer Interests Annual* of last year. His concern that the academic arena has had little impact on the real world and the desire of ACCI members to be relevant, to have an impact, and to make a difference could be addressed in several ways.

First, members of the National Association of Consumer Advocates could explain what are the main issues of concern for those providing legal services at the community level and what the private bar is attempting to accomplish in the class action arena. They could offer an overview on the role of class actions, the deterrence value of tort law, and the most recent scholarship from the field of game theory on this point, the type of cases most amenable to class treatment, the role of private enforcement in a period of deregulation and government funding cutbacks, and the various ways in which consumer class actions have benefited consumers with regard to banking services, credit cards, defective products, fraudulent sales (from light bulbs, to hearing aids, to contact lenses), auto leases, rent to own, and second mortgage fraud, among others. Class actions are playing an increasingly significant role, with breast implants and auto defect actions in cases not covered by the National Highway Traffic Safety Administration.

The point is that equal justice under law is no longer a platitude that loses its meaning in the hard reality of the economics of micro-level litigation when individuals try to take on America's biggest companies and find out what death-by-litigation means. Macro-level litigation is having an impact on millions of Americans and scores of businesses. It demonstrates the power that citizens can have in class actions. ACCI members need to appreciate, understand, and hopefully contribute to this national dialogue.

That leads me to my second idea. As long as we may be making the effort to bring the legal services, NACAA, and class action bar together, if everyone in the consumer movement (the front line dealing with consumer complaints, consumer advocacy groups, the government enforcers, the private bar, and the intellectual/intelligence arm) simply had an "open forum" in which to exchange ideas, that alone would be make such a meeting worthwhile. But in addition I am hopeful that a real cross-fertilization, discussion of current issues, suggestions for research and study, and the development of new strategies would benefit everyone in ways that I cannot fully imagine. For creativity to take place you need critical mass. Once you achieve critical mass, watch out. So, imagine a special "open forum" in which participants from every group could have five to ten minutes just to say what's on their mind in terms of research, what are they working on or thinking about, current problems, and the like. We would generate both great ideas and the beginning of solutions that would work.

The potential here is exciting and ACCI is in the position to make it happen.

Richard Alexander
Alexander, Rapazzini & Graham, San Jose, CA
(via email)

Erratum: The name of Irene Leech was inadvertently omitted from the masthead on our past issue, though Professor Leech has been a member of our Editorial Board since last fall. We apologize for the oversight.

Some of you may have noticed that we have added a subtitle to the name of the journal. It now reads: *Advancing the consumer interest: A journal of consumer law, policy, and research.* We have done this to more clearly define the scope of *ACI,* but are not yet convinced this subtitle adequately addresses the journal's audience. We solicit your ideas and opinions, and plan to begin a dialog through our "Letters to the Editor" column. Please send your suggestions and comments to us via letter or email.

The Alternative Financial Sector: An Overview

Roger Swagler
The University of Georgia

John Burton
The University of Utah

Joan Koonce Lewis
The University of Georgia

There is nothing new about low-income consumers turning from banks to alternative financial services. Pawn shops have been fixtures in American cities since colonial times. However, because of growth in both the scope and scale of alternative financial services, the situation today is qualitatively and quantitatively different from a generation ago.[1] One can now identify an *alternative financial sector* (AFS) which provides low-income consumers with a range of services in much the same way that the traditional financial sector provides services to more affluent individuals. Elements within the alternative financial sector include:

- *Rental-purchase agreements* are a credit alternative offering possible ownership through weekly or monthly rental contracts for a 12- to 18-month period. "Rent-to-own" programs are not covered by any federal consumer protection legislation.
- *Pawn Shops* offer another credit alternative, which in some states includes *car-title loans*. With the former, the customer turns over the merchandise; with the latter, the customer surrenders only the car title (and a key to the car) as collateral for the loan.
- *Refund Anticipation Loans* (RALs) are offered by many income-tax preparers. RALs are not marketed as loans, but as "fast," "quick," or "rapid" refunds. In fact, they are short-term loans through a traditional financial institution and secured by the taxpayer's refund check from the Internal Revenue Service.[2]
- *Post-Dated Checks* are unsecured loans (sometimes called "pay-day" loans) from check cashing outlets. The customer can cash a check dated up to two weeks later.
- *Money Orders* are widely available alternatives to personal checks.
- *Check Cashing Outlets* will cash personal and government checks, as well as paychecks. Fees vary by state and type of check cashed. Other financial services may be available in configurations that make classification difficult.[3]

Some of these services have been studied individually, including a considerable amount of literature on rent-to-own (*Rent*, 1993) and recent investigations of pawn shops and check cashing services (Roper, 1989; Caskey, 1994). Although some of these studies are extensive, they all treat the various services as largely isolated phenomena rather than as part of a larger system. The focus on individual services makes it more difficult to see the sector as a whole. Yet given the range of offerings, the various services should be grouped into an Alternative Financial *Sector*. That is, rent-to-

TABLE 1: SUMMARY OF SERVICES IN THE ALTERNATIVE FINANCIAL SECTOR

Service	How it Works	Cost[a]	Regulation
Rent-to-Own	Weekly or monthly contracts for up to 78 weeks.	APR 250% to over 350%. Higher with weekly rental.	State Disclosure Requirements.[b]
Pawn Shops			
▪ Regular	Customer leaves merchandise as collateral on loan. Loans of 30 days are typical.	APR's average above 200% (higher in some states).	State Usury Laws.
▪ "Car Title"	Customer leaves car title as collateral.	APR approximately 300%.[c]	State Usury Laws.
Refund Anticipation Loans[d]	Through tax preparers and other outlets. Advance of federal income tax refund with conventional bank loan.	APR 77-204%.	State and Federal Truth in Lending.
Check Cashing			
▪ Basic	Private and government checks cashed.	Wide variation. 2- 10% in regulated states; outlets may charge more informally.	None in most states. In regulated states, charges lower for government checks.
▪ Post Dated Checks	Checks cashed with later date. Short-term loan.[e]	APR 325-520%.	None.
Money Orders	Purchased from convenience stores, US Post Office, and other outlets.	Varies, but minimal.	

[a] All figures are illustrative. Estimates of costs are highly sensitive to assumptions about amount and length of loan and repayment pattern. For rent-to-own, figures are imputed values of interest equivalents, because technically, no credit is extended. Rates may be *biased downward* because no account is taken of late fees or services provided informally at even higher prices.

[b] Except in Pennsylvania, the only state to treat rent-to-own as a credit sale.

[c] Annualized rate based on 90-day loan with $25 interest per month per $100 loaned. Loan may be extended if all or some monthly interest is paid, which would make APR higher.

[d] Called *quick* or *rapid refund*, thus not marketed as a loan. Internal Revenue Service procedures changed for 1995, delaying refunds and causing many banks to withdraw funding for RALs. Standard fee for loans of about two weeks; APR declines as size of refund increases. The APR on a $750 refund, for example, is estimated at 173% (Tharpe, 1995).

[e] Usually two weeks.

own should be studied along with pawn shops and other alternative sources of credit because the *various services all grew in the same environment, all serve a similar clientele, and all pose similar problems for consumers.*

Despite the comprehensive range of offerings available, the alternative financial sector is often treated as if it were peripheral. Indeed, the AFS is repeatedly referred to as "fringe banking" in both popular and scholarly reports (Caskey, 1994; Marino, 1993). The AFS is obviously not geared to the economic mainstream, but it is no more a fringe than the speciality accounts which banks offer to affluent individuals. Households with no banking affiliation are not the entire market for the AFS, but constitute a significant market segment which has turned from traditional services altogether. Banking offices outnumber AFS outlets by about three to one, but with over 20,000 outlets, the AFS is a significant presence.[4]

It is evident from the summary in Table 1 that the AFS charges *much higher* fees than traditional financial institutions do for comparable services. A television which could be purchased for just over $200 in a discount store, for example, costs over $800 if "purchased" over an 18-month period through a rent-to-own program. That pattern is typical of the entire sector. Although these rates are estimates, it is clear that the AFS offers a very expensive option. Because the AFS is patronized largely by lower-income consumers, costs are highest for those who can afford them least.

EVOLUTION OF THE AFS

The reasons behind the emergence of the AFS are complex and not fully understood. However, it appears that the deregulation of banking and changing patterns of income growth have interacted with a variety of economic and behavioral elements to promote the growth of the AFS:

1. The *deregulation of banking* has changed banks' pricing and marketing strategies. Monthly and per-check fees on checking account services have increased sharply (or high minimum balances are required). Charges for "bounced" checks (funds insufficient to cover and check is returned)

have also increased. There is also the perception among some lower-income consumers that local banks are only interested in more affluent customers. In some areas this feeling has been underscored by "debanking" as branch banks in lower-income neighborhoods have been closed. Those branches still open are less likely to make small, unsecured loans. Taken together, these changes have sent lower-income individuals in search of alternative financing sources.

2. *Income growth has been uneven* over the past two decades. Despite periods of rising income nationally, benefits have gone primarily to upper-income groups. Thus, real median income has stagnated and the lower quintiles of the income distribution have lost ground. With fewer resources, individuals may have been forced to utilize the AFS.

Whether they turn to the AFS because of limited options or declining economic prospects, customers are likely pleased by the personal treatment, immediacy of transactions, and greater convenience offered at AFS outlets. Patrons may also benefit from the AFS outlets. Because transactions are difficult to trace, the AFS may particularly appeal to customers with links to the underground economy. Despite these apparent benefits, however, AFS patrons enjoy little consumer protection. This is a particular problem because many customers lack information about the true costs of transactions and some service providers engage in predatory behavior.

There is, of course, extensive literature on lower-income consumers paying higher prices (Andreason, 1975); simple exploitation cannot be ruled out, but does not itself explain the growth in the AFS. It appears that customers are in fact seeking services which, for one reason or another, they cannot obtain from traditional financial institutions. Low-income consumers may not have the credit histories required for access to services from traditional institutions. In that case, the lower-cost services are not really options.

Furthermore, the actual services provided are not strictly comparable. Most loans through the AFS are small. The average pawn-shop transaction, for example, is about $55 (Caskey, 1994). Traditional financial institutions simply would not bother with such small transactions, which again, leaves no alternative for the low-income consumer seeking a small loan. Because AFS does not offer large loans or long-term financing, there is no option for mortgage lending.

The *immediate* need for *small* amounts of money is a common element in all AFS transactions. In the case of rent-to-own, the stress is on immediate access to the products in return for small periodic payments. Pawn shops and "pay-day" loans provide small amounts of money immediately. "Quick" income tax refunds offer nearly immediate access to money. The *very* short time horizon implicit in such transactions suggests such a pressing need for cash (or, in the case of rent-to-own, the product) that the true costs involved are not a consideration. The true costs are tremendously high (in terms of annual percentage rates), but this is masked by the relatively small amount of the loan and short time periods involved.

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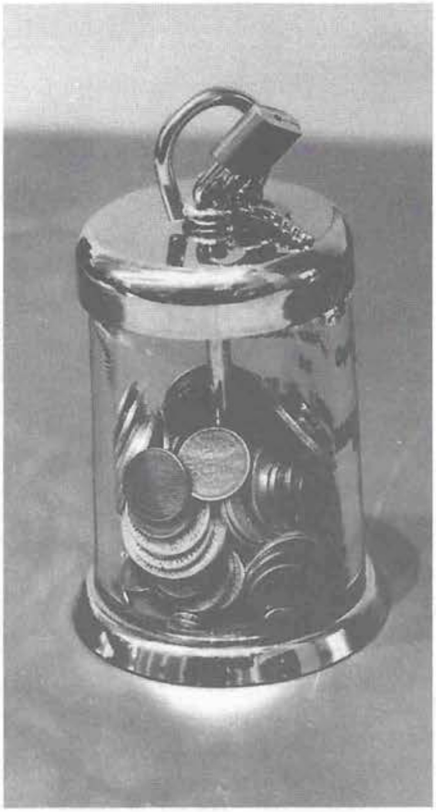
Income uncertainty may contribute to the immediate need for cash, since lower-income persons are also more likely to suffer an interruption of income (Andreason, 1975). Regardless, the consequences of reliance on the AFS should be clear. Patrons who pay such high rates have such a hard time simply keeping up payments that getting ahead becomes almost impossible. As a result, the *status quo* is perpetuated and it becomes more difficult for lower-income consumers to improve their economic status.

Even those who manage to pay off obligations to the AFS have little or nothing to show for it in terms of an improved credit record. Because such transactions are typically not part of a formal credit history, consumers still lack the access to traditional sources of credit which may have forced them to use the AFS in the first place. In a sense, there is no *long term* loan category in the AFS, which becomes especially important with respect to mortgage lending. The AFS neither offers that option nor prepares the consumer to seek such financing within the traditional financial sector.

