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EDITORIAL POLICY STATEMENT

Advancing the Consumer Interest is designed to appeal to professionals who explore consumer problems and help to shape consumer behavior and consumer policies. This includes teachers in higher and secondary education, researchers, extension specialists, consumer affairs professionals in business and government, journalists, lawyers, students in consumer science, and other practitioners in consumer affairs.

Manuscripts may address significant trends in consumer affairs.

Suggested content may include:

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.
6. Letters and sustained responses to items previously published in ACI.

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

Advancing the Consumer Interest
Norman Issac Silber, Editor
121 Hofstra University
Room 103C
Hempstead NY 11549

(516) 463-7476 fax: (516) 463-4962
email aci@hofstra.edu

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THE WISCONSIN THREE

This marks the first volume of the 1999 series, and with it a new editor. The previous co-editorship of *ACI* by the "Wisconsin Three"—the wonderful team of Professors Rima Apple, Robin Douthitt and Stephen Meili, who teach at the University of Wisconsin-Madison, was a splendid and successful one, and deserving of every attempt to emulate. Apple, Douthitt and Meili built on John Burton's successful beginnings and produced a series of volumes which deserve to be consulted by consumer affairs professionals in years to come, volumes which were continuously professional, informative, imaginative, and interesting. The Wisconsin Three, supported by Anita Metzen and her staff at the ACCI headquarters, were able to develop a mix of feature articles, essays, reviews and legal material enriched the literature about consumer research, consumer policy, and the consumer movement. They are of course in no way whatsoever responsible for any errors, omissions or production delays; but fortunately for the current editor, Apple, Douthitt, and Meili have helped in every way possible to make the transition between volumes a smooth one, and have agreed to continue to play a part in advising on and producing the new volume as well. For this and for the willingness of many talented consumer specialists to serve on the *ACI* Advisory and Editorial boards, the current editor is and no doubt *ACI* readers will be grateful.

THE PERISHABLE AND ENDURING LITERATURE OF CONSUMER AFFAIRS

A look back at the content of previous issues of *Advancing the Consumer Interest* suggests an irony: so much of consumer affairs literature is both transient and enduring at the same time. On one hand many discussions of consumer issues age quickly as technological innovations, new ways of marketing, and political reforms render them out-dated. On the other hand, a look beyond the particulars of this or that transient controversy reveals that the most antique of discussions usually reflects the absorption by consumer affairs professionals in a fairly constant set of broader interests. One central interest reflected in these pages over the past years, for example, has been the desire to explore policy responses to the difficulties facing discrete and often disadvantaged consumer subgroups—the special problems of poor consumers, minority consumers, older consumers, children and rural consumers in the marketplace. A second interest reflected in *ACI* has been in the effort to evaluate and recommend appropriate policies which improve consumer safety and performance standards, and to improve the accuracy and usefulness of consumer information. A third concern has been the need to understand the contours of consumer problems in sectors of the consumer economy which have created recurring difficulties, especially the financial sector, the health sector, and food and drug purchasing. There is, fourth, the continuing effort to understand when the regulation of producers is in the best interest of consumers. And finally there is the interrelationship of consumer behavior with the consumer movement, and with matters of social importance such as environmental responsibility, gender and racial equality, and labor policies. Exploring these broader interests in the context not only of developments in the United States in countries throughout the world and in international policy-making bodies, continually emerges from the pens of the consumer affairs professionals who have published in the pages of ACI .

THEMES IN THE CURRENT ISSUE

The current issue takes up several of these themes. The first is the role in standards-setting of consumer participants. Jeanne Bank, who works at the creation of standards for the Canadian Standards Association, offers to correct any impression left by an earlier discussion in ACI that Canadian and international standards setting bodies are saddled with the deficiencies of consumer representation in the process of standards setting in the United States. There follows an edited comment, drawn from a speech delivered by David Pittle, the Technical Director of

Consumers Union and former Director of the Consumer Products Safety Commission, which supports the view that deficiencies in the U.S. process do exist. Mr. Pittle offers ten reasons why policies need to be changed. The second theme explored is the problems which flow from concentration in the financial services sector. James Brown, who directs the Center for Consumer Affairs at the University of Wisconsin-Milwaukee, provides a tough and penetrating analysis of competition in the credit and debit card business and argues that "exclusivity" rules enforced by the major banccard associations are anti-competitive and anti-consumer. As newer and better payment technologies become technologically possible, will they in fact become available?

The third theme examines consumer problems associated with current legal policies and social attitudes about same-sex couples. Elizabeth M. Dolan, Marlene S. Stum, and Michael Rupured, three professors who teach in consumer consumer and family economics fields, review consumer difficulties faced by gay and lesbian couples and their families, illuminate the exceptional financial management challenges many of them face, and call for further exploration of this thinly explored territiory.

Finally, the legal digest reports about a series of significant cases that interpret consumer protection laws, regulations, and common law doctrines. In the view of the editors, some of these have set back the consumer interest considerably, while others represent advances.

Please provide feedback to the discussions contained here. ACI's present and future volumes hopefully will retain the spirit, style and professional quality of the past, and yet evolve with concerns of those who are interested in consumer affairs today.

Whither Consumer Representation? Reflections of a Canadian Consumer Standards Professional

To the Editor:

The Spring 1997 edition of *Advancing the Consumer Interest* invited reader responses to a set of contributions on the subject of consumer participation in law-making and private standards-setting (ACI Special Feature: Whither Consumer Representation? (Vol. 9, No. 1/ Spring 1997). I would like to provide an extended response to that discussion which suggests that developments internationally and in other countries have differed considerably from those in the United States, especially in areas relating to incorporation of consumer participants in the setting of voluntary standards, and in relation to the adversarial nature of consumer participation.

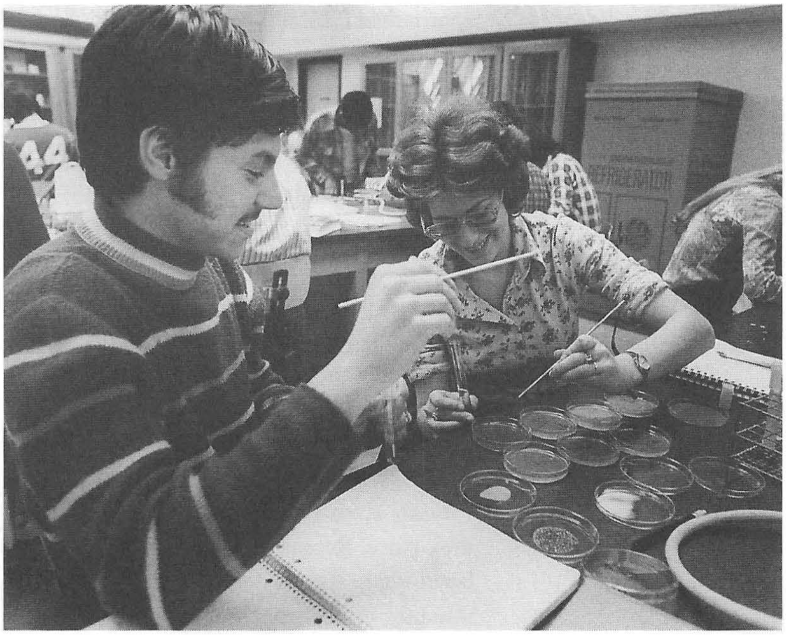
It may well be true that in the United States, as one of the ACI authors wrote, "there is no legal or cultural expectation that consumer professionals should participate routinely in committee drafting efforts in order to confer legitimacy on them or improve their results." (Silber, 1997). At the international level, however, the expectation of consumer participants is evident in many standards-setting forums. One central international reference document, *Standards and the Consumer: Information for the guidance of consumers engaged in standardization* (ISO/IEC, 1986, p. 8), embraces this philosophy while outlining expectations of consumer participation in voluntary standards work. The reference work states that "there should be provision at the national level for consumer participation in the initiation and planning of the programmes of standards work, both national and international, as well as in policy matters relevant to the consumer interest." Published in 1986, Standards and the Consumer is a joint effort by the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC), arguably two of the most influential standards organizations in the world.

The International Standards Organization (ISO) passed a resolution as far back as 1964 to promote consumer participation in standards work. In 1978, ISO established COPOLCO, the ISO Consumer Policy Committee, to provide a forum for the exchange of experience on consumer participation, the implementation of consumer standards, and any other question of interest to consumers who are involved in national and international standardization. COPOLCO is open to interested member bodies of ISO as participating or observer members and to interested correspondent members of ISO as observer members. At present it comprises 70 member countries throughout the world, as well as the International Electrotechnical Commission (IEC). Consumers International (CI) and the Organization for Economic Cooperation and Development (OECD) have a liaison with COPOLCO as well. In recent years, COPOLCO has been responsible for recommending the initiation of new voluntary standards work in areas such as environmental management, service standards, and the privacy of personal information.

In May 1997, COPOLCO held its annual workshop, taking as its theme "Consumers in Standards Work." There are still many challenges to consumer participation at the international level-especially a lack of financial support-but the concept of consumer participation has been well-established.

Shifting from the international to the national level, it is apparent that some national standards-setting bodies adopt a minimal process for eliciting input from consumers about proposed standards-for example, by simply making draft standards available for public review. In others, however, every technical committee dealing with a product used by a consumer must include a consumer representative. A major study comparing the national arrangements for the coordination of consumer representation in standardization was released in 1997 by the European Association for the Coordination of Consumer Representation in Standardization (ANEC) (Langmann, 1997). The report indicates that there are still a number of ISO member bodies that have no structure at present for the representation of consumer views.

With reference to norms for consumer participation in standards in Canada, I can state confidently that for many decades there *has* been a moral and cultural (though perhaps not a legal) expectation that consumers be represented and that consumers should participate routinely on standards-writing committees in order to improve committee results, particularly when public safety is an issue. Long ago-during the horrors of World War I, in fact-the need for standards first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Experimenting with bacteria, CA. 1967.

became obvious to Canadians and the other Allied nations. The pooling of technical resources that never had been designed to be compatible led to frustrations, injuries, and deaths when equipment didn't work as expected and weapon parts didn't fit. Thereafter, the industrial standards movement took off, as it did in the United States. In Canada, as voluntary standards for consumer products started to be developed, the standards movement came to embrace the concept of consumer participation.

Today, as manager of the Consumer Services Program of the Canadian Standards Association ("CSA International"), I coordinate the work of about 85 consumer representatives on more than 175 CSA committees involved in the setting of standards. CSA International is an independent, not-for-profit standards development, certification, and registration organization with 8,000 members. We use balanced committees of volunteers representing regulatory authorities, industry, and, significantly, consumers to develop voluntary, consensus-based standards.

Along with business and government representatives, for example, I have been involved on the consumer side in the development of a voluntary Canadian standard for the protection of personal information and privacy. The various stakeholders approached CSA as a neutral forum to develop a voluntary standard. Subsequently, in developing federal privacy legislation, the Canadian government has used the standard as the basis for proposed legislation. CSA published the standard in 1996, and ISO is now studying the feasibility of international standards in this area.

Consumer input to the standards-writing process also has helped to make a significant difference in the design of many important consumer products. Requirements in the hockey and bicycle helmets standards have led to fewer head injuries, reflected in national statistics collected since the changes took place. Recently, input from seniors has been sought for the child-resistant packaging standard to address the challenge of how to keep packages inaccessible for children while making them accessible for seniors. Weight requirements for oven doors were modified to prevent tipping, after one consumer brought to the attention of the committee the potential hazard of resting a 25-lb. turkey on the oven door to check while cooking. End users can bring to the table practical considerations that the rest of a standards development committee may not think about. The Canadian experience may be encouraging to consumer professionals in the U.S. and in countries where consumer participation apparently is less institutionalized.

One problem common to U.S. and Canadian consumer participation is difficulty finding appropriately dedicated, unbiased, and skilled consumer volunteers to participate in standards development work. Success in finding the right participant, however, can lead to a successful outcome for consumers. A couple of years ago, for example, I was asked to nominate a consumer representative to sit on a committee that was being set up to revise our national standard on school buses. After a thorough review of accident statistics and coroners' reports and consultation with safety experts, I finally located a gentleman who had just established an advocacy group for families that had lost a child in a school bus accident. His 10-year-old daughter had been fatally injured by her own school bus, and he was anxious to participate in work to improve the safety of school buses. While the last two years of committee meetings have been difficult for this man and he has not won all the battles, he is pleased with the improvements to the standard and he tells me that he is "proud to be a member of CSA." Perhaps more importantly, the personal contribution that he made to this committee forever changed the perspective of the other members of the committee about school bus safety. Two of his recommendations, improved mirrors and defrosting systems, were adopted by the committee and incorporated in the recently published 1998 edition of the school bus standard.

