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EDITORIAL POLICY STATEMENT

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

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

Suggested content may include but is not necessarily limited to:

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

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

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Editorial

This issue is the result of a new "joint venture" by Rima Apple, Robin Douthitt, and Stephen Meili, the incoming co-editors of *Advancing the Consumer Interest.* It is with trepidation and anticipation that we take the reins from John Burton, founding editor of the journal. *ACI* has been shaped and sustained by John since its first issue in 1989, and we will strive to attain the level of excellence established by him in volumes 1 through 6. We thank John for facilitating the transition between our offices and look forward to building on the firm base he created.

We hope that members will continue submitting high quality applied research papers for us to consider publishing in the refereed section of the journal. We appreciate the generosity of members who have already served as referees, and we look forward to reinforcing the efforts of our editorial board by soliciting a wide spectrum of occasional assistance from ACCI members. We welcome your suggestions for reviewers and encourage you to volunteer to be part of our reviewer pool.

In addition to refereed articles, we will continue to publish solicited articles on a broad range of consumer issues of interest to the ACCI membership, some of which will be organized around special themes. This spring 1995 issue represents two such themes. The first group of articles delineates a variety of perspectives on advertising, including two views on the role of the Federal Trade Commission in the regulation of advertising and an example of advertising's reach into our public school system. The second group involves consumer issues in Asian markets, with one article providing an overview of issues in a variety of countries, the other focusing on one specific nation. We have also added a new section, the "Legal Digest," in which we present summaries of important recent court decisions on consumer law issues. In addition to book reviews, we will solicit essay reviews of books that provide a platform for opposing views or further discussion of appropriate subjects. Another addition will be a "Letters to the Editor" column. Please use this section to register your reactions to journal submissions and current consumer issues.

Of primary importance to the maintenance of *ACI's* high standards is our Editorial Review Board. We are pleased that John Burton, Brenda Cude, Janet Garkey, Tahira Hira, Robert Johnson, Catherine Phillips Montalto, Norman Silber, and Richard Widdows have agreed to serve as members. In an effort to reach out to a broader constituency, we have also inaugurated an Advisory Board to assist us in generating ideas for theme issues and soliciting invited manuscripts on a variety of special topics. The Board includes representatives from a wide range of consumer fields and includes Stephen Brobeck, Consumer Federation of America; Bonnie Liebman, Center for Science in the Public Interest; E. Scott Maynes, Cornell University; C. Lee Peeler, Federal Trade Commission; Esther Peterson, formerly Special Assistant to the President for Consumer Affairs; Susan Reverby, Wellesley College; and Gerald Thain, University of Wisconsin Law School.

Changes in this, our first issue of *Advancing the Consumer Interest*, reflect the diversity of the new co-editors. Rima Apple is an Associate Professor in the Department of Consumer Science at the University of Wisconsin-Madison, with a joint appointment in the Women's Studies Program. With a Ph.D. in the History of Science, she studies the history of the consumer movement, focusing particularly on the role of experts and expert advice in the creation of markets and in shaping advertising. She also studies the history of women's health and health care in the United States. She is past editor of *Isis, the International Journal of the History of Science and Its Cultural Influences.*

Robin Douthitt is Professor and Chair of the Department of Consumer Science at the University of Wisconsin-Madison, and is an affiliate at the Institute for Research on Poverty. Some of her current research includes analysis of new technologies on the lives of consumers. She is working on projects that examine the impacts of the Information Super Highway on the time use of women and poor consumers. She also examines new food-related biotechnologies and the implications of poor consumer's information and risk perception on their acceptance. Finally, she is working on accounting for time scarcity in measures of well-being, and on incorporating the value of unpaid work in measurements of GDP. She also serves on the Editorial Board of the *Journal of Family and Economic Issues.*

Stephen Meili is Clinical Assistant Professor of Law at the University of Wisconsin Law School. He is also Director of the Consumer Law Clinic at the Center for Public Representation in Madison, Wisconsin, a nonprofit public interest law firm. In addition to teaching courses on Consumer Law and Pre-trial Advocacy, he supervises several law students each semester on a variety of consumer law projects, including litigation on denied health insurance claims, legislation on credit and other financial issues, and community economic development. His other areas of research include third-party access to personal records, alternate dispute resolution, and public interest law in Latin America. He has served as a consumer representative to the National Association of Insurance Commissioners and the Life and Disability Advisory Council of the Wisconsin Insurance Commission.

Thus, together we represent a wide range of overlapping consumer interests, interests that will inform *Advancing the Consumer Interest* for the next four volumes. We look forward to working with each of you.

The Misunderstood Problem of Consumer Protection in Japan: The Roles of Lawyers and the Government

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On the verge of the 21st century, ... the American consumer is reconsidering his/her position in a world of not so similar legal structures and values.

Throughout most of the second half of the 20th century, major technological advances in the fields of transportation and telecommunication have fostered the illusion among many Americans that the reduction in transnational travel time and the facility for immediate transnational communication leave only formalistic barriers to a set of common legal values among nations. Now, on the verge of the 21st century, while accepting increased openness through international agreements addressing everything from world trade to international environmental interdependence, the American consumer is reconsidering his/her position in a world of not so similar legal structures and values. It is of great importance at this point that, rather than revive the xenophobia of the first part of the 20th century, we move to examine foreign consumer structures more closely, in order to insure that foreign consumer law issues be resolved as much as possible in conformity with both foreign and U.S. needs and values.