This point relates to an increasingly contentious argument over fair lending and the Community Reinvestment Act (CRA). "Fair Lending" criteria have traditionally been focused on loan approval rates for different groups. If low-income minorities have relied on the AFS, however, they would be less likely to even apply for mortgage loans and would not be included in such assessments. That idea was implicit in a settlement with the Chevy Chase Federal Savings Bank in Maryland; evidence of discrimination was based not on the institution's lending patterns, but on its *marketing* strategy. Banks may therefore be found liable for not marketing themselves to lower-income neighborhoods (Karr, 1995). This interpretation is closely linked to the CRA's focus on banks' involvement in their communities and suggests that banks can no longer leave the low-income market segment to the AFS.[5]



COURTESY OF THE STATE HISTORICAL SOCIETY OF WISCONSIN. WHI (x3)50502

High-finance on a small scale (bank box circa 1955)

Although the term *fringe banking* was dismissed earlier, policy makers actually seem to view the AFS as an unimportant fringe. As a result, customers of traditional financial institutions enjoy much greater consumer protection than those of the AFS. The latter are largely lower-income consumers, who are particularly vulnerable because they lack both political and economic leverage.

The contrast is stark at the federal level, where the AFS is essentially unregulated.[6] Regulation at the state level varies in terms of both coverage and effectiveness. Usury limits, for example, may be so high that they are meaningless. Many states have simply ignored segments of the AFS. That is the case with check-cashing services, which are still unregulated in most states (Caskey, 1994). The rent-to-own industry has been supportive of disclosure requirements at the state level in return for declaring rental-purchase agreements to be non-credit transactions.[7] That designation exempts the industry from federal or state truth-in-lending provisions and state usury laws.

THE AFS AND THE CONSUMER

Given what has been said to this point, there are obvious questions about the Alternative Financial Sector and the consumer interest. Identifying the latter requires a clear perspective on the former, but there are at least three interpretations of the nature of the AFS. It may be viewed as:

1. a logical market response to a set of problems faced by certain consumers. In this view, the AFS provides legitimate services for which there is a demonstrated demand;
2. a benign development which, unfortunately, facilitates consumers' worst tendencies. This is similar to #1, but incorporates the possibility of abuse resulting from consumers' lack of knowledge or will power;[8] or
3. an evil industry (in whole or in part) which preys upon consumers who typically lack both political and economic leverage and thus have difficulty protecting themselves.

Note that if #3 applies to only parts of the AFS, the three interpretations are not necessarily mutually exclusive. Until more information is available, therefore, approaches to the AFS must be able to accommodate a variety of possibilities.

That is obvious for consumer educators, particularly those in extension or community-based programs. The short time periods and small amounts involved in most AFS transactions limit the effectiveness of traditional disclosure mechanisms and pose a particular challenge to educators. Even with better information, some consumers may not change their behavior, but those who are unaware of, or confused about, the cost will benefit. Others should have a better basis for making selections among alternative credit services.

Even those individuals who elect or feel compelled to continue using the AFS will have an impact because better informed consumers will be able to *police* the market and thus reduce price variation *within* the AFS. In the general case, it has been recognized for some time that increased information makes markets more efficient (Maynes, 1976); in the particular case of banking, recent evidence suggests that informed consumers are frustrating banks' strategies to limit services (Hansell, 1995). If there are relatively few informed consumers in the AFS, however, there will be little to constrain high-priced providers.

Financial counselors, particularly those working with lower-income families, can have a more immediate impact. Reliance on the AFS can be a symptom of dysfunctional financial practices and the costs associated with the AFS can debilitate a family budget.[9] Financial counselors are in a unique position to dramatize this point with clients (Swagler, Burton, and Lewis, 1995). If clients become aware that the AFS is a dead end (as described above), they are more likely to make the necessary changes in behavior for improving their long-term financial situations.

POLICY IMPLICATIONS

Given what was said earlier about the shortcomings of regulations dealing with the AFS, the questions for policy makers should be clear. It is, after all, difficult to justify a situation in which those who are least able to pay are given the least protection and confront the highest costs. Granting that, the question becomes: what type of policy best protects low-income consumers without depriving them of needed access to legitimate financial markets? Weak regulation may actually be harmful by providing the appearance of protection. Stringent regulation may exacerbate the situation by raising the cost of these services or driving legitimate providers out of business. This in turn could force lower-income consumers to search for services in the underground financial sector (e.g., loan sharks).

Finding the optimal balance between market forces and regulation presents a challenge to policy makers in responding to the AFS. For example, banning post-dated checks would be difficult because lenders would simply revert to cashing such checks on a more informal basis. Or, if lower APR limits are placed on pawn-shop loans, brokers might revert to an earlier practice of "buying" the collateral from the consumer and then "selling" it back at an implicit APR that was more reflective of a profitable market rate. Even the standardization and labeling principles involved in truth-in-lending laws are difficult to apply meaningfully to loans for small amounts for short, and often varying, periods.

Neither education nor regulation will be effective if the fundamental problem is lack of access to traditional financial services. Thus, policy makers must *not* view the alternative financial sector in isolation. The role of traditional financial regulation must be considered, including incentives for traditional institutions to locate in poorer neighborhoods and better serve the needs of the neighborhoods' population. Any such consideration should involve a reassessment of the Community Reinvestment Act, the impact of deregulation, and the overall regulatory environment.

The short time periods and small amounts involved in most AFS transactions limit the effectiveness of traditional disclosure mechanisms and pose a particular challenge to educators.

CONCLUSION

Given the many unknowns with respect to regulation, there is an obvious need for consumer research on the AFS. Research is needed to assess the extent, cost, and pattern of use for each of the alternative financial services and to determine why consumers use these services. The structure of the AFS also deserves attention, as does its relationship to traditional financial institutions. The degree of competition is unclear; it may be that the AFS has a unique market niche.

As this research moves forward, it is important that researchers, educators, and policy makers communicate. A better knowledge of what is going on in the market strengthens research. Research, in turn, can inform policy and improve the probability that policy initiatives will address fundamental issues. For any of this to happen, of course, educators, policy makers, and researchers must awaken to the importance of the alternative financial sector to millions of American consumers. Such an awakening is the goal of this paper.

NOTES

We gratefully acknowledge the research support provided by Renee Pruit and Richard Thompson, The University of Georgia. The manuscript also benefitted from the comments made by three anonymous reviewers and the editors of this journal. Any errors or omissions which remain are the responsibility of the authors.

1. For example, there were almost 5,000 check cashing outlets in the United States in 1992, over twice the number in 1985; the number of pawnshops nearly doubled over the same period (Caskey, 1994). The rent-to-own industry had sales of $4.5 billion in 1994 (Roush, 1995), a threefold increase over 1986 (Swagler and Wheeler, 1989).

2. In 1995, the Internal Revenue Service discontinued direct-deposit indicators (DDIs), which gave the lender immediate assurance that the refund would be paid. The change was made to allow more time to check information for earned-income credits, and thus did not involve RALs per se. The effect, however, was to make RALs so much riskier to the lender that many financial institutions quit making them. Some large tax preparation chains were able to continue the loans through arrangements with finance companies (Tharpe, 1995).

3. This list does not exhaust all possibilities. Insurance marketed through the home service system, some finance companies, retail outlets (such as furniture stores) stressing credit, and mobile stores which visit low-income neighborhoods might be considered for inclusion in the AFS. Thus, the transition from the traditional to the alternative financial sectors appears to be gradual rather than abrupt.

4. The 20,000 figure includes rent-to-own stores, pawn shops, and check cashing outlets, based on 1992 estimates. Quick tax refunds and money orders are not included, although some check cashing outlets offer these services. The number of AFS outlets is growing much more rapidly than the number of bank offices (Caskey, 1994; *Rent*, 1993; U.S. Department of Commerce, 1994; Karr, 1995).

5. It has been suggested by at least one source that banks are involved in the ownership of the alternative financial sector. Thus, rather than lending to lower-income consumers at market rates, banks could earn more by forcing such individuals to use the much higher priced services of the AFS (see Hudson, 1994). These allegations are not supported with thorough research.

6. The exception is refund anticipation loans, which come under truth-in-lending provisions because the loans originate with traditional financial institutions. As noted, RALs are marketed as "quick" refunds, not loans. Changes in IRS rules during 1994 limited RALs in 1995, but the changes were not intended as consumer protection and the impact was almost incidental (*Internal Revenue*, 1994).

7. *Every* state disclosure law regulating rent-to-own was passed with industry support. Pennsylvania is the only jurisdiction—state or federal—to regulate rent-to-own as credit (Rent, 1993).

8. Note that much the same point could be made about credit card use among middle-income consumers.

9. The key word here is *reliance*, which implies on-going dependence on a range of AFS services. Simply using the AFS occasionally, such as purchasing a money order, for example, would not be significant in and of itself.

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Toward the Regulation of Secret Warranties

Jeff Sovern
St. John's University School of Law

In 1982, Connecticut passed the nation's first "lemon law" (Connecticut, § 42-179). During the following decade, nearly every state followed suit (Pridgen, Appendix 15A, 1995). Now Connecticut has enacted a statute regulating secret warranties (Connecticut, §42-227). Three other states (California, Virginia, Wisconsin) have also passed such laws, and other states are considering them. Are secret warranty statutes the next lemon laws?

What are secret warranties? Everyone knows that automobile manufacturers normally repair defects that turn up while a warranty is in effect. But most consumers do not expect car manufacturers to repair defects that surface after the warranty expires. Nevertheless, automobile manufacturers sometimes provide repairs without charge when the identical defect turns up in many units of the products they make, even though the repairs are not covered by a warranty. A manufacturer might do so to retain the good will of the customer, in the hope that the customer will continue to buy the manufacturer's products. Many manufacturers who offer these "good will adjustments" strive to keep them confidential, so that few will request them. Hence consumer advocates call good will adjustments by another name: "secret warranties." Secret warranty programs, which have existed for at least twenty years, are enormous in scope. Indeed, nearly every car on the road is said to be subject to one of the more than 500 secret warranties supposedly operating at any given time (Ditlow and Gold, 1994, p. 1), while the Center for Auto Safety (CAS) estimates that the ten largest known secret warranty programs have covered 30 million automobiles and $3 billion in repairs (1989 NY Hearings, Ditlow testimony).

A number of consumer groups, troubled by the fact that some consumers obtain free repairs while others who are equally needy do not, have sought to make the repairs available to all consumers. These consumer organizations have attempted to publicize secret warranties, and have met with some success: Publication of one list of secret warranties generated more than 20,000 consumer inquiries and helped numerous car owners obtain relief (Polachek and Steinbach, 1991).

But consumer groups have been frustrated by the difficulty of learning about secret warranties. While federal legislation requires automobile manufacturers to file with the Department of Transportation copies of repair bulletins sent to dealers, manufacturers allegedly have avoided filing notices of secret warranties by addressing reports of secret warranties not to dealers but to customer service departments (*Consumer Reports*, 1989). Corporate whistleblowers have leaked allegations of some secret warranty programs (*Consumer Reports*, 1989), and consumer advocates have discovered others by carefully comparing government records with reports from consumers (1989 NY Hearings, Apuzzo testimony), but it is likely that other good will adjustment programs have remained confidential.

Consumer groups have also lobbied for protective legislation. That effort has borne fruit in California, Connecticut, Virginia, and Wisconsin, all of which have enacted statutes governing secret warranties. In the early 1980s the Federal Trade Commission commenced two proceedings in an effort to take the secrecy out of secret warranties (Ford,

Publication of one list of secret warranties generated more than 20,000 consumer inquiries and helped numerous car owners obtain relief.

1980; Chrysler, 1980), but since then the Commission seems to have lost interest in secret warranty regulation. As a result, in most of the country today, secret warranty programs are largely unfettered by governmental controls. That may change, however.

HOW SECRET WARRANTIES WORK

Any attempt to describe how secret warranties function suffers from a significant disability: Many manufacturers who provide them attempt to conceal their very existence, let alone how they work, and so accounts of their operation may be incomplete. Nevertheless, some information has become public. Most of what is known about secret warranties has to do with automobiles, though there is some evidence that cars are not the only product subject to secret warranties (Brown, 1991). Nevertheless, so little information is available about non-automobile secret warranties that critics of secret warranties have generally confined their comments to automobiles.

Most critics . . . see a secret warranty as a program to correct widespread defects under which certain people receive benefits and others do not.