Although standards are, in themselves, voluntary, consumer protection legislation in many countries makes reference to them to define detailed technical requirements for products with particular hazards and to establish marketplace requirements. About one-third of CSA's standards are referenced in legislation. Growth of legislatively referenced standards is increasing, furthermore, due to globalization and trade liberalization. GATT agreements as well as regional trading bloc agreements make specific reference to the use of international standards or the harmonization of standards to promote competition and remove barriers to trade through the elimination of different rules for each country. Effective consumer representation in this process is more vital than ever to ensure that standards reflect marketplace needs. Indeed, many national and international consumer organizations are recognizing this new reality and making standards development a higher priority on their work agendas. Although consumers benefit from greater competition among suppliers (e.g., greater product variety and lower prices), there is some concern that international harmonization could result in the lowering of standards for consumer protection in some countries.

Agreeing with the ACI contributors that some problems with consumer representation transcend international boundaries, I finally want to note that unlike consumer participation in American rulemaking and law drafting, much Canadian and international standards making is not by its nature adversarial. Founded in 1976, the CSA model for the operation of the consumer program has evolved into being a cooperatively inclined, value-added part of CSA's overall standards-development process. CSA's consummate consumer representative, Margaret Soper, summed up how to be an effective participant at a CSA consumer conference in 1991: "All we have to do is be friendly without being familiar, be an advocate without being an adversary, be self-confident without being pushy, develop our sense of timing and our sense of humour, and use every ounce of energy we possess to ensure the consumer perspective has been addressed. In so doing, we will have set a standard for consumer representation that is definitely persuasive." (Olley, 1991). CSA committees now recognize the benefit of having consumer views reflected in standards, and frequently ask for additional help.

I have been involved in the consumer affairs field for more than 20 years and in standards work for 10 years, and although I write to emphasize the positive work that has been and is being done by consumer participants in the standards area, I must agree with the view that "there remains much work to be done to understand how consumer affairs professionals can be included more regularly and formally in the process of consumer law drafting." To ensure that consumer participation continues to be effective, furthermore, we need to develop and implement strategies and programs to ensure that consumer volunteers have better access to training, financial support, information systems, consumer research , and linkages with consumer interests in other countries. Strengthened consumer input can only improve the quality of voluntary standards drafting.

Jeanne Bank
Manager, Consumer Services Program
CSA International

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Funded Consumer Participation and the U.S. Global Market Strategy

Dr. David R. Pittle
Consumers Union

On September 23, 1998, more than 300 representatives from government, industry, and the U. S. voluntary standards community gathered in Washington, D.C., to attend "The National Summit: Towards a National Standards Strategy to Meet Global Needs." Kicking off the daylong conference, the first roundtable addressed "Identifying U.S. Needs for Domestic, Regional, and International Standardization."

Among the first speakers was Dr. R. David Pittle, Vice President and Technical Director for Consumers Union, who focused entirely on the importance of funding consumer participation in standards development. He concluded his presentation with ten key reasons why the U.S. strategy would be flawed without consumer participation. The essence of his remarks is presented here.

I appreciate the opportunity to be here this morning to offer a consumer perspective on the important issues being discussed at this summit. I speak to you both as a former commissioner of the Consumer Product Safety Commission [CPSC] who served under four U.S. presidents, and as the Technical Director of Consumers Union, the nation's largest independent tester of consumer products and services. To summarize my remarks up front: Based on my 25 years' experience in these two roles and CU's experiences over many years, I have come here to argue that consumer participation in standards development must be an integral part of our global strategy, and that such participation should be funded to ensure consistency and credibility.

The problems being addressed by your agenda are both complex and timely, especially given the rapidly changing role of national and international standards in establishing the ground rules for global markets. Workable solutions are vital not only to the stability and strength of our economy, but also, and equally important, to the quality of life and well-being of consumers. We all have a stake in the outcome.

I look first to my government experience. During the nine years I served on the commission, our greatest challenge was to find the best way to reduce or eliminate unreasonable risks of injury and death to consumers. By "the best way," I mean one that is effective and is both technologically and economically feasible. The use of standards was a crucial element in our toolbox, whether they were voluntary or mandatory. When a serious, industry-wide pattern of injuries and deaths became evident, our first approach was to ask the industry to move quickly to address the problem. Many times they did just that, and consumers were well served within a relatively short time by industry's voluntary action. Indeed, in today's marketplace, there are hundreds of product safety standards that were developed in a voluntary setting that protect consumers from needless pain and suffering.

Unfortunately, not every industry leaped to the challenge. Instead of doing what was necessary to require safer performance for new products, some industry groups spent their time and energy trying to shift the focus to the victims and the role their behavior played in the injury. They fell into the blame game, almost as if to say people deserve what they get when they aren't smart enough to use the product right. In many of those cases, the commission used its authority to develop mandatory safety standards, and generally did so successfully. Injuries and deaths were reduced as a result.

Throughout the standards development process, the commission recognized, in accordance with the Consumer Product Safety Act, the unique and valuable role of consumer participation. In my view, developing safety standards without the participation of consumers makes no more sense than developing standards without the participation of manufacturers or any other essential interest. After all, it is the safety of the ultimate user that was being analyzed and improved. And these proceedings will necessarily cover such factors as consumer expectations and consumer behavior, and ultimately propose a level of safety for consumers; these are issues that should be decided with consumers, not for consumers.

By consumers I mean knowledgeable, experienced citizens who do not have a direct, significant economic stake in the manufacture or sale of the product. They include, for example, end users of the product, university researchers, medical experts, and consumer organizations.

In selected proceedings during the early years, CPSC reimbursed the out-of-pocket expenses, as well as offering an honorarium, to consumer participants. We also recognized the value of consumer participation that was supported by independent technical expertise, and therefore we provided funds so that consumer participants could hire their own experts to help them assess complex technical issues, understand the industry's position, and sometimes develop an informed position of their own. In my view, consumer participation greatly improved the process.

Switching to my current hat, at Consumers Union we use the best tests we can find-or develop-to help us evaluate products for quality, performance, convenience, value, and safety. And we do so in the most objective, accurate, and unbiased manner we can. As many of you know, Consumers Union does not accept outside advertising, free test samples, gifts, or grants from any commercial entity. We are supported solely by the readers of *Consumer Reports* and the consumers of our other information products. We consider our independence to be the cornerstone of the impartiality we apply to all our work. Bottom line: We have no stake in which products or services do well-or not so well-in our tests.

Similarly, we have no stake in whether we use tests based on an industry voluntary standard, a government mandatory standard, or our own test development. Rather, we evaluate available standards-both mandatory and voluntary-to determine which elements

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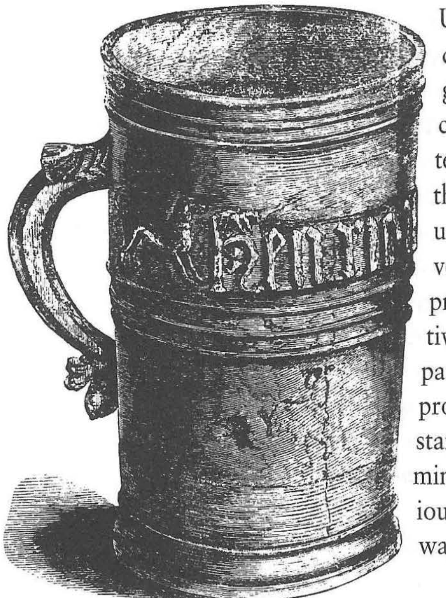
U.S. DEPARTMENT OF COMMERCE, MEASURES FOR PROGRESS, A HISTORY OF THE NATIONAL BUREAU OF STANDARDS (1966)



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are adequate and appropriate for our test programs. Often we will develop tests of our own, but we are just as likely to incorporate the industry's standards directly.

Over the years, members of Consumers Union's technical staff have served as consumer participants on various government and voluntary standards committees. As with our product tests, we have no financial stake in the final outcome of the standard under development, but we do have a very strong commitment to helping produce a standard that will be effective in protecting consumers. We also participate in the consensus review process for numerous product safety standards. There is no doubt in my mind that our participation in these various committees affected in a material way the final outcome of the standards.

I should point out that, to maintain our independence as a publisher of impartial advice to consumers, CU does not accept financial assistance for our participation in voluntary standards work. For other organizations, such support would likely be crucial to its ability to participate.

Based on all of this experience, we have arrived at a point of view regarding consumer participation that I would like to summarize for you now. I call it CU's Top Ten List of reasons why consumer participation-funded consumer participation-must be an integral part of our national strategy for effective participation in world markets.

The role of the government has changed dramatically. The Technology Transfer and Advancement Act of 1996 requires, among other things, that federal agencies use voluntary consensus standards whenever possible. *With greater reliance on voluntary standards rather than mandatory standards, the role of government is diminished in protecting the consumer.* Voluntary standards are not developed under the same policy direction as the agency would have applied in its own proceeding. As these government agencies evaluate voluntary standards for possible adoption, they will undoubtedly evaluate the process by which the standards were developed. Without strong participation by consumers, the standard's value and credibility will be greatly weakened.

American consumers should be on a par with their European counterparts. Countries such as the United Kingdom, Austria, Finland, Norway, Sweden, Denmark, and Germany provide funds to guarantee participation by consumers in standards development. Their voice is effective and constructive. American consumers need the same support.

The global community recognizes the importance of consumer participation, and is considering steps to isolate organizations that do not. At the 1997 annual meeting of COPOLCO (Consumer Policy Committee of the International Standards Organization), the Director General of Consumers International, Julian Edwards, urged that:

- national standards bodies have consumer committees within their structures;
- national standards bodies encourage inclusion of consumers in their delegations to international meetings, including funding their expenses; and
- national bodies that do not have a consumer council be denied membership in COPOLCO.

Again from the European community, ANEC [European Association for the Coordination of Consumer Representation in Standardization] has urged standardization bodies to involve consumers in their work. In particular, ANEC called for greater priority and more resources given to involving consumers in standardization work. Any strategy that hopes to solve the challenges of global markets needs to be politically acceptable at home and around the globe. *The presence of consumer participation in the development and use of voluntary standards demonstrates balance and fairness-while meeting behind closed doors with no role for consumers demonstrates the opposite.*

Consumers have an inherent right to participate. Society is moving toward a fuller understanding of what a civil society should provide its citizens. With this evolution has come the recognition that those directly affected by the outcome of a process have an inherent right to participate in it.

Consumers can participate competently where complex issues are involved. It has been argued over the years that the technical issues are just too difficult for consumers to comprehend and comment on in a meaningful way. I disagree, especially when consumer participation includes the funding of independent technical experts for use by those participants. Moreover, standards will undoubtedly become more performance based rather than design based, and consumers have the capacity to grasp and comment intelligently on performance criteria. They know the performance level they want in the marketplace. Similarly, as financial services come under the lens of international standards, there is a clear and valuable role for consumers. In short, the argument that consumer participation will lack competence is false.

Consumer participation in international standards-setting activities has been successful. For example, Consumers International has been an active participant in the work of the Codex Alimentarius Commission and its many subsidiary bodies for a number of years. Member organizations of CI, including Consumers Union in the U.S., have also participated in the work of national Codex committees. Consumer participants have influenced substantive decisions (safety standards, labeling standards), and just as importantly, have helped ensure that the process itself is open and transparent, which in turn helps bolster the credibility of Codex standards.

Consumer participation adds credibility to our standards at a national level, as well as enhancing the chances of their acceptance at an international level. When the interests of the end user are represented directly in the development of a standard, there is a far greater chance that the standard will be seen as benefiting society as a whole rather than more narrow commercial interests.

Manufacturers, especially small manufacturers, don't want to be treated as second-class participants in national and international standards proceedings, and I agree they shouldn't be. But consumers don't want to be treated as second-class participants, either-and they are. In a recent survey conducted by American National Standards Institute of 181 standards organizations, roughly half of the 104 responders invited consumers to participate, and of those, very few provided financial assistance to enable adequate participation. Most of the financial support has been in the form of "lunch and snacks." Beyond refreshments, the degree of financial assistance is "extremely low." This lack of financial assistance demonstrates a lack of commitment, and puts us far behind our counterparts in Europe.

In summary, as we develop a new strategy, I urge everyone here to remember this: *Our national standards strategy must include consumer participation as a fundamental component. Anything less will be a flawed system that is unfair to consumers and subject to challenge and controversy.* Like manufacturers, consumers have a clear and vital stake in the outcome. Their participation will add significant value and credibility to our national and international standards, and we are all winners as a result.

Dr. Pittle was appointed to the Consumer Product Safety Commission by President Nixon in 1973 and reappointed by President Carter in 1977.

The complete transcript for the conference can be obtained from the National Institutes of Standards and Technology, NISTIR 6290.