A common presumption among American consumerists, and the populace in general, is that consumerism flourishes in societies with modern and effective legal systems that have democratic, benignly paternalistic governments. However, in many of these societies, when legal objectivity confronts vested economic and social interests, the ability of consumers as individuals or as a class to pursue avenues of objective legal redress through legislation, administrative action, or the courts is severely constricted. Even where such legislation exists, enforcement is undermined by a lack of statutory enforcement incentives, ready access to the practicing bar, and/or active governmental support to prevent or redress consumer harm.

This brief article will introduce the role of law and government in consumer protection in Japan. It is hoped that the recognition of cultural differences between American and Japanese societies will provide insights that will stimulate the American consumer movement to confront the anticonsumer structures in Japan while, simultaneously, respecting the internal values of Japanese society.

I. RIGHTS CONSCIOUSNESS: IF I AM NOT FOR ME, WHO WILL BE FOR ME?

Japan is a society very different from that of the U.S. Rooted in the religious precepts of Buddhism and the teachings of Confucianism, Japanese society accepts and practices certain values that we disdain. Primary among these is the belief that individuals, as well as society itself, perceive their existence, not to mention their rights, from the perspective of the interests of the group, as against that of the individual. Further, the general belief is that all things (including races, nationalities, and the people within them) can be ranked hierarchically as either superior or inferior and that human interaction should be based on these rankings. Although Japanese society establishes no obligation to strangers (unless they have a defined status, e.g., guest, business associate, or warranted purchaser), where there is a relationship, the superior and inferior parties have a highly refined sense of their dependency and the obligations owed to each other. Often described in Japanese as *giri* or *on*, these obligations are accepted without question as a natural part of group-living and form the predominant part of human interaction in personal and business life. Each child is taught by her/his parents and by the educational system that dependency is essential and independence is dangerous. The Japanese language reflects this hierarchy through the use of different words for the same items, based on gender, work status, and position in the family. The unity and predictability of these group values provide many benefits to a society living in an extremely cramped environment. Most importantly, this general arrangement insures a smooth flow within the corporate culture. Unfortunately, the negative costs are borne most often by the individual and especially those individuals and groups on the lower levels of the hierarchial ladder.

As in all societies, unwritten laws reflecting cultural values such as *giri* and *on* are inherently in force in Japanese life through a "non-legal" legal system. In the U.S., most unwritten laws are eventually reduced to written objective laws so that they can be enforced by courts and other tribunals. For us, these bodies act as the great equalizers to protect against the regular use of raw power in the resolution of disputes. In Japan, by contrast, both the bureaucracy and the stronger parties use unwritten "legal" powers to protect societal and industrial interests. Therefore, it is not surprising that the objective legal system in Japan provides little succor for a rights-conscious individual, group, or competitor. Despite the acceptance of civil law codes and the appearance of objective rights over a century ago, neither the society at large nor the government sees the objective legal system as the place for effective redress of consumer grievances. It is commonly accepted in tort law that a private party has a duty to protect oneself from harm despite inattention or even gross neglect by the party "responsible." Further, there is a duty to avoid embarrassment and "loss of face" for the "responsible party." Actually, even the term "responsible party" implies an assignment of blame that would be considered inappropriate. In contract law, a review and possible revision of an agreement may be the expected resolution of a change in circumstances. Contractual disputes (including those based on warranty claims) between sellers and consumers are often resolved without litigation due to the expectations of both sides that acceptance of the amount proffered is socially appropriate.

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The Japanese reluctance regarding litigation actually reflects a deeper issue that is often unrecognized and, when recognized, rarely admitted. Represented in terms of *tatemae* ("outer face") and *honne* ("inner feelings"), the party suffering harm may feel impotent to challenge the party causing the harm. *Tatemae* describes the unwillingness to litigate or raise direct legal challenge, while *honne* describes the inability to pursue redress without suffering other harm (e.g., the discontinuance of an otherwise advantageous relationship). Clearly, these legal/cultural problems demand much greater finesse than the traditional examination of domestic U.S. legal issues.

II.PRIVATE LAW: THE DIFFICULTY OF REDRESS

Japanese societal discomfort with the use of objective law and judicial proceedings as the foci of dispute resolution has reduced the effectiveness of these mechanisms as compliance incentives. In addition, even when such remedies are pursued, the highly burdensome discovery and proof standards as well as the recovery limitation to actual or compensatory damages without attorney's fees or costs are strong constraining factors for plaintiffs. As we have learned in the U.S., the potential for recovery of punitive damages (or treble damages) as well as attorneys fees and courts costs often has a dual benefit: It provides the incentive for "private attorneys general" to obtain recompense for harm suffered, and it also, in pursuing violators, produces a strong deterrent effect that government alone could never secure. In contrast, punitive damages and recompense for compensatory damages not measurable by objective means have virtually no place in the Japanese legal system, where punitive damages are likened to criminal punishments and therefore are only permitted by state action. Indeed, vast areas of law that the American public and their lawyers accept as matters resolvable through private redress (e.g., antitrust, securities fraud) belong solely in the public law realm in the civil law system. Therefore, the standard for action is neither the harm suffered by the individual nor his/her/its desire to obtain redress for the harm, but rather an assessment of a public harm and the appropriateness of government action in consideration of group needs.