Because many consumers have their cars serviced by dealers, and because dealers provide information to manufacturers about repairs, auto manufacturers can identify widespread problems with the cars they sell (1990 Connecticut Hearings, Gabriel Statement, Bugno Letter). Manufacturers may respond in various ways to discovery of a common problem showing up in cars after expiration of the warranty. At one extreme, they may choose to do nothing. At the other extreme, they may initiate a recall campaign, and indeed, if the problem relates to safety or certain emissions, federal law requires such a recall (1966 Traffic Act). An intermediate choice is to provide a secret warranty program.

From the manufacturer's perspective, secret warranties offer advantages over doing nothing and over a recall, at least in some circumstances. While doing nothing is the cheapest course in the short term, in the longer run refusing to act may cost the manufacturer sales. Many consumers expect a car to run without significant repairs long after the warranty has expired, and if those expectations are frustrated, the consumer may "exit"; that is, stop buying the manufacturer's products. By contrast, if the manufacturer agrees to repair a consumer's car after the warranty has expired, the consumer is likely to perceive the manufacturer as generously providing free repairs, making the consumer more likely to buy from the manufacturer again and to praise the car to others (*Consumer Reports*, 1989).

Though secret warranties are more expensive in the short run than doing nothing, they are still cheaper than recalls, and are less likely to damage a company's reputation for quality. A manufacturer that recalls a car must notify its customers of that fact, at least in certain circumstances. The notification process itself can be expensive, and obviously more consumers are likely to bring their cars in for repairs under a recall program than under a secret warranty program. Moreover, media reports of a recall may cause some would-be car buyers to conclude that the manufacturer does not make its cars very well and that they would do better to purchase a different car (Crafton, 1981; Slovic, 1987).

Manufacturers sometimes go to considerable lengths to preserve the confidentiality of secret warranties. Some manufacturers deny that they provide secret warranties and instead insist that all they do is authorize dealers to make free repairs on a case-by-case basis (*Consumer Reports,* 1989). On occasion, automobile manufacturers have not notified all their dealers, or even any dealers, of their secret warranties (Rosmarin, 1991, p. 116). Though some of the disagreement between sellers and consumer groups may stem from a split over exactly what constitutes a secret warranty, the dispute also seems to reflect a genuine difference over what the facts are. Most critics see secret warranties as something more than a manufacturer's decision to placate a favored customer with repairs which may or may not be needed; rather, they see a secret warranty as a program to correct widespread defects under which certain people receive benefits and others do not.

How do manufacturers decide who gets free repairs? Often the manufacturer lets the dealer decide (Polachek and Steinbach, 1991). Perhaps the most important consideration is whether providing free repairs will enhance the seller's good will (Whitford, 1968). Whether a seller values a customer's good will can depend on the seller's guess about whether the consumer will buy new cars again and how hard the consumer bargains on price (Whitford, 1968).

Even if a seller wishes to retain the good will of a particular customer, the seller may not repair the problem without charge unless the seller believes that failure to make the repair would cause the consumer to buy elsewhere in the future. Thus, some manufacturers provide the free repairs only for the most aggressive and persistent customers (*Consumer Reports*, 1989; 1989 NY Hearings, New York State Automobile Association testimony). Probably manufacturers reason that consumers who are not unhappy enough to complain vociferously will not desert them for other sellers.

SHOULD SECRET WARRANTIES BE REGULATED?

Those who seek the regulation of secret warranties usually argue for a rule that would accomplish two goals: First, good will adjustments should be offered to all owners of the cars that might suffer from the defect, and second, notice of the adjustments should be provided to all eligible owners (1990 Connecticut Hearings, Riddle testimony).

The justifications for these goals are typically rooted in both economics and in a sense of fairness. The economics-based rationale stems from the fact that those who do not know about the good will adjustments not only end up paying for the repair itself, but may incur other expenses because of errors made by independent mechanics in diagnosing or fixing the problem, loss of use of the car, and the like (Ditlow and Gold, 1994, pp. 17-19).

In addition, the inequality of treatment—some consumers can obtain free repairs while others cannot—strikes critics as unfair. This inequality may lead to another problem as well: because the free repairs are dispensed on a discretionary basis, it is possible that they are provided on a discriminatory basis. Though no studies disclose whether the beneficiaries of secret warranties are more likely to belong to one racial group or another, for example, it does appear that on other matters, such as the prices charged for new cars, dealers are more generous to some groups than others (Ayres, 1991). It is plausible that dealers will be consistent in dispensing their largesse.

Another argument turns on the secrecy in secret warranties. Because so much about secret warranties is kept obscure, policy makers are unable to obtain enough information to formulate rules. For example, given the amount of information available to the public, it is impossible to determine such basic questions as how much secret warranties cost, who receives them, or even how many secret warranties have operated. The burden of proof on the issue of whether secret warranties should be regulated ought to rest on those who possess the relevant information and are keeping it confidential: automobile manufacturers.

Opponents of secret warranty regulation have argued that if secret warranties are regulated, sellers might offer fewer good will adjustments, if indeed they offer any at all (Crain, 1990; 1990 Connecticut Hearings, Farr remarks). They contend that manufacturers might conclude that the benefits of providing secret warranties (increased sales attributable to customer good will) would be outweighed by the costs of providing them (the expense of complying with whatever regulation is imposed, plus the costs currently associated with secret warranties).

The history of consumer protection suggests that argument should not be taken at face value. Proposals designed to aid consumers often elicit predictions of similar setbacks for consumers, and the predictions have sometimes proved fanciful. Thus, some forecast that sellers would stop warranting goods if Congress passed the Magnuson-Moss Warranty Act (Emerging Issues, 1976), and obviously sellers still furnish warranties.

Indeed, some empirical evidence suggests that manufacturers would not stop providing free repairs if the repairs were regulated. After Connecticut passed its statute regulating good will adjustments, Ford, at least, continued to make adjustments and simply complied with the statute (Giorgianni, 1992). Ford also reportedly continued to abide by the terms of a 1980 consent decree it entered into with the FTC, requiring notice of good will adjustments to Ford customers, years after the decree expired by its terms (Polachek and Steinbach, 1991).

If good will adjustments are regulated, manufacturers should continue to provide the adjustments if they conclude that it is in their best interests to do so. What manufacturers perceive as being in their best interests should, in turn, depend on a calculus of several variables, which takes into account the cost of compliance, including the cost of providing notice and repairs, and the cost of not providing the adjustments.

What is the cost to manufacturers of not providing adjustments? If the manufacturers respond to regulation by refusing to make any free repairs on widespread problems, they will certainly incur the irritation of the consumers who complain to them (call them "complainers"). In addition, the manufacturers will also generate ill will among some consumers who do not complain to them ("non-complainers"). Studies show that many consumers who discover that a product is defective do not complain to sellers or manufacturers (Best and Andreasen, 1977; McNeil, 1979); some of these, in the parlance of social scientists, "exit" and purchase products made by others in the future (Best and Andreasen, 1977; Warland, 1975).

One advantage of secret warranty programs, from a manufacturer's point of view, is that they permit manufacturers to target many of the customers who are most angry about a defect and thus offer the greatest return, in good will, per repair. Manufacturers who provide free repairs for all their customers retain the good will of non-complainers but to do so they probably pay for repairs for some customers who have not noticed the defect or who do not hold it against the manufacturer, and whose faith in the company thus has not been shaken. Such manufacturers end up paying for repairs that do not necessarily enhance their good will, and so, from the manufacturer's point of view, the money may not have been well spent. At a minimum, the cost of retaining the good will of the unidentified non-complainers who would otherwise exit is much higher than the cost of retaining the good will of the complainers. On the other hand, if manufacturers are barred by statute from spending money on some customers without also repairing the cars of others, the calculus is very different. In order to retain the good will of any customers who are angry about the defect, including the complainers, the manufacturers must repair the cars of all.

For example, assume that a particular model, of which 1,000 cars were sold, contains a defect that appears after the warranty expires, and that 300 of the purchasers complain to the manufacturer and seek a good will adjustment. Assume also that the manufacturer believes that all the complainers will exit if the defect is not repaired and that an additional 100, of the 700 non-complainers who bought the car, will exit because of the flaw, though the manufacturer cannot identify them. Finally, assume that the manufacturer believes that no one who is angry about the flaw and who receives a free repair will exit. As things stand now, absent regulation, if the manufacturer initiates a secret warranty program limited to complainers, it will retain the good will of the 300 complainers, and lose the repeat business of 100 of the remaining 700. The cost of reclaiming those 100 disappointed non-complainers is the cost of notifying all of the 700 non-complainers and agreeing to repair all of their cars. In fact, probably not all the 700 would seek free repairs even if they were notified that they could obtain them, but assume for the sake of argument that all 700 would. Thus, for every non-complaining customer the manufacturer keeps, it pays for seven repairs. A manufacturer, faced with the choice of losing the 100 or keeping them at the expense of repairing 700 cars, might choose to lose the 100.

However, regulation that prohibits fixing some without fixing all changes the economics. Because the manufacturer could not repair the cars of the complaining 300 without also fixing the cars of the other 700, the value to the manufacturer of fixing the cars of the 600 who do not care amounts to retaining 400 consumers. A manufacturer who would not repair 700 cars to retain the good will of 100 people might repair 1,000 cars to retain the good will of 400. Whether the manufacturer would pay to fix the 1,000 to retain the 400 still depends on a multitude of variables, including the cost of the repairs and the cost of complying with any notice rules. But the economics of good will adjustments is not so clear-cut as some have suggested.

Even if manufacturers were to offer fewer good will adjustments, or no good will adjustments, many consumers might still benefit. A system in which either all purchasers of a particular good or no purchasers have access to free repairs may be better for most consumers than a system in which only aggressive or lucky consumers obtain free repairs. In all probability, the average consumer, when purchasing an automobile, bears some portion of the overall expense of providing secret warranties. Because manufacturers have decades of experience with secret warranties, and can control whether they are offered at all, manufacturers should by now be able to predict fairly accurately the cost of secret warranties for a particular type of car at the time the car is sold. If that is so, sellers should recover much or all of the cost of providing future good will adjustments in their selling prices.

As a result, the vast majority of consumers end up paying for a benefit they do not receive: namely, providing free repairs for the most aggressive consumers (Whitford, 1968). If most consumers pay for secret warranties without gaining anything from them, they would be better off if automakers did not provide secret warranties at all, and so reduced the price of cars. Hence, most consumers would be better off under a system in which manufacturers must provide good will adjustments to all or none, even if that meant fewer good will adjustments were provided.

Of course, if good will adjustments were eliminated, the consumers who now obtain free repairs would lose benefits whose cost is spread over a much larger group. Alternatively, if all consumers were provided with good will adjustments, all consumers would have to pay the full cost of the adjustments they receive at the time they purchase their car. The people who now obtain the benefits of secret warranties might be disappointed if that were to occur, but as it is difficult to come up with a principled justification for their continued receipt of benefits for which others pay, that does not seem a tragic outcome.

EXISTING SECRET WARRANTY REGULATION

The key issues of law concerning secret warranties revolve around manufacturers' obligations to people to whom free repairs are not offered. May a manufacturer, without violating the law, provide free repairs to some consumers without notifying others with the same problem that they too may obtain help? If so, may the manufacturer also deny repair assistance to some who actively seek it while giving such aid to others? Except in the states that have enacted secret warranty legislation, the answers are not yet clear.

A system in which either all purchasers of a particular good or no purchasers have access to free repairs may be better for most consumers than a system in which only aggressive or lucky consumers obtain free repairs.

Conventional implied and express warranty claims are not likely to offer much aid in combating secret warranties. The leading federal statute governing recalls for automotive safety problems—the National Traffic and Motor Vehicle Safety Act—also does not normally apply to secret warranty programs. Secret warranties arguably violate the Federal Trade Commission Act, but the FTC apparently does not wish to pursue secret warranty cases at present, though it did negotiate consent decrees in two secret warranty cases in 1980 (Ford, 1980; Chrysler, 1980). Similarly, secret warranties may fall afoul of state "little FTC" acts, but there are no reported cases in which state authorities have litigated the legality of secret warranties.

Why is warranty law unhelpful? Consumer warranties are governed by an amalgam of state and federal law. The traditional rules, based largely on the common law, are found in the Uniform Commercial Code (UCC). Under the UCC, sellers may make express warranties (§2-313), and, unless disclaimed, may make implied warranties (§§2-314, 2-315, 2-316). State lemon laws also typically provide for protection against certain defects for a specified period, usually one or two years (Pridgen, 1995). The federal Magunson-Moss Warranty Act (15 U.S.C. §§2301-2312) provides that sellers of consumer products who provide written warranties—as car manufac-

In a sense, the warranty acts as a half-truth because it creates the illusion that the manufacturer will provide only the services identified in the warranty, and no more.

turers always do—may not disclaim the implied warranties, though they may limit the duration of the implied warranties "to the duration of a written warranty of reasonable duration." Most automobile manufacturers provide warranties of at least three years, and accept the invitation of the UCC and the Magnuson-Moss Act to limit the duration of the implied warranties to a like period. Because secret warranties are usually provided for cars only after the express and implied warranties have expired, conventional warranty claims are not likely to be available to secret warranty plaintiffs. Similarly, by the time secret warranties become an issue, the car usually is no longer protected by the lemon law.