Competition and Cards: Will Consumers Pay More To Pay?

James Brown, Director
Center for Consumer Affairs
University of Wisconsin - Milwaukee

Several recent developments within the credit card business and the financial services business may well have significant detrimental impact upon consumer well being. The level of concentration within the industry has increased dramatically, primarily due to a number of mergers between major card issuers. At the same time, important new types of consumer payment products are emerging. The largest of the major joint venture bankcard associations—VISA—has responded in ways that will likely have adverse implications for consumers, in large part by reason of the interaction between these developments and VISA's so-called "exclusivity policy."

It is, of course, the *member* banks of the VISA and similar MasterCard network which ultimately issue the products of those networksto consumers—everything from ATM cardsto rebate programs and warrantees, rather than the networks themselves. The networks, in turn, develop and provide various card products for their members, but they do so in a curious and selectively exclusive manner. There is an internal VISA bylaw which explicitly names American Express (hereinafter 'AMEX') and Dean Witter Discover ('Discover') as card product providers from which VISA member banks ***may not*** obtain card products, upon penalty of being required to withdraw from the VISA network. At the same time this 'exclusivity policy' is *selective* in the sense that a VISA member bank can choose to issue products from MasterCard, for example, without having to withdraw from participation in the VISA network. MasterCard has a similar internal policy. Given the *combined market share of approximately 75%* which VISA and MasterCard jointly enjoy in the credit card market, few network member banks are likely to elect to forego participation in VISA and MasterCard in order to also offer their customers products from AMEX or Discover. These policies are currently under attack in US District Court in New York by the US Department of Justice for alleged violations of various federal antitrust provisions.

Briefly put, the bankcard networks appear to be attempting to corner the market for some of the emerging new payment technologies, adding to their already dominating positions in markets for both credit cards and debit cards. Complicating the efforts of consumer affairs professionals to understand these developments are various pending reform trends and proposals, which may have significant impact on the manner in which consumers obtain financial services.

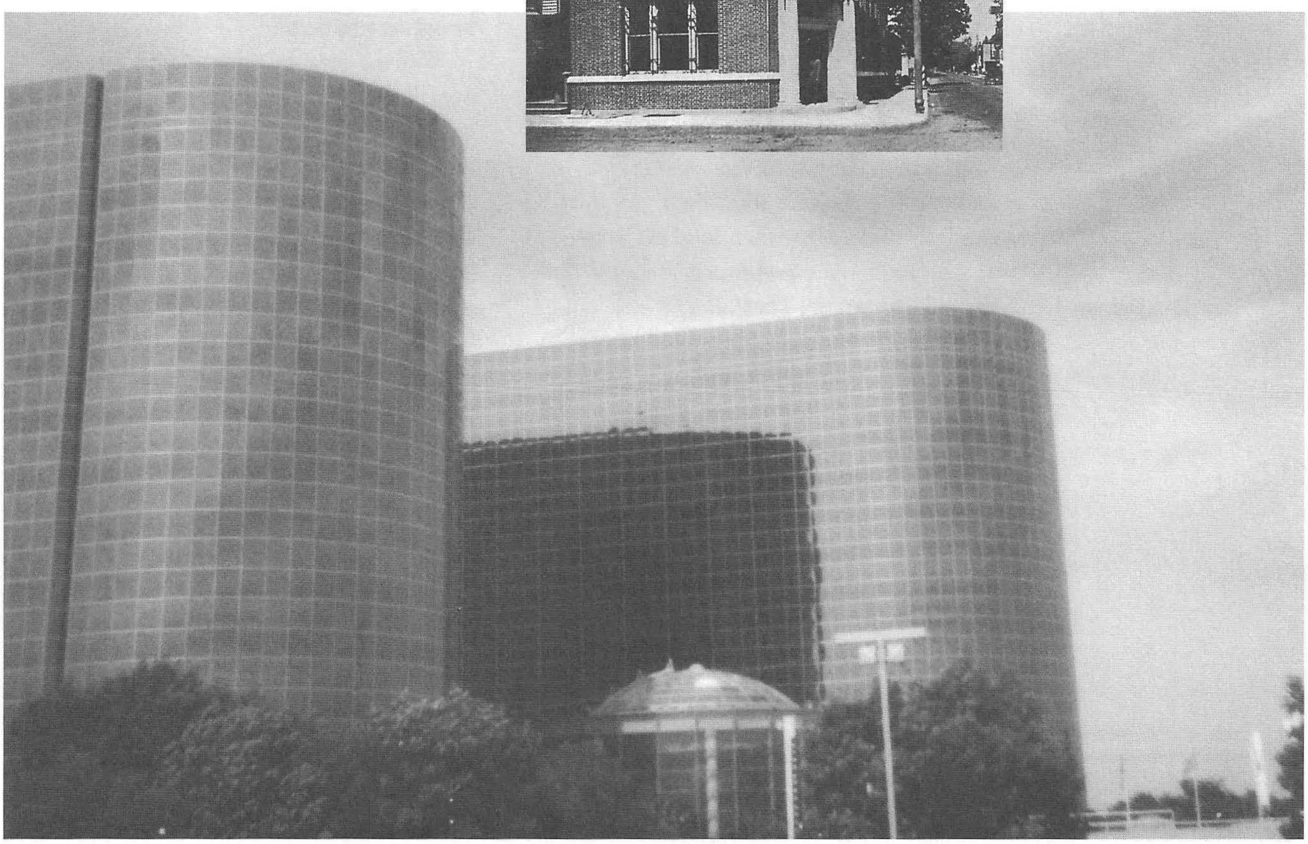
The increase in concentration in the credit card industry is an acceleration of a previously existing trend rather than the appearance of a new phenomenon. Nonetheless, this acceleration is so dramatic that it represents a *qualitative* shift in the potential harms that the exclusivity policies pose for consumer well being. This article suggests that such consolidation of the credit card business is combining with the bankcard networks' exclusivity policies to magnify the potential detriment which such policies already pose for consumers.

CONSUMER AWARENESS: CARD ISSUERS/CARD BRANDS

To understand the context in which these new developments are occurring, it is useful to appreciate the importance of brand names in the card business, the level of consumer awareness of such names, and the manner in which consumers have reacted to various industry marketing inducements and blandishments.Almost since the inception of credit card networks, VISA, MasterCard, and AMEX (and, somewhat more recently, Discover) have each engaged in extensive advertising and marketing to cultivate and promote consumer awareness of their respective brand names. Ultimately, of course, they wish to promote usage of their respective products.

The very popularity of card products with consumers stems in large part from the enormous breadth of outlets at which the products are accepted and usable, i.e., their ubiquity of acceptance. Clearly, the more widespread the acceptability of the card in terms of merchants honoring it, the more useful and thus, presumably more attractive the product is for consumers. However, this situation represents a classic 'chicken and egg' dynamic: for bankcard issuers to entice retailers to accept a specific card, merchants must also be convinced that significant numbers of consumers

First National Bank of Mineola, ca. 1920.



European American Bank Plaza, 1999

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in fact wish to use that particular card. For every transaction in which there is a consumer, there must also be a purveyor. And, for a card to achieve market share, *both* purveyor and consumer must perceive value *in that particular card.* In achieving this jointly held perception then, it is vitally important to emblazon a card's brand name onto the consciousness of both merchants and consumers: the result of this marketing imperative has been aggressive brand promotion efforts by the bankcard networks.

For the bankcard networks, this brand promotion policy has been highly successful.[1] The credit card business is clearly an industry in which consumers have acquired a very strong identification with and appreciation for brand names. This connection has been purposefully, aggressively, and successfully pursued and cultivated by all the various networks. The precipitous growth of these networks—especially the VISA and MasterCard networks—reflects the overwhelming success of this marketing strategy.

Aggressive promotion of brand names involves a variety of techniques, the most successful of which are typically extremely expensive. For example, VISA has helped sponsor such widely viewed spectacles as the Olympic Games and MasterCard the World Cup, reportedly paying tens or hundreds of millions of dollars for these privileges. AMEX similarly ranks high when total marketing and promotional expenditures are quoted in the industry press[2]. There can be little doubt but that presumably sophisticated marketers in such organizations expend such astronomical sums only in recognition of the essential role of brand name promotion.

The same conclusion regarding the crucial importance of brand recognition follows when one reviews the nature of the advertising and marketing engaged in by issuers of credit cards from the bank card networks. With the virtually anomalous exception of Citibank[3], promotions for VISA or MasterCard credit cards are relatively low-key about identifying the actual (individual bank) issuer of such cards. Presumably, this reflects the same recognition of the import of brand names *for such networks.*

The success of these efforts at brand recognition is anecdotally supported in research I conducted several years ago[4] for a regional EFT (debit) network. When consumers were surveyed regarding their awareness of debit card brand names, the second most commonly cited brand name was 'VISA', being cited more commonly than all but one of numerous debit card brand names. This occurred notwithstanding the *nearly invisible* status of VISA and MasterCard *in the debit card world* at such time. This quite obviously reflects the success of the widespread promotion of the VISA brand name, combined with the general lack of differentiation that many consumers make among differing types of card products.

Finally, the importance of brand names is only likely to increase in the important world of new, emerging payment products. Recent conflicts between Citigroup—perhaps the largest single issuer of card products in the world—and the VISA network, primarily focused on the relative prominence of their two respective brands on various VISA cards —reflecting the increasing importance of brand recognition.

With the expansion of consumer services over the Internet, in particular, the value of a brand is likely to become, if anything, even more important competitively than before. In the physical world, diverse merchants have often clustered together (e.g., in malls) to attract consumers for whom the inherent cache of a particular *individual* merchant and its brand may not be sufficiently attractive to induce consumers to shop there. On the Internet, however, any physical restrictions such as distance, that might inhibit the ability to reach a particular merchant in the physical world are essentially eliminated, since the consumer can 'shop' at any such merchant via a keystroke or two. Thus, brand identification— as a means of inducing consumers to make that keystroke—will, if anything, become even more *crucial* in the virtual world.

BANKCARD INDUSTRY CONCENTRATION AND REDUCED CONSUMER CHOICE

The bankcard business is fast becoming more concentrated. As measured by outstanding card balances ("outstandings") the top ten issuers by 1996 held 56.6% of the total and the top 25 issuers held 81.3% of outstandings.[5] This concentration is occurring in spite of the presence of approximately 6000 US members of VISA—most of which are actively issuing the network's products.

With several recent prominent bank mergers, this concentration has accelerated dramatically. Several noteworthy merger participants were already among the largest issuers: NationsBank (No. 15 as of 1/1/97, measured by outstandings[6]) merged with Bank of America (No. 13)[7], and First Chicago/NBD (No. 6)[8] merged with BankOne (No. 11)[9]. Following such mergers, the aggregated outstandings of a few large issuers grew and the resultant concentration in the industry became even greater.

The likely continuation of this phenomenon of acquisition and merger is well recognized.The CEO of one of the largest credit card issuers in the country—MBNA—recently predicted that "The United States credit card business will continue to slow, and consolidation will accelerate."[10]

The significance of these trends is magnified by the power that largest card issuing financial institutions enjoy within the bankcard networks. Not surprisingly, they often enjoy positions of relative power and influence within the networks, exercised, for example, through prominent board representation and committee seats. MasterCard has recently *shrunk* its Board membership with increased influence accruing to a smaller group of generally larger issuers. The consolidation of issuers will likely lead to the exercise of greater *relative* influence over the operations and policy directions of both the VISA and MasterCard networks by a relative handful of enormous issuing entities. Given the accelerating concentration within the business, this trend will likely focus ever more influence over the direction of the VISA and MasterCard networks—and their consumer finance policies and product development efforts—into ever fewer hands.

As a practical matter, the interests of smaller and larger institutions within the bankcard networks do not necessarily coincide. Relatively small financial institutions which are members of VISA or MasterCard are unlikely to be able to muster much influence over the policy directions of a bankcard association. These smaller members are essentially "consumers" of the products and services sanctioned by the joint venture of the networks. These members, ironically, are often the ones particularly keenly interested in being able to choose from a wide a range of diverse products that might be appropriate for their particular needs and the needs of their customers.[11] Such products, of course, might devolve *either* from the association themselves, or from sources external to the association, such as AMEX or Discover. And, experience has shown that alternative products from other providers external to the bankcard networks have often *better* suited the evolving competitive needs of such smaller institutions.