Further, although there is a broad array of quasi-formal and informal dispute resolution mechanisms, the cultural tension for the putative Japanese plaintiff in these situations is sometimes like that of the courtroom. In order to avoid tension and the feared disastrous effects of confrontation, the putative plaintiff will often obtain the assistance of intermediaries (governmental or private) to defuse the potential conflict. The intermediary intercedes (where possible, without disclosure of the identity of the complaining party), explains the difficulties raised by the current situation and requests the assistance of the "superior" party in relieving the burdens (i.e., harm) of the "inferior" party. Despite the clear power of the superior party to deny satisfaction to the inferior one, significant social and business reasons (including governmental pressure) often act as countervailing forces and encourage the superior to find a viable resolution for the inferior one.

Unfortunately, if the intermediaries are unable to resolve the dispute, the lack of legal counsel and the lack of awareness of the law are compounded by the discomfort of being a plaintiff. Ultimately, the potential plaintiff is forced either to accept the limited compensation or settlement offered, if any, and/or resign her/him/its self to an attitude of *shoganai* ("there is nothing that can be done about this").

The squelching of legal rights assertions through the lack of compliance incentives is compounded by the limited number and limited roles of *bengoshi* ("litigating attorneys") in Japanese society and the procedures of the civil law system. There are less than 15,000 *bengoshi* in Japan, and most of these are in Tokyo. Much like other civil law countries, Japan has a vast army of quasi-lawyers (scriveners and specialized advisors) who perform governmental or judicial form completion services but are totally unprepared for dispute resolution. Although there are many socially conscious lawyers, even these accept the values of the social contract (group interests over the individual) and, much like lawyers in most civil law countries, they are hardly confrontational in or outside of the courtroom. Rather, they see themselves as defenders of the system and officers of the court who, while serving the hiring party, focus their attention on meeting the demands of the inquisitorial judges. Moreover, the exclusivity of this protectionist legal cartel is maintained by the Japanese government (all lawyers are graduates of the single law school that is operated under the supervision of the Justice Ministry). Lawyers are not permitted to advertise. There are fee schedules that are strictly enforced and contingent fees are not permitted. Further, potential plaintiffs are often intimidated by the substantial court costs and the obligation to pay the defendant's court costs and legal fees if the plaintiff fails to prove her/his/its case. In fact, the plaintiff may be required by the court to submit a substantial security deposit for just such a contingency.

III. THE GOVERNMENT: ADMINISTRATIVE GUIDANCE VS. OBJECTIVE LAW

Traditionally, the role of the government in consumer law is particularly important. Because the origin of most commercial legal matters in objective legal systems has its roots in the guilds of ancient Europe, activity by modern governments in passing legislation providing for private and governmental enforcement of consumer rights has been an essential element in leveling the playing field. Therefore, the limited opportunity for private enforcement in Japan places an enormous weight on the government to act as a bulwark against consumer harm. Often however, the government (bureaucracy) eschews objective law and instead elects to use its non-legal powers (administrative guidance) to coerce cooperation. Although significant efforts are made to protect the society as a group through a mixture of code law and administrative guidance (particularly by the U.S.-implanted Japan Fair Trade Commission), where business and other non-consumer interests are sufficiently great the government acts to prefer those interests over those of the consumer. Despite Japanese society's acceptance and sometimes even support for business interests over consumer interests for the sake of the greater good, large groups of the society have been harmed by intentional actions by the government to defeat consumer interests. Three particular examples of governmental failure to pursue consumer interests include the continuing discrimination against women in employment, the failure to press for a resolution of the environmental disaster at Minamata, and the active protection of rice and other agricultural products in the face of absurd prices and environmental deception.

Supported by the philosophies of Buddhism and Confucianism, Japanese society has always accepted the superiority of men over women. After World War II, the predominantly American occupying forces ensured that the Japanese government would declare the equality of women through the passage of a new *Showa* constitution. During the 1960s and 1970s, many cases were brought (relative to the total number of private cases brought in Japan) challenging gender discrimination in employment. These victories in the courts started to challenge the accepted order of male dominance in the workplace: Among other things, the equality of women in hiring, pay, and career employment was upheld. In 1985, under pressure from virtually all segments of Japanese business, and probably in bureaucratic agreement with the complaints of the business community, the Labor Ministry acted in conjunction with the legislative branch to remove gender discrimination issues from the courts. The power of redress by the courts was replaced by a voluntary system of compliance under the supervision of the Labor Ministry. Since the Labor Ministry took over this field of enforcement, challenges have slowed to a crawl. Worse still, the government admits that during the current recession (1991-1994) women have been blatantly discriminated against in employment with virtually no action by the government.