The FTC Act offers more hope for those troubled by secret warranties. The FTC Act proscribes unfair and deceptive trade practices (15 U.S.C. §45(a)(1)). In the Ford and Chrysler cases, the FTC charged that the programs at issue were "unfair or deceptive." Because the cases terminated in consent decrees, it is impossible to know how they would have been resolved if the matters had proceeded to the courts. But secret warranties are arguably both unfair and deceptive.

Under a 1994 statute, the FTC may not outlaw a practice by reason of unfairness, "unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or competition" (15 U.S.C. § 45(n)). Secret warranties appear to meet this standard. Similarly, secret warranties are deceptive when considered in juxtaposition to the written warranty provided car buyers. A consumer who examined her warranty and saw that the manufacturer is not under a legal obligation to provide free repairs after the warranty expires could reasonably conclude that asking the manufacturer for such repairs will be fruitless. In a sense, the warranty acts as a half-truth because it creates the illusion that the manufacturer will provide only the services identified in the warranty, and no more. It is well-established that half-truths can be deceptive under the FTC Act (International Harvester, 1984).

Because the courts have not recognized a private cause of action for violation of the FTC Act (Holloway, 1973), a decision by the FTC not to regulate secret warranties ends the matter, at least insofar as the FTC Act is concerned. But the states have stepped in to fill the gap. Every state has enacted a statute that permits a public agency to proceed against manufacturers who engage in deceptive practices, and nearly all states permit consumers to bring claims as well (Sovern, 1991). Though different states frame the requirements for a successful claim under these "little FTC" acts differently, most courts rely heavily on federal interpretations of the FTC Act in interpreting their own legislation (Leaffer and Lipson, 1980). Consequently, if secret warranties violate the federal FTC Act, they most likely fall afoul of the state deceptive trade practices acts as well.

California, Connecticut, Virginia, and Wisconsin all have similar statutes governing good will adjustments. The statutes require manufacturers to notify owners of eligible autos of the existence of any good will adjustment program. The notice must be sent by mail within ninety days of the adoption of the adjustment program. Manufacturers must also reimburse those who have previously obtained the repairs on their own.

But these four statutes all possess a significant flaw. They largely leave the determination of when a good will adjustment program has been initiated to the manufacturer's discretion. The statutes define adjustment programs to exclude *ad hoc* adjustments made on a case-by-case basis. By so doing, the statutes permit manufacturers to describe good will adjustment programs as programs administered on a case-by-case basis. It would be preferable to define good will adjustments in terms of the number of repairs provided by the manufacturer. The goal is to select a number high enough to imply that so many cars suffer from the problem that it would be productive for society to require the manufacturer to notify all who own such cars of the availability of free repairs, and that more is going on than just a manufacturer rewarding a handful of favored customers with special attention. For example, a statute could provide that once a manufacturer had provided identical free repairs to 200 owners, other owners should be notified of the availability of free repairs. The number 200 is somewhat arbitrary, and perhaps should be higher or lower.

CONCLUSION

From an economic standpoint, as well as one that considers simple fairness, secret warranties should be regulated. Manufacturers would probably continue offering good will adjustments even if they were the subject of more widespread regulation. Even if manufacturers offered fewer adjustments, most consumers would be better off because they would no longer pay for a benefit provided to others. Existing laws do not adequately regulate secret warranties. It remains to be seen whether state legislators are persuaded to follow Connecticut's lead once again and enact secret warranty statutes. Consumer professionals can help bring about that result by supporting the enactment of laws to regulate secret warranties.

NOTES

This piece is adapted from a longer article by the author, Good will adjustment games: An economic and legal analysis of secret warranty regulation (1995) *Missouri Law Review*, 60, 323-414 (copyright 1995 by the Curators of the University of Missouri). The adaptation printed here contains a number of ideas which might be of interest to consumer professionals. The Missouri article contains many references which are not cited again here, as well as a much more extensive legal analysis of existing secret warranty regulation and specific proposals for how that regulation should be structured.

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Change Makers: The Struggle for Consumer Rights

Together, we set out to capture, in their own words, as many consumer leaders as possible who had played a part in the early efforts to form consumer organizations and to establish some much-needed consumer rights.

Video Documentary Project: A Brief History

Helen E. Nelson
with Mark L. Clark
Consumer Research Foundation

Five years ago, Mary Gardiner Jones and I presented a joint paper at an ACCI research conference in Snowbird, Utah. That evening, as we had dinner together with Esther Peterson and Meredith Layer, we began reminiscing. We decided that some of us really ought to get a group of the early people in the consumer movement together and record an evening's discussion. Esther suggested, "My dining table will seat 15 . . . " It started there.

From that point it grew, though it had an unusually long gestation period. It was Meredith Layer, then Senior Vice-President for Public Responsibility at American Express, who held to the larger vision that became the Video Documentary Project. Her challenge to me: that if the Consumer Research Foundation would undertake the project and I, as a participant in the consumer movement since the 50s, would act as executive, she would help us raise the money. Our goal would be to document in film and in print the struggle for consumer rights in the United States since World War II. Knowledge of history, in this case, would be an investment in our future.

In early 1993, the Board accepted the challenge and began by appointing a Documentary Advisory Committee, with the following persons accepting our invitation to serve as unpaid advisors: Jean Bowers, Bill Fasse, Ruth Jordan, Meredith Layer, Ken McEldowney, and Dick Morse. Together, we set out to capture, in their own words, as many consumer leaders as possible who had played a part in the early efforts to form consumer organizations and to establish some much-needed consumer rights.

The Board and Advisory Committee spent a day and a half identifying the consumer leaders we wished to record. The film-maker, Gary Shepard, set a limit on the number of interviews possible within the project's budget, and we extended that by 16 percent. In the end, 35 of 36 invited consumer leaders agreed to be interviewed at one of four sites across the country. Nearly all offered to come at their own or their organization's expense.

With the planning stage completed, I began our search for funds. Pacific Bell had already indicated its desire to become a major funder and I posited that we would need a total of four others to complete the project. I went to New York in the fall of 1993 to present to American Express and NYNEX the three parts of the proposed consumer history project: (l) the archival recording on video tape of interviews with consumer leaders, (2) a video documentary history built on excerpts from those interviews, and (3) the publication of the edited transcripts of the interviews, along with editorial introduction and comment. Fortunately, both companies agreed to throw their hats into the ring. Ford Motor Company, with its outstanding consumer program, soon lent its support. Finally, consumer organizations and individuals collectively contributed about as much as one of our corporate funders, essentially becoming the fifth major funder. Thus the project has been funded by organizations that have been a part of the history establishing consumer rights. The funders gave CRF complete freedom to tell this history.

The hour-long interviews were completed in March and April of 1994. The entire 35 hours of high-quality color video tape are now safely stored in a media vault, thus fulfilling CRF's primary goal of preserving this history for future generations. It is anticipated that copies of the unedited masters will be made and distributed to consumer archives and research libraries, thus providing access to scholars and historians.

We then proceeded with the creation of *Change Makers: The Struggle for Consumer Rights*, our video documentary of the U.S. consumer movement since World War II. Gary Shepard and I wrote the script, and he chose excerpts from 25 interviews of consumer leaders from the fields of education, government, and consumer activism, to be used as the basis for this oral history. Their words, along with archival footage of the events described, illustrate often heroic efforts on behalf of the American consumer. In addition, there are interviews of young persons discussing their current consumer concerns, conveying some of the present and future challenges marketers and consumers face.

All these interviews were integrated into a 56-minute film of broadcast quality, which CRF previewed in Washington, D.C. on March 16 of this year. That date was chosen to coincide with the anniversary of President Kennedy's historic Consumer Message to Congress, and also with the joint ACCI and CFA national conferences. Over 215 invited guests attended the gala premiere and supper at the Cosmos Club. Many offered their generous praise and thoughtful criticism, and we are grateful. Based on their comments, the film has since undergone considerable revision and is now complete. We hope that the changes have made *Change Makers* an even more useful tool for future generations of consumers and consumer educators.

CRF hopes to premiere the documentary on PBS. We also plan to distribute the film to secondary schools, colleges, and community groups. It can be presented in three segments of approximately 20 minutes each, so that educators and community leaders can hold discussions about the material during the segment breaks. In addition, there will be a teacher's guide and a companion text with the complete edited transcripts of all 35 filmed interviews.

Change Makers: The Struggle for Consumer Rights reveals the stories of ordinary people who participated in the struggle to obtain fairness in the present-day marketplace. It depicts an important part of American history, and raises vital questions about business and community for today's consumers to examine. Those who have seen the film say it has the potential to benefit all consumers, from students to senior citizens, in virtually every community.

ORDERING INFORMATION

For a limited time, ACCI members may order *Change Makers: The Struggle for Consumer Rights* directly from the Consumer Research Foundation for $35, plus $5 per tape to cover shipping and handling. (California residents add 7.25% sales tax.) This offer is good for all orders postmarked on or before March 15, 1996. After that time, orders will be handled through a national distributor, at a substantially increased cost. Please make checks payable and mail to Consumer Research Foundation, 249 Perry Street, Mill Valley, CA 94941. No C.O.D. orders. All tapes will be sent closed-captioned, unless open-captioning is requested.

The *Changemakers* Teacher's Guide and companion text will be available for purchase in 1996. Distribution of copies of the archived master video tapes will vary, depending on specific requests. We estimate that the reproduction costs will be around $500. Fax inquiries to (415) 381-3712.

ARCHIVED INTERVIEWS WITH CONSUMER LEADERS

*Stephen Brobeck, *Executive Director, Consumer Federation of America*
*Joan Claybrook, *President, Public Citizen*
Jim Conran, *former Director, California Department of Consumer Affairs*
*Bill Fasse, *Associate Professor, Department of Child, Family & Consumer Sciences, California State University, Fresno*
*Linda Golodner, *President, National Consumers League*
*Susan Grant, *Executive Director, National Association of Consumer Agency Administrators*
*Mark Green, *Public Advocate, New York City*
Barbara Gregg, *Executive Director, Mont-gomery County Office of Consumer Affairs*
*Ellen Haas, *Assistant Secretary, Food & Consumer Services, USDA*
*Elena Hanggi, *A.C.O.R.N.*
Pastor Herrera, *Director of Consumer Affairs, Los Angeles County*
*Mildred Jeffrey, *Staff, United Auto Workers (ret.)*
*Mary Gardiner Jones, *President, Consumer Interest Research Institute*
*Rhoda H. Karpatkin, *President, Consumers Union*
*Virginia Knauer, *former Head, U.S. Office of Consumer Affairs*
Meredith M. Layer, *former Senior Vice-President, Public Responsibility, American Express Company*
Odonna Mathews, *Vice-President, Consumer Affairs, Giant Food, Inc.*
Ken McEldowney, *Executive Director, Consumer Action*
*Fr. Robert J. McEwen, *S.J., Professor Emeritus of Economics, Boston College*
*Richard L.D. Morse, *Professor Emeritus, Family Economics, Kansas State University*
*Ralph Nader, *Public Citizen*
*Helen Nelson, *President, Consumer Research Foundation*
Glenn Nishimura, *former Director of H.A.L.T., Americans for Legal Reform*
Kathleen O'Reilly, *former Executive Director, Wisconsin Consumer Utility Board*
Endicott Peabody, *former Governor of Massachusetts*
*Mike Pertschuk, *Advocacy Institute*
*Esther Peterson, *former Head of U.S. Office of Consumer Affairs*
*R. David Pittle, *Technical Director, Consumers Union*
*Florence Rice, *President, Harlem Consumer Education Council, Inc.*
*Esther K. Shapiro, *Director, Detroit Department of Consumer Affairs*
*Sylvia Siegel, President, *Consumer Cable Cops*
*Mark Silbergeld, *Director, Washington Office, Consumers Union*
Ned Smith, Director, *Consumer Affairs, Ford Motor Co. (ret.)*
*Tamra L. Stark, *Community Health Concepts*
*Donald Vial, *Senior Advisor, California Foundation on the Environment & the Economy*

*Interviews excerpted for use in *Change Makers: The Struggle for Consumer Rights*

John F. Kennedy, speaking at the University of Wisconsin, October, 1963

COURTESY OF THE STATE HISTORICAL SOCIETY OF WISCONSIN WHi(x3)46472

An Appraisal

Robert N. Mayer
University of Utah

Helen Nelson, an ACCI Distinguished Fellow, has added film-making to her long list of contributions to the consumer movement. Teaming with director Gary Shepard and acting in her role as president of the Consumer Research Foundation, Helen has produced an hour-length history of the consumer movement in the United States. The film is called *Change Makers: The Struggle for Consumer Rights.*

There is only one other film even remotely like *Change Makers*. It is *America at Risk: A History of Consumer Protest,* produced by Consumers Union in 1985. Both films attempt to give an overview of the history, goals, accomplishments, and leaders of the American Consumer Movement. What makes *Change Makers* unique is its incorporation of footage from interviews with 35 consumer leaders.