A quick scan of the recent history suggests that many, in not most, of the innovations implemented in the card business have had their genesis from outside the VISA and MasterCard networks, either from other networks, or from banks (or, groups of banks). Among the innovations deriving external to these networks have been:

- premium cards;
- corporate cards;
- affinity cards;
- cards lacking periodic membership fees;
- rewards programs;
- travel accident insurance coverages;
- rental car collision damage waivers;
- protracted 'grace' periods;
- ATM cards;
- product warranties associated with cards; and,
- rebate programs sensitive to the volume of charges

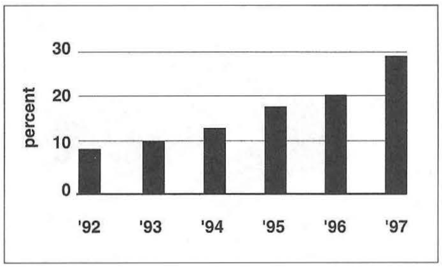
Additionally, the development of the Discover card was characterized by what was then an unusually low merchant discount fee, prompting a significant decline in such fees generally, with the presumed attendant price benefits to consumers buying goods and services from merchants. The subsequent incorporation of many of such features into VISA and

MasterCard products is compelling testimony to the benefits which consumers enjoy from such vigorous **inter-network** competition.

The larger, relatively dominating member institutions within the bank card network, in contrast, might be expected to act less forcefully in a bankcard association to promote development of those new products which expose the existing products (and, by extension, the members) of the joint venture to aggressive external competition.Larger members—who are able individually or in concert with a handful of similarly influential members to exercise significant (and, as noted, increasing) control over the joint venture—are less inclined to direct the association to develop new products which might enhance the ability of all the association members to more effectively compete, and to broaden the options available to the members of the joint venture generally.

Thus the bankcard networks and the larger institutional members may likely have at least somewhat conflicting interests which diverge from those of smaller members with regard to using alternative products external to the networks themselves.Permitting members to compete by offering both the joint venture's products and products from sources outside the joint venture may be detrimental to the competitive position of the network in relation to other networks.An individual bank's ability to offer its customers a wider variety of card products thus could well enhance *inter-system* competition. It might, for example, take the form of enhanced issuer competition through the sale and promotion of *multiple brands*, a common practice in many U.S. industries.[12]

Ratio of Debit Card Transactions to Credit Card Transactions in the US.



Innovations in products which come from within the bankcard networks are thus more likely to be those of value primarily to the largest, most internally influential association members.[13] In other words, the relative position of such a member *within* the joint venture is more akin to that of a purveyor rather than that of a consumer. One would not expect the associations to focus on developing products for their smaller, *more numerous*, members. Where, then, can smaller, 'consumer' members of the association turn to maximize their choices for new or innovative products to serve their (individual consumer) customers in the 'take all or take none' world of bankcard network products?

One logical place to look might be other intersystem competitors, such as AMEX or Discover. Both are enormous financial institutions, possessed of significant underlying resources so as to enable them successfully to develop and promote new products, and in fact, both have a history of doing so. Unfortunately, it is precisely these two prominent potential intersystem competitors —AMEX and Discover—which have been the two explicit targets of the networks' exclusivity policies. Both have encountered great difficulty offering their products to members of the bankcard networks. In the author's view, it is unlikely that this is merely a coincidence.

DEBIT CARD COSTS

VISA and MasterCard have achieved a position of dominance in the credit card industry, and the detrimental impact on consumer well-being of their exclusivity policies, as has been argued here, are significant. There are indicationsfurthermore, that consumer ability to choose and benefit from newer payment system technologies is being adversely affected by the bankcard networks. Based upon behavior to date there appears to be a spillover anti-competitive impact on consumer choice in these areas as well—particularly in the area of "debit" cards.

From 1992 to 1997, total transactional growth in the US *credit* card market was approximately 130%. While extraordinary, this rate of growth was dwarfed by the growth in the number of *debit* card transactions in the same period—which was approximately 585%. During that period, the frequency of debit card transactions grew from approximately 1/10 as many as credit card transactions to nearly 1/3 as many. The CEO of VISA, Carl Pascarella, recently predicted continued remarkable growth for its VISA Check (i.e., debit) Card: "We're projecting it to continue to grow at 40 percent and it's just phenomenal the way that's caught on."[14] Notably, VISA's share of debit card volume is more than four times that of MasterCard; that is to say, VISA already effectively dominates the debit card business.

None of the major credit or charge card networks or issuers—VISA, MasterCard, American Express, or Discover—is limited, of course, to providing *only* credit cards or charge cards. Rather, they provide, among other things, a range of *'payment services.'*[15] Debit cards and credit cards, though distinct financial products, are nonetheless similar in many respects, and, in fact, are often inter-related—*operationally, conceptually* in the minds of consumers, or *both*. For example, demand deposit accounts (accessible via a debit card) are frequently linked with overdraft accounts through a revolving credit line, which in turn is often accessed via a credit card. Similarly, many consumers fail to appreciate fully the sometimes-nuanced distinctions between debit and credit cards: in the minds of many consumers, 'a card is a card.' Similarities in consumer protection standards, such as limitations on liability for unauthorized usage, among other factors, likely contribute to such consumer impressions.[16]

As such, it is not surprising that providers (or, would-be providers) of a *range* of payment services would clearly wish also to compete in this fast growing arena of payments. It is thus similarly worthwhile to consider the possible impacts of the bankcard networks' exclusivity rules on competition in this rapidly growing area.

TYPES OF DEBIT CARDS

Both the national bank card networks have been promoting debit cards quite aggressively in recent years. These products to date have been coordinated with the cards of the numerous regional EFT networks around the country; thus, the card is *dual-branded*. It carries both the bank card network's brand logo (VISA or MasterCard) and that of the particular regional network—including such well-known names as NYCE, STAR, CIRRUS, CashStation, etc.[17]

The card can be used to obtain cash at the particular regional network's ATMs, or, to get goods or services at various merchant outlets participating in the regional network. These transactions are performed in an **'on-line'** mode. That is to say, the consumer is required to provide an identifier[18] at the time of the transaction to verify and thus facilitate the transaction. For example, a NYCE card (whether dual-branded or not) can be inserted into any NYCE ATM to obtain cash, or presented at a store participating in the NYCE network to purchase goods or services.[19] In either case, NYCE routes the transaction to the issuing bank for transaction approval and for debiting from the consumer's account.

Dual-branded cards can also be used **on-line** at PLUS or Cirrus terminals. PLUS is a *national* network owned by VISA linking many terminals which are also typically linked into a particular regional network, such as NYCE[20]; Cirrus is the counterpart network owned by MasterCard. There, the consumer inserts his or her card and enters a PIN—as would be done in an NYCE terminal—and obtains cash or goods or services. Thus, for example, a consumer from New York with a NYCE card (which is co-branded with the VISA and PLUS logos) can use the card at a PLUS terminal (which also participates in the regional Star network) in California. This terminal—either an ATM or at the PoS—enables the consumer to get cash, or goods or services, respectively.

The same dual-branded VISA/regional network card can also be used in an **'off-line'** mode at *any* outlet accepting VISA products; i.e. at any PLUS ATM to get cash, or, at any merchant that already accepts VISA's other products, including its highly popular credit cards. And, importantly, any merchant who accepts a consumer's VISA *credit* card must also accept the VISA debit card by virtue of VISA's internal system rules. As in the case of the credit card, the consumer effectively 'verifies' this transaction in an 'off-line' mode by his or her signature, rather than through a 'real-time' verification process, i.e., by entering the PIN as in an 'on-line' debit transaction. As a practical matter, the merchant accepting the VISA card is unlikely even to be aware *at* *the time of presentment of the card by the consumer* whether the card offered is being used in a credit or debit mode.Depending on which card the consumer uses or in which mode she uses it, however, the transaction initiated by the consumer can be routed either through the regional network 'on-line' or through the national bank card network 'off-line' back to the issuing bank.

In either case, the cost to the merchant for accepting payment via the card is assessed through a so-called 'interchange' fee set by the processing network. In the case of an ('on-line', PIN-supported) transaction routed through a regional network, the cost assessed by the network averages about 7 cents. In the case of an off-line 'VISA Check' debit purchase routed through the bankcard network, the cost is 1.04% of the face value of the transaction plus 6 cents.[21] Obviously then, the cost to the merchant of accepting payment in different forms can vary substantially.[22]

Merchants can be expected to factor the cost of accepting payment through various payment mechanisms into the price charged the consumer, just as they would any other cost of doing business. While most merchants are profit-maximizers, they are also subject to the constraints of price competition, which can be brutal. As such, their ability to pass such charges through to consumers in the form of higher prices is not unconstrained. The alternative to not doing so, furthermore, would be for a merchant to accept a reduced level of profitability in absorbing such higher transactional cost. Most observers agree that this is highly unlikely in practice, except to the extent absolutely required by competitive constraints. Thus, higher interchange *charges* are likely, at least in part, to be passed on to consumers. The routing of such a transaction can thus have significant—potentially negative—impact on consumer costs.

NEW DEBIT PRODUCT

VISA has announced a new PIN-based debit card, which became available in October, 1998. This payment vehicle is particularly pertinent to the dispute over the exclusivity rules as access to debit cards is, by definition, tied to demand deposit accounts ('checking accounts' in common parlance) which, of course, are the exclusive province of banks and other depository institutions. Access to depository institutions (and the consumer asset accounts they hold) is essential to compete in the debit card area generally.Bank members of VISA or MasterCard cannot **also** participate in AMEX or NOVUS/Discover (by virtue of the bank card networks' exclusivity policies).The result is that those external networks are effectively foreclosed from offering debit products to demand deposit holding institutions unless they can convince those institutions to leave the VISA or MasterCard networks *completely*. To date, they have been unable to do so in the United States.

In accordance with card association rules, all VISA products are acceptable at all outlets that accept VISA products, including its nearly ubiquitous credit cards. What will distinguish the new VISA debit card product in one crucial way, however, is that these new cards *cannot*[23] be co-branded with the logos of the various regional networks. This has been characterized in the industry press as a direct attack by VISA on the regional networks. For example,

> "The Visa-branded online debit card potentially will pit issuers [i.e. card issuing banks] against their established regional EFT networks. ... [by] commanding a substantially higher interchange rate than the regional networks charge."[24]

The product will almost certainly have broad appeal to *issuers* (i.e., the depository institutions which issue debit cards to consumers) as they will enjoy greater revenue per transaction through the almost always much greater associated interchange fee. However, the prohibition on co-branding with the on-line debit products of the regional networks will certainly imperil regional networks. Bank issuers—forced by the networks' exclusivity policies to choose—will almost certainly gravitate to the VISA product, both to capture its greater interchange fee, and to retain access to its popular credit cards.

On the other hand, consumers can hardly

expect to celebrate these new debit card payment opportunities, in light of increased costs that will likely be passed along to them, either in whole or in part. Put another way, it will be consumers who ultimately pay, presumably through higher prices for the goods or services they purchase.

Merchants are unlikely to be enthusiastic, either. When a consumer presents a VISA card, the merchant is unlikely even to be able to determine whether it is a credit card or a debit card. Yet the ultimate cost of accepting such a card could, as described above, vary significantly, depending on the particulars of the transaction—the type of card, the routing of the transaction, etc. And without even knowing if the card offered is in fact a debit card, the merchant would be unable even to suggest that the consumer might wish to consider paying with the (significantly less expensive to the merchant) debit card of the local regional network.[25] Faced with the prospect of paying higher interchange fees on the one hand or foregoing acceptance of <u>all</u> VISA products—including its wildly popular credit card—merchants are truly placed between the proverbial rock and hard place.[26] And, because ultimately of the enormous attraction of accepting the bankcard systems' *credit* cards, merchants will likely also reluctantly accept the new debit product, regardless of its less seemingly less competitive (at least, for retailers and consumers) pricing structure.[27]

From a consumer perspective, the ultimate perversity of this market then stems from the positive incentives to *card-issuing* banks in the forms of higher *interchange fees*, which of course are contrary to the interests of merchants and consumers.

By virtue of the bank card networks' extensive merchant coverages, regional EFT networks are already hard pressed to compete in terms of the breadth of outlets at which their (generally) on-line products are accepted.[28] Leveraging its dominating position in the credit card market, VISA seemingly intends to achieve similar pre-dominance in the debit card market by driving out *lower-priced* network debit products. This product will seemingly serve to make competition from the regional networks even more difficult. And, in the long run, it appears, as a result, that consumers will pay more for the privilege of paying immediately through a debit card.

FINANCIAL SERVICES "REFORM" PROPOSALS

A number of financial services 'reform' proposals have been under legislative consideration for the past several sessions of Congress. Most of these proposals would, among other things, significantly erode the previous balkanization that has characterized consumer financial services in the US. In order to capture and retain customers, financial service institutions have sought to obtain legal authority to offer an ever-broader range of products and services. Consumers have increasingly come to expect to be able to obtain more services from a single source. For example, the most commonly stated rationale for the merger of Citibank and the Travelers Group is to provide customers with 'one-stop shopping.'