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In 1960, the Chisso Company spilled mercury poison in the waters surrounding the village of Minamata. Rather than disclose this fact to the inhabitants, Chisso attempted to suppress information that might tie the company's actions to the major medical harms visited on this population by this environmental

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disaster. Various national and provincial ministries took an active part in protecting the company. After years of governmental inaction and feigned action, the people harmed by the mercury poisoning formed a class action to obtain redress for the tortious act. More than 30 years have passed. Many members of the class have died or will soon die due to the ravages of their diseases. Yet, they had to act alone and have received neither significant compensation nor much governmental assistance. Instead, much like the women plaintiffs noted above, they are seen by the government and private industry as troublemakers.

Finally, there is the case of economic protectionism and environmental deception in agriculture. Because rice has been such an important part of the diet of the Japanese people, and because it occupies a cultural role as a symbol of purity that derives from their indigenous Shinto faith, rice farmers have always occupied a special place in Japanese society. Following the end of WWII, the American occupying forces directed the redistribution of land and thereby created small-farm ownership. These farmers formed an important voting block in the gerrymandered and grossly unequal legislative apportionment that provided a foundation for control by the Liberal Democratic Party (LDP) that dominated Japan for over 40 years. In repayment, the LDP provided the rice industry with both substantial price support and protection from foreign imports. As Japan's economy grew and the yen increased in value, the disparity between Japanese rice prices and world prices grew so disproportionate that foreign governments demanded an opportunity to sell in Japan. The LDP, however, loyal to its political ally and bolstered by a nationalistic consumer movement that actually marched to prevent the entry of lower-priced foreign rice, refused to break its wall of protection. In addition, the Japanese rice industry, in conjunction with the Agriculture Ministry, spread fear about the quality and dependability of foreign rice. Finally, a massive short-term (1993-1995) rice shortage occurred, due to a weather induced harvest disaster, causing the price of rice to reach $3-4 a pound. At this point, with the LDP having recently been thrown out of power, the government agreed to permit the importation of foreign rice to bridge the short-term shortage and, under the new GATT, to open the Japanese rice market to a minor percentage (less than 5%) of foreign rice, allowing regular entry starting at the end of the century. As many Japanese consumers reached the point of frustration with the extortionately high prices being exacted from them by rice farmers through the government, they were doubly dismayed to discover that Japanese agricultural producers have been treating their fruits and vegetables with dangerous and sometimes poisonous insecticides. Still, the government continues to protect the rice industry. The argument that this is due to the special position of rice in Japanese society's religious and cultural values is unconvincing, given that the same protections are applied to apples, strawberries, corn, etc.

IV. THE FACE OF CHANGE

Over the past decade, foreign pressure *(gaiatsu)* has played a significant role in bringing direct change as well as stimulating domestic consumer legislation (e.g., the 1994 product liability laws). Because the Japanese antitrust law was developed by the Supreme Command Allied Pacific occupying forces after WWII, it is probably closer to American antitrust law than any other in the world. Due to foreign pressure, both Japan's Fair Trade Commission and a few private discounters have been bringing claims for various anticompetitive practices. Further, the U.S. has been demanding several major concessions: the opening of the Japanese market for more efficient and price-sensitive competition; greater powers for antitrust litigation; and a more assertive and effective enforcement of Japan's equal rights laws.

These endeavors, which we perceive as the first steps towards an economy that would be more consumer-sensitive, are perceived by many Japanese as meddling. It could be argued, after all, that they have "elected" paternalism. Clearly, it is important that one society not impose its values upon another. A balance must be struck so that both American and Japanese societies will be significantly enhanced economically without tampering with one another's culture and internal values. It may be that Japanese citizens are willing to continue to sacrifice their individual economic self-interests for the asserted benefits of the Japanese group. That is, even after avenues for effective redress are available to all private individuals and groups, those individuals and groups may choose not to exercise these rights and mechanisms. At that point, the results may include economic dislocation in other parts of the world—especially in the U.S. Nevertheless, it will then be clear, at least, that Japanese society will have spoken with a voice that represents a true cultural choice.

NOTE

This article is a revision of a paper presented at the 2nd Annual Consumer Law Conference, University of Wisconsin-Madison, October 8, 1994.

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Consumer Issues and Consumer Protection in Asia

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Of the many exciting events that occurred at the 40th Anniversary Conference of ACCI held recently in Minneapolis, one was a coming together of members with special knowledge of the Asian consumer scene. The members constituted a panel that presented information about Asian consumer affairs on a country-by-country basis. A brief summary of each of the presentations is contained in the Proceedings of the Conference (Xiao et al. 1994).

In this paper, panel members would like to provide a different kind of summary of the material covered in the session. The objective of the paper is to draw out themes of consumer interests in Asia and comment on the directions consumer policy is taking in the region. The countries or areas from which the themes are drawn are India, Indonesia, Japan, Malaysia, People's Republic of China (PRC), South Korea (henceforth Korea), Taiwan, and Thailand.

If anything binds together these countries of Asia, it is the notion of their recent emergence into industrialized nation status. For some, the transition to an industrial country has progressed considerably (notably Japan, Korea, and Taiwan), while for others there still is a long way to go (PRC, India, and Indonesia). Some have begun and are moving along well (Thailand and Malaysia).