The film may be thought of as the tip of an archival iceberg. Each of the 35 consumer leaders submitted to a one-hour filmed interview. From this vast amount of footage, only about 30 seconds an interview ends up in *Change Makers*. In fact, about ten of the interviewees don't even make it into the film. Thus, there is a vast amount of unused video footage. This material, if and when it is made available, could constitute the source of additional films, books, and articles. There are also plans to publish the complete text of the 35 interviews.

The list of interviewees around whom the film is built reads like a "Who's Who" of the consumer movement. From the not-for-profit consumer groups, one sees Ralph Nader, Joan Claybrook, Stephen Brobeck, Linda Golodner, Rhoda Karpatkin, and David Pittle. Reflecting on their experience as government officials charged with protecting consumers, one hears from Helen Nelson, Esther Peterson, Virginia Knauer, Michael Pertschuk, Esther Shapiro, and Mary Gardiner Jones. The voice of consumer academics is heard as well in the form of Robert J. McEwen, Richard L.D. Morse, and Bill Fasse.

The film interweaves the interviews with both historical and contemporary footage. The result is a film that is lively and varied. For example, the film contains video footage of Presidents Kennedy and Johnson making formal speeches, scenes of everyday consumers browsing in stores, and laughable television advertisements from the 1950s and 60s—all augmented by still photography of consumer leaders and consumer-oriented legislators in action.

While the film touches on the consumer movement during the Progressive Era and New Deal, it concentrates on the post-World War II period. This coincides with the period when the interviewees were active in the consumer movement. The film progresses in a roughly chronological order, telling the story of the issues that shaped the American consumer movement. These issues range from the "classic" (e.g., automobile safety, truth-in-lending, fabric care labeling, and consumer representation) to the contemporary (e.g., nutrition labeling, smoke-free airline flights, and access to generic drugs) to the future (e.g., privacy in an age of computers, competition among telecommunication giants, and health care reform). The fight for consumer rights at the state and national levels are covered in roughly equal proportion.

(O)ne is somehow heartened by the ordinariness of these people. One does not have to be charismatic or technically trained to be a consumer advocate; the primary prerequisite is a commitment to social justice.

The interviews with consumer leaders are used to advance the story of the movement, but I found the interviews most interesting for what they reveal about another question—what motivates people to become consumer advocates. In some cases, participation in the consumer movement was an extension of involvement in other social movements, especially organized labor, women's organizations, and cooperatives. In other instances, consumer advocates were spurred into action by some injustice they experienced or witnessed. In either case, one is somehow heartened by the ordinariness of these people. One does not

(T)he film-makers describe their work as an affirmation of democracy and a challenge to ordinary citizens to imbue the economic marketplace with fairness and dignity.

have to be charismatic or technically trained to be a consumer advocate; the primary prerequisite is a commitment to social justice.

The film is not merely an examination of the consumer movement's past. Its present status is addressed as well. One learns about the current activities of organizations like the National Consumer League, Consumers Union, and the Consumer Federation of America, as well as government agencies like the Federal Trade Commission and Consumer Product Safety Commission.

One of the film's particular strengths is its ability to look forward. It highlights consumer issues involving "information age," biotechnology, and the protection of the natural environment. In addition, the film emphasizes that a new generation of consumer activists is emerging. This is accomplished by showing college students participating in CALPIRG and showing a group of high school students articulating their consumer concerns and frustrations.

If one relied exclusively on *Change Makers* for a picture of the consumer movement, one might come away with certain misperceptions. First, one might believe that all consumer advocates are white, middle class, and over 50 years old, whereas in fact considerable impetus for the consumer movement has come from low-income and minority organizations. (The role of organized labor is properly acknowledged in the film, however.) Second, one might think that the exclusive goal of the consumer movement is to improve consumer welfare by getting governments to pass laws and regulations. The roles of the judiciary, on the one hand, and the role of businesses, on the other, are largely ignored. Third, one might not realize that the list of consumer rights has gone beyond the four articulated by President John F. Kennedy—safety, information, choice, and representation. For example, President Ford added the right to consumer education, and President Clinton added the right to service.

Given the film's exclusive focus on the United States, viewers unfamiliar with the consumer movement might come away from the film without knowing that the movement exists outside the borders of the United States. Consumer organizations and consumer policies are now evident in developed, newly industrialized, and developing nations, and even in the formerly socialist countries of Eastern Europe and the C.I.S. Indeed, the consumer movement is a truly worldwide phenomenon. This is a good thing, given that business operations and consumer problems are increasingly global as well.

A final omission of the film concerns the movement's critics and internal squabbles. The film, with its emphasis on the benefits of laws and regulations for consumers, fails to provide an understanding of the hostile environment in which consumer protection is viewed as too costly or as counterproductive. Similarly, the film lacks the time to explore the divisions that exist within the American consumer movement with respect to goals, tactics, and views of the business community.

Ultimately, the film's omissions are minor and easily overlooked in light of what the film achieves. *Change Makers* celebrates the consumer movement. Its leaders are not portrayed as primarily interested in saving consumers a dollar here and a dollar there. Rather, the film-makers describe their work as an affirmation of democracy and a challenge to ordinary citizens to imbue the economic marketplace with fairness and dignity. The film's final section shows a group of high school students discussing their consumer concerns about the future. Let us hope that these students and their peers will follow the example of the leaders portrayed in the film and become change makers themselves.

The Assault of Commercialism

Michael F. Jacobson and Laurie Ann Mazur (1995), *Marketing Madness: A Survival Guide for a Consumer Society*. Boulder, CO: Westview Press, $59.95 (hardcover), $18.95 (paper).

Marketing Madness [A Survival Guide for a Consumer Society] is a bit of a misnomer; the book is not so much a survival guide as it is an attempt to chronicle the evils of commercialism in American society. It is well-written and well-researched, and makes for interesting, thought-provoking reading. Its distinguished authors are Michael Jacobson, a founder of the Center for the Study of Commercialism, and Laurie Ann Mazur, a writer and consultant to nonprofit organizations.

The book's only major weakness is its decided lack of even-handedness: Corporations in general and marketers in particular are portrayed as the all-powerful villains, and consumers as their hapless victims. At times, the outraged tone becomes shrill, diminishing the credibility of the content. On the other hand, in certain passages—like those detailing how alcohol and tobacco marketers target minorities and the young—the authors display more self-restraint, letting the truth stand alone in all its ugliness.

The book is divided into two major sections. Part One, containing eight of the ten chapters, describes how commercialism (especially advertising) affects our lives. Part Two presents ways consumers can empower themselves in their dealings with advertisers and, more generally, with a consumer culture.

A major strength of Part One is the "What You Can Do" box at the end of each chapter's main sections. These boxes contain suggestions about how we can deal effectively with the problems discussed in the preceding section; my only complaint is that more space is not devoted to such action-oriented material.

Chapter One focuses on marketing that is directed at children, at home and at school. The authors point out that children are especially vulnerable to advertising messages because they do not possess the cognitive capacities or life experience of an adult. Several Western countries have banned all broadcast advertising to children; Jacobson and Mazur observe that while this may not be possible in the current political climate in the U.S., there is much that parents can do to educate their children about the purpose of ads and how they work.

In their discussion of corporations' increasing influence on American schools, the authors fail to note that corporations are filling a void left by uncaring tax payers who do not want their property taxes raised for any reason, and disaffected parents who view public schools as a sinking ship to be escaped from rather than repaired. The authors ask, "Can frazzled teachers in underfunded schools really compete with slick, polished business propaganda?" The answer is an emphatic "Yes." It is a teacher's job to educate the young. Young minds are as open to unadorned truth presented by a wise and nurturing authority as they are to "slick, polished" propaganda.

Chapter Two, "The Private and Public Airwaves," strikes me as primarily a diatribe against the evils of television; the authors' position is that "commercial TV reflects and perpetuates the consumer culture as it erodes democracy." They view commercial television as a (if not the) root cause of our seem-

The book is not so much a survival guide as it is an attempt to chronicle the evils of commercialism in American society.

ing inability to think critically. Again, we consumers are portrayed as helpless, hapless victims of commercialism; we need the authors to grant us a "reprieve" from the "prison sentence" of watching TV.

The authors do, however, make an important point about how increased government funding is essential for the integrity of public broadcasting to survive. When commercial underwriters of PBS programming start demanding the suppression of controversial topics, it's high time the public, whose interests are no longer being served by PBS, stand up and exert pressure on state and federal representatives to allocate sufficient funding.

When commercial underwriters of PBS programming start demanding the suppression of controversial topics, it's high time the public, whose interests are no longer being served by PBS, stand up and exert pressure on state and federal representatives to allocate sufficient funding.

Chapter Three, "Hidden Advertising," details the myriad ways advertisers blur the lines between advertising, news, and entertainment. They use advertorials, infomercials, and video "news releases" to gain credibility in the eyes of jaded, wary consumers. As the authors point out, we have a right to know whether we are watching (reading) an ad or news. A simple label would suffice.

Advertisers also place their products in movies and arrange to donate products to TV shows to gain increased visibility and to become associated with a hit or with a favorite character. The Center for the Study of Commercialism suggests banning placements in children's media altogether, and that disclosures of paid product placements be prominently displayed. These recommendations seem eminently reasonable.

Chapter Four, entitled "Sexism and Sexuality in Advertising," addresses the portrayal of women as sex objects in ads, and also exposes marketers' sexualization of little girls. One egregious example is a marketer who makes bras and panties with lace and ruffles for preschoolers. Another is a maker of a doll that looks like a five or six year old girl; when water is applied to her, she appears to be wearing make-up, and sports a heart-shaped beauty mark. In Philadelphia alone, at least 100 cases of child sexual abuse are reported every month. As a child psychologist, I have worked extensively with the small victims of sexual abuse; I have viewed the trauma and its aftermath at close range. Offering up sexualized images of little girls in ads or products is unethical and immoral at best, and at worst might be viewed as a form of child pornography. Children have no power to consent to their sexualization or use for sexual gratification; they depend on the adults around them for their survival. They are entitled to love, respect, and protection from exploitation of any kind.

Chapter Five describes the "co-opting" of civic groups, culture, and sports by corporations. As the authors assert, many marketers have attempted to gain "innocence by association" with popular social causes or historical fights for freedom. And civic organizations as well as cultural institutions should be clear about whether corporate (or any other sizeable) donors are, in fact, attempting to purchase control or visibility.

In Chapter Six, the authors take on direct mail, telemarketing, and outdoor advertising. They provide excellent lists of consumer resources and actions that will afford some degree of protection from direct marketers' incursions into our homes and private lives. As information technology advances, Americans become increasingly concerned about privacy of personal information, not only from marketers, but from governmental entities, and from subscribers to on-line computer services. If we heed Jacobson and Mazur's call to action, Congress will be forced to listen to our concerns—as will marketers.

Chapter Seven alone makes the book worth reading. It is an eloquent indictment of alcohol and tobacco marketers, who (though they will not publicly admit to it) systematically target children and youth as well as minorities with their advertising and promotions. Among their many examples of such target marketing, the authors include excerpts from a strategy commissioned by Brown and Williamson outlining how to market high-tar Viceroy cigarettes to "young starters," and a detailed account of RJR's attempt to market its high-tar Uptown brand to African Americans.

Jacobson and Mazur's account of alcohol advertising is equally well-researched and gut-wrenching in its descriptions of blatant and sustained efforts to win young school children and minorities. The authors rightly observe that many liquor ads aimed at males connect product consumption with getting to have sex with a woman, and that some of the scenarios depicted verge on date rape.

Chapter Eight provides an abbreviated discussion of the commercialization of holidays and rites of passage. The book posits that pressure from peers and children makes it extremely difficult not to overspend on such occasions—and, as always, that marketers are to blame for the problem. In truth, we all make our own decisions about whether to buck cultural norms we dislike or disagree with, and resisting this norm seems straightforward enough (as the authors' suggestions confirm).