Because of the complexity and the underlying economic efficiencies involved in many such products, banks often have affiliated with various external vendors to assist them in supplying such services rather than developing and offering such products themselves. Thus, bank lobbies may also contain insurance, securities, or financial planning outlets in addition to more traditional banking services. Vendors of many types recognize the value of affiliating with and offering products in conjunction with banks, which, of course, continue to hold the basic consumer account —the payment (i.e., checking) account.[29]

Further, the arrangements by which such products are made available through depository institutions are often such that the brands of the various 'additional' products[30] are emphasized, clearly a recognition of the attractive and reassuring characteristics of well-known and trusted names in these other fields.[31]

Restrictions on the ability of banks and other depository institutions to select and offer a variety of services[32] from a variety of vendors inhibits their ability to compete to serve consumer preferences. These restrictions—especially the retention ofbank card associations' exclusivity rules or practices - therefore should be reviewed under the closest scrutiny. As financial services 'reforms' move forward our skepticism about the consumer orientation of the bankcard networks should be higher than ever.

NOTES

[1] For example, according to the industry trade publication, *The Nilsen Report*, VISA has an estimated 52% of the current credit card market in the US.

[2] For example, the three systems' advertising expenditures for the first Quarter of 1998 were VISA - $46 Million; MasterCard - $23 Million; and AMEX - $57 Million, *Credit Card News*, 9/1/98, at p. 3.

[3] Which engaged in an extensive (though relatively short-lived) promotional program founded on the slogan, "Not just VISA; rather, Citibank VISA."

[4] Well prior to any aggressive promotion of ***debit*** products by either VISA or MasterCard.

[5] *Credit Card Directory*, (1997), page 32.

[6] *Credit Industry Directory*, (1998), page 59.

[7] *Ibid.*

[8] *Ibid.*

[9] *Ibid.*

[10] Charles M. Cawley, Chairman and CEO, MBNA, speaking at the American Bankers Association Annual Bank Card Conference, Philadelphia, Sept. 15, 1998.

[11] Indeed, a critical reason for *joining* the association ab initio was to gain access to products, which would typically be beyond the capacity of such institution to develop independently.

[12] Brown, "An Examination of Competition in the Credit Card Industry and Attendant Benefits or Harm to Consumers," 1997, at p. 5 (unpublished working paper on file with the author)

[13] For example, in *The American Banker*, June 26, 1998, Tony McEwan, EVP at VISA, was quoted, "The requirements of having to deal with multiple providers of online services can be pretty onerous," as the first reason justifying their announcement of the new check card, described in greater detail beginning at page 7, infra. In other words, bank members who are already big enough to belong to multiple regional networks are pushing them to develop something easing this burden. Seemingly then, VISA has responded to the needs of these members.

[14] "Off the Wire" Reuters, Wall Street Desk, 212-859-1610; Sept. 15, 1998,

[15] Recall, for example, that the two largest brands of travelers' *checks* are American Express and VISA.

[16] The avalanche of *brand* name promotional efforts of the bankcard networks has undoubtedly also contributed to this confusion on the part of many consumers.

[17] For example, networks with such (regionally) well-known brand names as STAR, MAC, NYCE, Honor, Pulse, Cash Station, Magic Line, TYME, etc.

[18] Typically, a so-called 'Personal Identification Number,' or PIN.

[19] This latter transaction is termed a 'PoS' transaction, for Point of Sale.

[20] Particular terminals within the NYCE network may but need not necessarily also be participants in the PLUS or Cirrus networks, depending on the policies of the owner of the terminal.

[21] Thus, for a $60 purchase, for example, the interchange fee charged the merchant would be $0.68.

[22] There are also differing underlying costs, of course, to the various parties in the payment systems, e.g., relative credit risk.

[23] Again, by virtue of VISA's system rules.

[24] EFT Report, June 17, 1998, p. 1.

[25] Indeed, VISA rules effectively prohibit the merchant from making such an inquiry in any event. This rule is currently under challenge by several merchants and merchant groups in litigation pending in federal court in New York.

[26] "Unhappy is an understatement," Wal-Mart Manager of Financial Operations, Kathy Schimmel, EFT Report, June 17, 1998, p. 1, in characterizing that merchant's reaction to the proposed new VISA debit product.

[27] In the week of September 21, 1998, Wal-Mart, the largest retailer in the United States, announced that it would defy the VISA bylaw and decline to accept the new VISA debit product, while continuing to accept the popular VISA credit card. VISA's response to this pronouncement is unknown at this time.

[28] VISA's off-line product is accepted at approximately 3.5 *million* merchant outlets in the US. By comparison, cards in the largest regional point-of-sale EFT network, STAR, are accepted at approximately 170,000 merchant outlets.

[29] In fact, it was just such a recognition by American Express and by NOVUS/Discover which precipitated their challenge to the networks' exclusivity rules in the first place.

[22] For example, Charles Schwab, Prudential et al.

[31] Securities firms, insurance companies, financial planners, etc. are also keenly aware of the importance of brand recognition in their fields, as with credit card issuers. *Supra*, at p. 1 et seq.

[32] Subject to normal prudential requirements, of course.

REFERENCES

A good description of the credit card markets in the US can be found in the Complaint issued by the US Department of Justice, Antitrust Division, in its lawsuit filed against VISA and MasterCard, challenging, among other things, the bankcard networks' exclusivity policies. The complaint is available on-line at:

http://www.usdoj.gov/atr/cases/f1900/1973.htm

Related documents in that lawsuit can be found through the same web-site.

See also, *EFT Report*, Feb. 10, 1999: "VISA Fees Going Up Again; Action Reflects Market Power"; Phillips Business Information, Inc.; Potomac, MD

Addressing the Economic Security Issues Facing Same-Sex Couples

Elizabeth M. Dolan
University of New Hampshire

Marlene S. Stum
University of Minnesota

Michael Rupured
University of Georgia

The U.S. Census Bureau defines a family as two or more persons related by blood, marriage, or adoption. Using this definition, the married couple family is still the predominate form of household in the United States today, encompassing about 69% of all households (U.S. Census Bureau, 1998). Many of the other 31% of households not meeting the Census Bureau's definition of family act as families. A broader definition, such as those persons who provide for the growth and maintenance of the unit (Deacon and Firebaugh, 1981), means that these less traditional household groupings are also considered to be families. The diversity of family composition requires that family and consumer economics educators understand the unique situations faced by each of the various types of families as they interact with their economic environments.

The traditionally defined and legally sanctioned family by marriage provides married couples access to numerous economic benefits and responsibilities. Gay and lesbian couples and their children typically fall outside the traditional definitions of family based on blood and marriage ties (Allen and Demo, 1995), affecting their economic well-being and financial management choices. While some of the economic security issues facing same-sex couples and their children also apply to cohabiting heterosexual couples, others are unique to same-sex couples (Dolan and Stum, 1997). Two further distinctions can be made between same-sex couples and cohabiting heterosexual couples: cohabiting heterosexual couples can choose to marry if they want to avail themselves of all the economic and legal benefits of marriage; or they can "pass" as married by simply adopting the married status, because couples are rarely called upon to provide a marriage license. Neither of these strategies is open to same-sex couples.

Nowhere are the full economic benefits associated with marriage granted to same-sex couples ("Let them wed," 1996), although

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Marriage certificate (1858).

the Netherlands comes close ("When my old," 1998). As a result, same-sex couples consistently encounter distinct, and potentially difficult, financial situations, which may require strategies and solutions to protect financial security over their life course that are different from those available to married couples. It is estimated that 3% to 17% of the population is homosexual (Bagley and Tremblay, 1998; Gonsiorek and Weinrich, 1991), and although not a large group, a significant one in terms of numbers.

The purpose of this paper is to provide educators and researchers with an awareness of the financial security issues faced by same-sex couples, and to offer suggestions for incorporating the discussion of these issues into existing curricula and research. Whether or not one approves or disapproves of the lifestyle is irrelevant. Family and consumer economists need to be mindful of the unique financial situations facing diverse family types, including same-sex couple families.

OVERVIEW

At the outset, financial decision-making dynamics are quite different for same-sex couples than for married couples. Part of the rite of passage for newlyweds typically involves making choices about the commingling of financial resources through the establishment of joint bank accounts, joint credit arrangements, and the rental or purchase of property together, to become a single economic unit. The legal and economic protections that are moored in the presumed interdependency of a married couple are absent for same-sex couples. Gay and lesbian partners are considered to be separate economic entities because of their single-person legal status. As a result, same-sex couples must exercise caution when merging their financial lives by making joint purchases, opening joint accounts, and otherwise commingling their financial resources.

Some of the economic issues facing same-sex couples are obvious. Others are less so. For example, whereas almost all states divide "marital property" on the basis of an equitable distribution at divorce, for non-married partners the name on the property's title is the sole consideration, regardless of the financial or in-kind contributions of the other partner (Stum and Dolan, 1994). Later life security issues also are problematic for same-sex couples. In the event of a spouse's premature death or disability, married couples can count on Social Security survivor or disability benefits, as well as some types of employee benefits, to ease the financial loss. Same-sex couples do not have these benefits available to them, and must plan accordingly.

Without a written will, all property of a deceased partner will go to his or her statutorily defined survivors without regard to any financial input or contribution made by the surviving partner. Estate planning and inheritance issues are extremely complex for same-sex couples, more so when there are children involved, whether the children are biological or adopted.

Same-sex couples pay significantly more for health and property insurance than do married couples. Most employers do not provide same-sex couples the opportunity to purchase family health coverage, requiring that each partner obtain his or her own separate insurance coverage. While so-called joint auto insurance policies for same-sex couples are available, typically one partner is fully insured while the other has limited coverage, and it may require that all vehicles be owned by one partner. In general, the coverage is less than for a traditional "family" policy. Likewise, when same-sex couples rent housing, each partner must purchase his or her own rental insurance. When a gay or lesbian couple owns a home, one partner may be required to purchase rental insurance to cover his or her property. Whether renters or owners, in the event of a loss, the couple may encounter difficulties in determining whose policy should cover jointly owned items.

The cumulative impact of financial management issues facing same-sex couples results in less income available for other family expenditures. These couples face less economic security in their family lives than their heterosexual married counterparts. The day-to-day stress of duplicate expenses can exhaust a family's limited financial resources. Allocating limited resources to provide for family necessities can be challenging under the best of circumstances. Gay and lesbian couples operate at a disadvantage as they endeavor to provide for themselves and their families. They can mitigate a few of the problems by drawing up certain legal documents such as a living together agreement (Seff, 1995), wills, durable powers of attorney,[1] and medical powers of attorney.[2] But these remedies offer only a limited range of security.

POLICY OVERVIEW

Domestic partner benefits, offered by an increasing number of employers and municipalities, acknowledge a degree of interdependency between same-sex couples. These policies, however, may not provide as extensive coverage and/or [3] may be more expensive than the choices available to married employees (Whitaker, 1997). Furthermore, although federal law requires employers to extend health insurance coverage for the married worker and family after the worker leaves the employer, no comparable requirement exists to continue benefits for domestic partners. Finally, any contribution an employer makes toward insurance or other benefits through a domestic partner policy is considered taxable income by the Internal Revenue Service, unless the employee provides at least 50 percent of the dependent partner's support (Whitaker, 1997).

Hawaii's reciprocal beneficiaries policy, which applies to all who cannot legally marry, endows the couple with some, but certainly not all, of the economic benefits associated with marriage, acknowledging their potential interdependency. Reciprocal beneficiaries are able to own property jointly as tenants by the entirety, file joint state income tax returns, and have the right to sue for wrongful death. Several provisions apply to state employees only, such as access to health insurance and related benefits, and survivor rights to pensions. All registered partners have hospital visitation and medical decision-making privileges as family members, and are able to take family leave to care for their partners. Finally, the policy allows partners to access workers' compensation benefits ("Same-sex marriage," 1999).

The premier public policy question is the constitutionality of prohibiting same-sex marriages. If same-sex partners were allowed to marry, their economic security issues would be remarkably similar to those of heterosexual married couples. The constitutional question has been considered in Hawaii (Baehr v. Miike, 1996) and is currently under review by the Vermont Supreme Court (Shea, 1998). The Defense of Marriage Act (P.L. 104-99), on the other hand, allows states to decline to recognize same-sex marriages legitimated in another state.

IMPLICATIONS FOR FAMILY AND CONSUMER ECONOMISTS

Being aware of the financial management, economic security, and policy issues faced by gay and lesbian couples is critical for family economists. Family economists have provided leadership in the development of resources for stepfamilies, single-parent families, and various other household units. Few educational materials are designed to specifically meet the financial management needs of same-sex couples. Family financial education programs and research must recognize and explore the unique financial problems of same-sex couples to assist them in making informed decisions as family units interested in achieving financial security over their life course.