For many of these countries, a paradox of high economic growth and low (but growing) consumer purchasing power has been or is being experienced. This juxtaposes a strong, more entrenched business sector with a weaker consumer sector. As will be seen, this poses problems for consumer protection. But perhaps an even bigger problem for consumer protection is a dissonance between consumers' expectations of what they can do with their rapidly increasing purchasing power and their knowledge and awareness of their rights (Thorelli, 1988). This also brings up the whole question of consumer education and its role in the region.

A transition to something is also a transition from something else. The industrial society of Asia is being grafted onto cultures with prescribed traditional relationships between buyers and sellers (Darley and Johnson, 1993). These relationships differ but share one common characteristic: a very strong emphasis on the transaction stage of consumption with less emphasis on the pre-sales ("information") and post-sales ("redress") stages. Traditional bargaining methods are not always conducive to consumer protection in the context of an advanced industrial economy.

It could hardly be said that one type of internal political structure binds these countries together, but one aspect of politics does recur throughout the region. Governments have been struggling with laws and regulatory structures designed to provide the consumers of these countries with some support for their basic rights and needs. The consumers of Asia are not without official protection, though, as we will see, the protection varies in form and extent throughout the region.

With this introduction, we turn to the themes of consumer problems and consumer protection in Asia. In the first section below, some current issues facing the region's consumers will be outlined. In the next section the consumer protection mechanisms now evolving will be described. The final section presents a model of how to promote consumer interests in the region.

CURRENT CONSUMER ISSUES

What follows is a review of problems identified by the panel as being of current concern to the countries of the region. It is not meant to be a comprehensive list of the issues facing consumers, but, rather, an illustration of the themes of consumer interests in Asia. Countries in which the problems are particularly apparent will be identified by name. Readers are referred to the panel members and the references listed at the end of the paper for further details of the situation in any particular country.

The first set of issues identified by the panel has to do with international business relations. A curious Veblen effect has developed in the process of transition to the industrial society in Asia. Although much of the miraculous economic growth that has characterized parts of the region stems from their exports of high technology products desired by the West, there is a clear preference among the purchasers of those same goods in Asia for brands imported from the West. The preference for imports leads to problems in the pre-sale stage of consumption, in that labels and inserts are in foreign languages. From Korea, Indonesia, Taiwan, Thailand, and the PRC, we hear complaints that information and advertising regarding imported consumer goods are often confusing or even false. In the PRC, there is also the problem that despite what the labels say, the goods are actually produced domestically. This is in addition to the widespread practice common in Thailand and Malaysia of selling "fake" brand-name goods.

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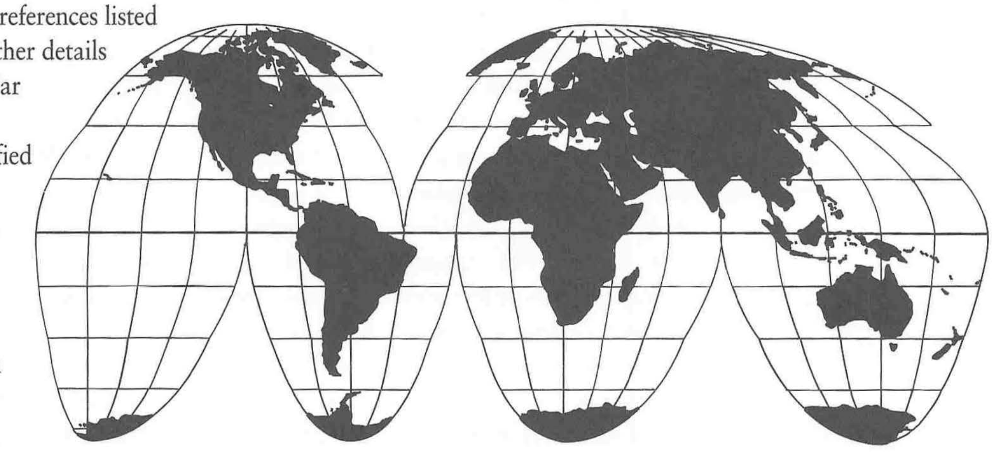
The opposite situation pertains to food stuffs in Japan and Korea. Here there is a marked preference for domestically produced agricultural products, especially rice, the premier staple food. Consumers' resistance to imported rice, which is seen as vastly inferior to local varieties, can be extreme. This will become an issue not just for consumer interests but also for foreign relations, since the latest round of GATT talks essentially forces the region to open up its markets to imports.

In much of the region, the cultural uniqueness of the bargaining process generates consumer protection issues. The transaction stage of consumption involves haggling, or face-to-face bargaining. From the seller side, successful bargaining requires that the reserve price be concealed. As a consequence, consumers are unable to acquire pre-purchase price information, an essential component of efficient consumer decision-making. In Malaysia, an attempt is currently under way to overcome this problem through laws which make posting of prices on all goods mandatory. Still, the posted prices may be false. Often the reserve price is revealed only through "special



PREPARED BY THE UNIVERSITY OF WISCONSIN-MADISON CARTOGRAPHIC LABORATORY discounts for special customers," something which in Korea and Taiwan is reported to lead to abuses. In India, prices are often misleading in that "extra local taxes" are added to the actual price. Manufacturers are now mandated to print a maximum consumer price on packaged goods. It is common in Indonesia for sellers to introduce false "sales" to induce customers to shop.