In Section Two of the book, Jacobson and Mazur discuss the impact of commercialism (Chapter Nine) and how we can respond (Chapter Ten). Chapter Nine, like several earlier chapters, suffers from its portrayal of Americans as hapless victims of commercialism. Chapter Ten, in contrast, offers a number of constructive actions we can take to empower ourselves as consumers and as citizens.

The authors seem to believe that Americans were once (before commercialism invaded) a compassionate, selfless, community-minded bunch. Our history, however, is littered with the casualties of our forefathers' greed and violence. They slaughtered Native Americans and enslaved African Americans; today we continue in that tradition every time we humiliate an employee or strike a child.

Yes, commercialism has created many problems and exacerbated others. But there were "no good old days." We would do well to cease looking to a mythical past for our guidance, and to begin to manifest values that were never popular in this culture: compassion and respect for one another and for our children especially; and courage to stand up and fight for all true victims of oppression.

Debra Lynn Stephens, *Villanova University*

Herbert Burkholz (1994), *The FDA Follies*. New York: Basic Books, $23.00.

America's first national legislation regulating foods and drugs was brought about in 1906 by a wave of muckraking disclosures of the dangers in patent medicines, processed meats, and other adulterated products. Passage of the Food and Drugs Act was greeted with an enormous sigh of relief and optimism: "the purity and honesty of the food and medicines of the people," the New York Times editorialized, "are guaranteed" (Young, 1989, p. 269). Yet only six years later, the government official in charge of enforcing the act resigned in protest against both the loopholes in the legislation, and political interference with his efforts to exert what regulatory power he had. Almost immediately a new generation of consumer champions stepped forward to stir up the muck again and generate pressure to reform the law and tighten its enforcement. So it has gone ever since. Burkholz's book is just the latest in a long, generally honorable line of exposés of the follies associated with a vital consumer agency that has been chronically underfunded, understaffed, and underarmed, battling against deep-pocketed and politically muscular business interests.

This *Follies* presents new episodes of failure of our laws to protect. It covers the 1980s, when, it is argued, the Reagan-Bush administrations' coziness with industry virtually assured emasculation of the Food and Drug Administration. Chapters detail, with thorough documentation, the behind-the-scenes machinations that impeded the proper handling of a host of problems ranging from Chilean grapes and aspirin labels to intrauterine devices and silicone implants. Many of the scandals are familiar, having been well aired at the time by newspaper and television coverage; nevertheless, they shock anew when presented together to demonstrate a pattern of neglect of consumers' interests.

If only the book's style were as lively as its substance. "Journalistic" is the best description of the prose; however, this journalistic style is broken by an occasional slip into glibness that is disconcerting in a work of such serious content (certain FDA personnel, we are told, were willing "to work their butts off" [p. 179]). Burkholz manages to deliver a hard-hitting message anyway, at least in the body of the book, but its impact is dissipated by a concluding chapter that wanders aimlessly through an assortment of musings about the power of wealth, the character of bureaucrats, and the search for the perfect cup of coffee.

There also runs through the book a seeming inclination to damn the FDA whether they did or they didn't act. The Administration's policing of the drug industry is criticized as too lax, for example, then two chapters later its attempt to regulate the vitamin industry is portrayed as too strict, even persecutory. Yet one of the agency's challenges has always been to protect consumers from themselves, to keep people who are unschooled in pharmaceutical and nutritional chemistry from falling for exaggerated advertising claims. Given the long history of excessive health promotion claims made by food manufacturers, the appeal of megavitamin therapy in popular health culture, and the lack of certainty about the long term effects of large doses of food supplements, there is surely a case to be made for the FDA to at least consider the adoption of a policy for regulating megavitamin products as drugs. Why is such a step "draconian" (p. 92), when a similar caution (in this case applauded by Burkholz) kept thalidomide off the American market in the 1960s? Oversimplification is apparent also in the repeated attributions of FDA impotence to the political mindset of the 1980s. To be sure, the Reagan-Bush era was one that industry found congenial, but to explain the inaction of food and drug regulators by saying they "conformed to the ethics of the time, which dictated that nothing must be allowed to get in the way of making a buck" (p. 159) implies some golden age existed when buck-making was not the ethics of the time and food and drug enforcement was essentially unimpeded. A best-selling attack on the FDA published in 1933 (during the Franklin Roosevelt Administration) suggested that the agency would always be hampered "by the norm in a society which has sanctified the fastest acquisition of the greatest number of dollars" (Kallet and Schlink, 1933, p. 15).

Economic and political pressures inevitably impose upon the work of a regulatory agency; funding and staff are chronically insufficient, duties and powers are often ill-defined or overlap with those of other bureaus. In the end, no matter how liberal the political environment, consumer education and awareness will always be required for self-defense, and *caveat emptor* will always have to be recommended. The 1933 exposé cited above—titled *100,000,000 Guinea Pigs*—was written, its authors stressed, "in the interest of the consumer, who does not yet realize that he is being used as a guinea pig, and who can protect himself . . . only through a knowledge of the methods used in this curious, one-sided experiment" (Kallet and Schlink, 1933, p. 18). Whatever dissatisfactions one might express with *The FDA Follies*, it does provide a great deal of information about the one-sided experiment that is the food and drug marketplace, and alert us that we are now 250,000,000 guinea pigs.

James Whorton, *University of Washington*

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Jack Haberstroh (1994), *Ice Cube Sex: The Truth About Subliminal Advertising*. Notre Dame, IN: Cross Roads Books of Cross Cultural Publications, $17.90.

This brief trade book claims to be the first attempt to write a comprehensive rebuttal to Wilson Bryan Key's widely-publicized thesis, disseminated via his books and lectures, that consumers are being barraged and influenced by subliminal advertising. Haberstroh's goal in penning this book is twofold: (1) to provide the public with what he believes to be the truth regarding subliminal advertising; that it does not exist and does not affect their marketplace behavior, and (2) to admonish advertising professionals whom he feels have a duty to expose Key for the charlatan that he really is.

Haberstroh begins by tracing the history of subliminal advertising, commencing with Vicary's 1957 movie theatre experiment, and continuing through Key's four books on the subject. Haberstroh goes on to question the phenomenon's existence and efficacy, explains why advertising practitioners and advertising educators should be concerned with this issue, and offers evidence that media publicity has duped the majority of the public into believing that their minds are being secretly assaulted by advertising. He explains why people believe this phenomena is real, reviews the legality of subliminal advertising, and issues a call to arms to the advertising community to debunk the myths that the media have perpetuated regarding subliminal stimulation.

Haberstroh's evidence and information sources include a sampling of the literature (primarily academic studies involving controlled experiments and trade literature), his own personal encounters with Key, talks he has personally held with advertising practitioners, and research that he has conducted. An appendix contains a sampling of some of the print ads discussed throughout the book, and the References contain a wide variety of academic and trade articles and books (albeit with gaps) upon which Haberstroh relies for much of his information. Although statistical results are summarized periodically, the book lacks tables as well as an index.

Haberstroh's concern stems from at least five reputable and independent research studies which confirm that about 62% of all Americans continue to believe that advertising practitioners are deliberately embedding invisible messages and images into nearly all the ads and commercials they create. Yet, *Ice Cube Sex* shows that there is no substantial proof that subliminal advertising exists let alone that it affects consumers' thinking or behavior.

With the exception of a few pranksters who have perhaps dabbled in subliminal artwork for fun (certainly not profit!), Haberstroh altogether dismisses the existence of subliminal advertising. He notes one problem in Key's "research"—it is based on asking thousands of his students what they "see" in supposedly subliminal-laden ads. Under Key's guidance they eventually come to see the genitalia, nasty words, skulls, scorpions, and so on that he hopes they will see. While not describing exactly whether and how Key leads his students to see these things in this "pseudo-research," Haberstroh points out that Key's neglected responsibility as a social scientist is to demonstrate how subliminal embeds have been intentionally implanted into advertising artwork. Also, Key asserts that there is a giant "conspiracy of silence" in which advertising people refuse to discuss any involvement with subliminals. Contrary to this, Haberstroh shows that most practitioners he has communicated with are more than willing to discuss the topic and readily voice their outrage against Key and his theories. Haberstroh surveyed practitioners who had allegedly worked on subliminals described in Key's books; all vociferously claimed that neither they nor anyone they knew had created subliminal advertising. While denials are expected, the outrage expressed in the practitioners' open-ended comments suggests that perhaps they were telling the truth. Haberstroh also points out that several advertising textbook writers have questioned why no practitioner or ex-practitioner has come forward and admitted to using embeds.

Haberstroh shows that the evidence that anyone has the ability to unconsciously perceive, let alone be influenced by subliminally-transmitted stimuli, is so slim that most researchers doubt the effectiveness of any such transmission. "Of the scores of research studies on the effectiveness of subliminal advertising in a market environment, only two or three suggest subliminals work. And those studies have been invalidated by later, more thorough research. Subliminal advertising does not affect consumer buying behavior, advertising recall, or any other marketplace behavior. Which, of course, prompts the obvious question: Why in the world would any advertiser, or ad agency, think about using it?" (Haberstroh, 1994, p. 55). Haberstroh only mentions in passing a critical point—that Key never explains a theory as to how subliminal images induce people to buy products.

If subliminals don't hold the threat of turning us into mindless, quivering globs of compliance at the mercy of marketers, why should we care? The answer, according to Haberstroh, is that Key's theories appear to be more popular than ever, and that public misconceptions help shape negative attitudes toward ads and the advertising industry overall. Although most college advertising instructors discuss and refute Key's ideas in the classroom, social science instructors meanwhile are teaching the opposite view and duping high school and college students into believing in the existence and efficacy of subliminal advertising. In fact, research shows that the younger and more educated people are, the more likely they are to believe this phenomena exists.

Ice Cube Sex offers several reasons why so many believe in this strange phenomenon. First, the mass media have given it sensationalistic, one-sided coverage. As Rogers (1992-93) points out, P.T Barnum said people love to be fooled. Second, "the public wants to believe the ad guys are bad guys" (Haberstroh, 1994, p. 114). These two reasons amount to what this reviewer sees as the general vilification of business by the media, with much of the public consequently believing simplistically that business is a root of much evil. Third, Haberstroh's the "devil made me do it" theory—the failure to accept responsibility for our own actions—comes into play. Under this theory, if we feel uncomfortable about our consumption of certain products (many so-called subliminal ads are for "sin" products such as liquor and cigarettes) or otherwise experience cognitive dissonance, it is much more comfortable to blame certain mysterious persuasive forces beyond our control rather than blaming ourselves.

While *Ice Cube Sex* is not meant to be a scholarly work, it is nonetheless well documented. While written in a breezy, easy-to-read style, the text is nevertheless overly repetitious and could have been more tightly organized and written. Also, it wasn't really necessary for Haberstroh to print the various four-letter words which Key claims to have uncovered in print ads.

This book is far from comprehensive. For instance, of a dozen possible sources cited by this reviewer's students in a bibliography for a recent classroom debate on this subject, only two appeared in the book's references. And there is no explanation as to why the early studies finding emotional responses to subliminal stimuli were flawed. Several oft-cited reasons why subliminals are ineffective are not explained either. Some of these are: drives (such as hunger and thirst) can't be externally created but rather come from within; absolute threshold levels differ markedly among individuals and even for any one individual over time and space, so that what is subliminal for one person might be supraliminal for another; consumers selectively screen supraliminal stimuli that conflict with their predispositions, so they might also do so with subliminal stimuli; and finally, subliminal stimuli are highly susceptible to misinterpretation since they are so vague (e.g., "Drink Coke" could be interpreted as "Drink Pepsi," "Drink Cocoa," or "Stink Coke"). Another point Haberstroh neglected—that many of the print ads in question must be held sideways or even upside down for the images to be seen, and it is doubtful that the subconscious mind can unscramble such images. In fact, a discussion of the subconscious mind and how it works, according to both psychologists and Key, would be helpful.

The author of *Ice Cube Sex* seems a bit filled with himself and his mission to expose Key, and perhaps exaggerates the gravity of this issue. Nevertheless, media hucksters and their reporting on subliminal advertising are harming the image of advertising and business. In defense, we advertising educators and practitioners alike must counter with intelligent responses. This book will help us to this end.

Geoffrey P. Lantos, *Stonehill College*

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Robin Langley Summer (1994), *Great Cons & Con Artists: The Incredible Stories of the Masters of Deceit.* Philadelphia: Courage Books of Running Press, $16.98.

What did Charles Ponzi really do? Did Phineas T. Barnum prove "there's a sucker born every minute"? Who was conned by the Home Stake Production Company? What did Lydia E. Pinkham advertise on the front page of *The Boston Herald*?