INTEGRATION INTO CLASSROOM CURRICULA

Resident faculty can easily add information about the economic rights and responsibilities of same-sex couples into their courses without being an expert on same-sex issues. Some knowledge about the specific differences in economic security between same-sex families and married couple families is necessary to integrate this information into one's paradigm. Whenever the implications of a certain economic concern are addressed relative to families, same-sex families should be routinely included, making an effort to always speak inclusively. If texts and course readings do not include issues related to same-sex families, instructors can bring them into the class discussion.

Paradigms that equate "family" solely with the married couple family need to be updated to reflect the diversity of family types. While some students may not approve of the unmarried heterosexual couple's choice to remain unmarried, little stigma is attached to living together. A discussion of same-sex couples may well offend certain students. Considering both types of unmarried couples may make the discussion more acceptable.

Not much has been written on the financial issues facing same-sex couples, and what is available is primarily in the legal literature. Not all college libraries carry law journals, so finding appropriate readings can be onerous. Furthermore, an instructor may be loath to assign a law journal article that is only partially focused on the topic of interest. Although gay and lesbian newspapers and magazines may contain articles addressing some financial issues, these periodicals may be difficult to find as they are not part of the typical university library collection. Gay and lesbian colleagues may be an instructor's most valuable resources.

Inviting same-sex couples to speak about their issues is one method of introducing the topic. Most campuses have gay, lesbian, bisexual, and transgender support organizations, which tend to have either members who are willing to speak or community contacts for speakers. If students are required to interview different types of households with respect to their finances or management styles, gay and lesbian couples should be included on the list of possibilities.

Other types of learning strategies and assignments include:

- Identifying communities with domestic partner ordinances. Compare the provisions, including what, if anything, is required to obtain coverage. Students can examine the different provisions and analyze their impact on the household economy.
- Identifying corporations that allow domestic partners to be covered by employee benefit plans. Students can compare the benefits offered with what is available for married employees.
- Debating how inclusion of domestic partners benefits improves or impinges on the functioning of the workplace. Related topics include affirmative action and cost of employer benefits.
- Identifying myths and misconceptions about gay and lesbian couples (such as all gays and lesbians are wealthy), and uncovering factual information through library research, guest speakers, or interviews.
- Utilizing the Internet to find the latest information on issues such as domestic partner benefits or in the public and private sectors.

Building the discussion of economic issues facing same-sex couples into the framework of college course materials accomplishes two goals. First, it helps to normalize treatment of the subject. Second, and more importantly, it will better prepare future professionals to integrate same-sex issues into their professional activities.

INTEGRATION INTO EXTENSION PROGRAMS

As in the formal educational setting of resident instruction, the problems and concerns of unmarried couples can, and should, be routinely included in the content of non-formal educational programs offered through cooperative extension. Extension educators, like resident faculty, should update paradigms that focus solely on married-couple families, and speak inclusively about the diversity of families.

Existing programs, such as Women's Financial Information Program, Money 2000, the High School Financial Planning Program, and others, can be evaluated for sensitivity to the needs of unmarried couples. As with resident instruction, augmenting materials and discussion to encompass unmarried couples in general, whether gay, lesbian, or heterosexual, can provide a more comfortable atmosphere for program participants. When new materials and programs are developed, gay and lesbian concerns can be incorporated alongside those of married couples and cohabiting heterosexual couples. Information regarding the myths about cohabitation and the economic security challenges of not being married could be added to programming resources.

Gays and lesbians are likely already being reached by extension programming, but may be invisible. Extension educators might want to get into the habit of pointing out some of the major differences between the financial needs of unmarried couples and married couples as discussed previously. Gay and lesbian participants, as well as heterosexual cohabitors, would then be aware that they needed to get more information. For example, during a discussion of automobile insurance, an educator could mention that some companies offer policies for unmarried partners similar to traditional family policies (Ihara and Warner, 1997). A caveat could be added that unmarried couples need to carefully compare the coverage provided in these policies to traditional family policies, because some of these policies are not bargains, and some have rather stringent qualification requirements.

Extension educators can acknowledge that same-sex couples may already be attending extension programs by revamping program registration materials and fees to be more inclusive of diversity. If a discounted registration is available to multiple members of the same family, gay and lesbian partners should not be denied this discount due to a failure to recognize their family status. Partners might not have the same address if they feel compelled to hide their relationship for employment or other reasons. When collecting registrations and fees for extension programs, a method can be chosen that will allow participants to select the family fee regardless of the formality of their relationship, and to receive only one set of materials for both participants.

Most of the time, when programs are geared to the general public, spending a great deal of time discussing the financial management concerns of same-sex couples is neither necessary nor feasible. However, mentioning when same-sex couples may need more information is vitally important. For example, when conducting an estate planning program, an educator could point out that many of the options available to married couples have little or no value for unmarried couples. The educator could then indicate some of the risks facing unmarried couples, and suggest that unmarried couples might want to consult with an attorney. Educators should also recognize that gay and lesbian families cross all age groups, life cycle stages, and income ranges (Weston, 1991).

Gay and lesbian couples represent a previously untapped audience for special interest programs, particularly in urban areas. It makes sense to target this audience for programs because their financial information needs are so different. Various programming techniques of reaching this diverse audience could include specifically developed web sites or prerecorded telephone messages that lead callers to specific resources. As with other programs aimed at a particular audience, the key to success is involving the target audience in program planning. Gay and lesbian service organizations, and other groups such as PFLAG (Parents and Friends of Lesbians and Gays) can be valuable resources. An advisory group consisting of several same-sex couples would be ideal, but even one couple could make a difference in the overall success of the program. This advisory group might also help the extension educator explore the relevancy of program content and approaches, develop credibility with the community, as well as help identify experts within the community who could be used as resources.

INTEGRATION INTO RESEARCH

Economic security and financial management issues of same-sex couples as consumers need to be explored to help inform policy as well as to provide a strong conceptual basis for educational programming. While same-sex partners are undoubtedly included in large survey samples, they remain invisible because most survey instruments do not include methods of identification. A basic step for family and consumer economics researchers is to ensure that data collection instrument language is inclusive. For example, marital status categories can be made inclusive by adding a "partnered" category; questions can be framed in terms of "partners" or "spouse or partner" rather than simply "spouse" or "husband or wife." Making such changes avoids the assumptions that all couples are heterosexual and married. Identifying and recruiting same-sex couples for sampling purposes still poses problems. Currently there is no method for identifying a random sample of gays and lesbians. Studies designed to identify patterns, dimensions, and dynamics in purposeful samples of same-sex couples using qualitative methods may be most appropriate.

Family and consumer economists are in an ideal position to examine the context and scope of financial management and economic security issues facing same-sex couples. Examples of questions that need to be answered include: a) How are same-sex partners' expenditures, income, and saving patterns influenced by specific financial management strategies? b) What consumer issues are likely to threaten the financial security of same-sex couples? c) How do same-sex partners describe economic security? And d) How effective are specific financial and legal strategies in helping same-sex couples achieve financial security? Answers to these types of questions would help resident and extension faculty develop more relevant and appropriate consumer and financial education strategies and materials for same-sex couples, as well as help train professionals needing to understand the breadth and depth of these issues.

Researchers interested in private and public policies, as well as the impact on well-being, also have many opportunities to help understand the context and scope of issues facing same-sex couples. A research base is needed to: a) identify and analyze both public and private policies impacting the financial security of same-sex couples; b) examine the intended and unintended consequences of recent policy changes on same-sex couples; c) examine how eligibility criteria and benefits offered workers are utilized and impact the household economy; and d) examine what case law trends and patterns suggest are the economic and consumer issues for same-sex couples. Private and public policies are clearly in transition regarding the economic and consumer rights and responsibilities of various consumers, including same-sex couples. Answers to the above questions cannot only help influence, but better inform, the policy-making process.

MOVING FORWARD

Family and consumer economists are ideally suited to openly acknowledge and examine economic security issues, and related public and private policies, facing same-sex couples along with other nontraditional family units. The discussion of family and household economic well-being should encompass gay and lesbian couples on the principle of equality and concern and respect for all types of households (Sartorelli, 1994). To do so may first require family economists to make a conscious effort to alter their own assumptions regarding "family" to facilitate inclusion of gay and lesbian couples in their paradigms. Regardless of one's feeling about homosexuality and same-sex relationships, addressing the unique financial management challenges of these couples seems essential.

Improving the relevance of formal and

non-formal education and research agendas to address nontraditional families is a critical beginning step for family and consumer economists. Talking about gay and lesbian issues in the classroom is no longer taboo. Extension education programs already include gay and lesbian participants whether openly visible or not. The content of these programs can be altered fairly readily to be more inclusive. The need for unbiased, research-based information exists, without regard to sexual preference. While research focused on the financial management issues faced by same-sex couples will present challenges, findings from these investigations will enhance the knowledge base and improve our understanding of economic security issues across the spectrum of family types.

NOTES

[1] A written document that grants certain authority to another person to act on one's behalf (American Bar Association, 1994).

[2] A written document appointing someone as one's proxy to make health care decisions if one becomes unable to do so for oneself (a.k.a. "health care proxy"). (American Bar Association, 1994).

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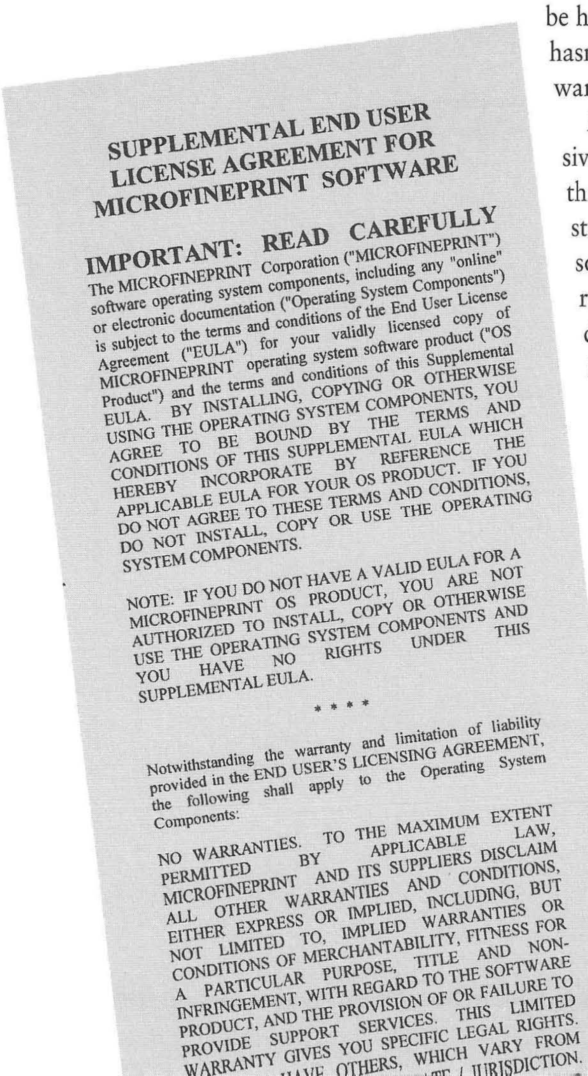
Cem Kaner and David Pels (1998), Bad Software: *What to Do When Software Fails.* New York, NY: John Wiley & Sons, Inc., $29.99.

While reading *Bad Software: What to Do When Software Fails?* I continually found myself wondering, "Why wasn't this book written before?" *Bad Software* represents an important contribution to understanding the multitude of issues computer software developers and publishers have spawned for consumers.

The authors describe the book as a tool, acknowledging their expectation that most readers will buy it after experiencing trouble with software. In actuality, reading it *before* one encounters a software problem might be a better idea. I recall the "old" adage of a dozen years ago, as PCs were becoming a fixture on every office desk and entering the home: "There are two kinds of people in the world, those who have experienced a hard drive crash and those who haven't, yet." Today, the adage could be recast for software users-or, to state it more precisely, it would be hard to find someone who hasn't bought defective software.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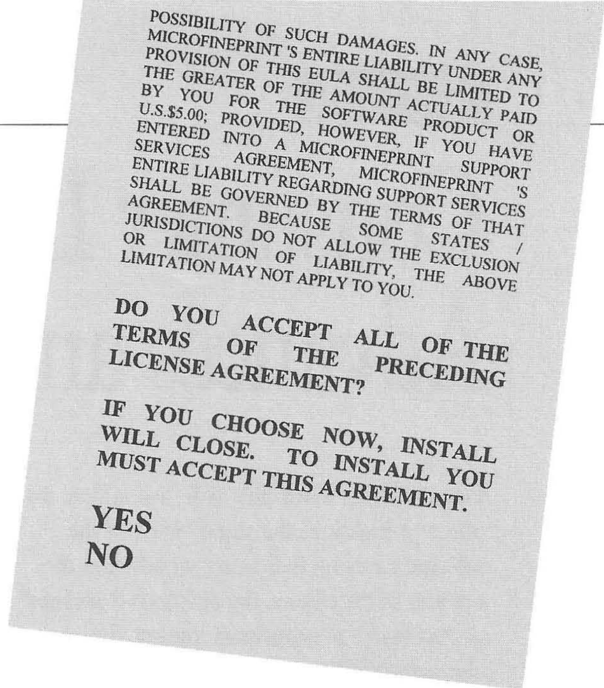
Bad Software progressively takes the reader through the succession of steps in dealing with a software problem, from realizing that a "bug" or defect exists, to contacting and seeking a solution from the company, all the way through filing a complaint with regulatory agencies, even to weighing legal action.