In much of the region, cultural considerations militate against complaining: The issue is "face." Complainants may both lose face themselves and cause others to lose face in the process of complaining, something to be avoided wherever possible. In response to this, campaigns to encourage complaints have been initiated in several countries. India's Consumer Protection Act is largely dedicated to setting up a framework for consumers to file complaints at local, state, and national levels. In Korea, the Consumer Protection Board and many women's associations handle consumer complaints. The Malaysian government has even gone so far as to set up complaint boxes in prominent locations such as railroad and bus stations to try to encourage people to come forward and complain.

In a situation where consumers tend not to complain, high-pressure selling techniques and associated fraud are likely.

The transition to industrialized status creates another arena of consumer protection issues. The basis for transactions in much of the region is cash. Nevertheless, the use of credit cards is spreading, and with it the associated problem of overindebtedness. Financial difficulties of consumers due to excessive use of consumer credit is very much a current issue in Japan and Korea. Credit cards have been introduced recently in the PRC, where, due to the lag in introduction of computerized communications between banks and stores, credit fraud frequently occurs. Research into the place and role of consumer credit in the economy is under way in Taiwan and Korea. For a fuller discussion of consumer issues in a transitional economy, the reader is referred to Xiao, Yin, Anderson, and Noring (1993).

As well as having to cope with problems of the international economy, cultural uniqueness, and transitional problems, the region faces a range of problems familiar to the industrialized world. In some cases these are exacerbated by the cultural setting. In a situation where consumers tend not to complain, high-pressure selling techniques and associated fraud are likely. The abuses of consumers through door-to-door sales and installment contracts is a concern in Korea. In Taiwan, the contracting process has often involved consumers accepting a product sight unseen through so-called "No Adhesion" clauses, and these clauses are now a subject of the new Consumer Protection Law in that country. Fraud is specifically mentioned as a current consumer problem in the PRC and Japan. From Indonesia comes a graphic example of pressure sales. Consumers in a small community in Sulawesi were persuaded through advertisements that they would be "behind the times" if they did not own a refrigerator. Those who responded, many of whom used credit for their purchase, ended up using their refrigerator as a closet, as there was no electricity in the area.

In addition to fraud, a problem in societies where complaining in public is frowned upon is that, absent government intervention such as that found in India, Taiwan, and the PRC, methods of redress will be slow to develop. Self-regulatory initiatives such as toll-free complaint hotlines are rarely used. It is only recently that product liability laws have emerged in the region. Korea's seventh five-year economic plan includes product liability laws. Japan is currently in the process of implementing laws making manufacturers liable for defective products.

A problem which besets all industrialized economies is environmental spillover. This has been a big concern in Japan, possibly as a result of its relative scarcity of natural resources. Cost of sewerage and refuse disposal are specifically mentioned. In Korea, there is concern about industrial wastes in general and chemical residues in drinking water in particular. From Thailand, there is concern that farmers have been encouraged to overuse chemicals, to the detriment of their own health as well as that of consumers as a whole. The PRC reports environmental problems mainly caused by small and farmer-operated businesses in rural areas. In India, concerns have been expressed over the polluted state of the air and water. One factor in multinational corporations' decisions to move their factories to Indonesia is claimed to be that there is no strict regulation of industrial waste disposal. If the experience of developed industrial countries is anything to go by, environmental spillover will become a greater cause for concern in Asia as consumers' levels of affluence increase.

Given that many of the countries of the region are experiencing rapid economic growth, inflation is a cause for concern. In the PRC, it is much more than that, with price increases in the 10 to 15 % range in recent years. Elsewhere, combinations of tight monetary policy and discrete controls over key prices have managed to keep inflation at bay. An instance would be the decline of the annual inflation rate in Korea to 5.5 % in 1993 after reaching a recent high of 9.3 % in 1991.

CONSUMER PROTECTION

It is arguable that countries that are committed to rapid industrial development will tend to put the concerns of producers before those of consumers, to the detriment of the latter. The situation might be exacerbated by the fact that the first recipients of the fruits of growth are the producers themselves, who therefore gain economic and possibly also political power relative to domestic consumers. In such a climate, consumer protection may not be all it should be. When the producers are foreign multinationals, governments, in their eagerness to attract and retain the investments, may be over-accommodating to the companies to the detriment of local consumers.

Rumors even abound that consumer activism can be a risky business in parts of Asia. For example, several years ago in the PRC, private consumer groups were strictly prohibited from existing because the government believed that this kind of group could be used to conduct antigovernment activities. The situation has improved of late.

The move toward industrialization, however, also brings with it a countervailing power in the form of rising consumer expectations. Young people particularly yearn to adopt the consumption patterns of their Western counterparts, as a trip to a shopping mall or department store in any of the cities of the region will show. It is, then, a natural step to go from demand for the consumer goods of the industrialized world to demanding to be treated like a consumer of the industrial world.