This book is a readable history of cons and their "masters of deceit." Despite the view that con artists prey on the vulnerable, the author maintains three themes—great numbers of people may be exploited over time, often the media buys into the con and perpetuates it (and is the last to accept the truth), and the rich are frequently victimized. This latter theme was recently explored in a *Wall Street Journal* article, "Plucking Pigeons" (1995), indicating it keeps happening. Why/how do the same cons continue to occur with only slight twists and changes in approach to make them believable to a new generation or to the same generation yet again?

More than 100 pictures of the "masters," often in action, and the tools of their trade make this a book to browse. I label it one of the few coffee table books that explores a consumer topic. It could well serve as a conversation starter!

Six cons are explored—hoaxes, patent medicines, pen names, fine art swindling, pseudo-science, and impostors. Hoaxes are how a few get great amounts of money from many on the pretense of "high returns in short periods"—Ponzi schemes and Peter-to-Paul swindles. The book includes examples from the U.S. and other countries. Other hoaxes are purposeful efforts, such as the inflatable military look-alike equipment used to fool the enemy in World War II.

Patent medicines are a study in "how to effectively appeal to the consumer using the right words," whether Dr., Indian, or vegetable, and the "right maladies" whether weary in brain and body, obesity cure, etc. Examples explain the medicine show (a combination of circus, revival meeting, and theater), shills, rubes, snake oil, and pitchmen. An interesting insight is the involvement of well-known personalities as financiers, sellers, copywriters, etc. You can always find people if there is a buck to be made!

Pen names describe print deception— forgers of maps, poems, novels, plays, and signatures. These are done not only for fame and fortune but for propaganda, to please family, and for publicity. Autobiographies of Howard Hughes and Al Capone and diaries of Adolph Hitler are examples.

Fine art swindling involves all art forms—museum personnel as well as seasoned and novice collectors and investors have been conned. Con artists may be self-taught serious artists or young people on a lark. Many frauds were only discovered years later. Now, with current scientific methods of measuring the age of materials, it has become easier to fake modern works.

Pseudo-science makes one ask, "Could you believe Mark Twain? What do astronomers see in their telescopes? Would you pay to see the 'Cardiff Giant'? What did your school books and encyclopedia say about the 'Piltdown Man'?"

Remember the movie *The Great Impostor*? It was not all fiction. Impostors have made claims to be royalty—often gaining access to heads of state—or to have training (i.e., surgeon, lawyer) they do not possess. They still practice!

In exploring this book, one is reminded how readily people and the media have been conned. This is not to say the schemes were not elaborate or well thought out, many were. Examples of these cons continue, many waiting to be discovered or revived! And with the increased speed of travel, communications, and transfer of funds, what do today and tomorrow hold?

A frustrating element in this book—simple paragraph indents mark the beginning of each new con, making the reader ask, "Has this one ended?" The index is useful for seeking information on a specific con, and the book may be more engaging if browsed rather than read cover-to-cover.

Carole Makela,
Colorado State University

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Benji O. Anosike (1995), *How to Plan Your "Total" Estate With a Will & Living Will, Without the Lawyer's Fees.* Newark, N.J.: Do-It-Yourself Legal Publishers, n.p.

Benji O. Anosike (1995), *How to Properly Plan Your "Total" Estate With a Living Trust, Without the Lawyer's Fees.* Newark, N.J.: Do-It-Yourself Legal Publishers, n.p.

The two books are definitive manuals on the laws, requirements, and actual practical procedures of drafting, signing, amending, or revoking a legally valid Will, Living Trust, and other essential accompanying documents, including the Living Will, the Medical Directive, and the Durable Power of Attorney. The books provide a complete estate planning approach and are written in nontechnical language. They use easy, step-by-step procedures, illustrated sample forms, and worksheets to enable a nonlawyer to actually write his or her own estate planning documents. However, you must read through each book, every word of every chapter, from the beginning to the end, if you hope to gain the widest possible insight into the essence of what is involved in drafting and coordinating all of the appropriate documents.

Who might benefit? For the financial professional, these books are useful for gaining a basic understanding of estate planning concepts. The books cite unique differences in estate planning law requirements among the various states.

Someone might use the information in the books in two fashions. First, the manuals are appropriate for consumers at two levels. They are informative for the consumer who wants a basic understanding of estate planning and wants to see sample documents before seeking professional help from a lawyer, accountant, financial planner, estate planner, or tax expert. Second, the manuals are user-friendly for the highly motivated consumer, who is willing to commit the time and effort to learning about estate planning details and feels confident actually writing his or her own documents.

The books accurately and clearly highlight advantages and disadvantages of various estate planning techniques as well as discuss when certain estate planning techniques are and are not appropriate. Anosike cites specific situations to illustrate appropriate uses of the various estate planning tools, and makes one point that is often viewed another way among financial professionals: putting funeral plans in a will. Many financial professionals advise not to include funeral arrangements in the will. Most wills are not read or probated immediately following the decedent's death. Therefore, the decedent's wishes would not be known in time for the funeral.

If one is willing to invest the time to learn the intricate details of estate planning, these books provide essential information to write estate planning documents. For those not so ambitious, the books give enough information to prepare to meet with financial professionals who can draft appropriate documents.

Esther M. Maddux, *The University of Georgia Cooperative Extension Service*

Consumer Law Cases of Note From Around the Country

UNFAIR DEBT COLLECTION PRACTICES

Heintz v. Jenkins, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995)

Darlene Jenkins borrowed money from the Gainer Bank to purchase an automobile. The loan agreement authorized the bank to purchase insurance to protect the car against loss or damage if Jenkins failed to do so. When she failed to buy insurance, the bank exercised its right, buying insurance that protected against not only loss and damage, but also against failure to repay the loan.

When Jenkins defaulted on the loan, the bank hired attorney George W. Heintz to represent it in a lawsuit against her. During the litigation, Heintz sent a letter to Jenkins's lawyer, including the price of the insurance in his listing of the amount owed by Jenkins under the loan agreement. As a result of this letter, Jenkins filed suit under the Fair Debt Collections Practice Act (FDCPA), claiming that because the bank bought a type of insurance not covered by the loan agreement, Heintz's letter to her was a representation of a false amount of debt owed.

The main issue in this case concerns whether the FDCPA applies to attorneys involved in litigation. The district court held that the Act does not apply in such situations, and dismissed the case for failing to state a claim. The Seventh Circuit, however, reversed, interpreting the FDCPA to apply to litigating lawyers. The Supreme Court agreed to hear the case in order to resolve a conflict between the Sixth and Seventh Circuits on this issue.

Heintz argued that the FDCPA does not apply to attorneys on three grounds. First, the Act's requirements, if applied to litigators, would create anomalous results, such as an inability to prosecute a lawsuit if the debtor refused to have further communication with the lawyer. The Court rejected this argument, reasoning that even if a debt collector is forbidden from communicating with the debtor, he or she may still notify the debtor that he or she intends to invoke legal remedies.

Heintz's second argument rested on legislative intent. The original version of the Act included a blanket attorney exemption which was repealed by an amendment in 1986. Three months after the amendment passed, one of its sponsors, Representative Frank Annunzio, stated that the amended Act still did not apply to lawyers' litigating activities. The Court rejected this argument due to the plain meaning of the statute and Congress' rejection of amendments that would have retained an exemption for litigation.

Finally, Heintz relied on an interpretation of the FDCPA by the Federal Trade Commission (FTC), which stated that the Act contained an exception for attorneys involved in legal activities. The Court rejected this argument because the FTC did not have the authority to create an exception contradictory to a reasonable interpretation of the Act. Therefore, the Court held that the FDCPA applies to litigating attorneys.

Tolentino v. Friedman, 46 F.3d 645 (7th Cir. 1995), *cert. denied* 63 U.S.L.W. 3900 (1995)

Tolentino allegedly fell behind on payments on an auto loan from Citicorp National Service (Citicorp). In 1992, Citicorp hired attorney Lawrence Friedman to collect the debt.

Friedman sent several letters to Tolentino. The first letter advised Tolentino of who Friedman was, requested payment, and informed Tolentino that any information given to Friedman by Tolentino would be used for debt collection.

The second letter was entitled "IMPORTANT NOTICE" and advised Tolentino to be cautious about declaring bankruptcy and to contact Friedman to arrange a repayment schedule. This letter, however, did not advise Tolentino that it was part of a debt collection, and did not advise that any information given in response to the letter could be used against Tolentino in debt collection.

Tolentino sued Friedman for violating the FDCPA's disclosure requirement, which requires that all communications from a debt collector must disclose that the collector is attempting to collect a debt and that any information obtained may be used for debt collection. While the first letter contained this disclosure, the second did not. Therefore, the court held that the second letter violated the FDCPA's requirement that *all* communications contain the disclosure.

The FDCPA provides for attorneys fees for a victorious plaintiff. In this case, the district court awarded fees, but refused to give Tolentino's lawyer his normal rate of $275 per hour, holding that no client would voluntarily pay such a high rate in order to win a maximum award of only $1,000. The Seventh Circuit reversed this decision, finding that the most important factor in determining a fee is the degree of success achieved; in order to encourage able attorneys to take FDCPA cases, attorneys should be paid at rates comparable to what they charge other clients. Because Tolentino received the maximum statutory award, the attorney achieved a high degree of success and was entitled to his normal billing rate.

Herbert v. Monterey Fin. Servs., 863 F. Supp. 76 (D. Conn. 1994)

Herbert allegedly incurred a debt to Inn Group Associates (IGA) for a timeshare vacation home. IGA hired Monterey Financial Services (MFS), a debt collector under the Fair Debt Collections Practices Act (FDCPA), to collect the debt. MFS did not have the authority to institute legal action under its agreement with IGA.

On September 21, 1992, MFS sent Herbert a letter purporting to be the final demand for payment before legal action was to be taken. On October 16, MFS received a letter from Herbert's attorney disputing the debt. On October 21, MFS sent a letter directly to Herbert, requesting settlement prior to a final decision on taking legal action. Herbert's attorney sent an additional letter to MFS on November 23, stating that Herbert did not owe the debt and refused to pay it. On December 23, MFS telephoned Herbert directly, claiming that it had been unable to reach her attorney.

Herbert sued MFS, claiming the following four violations of the FDCPA: (1) MFS contacted her directly after she had informed MFS that she had an attorney; (2) MFS attempted to communicate with her after it had been notified that she did not owe and refused to pay the debt; (3) the September 21 letter from MFS purporting to be a "final demand" was a false, deceptive, or misleading practice under the FDCPA because MFS subsequently attempted to collect the debt without instituting legal action; and (4) Since MFS did not have the authority to take legal action against Herbert, its threats to do so violated the FDCPA's prohibition against "threats to take any action which cannot be legally taken."

The court granted Herbert's motion for summary judgment. The court rejected MFA's argument that Herbert was not a consumer under the FDCPA, since she had incurred an obligation arising out of a transaction primarily for personal, family, or household purposes. Additionally, the court found that the evidence supported all of Herbert's claims. The court applied a "least sophisticated consumer" standard to her third and fourth claims, finding that such a consumer would have understood MFS's claims in a way which would violate the FDCPA.

MISREPRESENTATION

Serbin v. Ziebart Int'l Corp., Inc., 11 F.3d 1163 (3d Cir. 1993)

The plaintiffs, Serbin and Baker, purchased new automobiles in separate transactions. They also purchased a "Super Rust Protection" policy from Ziebart International Corporation and Ziebart Company (defendants Ziebart). They later sued Ziebart, alleging that Ziebart's advertisements about the "Super Rust Protection" contained false representations which misled them into buying the additional policy. They also claimed that Ziebart had knowingly made these false statements. Serbin and Baker claimed that they were misled into buying a policy that was already extended to new automobile buyers through standard manufacturers' warranties. Their claim was brought under Section 43(a) of the Lanham Act, as well as under state law. They sought class certification on behalf of all persons who had bought the "Super Rust Protection" in connection with the purchase of a new automobile.

The district court dismissed the complaint for failure to state a claim under the Lanham Act. It held that only a party with a "reasonable and cognizable" commercial interest that has been, or potentially might be, injured by the claimed violation can state a claim. The district court held that Serbin and Baker, as consumers, did not have such commercial interests.

On appeal, the Third Circuit rejected Serbin and Baker's argument that the 1988 revision of the Lanham Act expanded its scope to protect consumer interests. The court relied on the legislative history of the Act and suggested that state courts allow consumers to pursue statutory or common law tort claims for misrepresentation.

RENT-TO-OWN

Miller v. Colortyme, Inc., 518 N.W.2d 544 (Minn. 1994)

D.E.F. Investments, Inc. (DEF) operates rent-to-own stores in Minnesota. Under its standard form contracts, customers receive immediate possession of merchandise and can obtain ownership of it if they make a specified number of weekly or monthly payments. In these instances, the total payments usually far exceed the fair market value of the item.