As I first picked up *Bad Software* I recalled the comparatively minor problems I have encountered-for instance, when I discovered that one of the installation disks in the off-the-shelf income tax package I purchased this year needed replacing. I found myself reliving this experience as I flipped through the step-by-step how-to discussion of dealing with the software publisher. What if you want to talk to a live body (I got one) rather than consult the publisher's web site? Will I have to pay for the call? (I didn't.) Will there be a long wait? (A medium wait that time.) How do you deal with the technician on the other end? (No difficulties in my case.) *Bad Software* contains numerous helpful suggestions for solving problems, and even though some of the tips are in a sense elementary, they rarely seem trite.

This book will prove valuable for all consumers who purchase computer software-from the individual whose biggest software complaint might be a game package with a bug to the consumer affairs professional whose entire research agenda could be wiped out by a single software flaw. Kaner and Pels discuss a range of remedies, including, most importantly, consequential damages, which they treat in a manner that is both understandable and comprehensive enough to help a consumer determine whether to consult a lawyer.

The book's first sections have the straightforward headings, "Preparing to Make the Call," "Knowing What to Ask for," and "Making the Call." The authors consider "Knowing What to Ask for" the most important chapter in the book; it is intended to help a consumer formulate a realistic demand based on a particular problem and the harm done, and effectively communicate that demand to the technician on the other end of the line. Their thinking is, of course, that by being able to achieve satisfaction at this stage, the consumer is way ahead of the game.

Later chapters discuss what a consumer can do should a publisher be unresponsive. There is a clear and comprehensive treatment of various theories by which publishers can be held legally accountable, including express and implied warranties, misrepresentation or fraud, and deceptive trade practices. The



authors hit the main points of these legal theories lucidly, while noting that there may be some differences from state to state.

The authors (one of whom is a lawyer, the other a computer specialist) also appropriately emphasize that the whole point of knowing the law is to avoid litigation, not seek it out. Their view is that a working knowledge of the legal aspects of software can help a consumer achieve satisfaction when software proves bad. Covering fairly obvious points such as that the warranty of merchantability applies even if a software package says "sold as is" and less settled matters such as the fact that, yes, you do have the right to send back defective software even after opening the package (how else would you know it's defective?), this book imparts valuable consumer guidance.

There is also an excellent chapter concerned with how to approach consumer protection agencies and what to expect from them. From my perspective as lawyer in a consumer affairs agency, this book promotes consumer well-being by encouraging consumers to speak up anytime they encounter problems with consumer products. When consumers file complaints with agencies, they help regulators do their job. And when they complain to companies, they encourage self-regulation, which may lead to better products.

Perhaps the most interesting discussion in the book is its analysis of the dramatically different levels of testing and production quality within the software industry, and why such differences exist. In essence, no software is absolutely bug-free. According to the authors, however, it is possible, given adequate lab testing, for almost all bugs to be discovered before production,. The difference between a good program and a disaster depends on the level of consumer dissatisfaction that a publisher is willing to accept.

The authors include an important appendix on a significant new body of law that governs software and electronic commerce. Previously named Article 2B of the Uniform Commercial Code, these rules are now contained in the "Uniform Computer Information Transaction Act". UCITA is an important topic on the consumer horizon, and if enacted in the various states it will govern licenses, including software-related and information-related law. The authors are clearly critical of the recent drafting efforts. They state that it is "fundamentally unfair" to draft a statute that "will result in lower-quality products, lower customer confidence, and a weaker domestic industry."

This is an eminently readable and informative book. We are all familiar with the experience of picking up a how-to book, whether computer related or not, and finding that it is either too glib to sink your teeth into or too dense or technical to plow through. This is not such a book. By supporting their findings and suggestions with real-life references to statutes, court cases, and computer materials, the authors communicate useful knowledge in an accessible, insightful, thoughtful manner. *Bad Software* makes for good reading.

Robert A. Martin
General Counsel, New York City Department of Consumer Affairs

Consumer Law: Advances and Setbacks

Editor's Note: With this issue, we initiate an effort to highlight the significance of the selected cases by indicating whether, in the opinion of the editors, the outcomes "advance" or "set back" the consumer interest. These characterizations reflect opinions of the editors and do not in any way represent policies or positions adopted by ACCI or *Advancing the Consumer Interest.* Persons with differing viewpoints are encouraged to reply.

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ADVANCE: ODOMETER TAMPERING

Among unscrupulous used car dealers, setting back the mileage on odometers is an honored tradition-despite legislative and judicial attempts to curb the practice. In Suiter v. Mitchell Motor Coach Sales, 151 F.3d 1275 (10th Cir. 1998), *a federal court of appeals upheld the punishment of an auto dealer who recklessly confirmed the mileage on a car without attempting to verify the odometer's accuracy, and awarded damages to the consumer plaintiff.*

The Desbien family purchased a Motor Coach in 1988 with 30,091 miles on the odometer. A few months after the purchase the odometer malfunctioned, and the Desbiens had the odometer replaced, with the mileage then reading zero. Four years later, the Desbiens contacted Mitchell Motor Coach Sales ("Mitchell") and asked if the company would sell the Coach for them on a consignment basis. Mitchell agreed. Mr. Desbien then provided Mitchell with an odometer statement indicating that to the best of his knowledge, the current odometer reading was the actual mileage of the vehicle. The odometer reading was 46,520 miles.

Suiter then purchased the Coach from Mitchell. Mitchell told Suiter that to the best of his knowledge, the current odometer reading was accurate. A few months after purchasing the Coach, however, Suiter found vehicle service records in a box in the Coach disclosing that an odometer reading 30,091 had been replaced four years earlier, and thus realized that the current odometer reading was incorrect. Suiter filed suit against Mitchell soon thereafter.

The Federal Odometer Act requires a person transferring ownership of a motor vehicle to give the new owner an accurate, written disclosure of the vehicle's odometer reading, or, if the seller knows the odometer reading is incorrect, a written disclosure stating that the actual mileage is unknown. To hold the seller liable under this act, the new owner need not show that the seller acted with a specific intent to deceive. Instead, the new owner need only show "reckless disregard" by the seller. The Odometer Act imposes an affirmative duty on automobile dealers to discover defects. Reckless disregard occurs if the seller "closes his eyes to the truth."

Mitchell argued that because (1) there was no evidence of his knowledge that the Coach's odometer reading was incorrect and (2) it was impossible for Mitchell to inspect the Coach to determine the actual mileage, he could not be held liable. However, several witnesses called by Suiter testified that by inspecting the wear on the brake pedal, the condition of the brake pads, the tires, and by reading the coach's engine hour meter, a reasonable estimate of the actual mileage could have been made.

The Tenth Circuit concluded that an automobile dealer cannot escape liability under the Odometer Act by relying solely on the odometer reading and the assertions of the previous owner. Dealers have an affirmative duty to discover odometer defects. The failure to take any steps to independently verify the accuracy of the odometer reading constitutes reckless disregard for the purposes of the Odometer Act. To hold otherwise would strip the act of any meaning. The Tenth Circuit affirmed the district court's award of $78,858.00 in trebled damages.

SETBACK: HOSPITAL BILLING PRACTICES

Many consumers who undergo hospital procedures incur bills that appear confusing and duplicative. Consumers are especially confused when they receive multiple bills from different parties for the same procedure. The Fair Credit Billing Act, federal legislation that provides disclosure rules that standardize billing information in some transactions, arguably covers billing practices by hospitals as well. In Finnegan v. University of Rochester Med. Ctr., *No. 97-CV-0406C, 1998 WL 661318 (W.D.N.Y. 1998), however, a federal district court determined that hospitals do not fall within the Fair Credit Billing Act.*

John Finnegan was treated at the University of Rochester Medical Center's Strong Memorial Hospital ("Hospital") for a variety of physical and neurological ailments from February 1995 through June 1995 of that year. The cost of these treatments totaled over $50,000. On June 21, 1995, Finnegan felt the treatment he was receiving from the Hospital was not adequate and sought another opinion.

From June 21, 1995 to March 22, 1996, the Hospital billed Finnegan directly for the medical services it provided to him from February through June 1995. When Finnegan initially received these bills, he immediately called the Hospital about reconciling his bills. Finnegan explained that he had filed a claim for disability benefits with the Social Security Administration (SSA) prior to his treatment at the Hospital, and although his claim was initially denied, his appeal was still pending. The Hospital therefore agreed to forego the collection of any of Finnegan's accounts until his appeal with SSA was resolved.

On March 22, 1996, Finnegan was notified that his appeal was successful and that he was adjudged totally disabled. When Finnegan's first SSA benefits arrived, he immediately began to arrange for payments to the Hospital. In April 1996, however, Finnegan found out that the Hospital, as early as December 1995, reneged on its oral agreement to forego collection until the appeal was resolved and had sent Finnegan's account to at least two collection agencies. In addition, adverse credit reports were sent to credit reporting agencies. As a result of these reports, Finnegan had numerous difficulties in obtaining a mortgage to purchase a home and suffered significant physical and emotional injuries. Finnegan further alleged that he sent at least 15 letters to the Hospital disputing the amount the Hospital claimed he owed.

Finnegan filed suit in federal court. He claimed that since the arrangement he made with the Hospital to reconcile his bills was an extension of credit, it was governed by the Fair Credit Billing Act (FCBA). The court disagreed. It held that Finnegan's arrangement with the Hospital was informal and not covered by the FCBA.

This decision, therefore, severely limited consumers' recourse when challenging hospital billing practices and procedures.

ADVANCE: AUTO LEASING DISCLOSURES

The fine print in auto leasing contracts is notoriously obscure and confusing. Especially irritating are efforts auto dealers make to obscure the fees that will be charged upon surrender of an automobile at the end of a lease. In Abt v. Mazda American Credit, No. 98 C 2931, 1998 WL 758837 (N.D. Ill. 1998), *a federal district court analyzed one such problem, buried "disposition fees," and found justification in the Consumer Leasing Act for awarding damages to an aggrieved consumer.*

On February 28, 1994, Elliot Abt leased a car from Highland Park Mazda. Highland Park offers financing to its customers by assigning its contracts to Mazda American Credit ("Mazda Credit"), a financing corporation. Highland Park provided financing to Abt by completing Mazda Credit's standard lease agreement and assigning the lease contract to Mazda Credit.

In March 1997, at the end of the lease term, Abt returned the car to Highland Park and requested the return of the $400 security deposit he initially paid. Highland Park gave Abt $50 and kept the remaining $350 as a disposition fee.

At issue in this case were two conflicting lease provisions-paragraphs #9 and #20. The title of paragraph 9 was "Total of Other Charges Payable to Lessor." The paragraph clearly indicated that the total was $0. Paragraph 20 was a standard provision concerning the termination of the lease. Hidden in the middle of the paragraph was a provision that said Abt would owe a $350 disposition fee at the end of the lease.

Prior to addressing potential violations of the Consumer Leasing Act (CLA), the court decided which of the contradictory paragraphs would govern the contract. In other words, was the disposition fee $0 or $350? Because the term "disposition fee" found in paragraph 20 was more specific than the "other charges" found in paragraph 9, the court decided the intention of the contract was to impose a $350 fee.

Having made this decision, the next issue was whether Highland Park and Mazda Credit violated the CLA. Regulations promulgated pursuant to the CLA require that the total of all other charges that are not included in the periodic payments be disclosed to the lessee. 12 C.F.R. ß 213.4(g)(5). Disposition charges are one of the items that must be disclosed. 12 C.F.R. ß 213, Supp I, 4(g)(5)(4). Regulation commentary states that "disposition charges . . . must be disclosed as an item of 'total amount of all other charges.'" It seems obvious, therefore, that the disposition fee should have been included in paragraph 9.

Despite this apparently clear language, however, the regulations do provide that the lessor need not use the specific term "other charge" or place the charge in a specific location. 12 C.F.R. § 213, Supp I, 4(g)(5)(2). In fact, the disposition fee can be included with other related disclosures, which is exactly what Highland Park and Mazda Credit did.