The process is already well advanced in many of the Asian countries. Though the political form of each country is different, each has adopted some measure of consumer protection. As instances, India (1986), Korea (1986), the PRC (1993), and Taiwan (1994) have adopted comprehensive consumer protection laws. In the PRC, for example, the government has created agencies named "Consumer Associations," has enhanced the consumer protection function within other regulatory agencies, has developed consumer laws at national, provincial, and local levels, and has launched major campaigns against fraud and unethical business practices. Malaysia has a Ministry of Domestic Trade and Consumer Affairs whose pro-consumer activities are usually backed up by enthusiastic local media. Thailand's Ministry of Commerce has been looking into pricing policy since 1951. Japan, as mentioned above, is in the process of bringing in manufacturer responsibility for product defects. All of the countries are moving away from caveat emptor to some degree.

(C)onsumerist activity is alive and well throughout the region.

The consumer protection effort in the region is by no means confined to governments. Although consumer-led initiatives have not always been welcome, consumerist activity is alive and well throughout the region. Korea has 22 nonprofit consumer groups whose functions include information dissemination, consumer education, and product testing. Taiwan's Consumer Protection Union is allowed to pursue class action suits on behalf of consumers, as well as act as a complaint-handling body and generally assist consumers. Indonesia's Consumer Foundation (YLK) produces a consumer magazine and at one time had a segment on television. YLK hopes to restart the television program in 1995. India boasts some 400 private consumer groups. It is also not to be overlooked that the International Organization of Consumer Unions (IOCU) has a branch linking consumer organizations from 30 countries in the Asia-Pacific Rim located in Penang, Malaysia.

A compilation of activities of the various consumer protection mechanisms in the region shows that the following functions are covered in at least one country: consumer policy research, consumer education, surveys of consumer opinions, dissemination of information, forums, product testing, product safety analysis, dispute resolution, counseling, and complaint handling. Laws cover the following in at least one country: product safety, labeling, advertising, fair pricing, posted prices, product liability, redress, cooling-off periods, and class action suits. While it is as yet too much to expect all of the countries of the region to do all of these or more, there is a joint learning process going on, and one can expect that what works in one country or area will eventually spread to others. In some cases there is even evidence of "friendly rivalry" to outdo one another in extending protection to consumers. The case of the PRC and Taiwan passing consumer protection laws within a year of each other can be cited in this regard.

The United Nations and IOCU have identified a Bill of Rights for consumers to which they feel everyone is entitled. The rights are choice, information, safety, voice, redress, a healthy environment, consumer education, and subsistence needs.

CONCLUDING COMMENTS

Despite the rush to become industrialized—and perhaps as a dialectical consequence of it—there are pressing consumer problems in Asia that need to be faced. The need is most pressing for those who have as yet shared little in the fruits of growth. Pockets of extreme poverty do still exist in parts of the region, and in some countries the real purchasing power of consumers on the average is well below that of their industrialized-nation counterparts. The litany of problems faced by people living in pockets of poverty in the region is described by Narayanswami (1989): adulterated food, unsafe and substandard products, shortage of essential commodities, black market profiteering, hazardous drugs, unethical and manipulative advertisements, and harassment at the hands of the public sector.

However, even the most affluent of consumers in the region will from time to time experience consumer problems, and their needs, too, must be met. As a conclusion to this paper, we would like to present a model of a three-pronged approach to the promotion of consumer interests in the region that takes into account the needs of consumers at all levels of living.

Rights and Education

The first approach concerns the basic needs of consumers. The United Nations and IOCU have identified a Bill of Rights for consumers to which they feel everyone is entitled. The rights are choice, information, safety, voice, redress, a healthy environment, consumer education, and subsistence needs. The vigorous promotion of these rights would place a "safety net" under the consumers of Asia.

The safety net would be the more effective if consumer education were included in the curricula of grade schools. The accent would be on teaching children what questions to ask when evaluating consumption alternatives, and how to evaluate the information they are presented with, especially that used in marketing. The effort would be potentially highly productive given the respect with which education and educators are held throughout the region. A case in point is Japan, where the initiative to teach consumer education in elementary, junior high, and senior high schools could serve as a model for any industrialized society. Elsewhere in the region, however, initiatives in consumer education have tended to lag behind other efforts toward consumer protection.

Testing

The second approach should be the promotion of consumer interest through specialized efforts intended to advance the individual goals of the Bill of Rights. Thus product testing, for example, would extend the goal of ensuring the safety of products for consumers. This effort should be undertaken by independent bodies that are already present in most of the countries. Government and private sector participation should be limited to the provision of unfettered financial grants. Expertise to make these organizations work is available in the region and can be supplemented by sabbaticals or internships in the industrialized nations. It has been pointed out that in Korea, where career possibilities for women are currently somewhat limited, there exists an army of underemployed, highly educated women who have been playing a key role in the consumer movement. It is also a matter of record that India's first consumer protection group was started by nine

Bombay housewives (Narayanswami, 1989). Thai housewives have long been providing leadership in consumer training and awareness through the National Council of Women of Thailand's Consumer Affairs Program.

An International Approach

The third approach involves the promotion of self-regulation among the producers of the products of the industrialized world. The forces of competition, backed up in some cases by warranty laws in advanced industrial economies, have placed the responsibility for complaint handling and dispute resolution squarely on the shoulders of the sellers of the products concerned. Such companies should treat Asia no differently from their home bases. Companies should stand by their products by having mechanisms in place to follow through on complaints until they are resolved. The appropriate means for this approach to consumer protection lies with professional organizations that have an international component.