Miller and Stenzel each entered into rent-to-own agreements with DEF that extended over several years. In 1992, Miller and Stenzel filed a class action suit against DEF, alleging that: (1) DEF's rent-to-own agreements were consumer credit sales as defined by the Minnesota Consumer Credit Sales Act (CCSA); (2) DEF violated the CCSA by failing to treat the agreements as consumer credit sales; and (3) DEF committed usury in violation of the state's usury statute. Miller and Stenzel moved for partial summary judgment, requesting a declaratory judgment that the agreements with DEF constituted credit sales. DEF also moved for partial summary judgment, requesting that the court dismiss the usury claim.

The Minnesota Supreme Court first discussed whether the CCSA considers rent-to-own agreements as consumer credit sales. In its analysis, the court stated that under common law, rent-to-own transactions were treated as leases, rather than sales, because the customer was never bound to pay the total purchase price of an item. The lease could be terminated at any time simply by returning the item. The supreme court suggested that the state legislature showed its intent to move away from this rule when it amended the CCSA in 1981. Terminable leases are now subject to consumer credit sales protection laws. The amendment defined certain terminable leases as a "sale of goods" if the agreements met three criteria: (1) the bailee or lessee has the option to renew the agreement by making the payments specified in the agreement; (2) the agreement obligates the bailor or lessor to transfer ownership of the property to the bailee or lessee for no other or a nominal consideration upon full compliance by the bailee or lessee to renew the contract; and (3) the payments agreed to by the bailee or lessee, including those payments pursuant to the exercise of an option by the bailee or lessee to renew the agreement, are substantially equivalent to or in excess of the aggregate value of the property and services involved. The supreme court ruled that DEF's rent-to-own agreements satisfied each of the requirements and thus constituted a "sale of goods." It further held that such agreements were consumer credit sales because the buyer was not required to make full payments when acquiring possession of an item. The buyer could pay for the item over a period of time. The court stated that the term "credit" must be construed liberally to further the goal of the CCSA, which is consumer protection.

The supreme court next addressed the issue of whether DEF violated Minnesota's usury law, which has four elements: (1) forbearance of a debt; (2) an absolute obligation to repay a principal amount; (3) charging an excessive rate of interest; and (4) intending to evade the law at the inception of the transaction. The court concluded that rent-to-own agreements were similar to ordinary credit agreements "in that they must either forfeit possession of a good or continue paying for it." Thus, the first two elements were met. The third criteria was met because of the large difference between the amount paid and the actual value of the goods. The court rejected DEF's argument that the higher costs were justified because of the other services it provided (free delivery and maintenance). Finally, the court held that the fourth element was met: even though DEF did not intend to violate the usury law, it did intend to charge an excessive interest rate, which is all that is required by the statute.

Rent-A-Center v. Hall, **510 N.W.2d 789 (Wis. 1993)**

On April 6, 1991, Flora Hall signed a rent-to-own agreement with Rent-A-Center for a new washer and dryer. Under the terms of the agreement, Hall was required to pay a monthly fee of approximately $77.96 for nineteen months, after which she could obtain ownership of the washer and dryer if she paid an additional $161.91. The total payments for ownership were $1,643.15. Hall stopped making payments after having paid $1,000.00 towards ownership. Rent-A-Center sued her in small claims court to recover the washer and dryer. The small claims court held that the rent-to-own contract was a consumer credit sale under the Wisconsin Consumer Act and that it violated the Act in several ways.

Rent-A-Center appealed to the Wisconsin Court of Appeals. The central issue was whether the $161.91 option price was "nominal" under the Wisconsin Consumer Act. The court based its analysis on the Uniform Commercial Code law, which sets forth, among other factors, a "no sensible alternative" test for determining nominality. Looking at the facts of this case, the court concluded that anyone "who has paid $1,481.24 already [for the washer and dryer], would have 'no sensible alternative' but to pay an additional $161.91 to become their owner." Therefore, the court concluded, because the final payment to be made by Hall was "nominal," Hall's transaction was a consumer credit sale, and thus fell under the provisions of the Wisconsin Consumer Act.

TRUTH IN LENDING

***Cades v. H&R Block,* 63 USLW 2401, 1994 WL 19070 (4th Cir. 1994)**

H&R Block, like other tax service companies, offers its customers electronic filing and a rapid refund service. In connection with the rapid refund program, Beneficial National Bank (Beneficial) agreed to loan qualified Block customers the amount of the customer's expected refund, less a flat finance charge of $29.00. In this case, Mr. Cades received $1,145.00 two days after filing his tax return, while Beneficial received $1,234.00 in two to three weeks (this amount consists of the refund, Beneficial's flat finance charge, and an assumed H&R Block charge of $60.00). This loan resulted in a 78% return for Beneficial and an annual percentage rate (APR) of 2.406% for Cades.

Cades alleged that the disclosed APR of 2.406% violated the Truth in Lending Act (TILA). The loans through H&R Block are drafted as "demand" notes with no stated maturity. Repayment occurs when the IRS electronically sends the taxpayer's refund to the lender within 2-3 weeks. Cades alleged that the interest rate should be based on this 2-3 week time period, not one year. According to Section 226.17(c)(5) of Regulation Z of TILA, if an obligation is payable on demand, the creditor shall make the disclosures based on an assumed maturity of one year. The court ruled against Cades, holding that the one-year estimated period for demand notes was acceptable.

More importantly, the court upheld Beneficial's practice of charging the interest rate permitted by the state where the loan transaction originated, rather than where the borrower accepts the loan. In this case, Delaware law applied to a loan made in South Carolina to a South Carolina resident because Beneficial is headquartered in Delaware and operates its rapid refund loan program through agreements with H&R Block across the country. Cades argued that the transaction violated South Carolina's Consumer Protection Code and Unfair and Deceptive Trade Practices Act. He claimed that because the loan was made in H&R Block's South Carolina office, that office is, in effect, a branch office of Beneficial. The court disagreed because Beneficial does not own or have a leasehold interest in H&R Block's South Carolina office, and because Beneficial does not exercise authority or control over H&R Block's employees. Thus, the laws of the state of Delaware, not South Carolina, apply.

CONSUMER LEASING ACT

Highsmith v. Chrysler Credit Corp., 18 F.3d 434 (7th Cir. 1994)

The plaintiffs had signed automobile leases with Chrysler, and later sought to invalidate them on several grounds, including violation of the Consumer Leasing Act (CLA). More specifically, the plaintiffs claimed that Chrysler had violated the CLA by (1) not disclosing the formula it used in calculating early termination charges, and (2) failing to identify any warranties that the manufacturer provides to the lessee. The district court dismissed the complaint, but the court of appeals reversed on two grounds. First, the court held that the failure to disclose any portion of the formula that a lessor actually uses for calculating the early termination charge constitutes a technical violation of the CLA's disclosure provision. Second, the court found that the statements in the leases that "the vehicle may be subject to a separate written warranty from the manufacturer" failed to meet the CLA's requirement that a lease identify the manufacturer's warranty.

COMMERCIAL LEASES

Samuel Friedland Family Enterprises v. Amoroso, 630 So.2d 1067 (Fla. 1994)

The Diplomat Hotel (Diplomat) owned waterfront property in Hollywood, Florida, and leased part of it to Sunrise Water Sports, Inc. (Sunrise). Sunrise used the land to operate a sailboat rental facility. Sunrise owned the sailboats; Atlantic Sailing Center, Inc. (Atlantic) rented them out. The Amorosos, guests at the Diplomat, rented sailboats and on one occasion, the crossbar on the sailboat broke and Mrs. Amoroso was injured. The Amorosos sued the Diplomat, Sunrise, Atlantic, and the welder who repaired the crossbar a few days before the accident. The Amorosos claimed that the defendants were strictly liable for the injuries.

The trial court ruled in favor of the defendants on the strict liability claim. The district court reversed, holding that strict liability extends to commercial lease agreements. On appeal, the state supreme court looked to other jurisdictions for guidance. Both the New Jersey and California Supreme Courts have held that commercial lessors are strictly liable for defective products they lease. The supreme court found no authority or reason to differentiate between a business which is a small dealer in a product and one which is not, provided each is actually engaged in the business of leasing the defective product.

The supreme court rejected Diplomat's argument that lessors should be treated as sellers of used goods, who are strictly liable only for manufacturing and design defects, not for defects arising after a product has left the manufacturer and the original seller. The supreme court reasoned that sellers of used products differ from commercial lessors in that commercial lessors know the prior history of a product and can more easily discover and repair any defects through routine inspections. Further, by placing products on the market, the commercial lessor represents by implication that those products will be fit for use throughout the term of the lease and, consequently, assumes the risk of damages resulting from a defective product.

Finally, the court ruled that although the Diplomat is a hotel, and thus would not normally be engaged in the business of renting sailboats, it was liable because it (1) leased part of its property for the specific purpose of sailboat rental, (2) marketed the boats as part of its hotel services, and (3) led guests to believe that they were renting from the Diplomat.

PUNITIVE DAMAGES

Transportation Insurance Co., v. Moriel, 879 S.W.2d 10 (Tx. 1994)

Juan Moriel, an employee of a building materials company in El Paso, Texas, was injured when a stack of countertops fell on him at work. Moriel broke three ribs and a wrist, and fractured his pelvis. As a result, he was hospitalized for twelve days. Six weeks after the accident Moriel attempted to resume sexual relations with his wife, but discovered that he was impotent. He had never before experienced this problem.

Transportation Insurance Company (Transportation) delayed paying several of Moriel's medical bills (which totaled several thousand dollars) for up to two years. Moriel sued Transportation and a jury awarded him $1,000 in actual damages, $100,000 in mental anguish damages, and $1,000,000 in punitive damages.

In its written decision, the Texas Supreme Court explained the difference between punitive and compensatory damages. The latter are designed to restore a person to their condition prior to the injury, while punitive damages are "to punish the defendant for outrageous, malicious, or otherwise morally culpable conduct."

The court also announced two new procedural standards to be applied to punitive damages cases in response to concerns about allegedly excessive jury awards. The overall goal of such standards is to ensure that punitive damages "are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." First, the court stated that while evidence of a defendant's net worth is generally relevant to the amount of punitive damages to be awarded (since "that which could be an enormous penalty to one may be but a mere annoyance to another"), such evidence has the potential to prejudice the jury's determination of other disputed issues in tort cases. Therefore, the supreme court ruled that trial courts, presented with timely motions, must bifurcate the determination of punitive damages from other issues in a case. A jury would first hear evidence regarding the defendant's liability for actual damages, the amount of actual damages, and liability for punitive damages. If the jury finds the defendant liable for punitive damages, it can then hear evidence relating to the amount to be awarded. Second, the court held that when the court of appeals reviews punitive damage awards, it must detail relevant evidence in its opinion and explain why the evidence does or does not support the award. However, the supreme court declined to place a similar requirement on trial courts on the grounds that such a requirement would burden already severely overworked and understaffed trial courts.

ERISA (EMPLOYEE RETIREMENT INCOME SECURITY ACT)

Anderson v. Humana, Inc., 24 F.3d 889 (7th Cir. 1994)

Anderson enrolled in an HMO plan offered as part of her employer's medical benefits package. Later, she filed a complaint in state court against the HMO and its sponsor, Humana, Inc. Anderson claimed fraud in violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, and state common law. She claimed that the HMOs were deceptive by nature, or alternatively, that the information the HMOs provided did not accurately explain the incentive structures under which HMOs operate. Anderson sought damages on behalf of a class of persons who chose Humana HMO over other health care providers. Humana immediately removed the action to federal court, contending that the information the plaintiffs used to select HMO benefits "relates to" a plan regulated by the Employee Retirement Income Security Act (ERISA), which explicitly preempts state remedies.

The U.S. District Court for the Northern District of Illinois held that the suit was properly removed to federal court. In addition, because Anderson based her claim solely on preempted state law and declined to address the ERISA issue, the court dismissed the complaint for failure to state a claim upon which relief may be granted. Anderson then appealed to the U.S. Court of Appeals for the Seventh Circuit. The Seventh Circuit affirmed, holding that the state law claim was both preempted and properly removed to federal court. The court explained that ERISA expressly preempts state law and that a state claim involving a plan regulated by ERISA cannot avoid removal to federal court. In addition, the court stated that any lawsuit that attempts to control information provided to employees choosing benefits falls within ERISA's preemption clause. Since Anderson was attempting to change the type or amount of information regarding Humana's HMO, her claim was preempted by federal law.

Compiled by Stephen Meili
Center for Public Representation

with the assistance of
William Caplan, Debra Holewinski, and Michael Leo
University of Wisconsin Law School

AMERICAN COUNCIL ON CONSUMER INTERESTS

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