According to the court, however, such inclusion is appropriate only when there is a single "other charge" in a lease and the lease contract does not use the term "other charge" in any other part of the lease. In this case, the contract had a separate paragraph (#9) for "Other Charges." Therefore, failure to include the disposition fee in paragraph 9 violated the CLA.

This decision is at least a partial victory for consumers, since it limits a regulation that allows lessors to bury charges in obscure contract provisions. The court makes it clear under what limited circumstances lessors can bury "other charges" in other contract provisions.

SETBACK: THE SCOPE OF CONSUMER PROTECTION UNDER AUTOMOBILE WARRANTY CONTRACTS

To help implement provisions in the Truth in Lending Act, the Federal Trade Commission has for many years imposed a requirement that most consumer loan instruments include language notifying those financial institutions who purchase them that they are subject to all claims and defenses by consumers that the consumers *could assert against the original sellers of those goods or services contracts. However, the court in* Ellis v. General Motors Acceptance Corp., No. 97-6963, 1998 WL 789174 (11th Cir. 1998) *ruled that despite such language in a consumer note there was no evidence to suggest that the defendant agreed to assume the same liability as that of the original contract provider.*

On May 22, 1995, Paul and Peggy Ellis bought a used car from Royal Oldsmobile. At the same time, the Ellises purchased an extended warranty for an additional $1,195. The Ellises financed the car and warranty through a loan from Royal. The loan was simultaneously assigned to General Motors Acceptance Corp. ("GMAC"). The loan agreement listed $1,195 as being paid to "Mechanic" for the extended warranty.

The Ellises brought suit against GMAC on January 14, 1997, eighteen months after purchasing the car and warranty. According to the Ellises, only a small portion of this amount was paid to "Mechanic," and Royal retained the rest. The Ellises further allege that GMAC is liable for this misrepresentation under the Truth In Lending Act (TILA).

The Federal Trade Commission (FTC), which issues regulations to assist in the enforcement of TILA, requires that contracts like the one signed by the Ellises contain the following language:

> NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF . . . . 16 C.F.R. § 433.2 (1998).

This language was part of the Ellises' contract.

Despite finding that GMAC was clearly a "holder" of the Ellises' credit contract, the court held that GMAC was not liable for the alleged TILA violations. To support its decision, the court turned to the language of TILA itself, which states that "[a]ny civil action . . . which may be brought against a creditor may be maintained against any assignee . . . only if the violation . . . is apparent on the face of the disclosure statement . . ." 15 U.S.C. § 1641(a). The scope of this liability is much narrower than that required by the FTC notice requirement.

While it is clear that the language of an actual statute supersedes the language of accompanying regulations, it is equally clear that parties can agree to assume greater liability than that required by the statute. Nonetheless, the court found that, despite agreeing to the contract terms (including the FTC notice), there was no evidence to suggest that GMAC agreed to assume greater liability than that required by the statute.

This decision is clearly a setback for consumers. Despite assurances by the court to the contrary, this decision effectively renders the FTC notice requirement meaningless. According to the court, "the provision continues to fill a valuable role by reiterating the right of buyers to withhold payment from . . . assignees, if the cars they purchased turn out to be lemons." Such limited protection, however, clearly flies in the face of the Congressional intent that TILA be liberally interpreted to ensure that consumers are provided with full and accurate information.

NASSAU CO. MUSEUM SERV., LONG ISLAND STUD. INSTITUTE AT HOFSTRA UNIVERSITY

ADVANCE: ATTORNEY'S USE OF CREDIT REPORTS

As a tactical measure, attorneys may use credit reports of opposing parties in an attempt to intimidate their adversaries into settlement. However, after deciding that the Federal Credit Reporting Act covered consumer credit reports, the Federal Appeals Court in Bakker v. McKinnon 152 F.3d 1007 (8th Cir.1998), *held that the Federal Credit Reporting Act prevented attorneys from using credit reports to force settlements.*

Bakker, a dentist, was sued by several patients for malpractice. During the course of the litigation, McKinnon, an attorney for one of the patients, obtained Bakker's credit report from a local credit bureau on two different occasions. McKinnon's purpose in obtaining the reports was to determine Bakker's total assets and to see if Bakker was trying to transfer assets to his adult daughters; i.e., she wanted to determine if Bakker was "judgment proof." However, McKinnon also used the information to intimidate Bakker in an attempt to push him toward settlement. Bakker sued McKinnon for violating the Fair Credit Reporting Act (FCRA).

McKinnon first argued that credit reports obtained in connection with commercial or professional transactions were not covered by the FCRA, thereby precluding her liability under the statute. Because the reports were obtained in connection with the litigation involving Bakker, she argued that they were not obtained for the purposes of a consumer transaction and thus not covered under the FCRA. The court held, however, that McKinnon's purpose in obtaining the reports was irrelevant and did not alter the fact that the reports were consumer reports within the meaning of the FCRA.

McKinnon then argued that she had a legitimate business need for the reports. Section 1681b(3)(E) of the FCRA states that a consumer reporting agency may furnish a consumer report to a person it has reason to believe has a legitimate business need for the information in connection with a business transaction involving a consumer. McKinnon argued that, as an attorney representing clients in litigation, she had a business need to obtain reports on opposing parties. However, the court determined litigation between parties did not qualify as a business transaction involving a consumer. The parties were not engaged in any consumer transaction involving the extension of credit, insurance, employment, or licensing. Thus, FCRA's business need exception did not apply to McKinnon.

The district court awarded $500 in actual damages to Bakker and each of his adult daughters, as well as $5000 in punitive damages to each. The court relied on the rule that consumers may recover punitive damages for a willful failure to comply with the FCRA, which is shown by knowingly and intentionally committing an act in conscious disregard for the rights of others. Because McKinnon trampled on Bakker's rights under the FCRA, blatantly attempted to extract a settlement through the use of the credit reports, and threatened Bakker with loss of his profession and dental license, the Eighth Circuit affirmed the award.

ADVANCE: HEALTH INSURANCE CLAIM DENIALS

All too often insurance companies and HMOs use the preexisting condition rationale to deny the claims of policyholders. Recognizing the needed protection for policyholders in the ever increasingly costly health care industry, the court in In re Estate of Ermenc v. American Family Mut. Ins. Co., 585 N.W.2d 679 (Wis. Ct. App. 1998), held that discovering a preexisting condition of a policyholder with the aid of hindsight will not prevent an insurance company from paying a claim of the insured individual.

In May 1996, Monica Ermenc was experiencing abdominal pains and went to see her doctor. In addition to the pain, she was having some difficulty breathing and had one incident of spitting up blood. The doctor examined her, diagnosed gastritis, gave Monica samples of Tagamet, and told her to return for further tests if her condition worsened. Four days later, Monica went to the emergency room. The emergency room doctor diagnosed a probable peptic ulcer and sent Monica home with more Tagamet. Both of these doctors noted an absence of blood in her stool. Monica's stomach pains continued. On June 27, 1996, she was admitted to the hospital. Her treating physician discovered a palpable mass in her stomach and blood in her stool. Further testing revealed cancer. Monica died two weeks later.

Prior to being diagnosed with cancer, Monica bought a short-term health insurance policy from American Family Mutual Insurance Company ("American Family"). The policy became effective on June 18, 1996, before her cancer diagnosis. After her death, Monica's estate sought payment of her medical bills by the insurance company. American Family denied coverage, contending that Monica already had cancer when she bought the policy. In other words, the cancer was a preexisting condition.

To determine whether Monica's cancer was a preexisting condition, the court looked at the policy itself. According to the policy, a "preexisting condition" is ". . . a sickness, injury, disease or physical condition: 1. For which the covered person received medical treatment or advice from a physician within the 5 year period immediately preceding that covered person's effective date of coverage; or 2. Which produced signs or symptoms within the 5 year period immediately preceding that covered person's effective date of coverage which should have caused an ordinarily prudent person to seek diagnosis or treatment."

Although hindsight suggested that the May symptoms were probably caused by the cancer, the court explained that no one knew she had cancer at the time Monica initially sought treatment. Her symptoms could have been caused by cancer or a number of different illnesses. Monica was not treated for cancer until after the effective date of the policy. According to the court, the fact that Monica had some symptoms prior to the purchase of her policy which later proved consistent with cancer was insufficient grounds for American Family to deny coverage on preexisting condition grounds. Although Monica's symptoms were also consistent with other conditions (such as the peptic ulcer her doctor suspected), the court held that it would be absurd to allow insurers to base claim denials on "backward-looking reinterpretation of symptoms." Otherwise, any prior symptom not consistent with the ultimate diagnosis would render the insurance policy meaningless.

This decision is important because it narrows the scope of preexisting condition exclusions in health insurance contracts. Such exclusions are one of the most frequently cited bases for denial of claims by insurance companies and HMOs.

ADVANCE: CREDIT DISCRIMINATION

To achieve first lien status over the claims of creditors with priority regarding the same debtor, creditors granting home improvement loans may wish to add those previous claims to their loan agreement with the debtor and pay those creditors. However, to the dismay of creditors, the court in Newton v. United Companies Financial Corp., 1998 WL 770623 (E.D. Pa., 1998), *held that a financing company cannot unilaterally raise the amount of a loan request and distribute funds to creditors with priority without notifying the debtor.*

Four low-income homeowners brought this action against a lender allegedly involved in a "loan-packing" scheme. The homeowners individually decided to have their properties improved and contacted various contractors for estimates. The contractors told the plaintiffs the approximate cost of their proposed improvements and offered to help secure financing for the work. The contractors then informed the defendant, United Companies Financial Corp. ("United"), that financing was requested to complete the improvements.

While investigating the credit histories of the various plaintiffs, United discovered that each one had delinquent bills, taxes, or various other encumbrances on the titles of their homes. In order to be placed in first lien position if the plaintiffs defaulted on any payments, United granted the home-improvement loans in larger amounts than requested, thus allowing United to pay the delinquent bills and be the only creditor to which the plaintiffs were liable.

Promissory notes were then sent to the plaintiffs to be signed. However, these notes failed to provide adequate notice to the plaintiffs that United had unilaterally decided to increase financing to include these bills. The Equal Credit Opportunity Act (ECOA) requires a lender to provide notice to an applicant if the lender makes a counteroffer to a completed loan application. Since none of the plaintiffs had requested the additional money to pay delinquent bills, the plaintiffs should have been notified that a counteroffer had been made.

The court entered judgment against United, and all the loans were rescinded. Any loan payments or finance charges paid by the plaintiffs were refunded.

POTENTIAL ADVANCE: MISLEADING ADVERTISING

Many products are advertised in ways that suggest they contain ingredients or have attributes of ingredients that they do not, in fact, contain. Consider, for example, products such as Cottonelle toilet paper (resembling cotton); Chockfull O' Nuts coffee (tasting like nuts); or Aunt Jemima Blueberry Pancakes (containing "real imitation blueberries"). In Garner v. Healy, (N.D. Ill.), 1999 U.S. Dist. LEXIS 240, (N.D. Ill., January 5, 1999), *a federal district court certified a class action consumer lawsuit against Turtlewax, Blue Coral, and Simonize USA, the three largest manufacturers of car wax, based on the charge that certain of their products contain no wax and do little to protect the finish of a car.*

The plaintiffs are consumers who contend that defendants Turtle Wax, Blue Coral, and Simonize USA, and several of their senior executives, manufactured, marketed, and distributed so-called "cheater wax," a "worthless non-wax substance" sold for a premium at automatic car washes that does nothing to protect a car or enhance its appearance. The suit sets forth three sets of claims: (1) RICO (racketeering) violations premised on a pattern of illegal behavior; (2) consumer fraud violations premised on violations of state consumer protection statutes that protect consumers against unfair and deceptive practices; and (3) breach of express warranties by manufacturers to consumers about the performance of their products

The court permitted the plaintiffs to pursue a class action lawsuit after determining that they met each of the stringent preliminary requirements set out in Federal Rule of Civil Procedure 23(a). That rule provides that members of a class may be certified as a class only if "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

Courts in the United States typically have tolerated a great deal of untruth by characterizing falsity as "mere puffery" or "opinion." The certification of classes such as this offer courts the opportunity to revisit and narrow the "puffery" exceptions to truthful advertising.

Compiled by Stephen Meili
Center for Public Representation

Johanna Novak and Wendy Rusch
University of Wisconsin Law School

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Leet, D. R. and Driggers, J. (1990). *Economic decisions for consumers* (2nd ed.). New York: Macmillan.

■ Journal articles (notice inclusive pages):
Peltzman, S. (1981). The effects of the FTC advertising regulation. *Journal of Law and Economics, 24*, 403-448.

■ For other references see the *Publication Manual of the American Psychological Association* (4th ed.).

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