Policies

One or another of the three prongs of our model are in use in the countries of Asia, but rarely are all three being used, and often there is no conception of how they all fit together, and why. We hope that our exposition will help give guidance to efforts to further the consumer interests in the region and ensure that everyone is ultimately able to share in the benefits of the new industrial states. We would add one rider, however, and that is that consumer policies based on the current experiences of advanced industrial economies should be carefully adapted to local conditions, lest cultural bias render harmful effects to emerging economies.

We would like to close by mentioning two practical ways U.S. consumer educators could help improve the climate for consumer protection in Asia, particularly within countries that are in the earlier stages of industrialization. First, there is always a need for textbooks and other basic information sources. Professors at the University of Rhode Island donated 200 recently published textbooks to a University in the PRC. Partnerships of this sort are potentially helpful to consumer educators in the region.

Second, there is a need for financial support for consumer research and advocacy organizations. Cooperative research grants and introductions to foundations and other sources of financial support are ways in which U.S. educators could help the independent consumer protection organizations of Asia.

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Much of the material drawn on in this paper is in the original language of the country concerned and will not be referred to directly here. For further information about any of the countries, the reader is invited to contact the author responsible, as follows: India, Malroutu; Indonesia and Malaysia, Widdows; Japan, Higa; People's Republic of China and Thailand, Xiao; South Korea, Hong; Taiwan, Tso.

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In the Educational Marketplace, Let the Buyer Beware

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Given the current ascendance of the market as a metaphor for reform in almost every aspect of human life, the attempt to recast education as a consumable product instead of a civic process is hardly surprising.

In the United States today, the media assure us, our choices as consumers in a free marketplace will renew our public institutions, liberate us from stifling public bureaucracies, and free us from messy democratic formalities. Given the current ascendance of the market as a metaphor for reform in almost every aspect of human life, the attempt to recast education as a consumable product instead of a civic process is hardly surprising. Nor is it surprising that the widespread misperception that public schools are failing would inevitably be used as a rationale for proposals to end the government educational "monopoly" and open the public school system up to competition. Public education in the late 20th century has been assaulted by a variety of market interventions, one of the more dramatic being Chris Whittle's Channel One. Where government has failed, the market, current fashion tells us, will succeed—and at lower cost.

The idea of an educational market place is hardly new. As early as the mid-1950s, Milton Friedman, a monetarist economics professor, proposed the idea of educational vouchers that parents could use to purchase an education for their children at schools of their choice. Christopher Jencks, a liberal sociologist, proposed a similar plan in the late sixties as a way of enabling parents living in poverty to side step unresponsive educational bureaucracies. However, it has taken a decade of corporate supported reform efforts to create a foundation of mainstream respectability for the idea that market competition in public education is a legitimate public policy option.

The current period of corporate dominance in educational reform was signaled by the publication of *A Nation At Risk* in 1983 (The National Commission, 1983). This report bluntly asserted that the performance of America's schools was mediocre and that as a result the United States was losing what amounted to an international economic war. Although *A Nation At Risk* represented the voice of America's education establishment, it was quickly embraced by business leaders and politicians.

The enthusiasm with which executives and their political allies responded to *A Nation At Risk* might have been predicted. Its underlying logic cast America's enduring economic crisis as primarily a symptom of the failures of public education. Its self-assured, bombastic tone helped deflect public attention away from a careful assessment of the extent to which the economic problems facing the United States were a function of structural problems in the economy, the consequence of corporate strategy, or a result of government policy. It also helped create a political climate in which the pronouncements of business leaders about educational matters assumed preeminent status in the school reform debate.

Following the publication of *A Nation At Risk*, corporate America helped make the economic importance of public education the most potent justification for reform. Schools had to do better, executives argued, or the American economy would continue to crumble. Again and again business leaders told the public that our competitors were beating us because they did a better job of educating their young. Executives tirelessly preached the gospel of school improvement as a matter of national economic survival and, with considerable fanfare, corporate officers mobilized. All over the country businesspeople took leadership roles in collaborating with politicians and educators to reform public education. Business leaders contributed political muscle to the fight to raise teachers' salaries, promote greater professional accountability, institute more stringent high school graduation requirements, and reform the school curriculum. Higher standards for teachers and students, a curriculum more relevant to the world of work, and more accountability for everyone associated with public education were said to be essential if America was to become more competitive in the global marketplace. Throughout the 1980s one corporation after another raced to form "partnerships" with public schools as state and federal policymakers cheered them on.

In the popular press as well as in business and education journals, corporate educational reform efforts were covered extensively. With few exceptions, reports of corporate involvement in education were celebratory and uncritical. The future was painted in rosy colors. Yet, at the close of the 1980s it was apparent that, despite countless high-profile business initiatives, the decay of America's urban schools had not slowed, nor had the overall character of American public education markedly changed.

Whatever else they may have been, the major education reforms promoted by corporations in the 1980s were not, as a rule, advanced as schemes to directly enhance the profits of individual corporations. Even so, many corporate initiatives could not plausibly claim a high public purpose. The wave of corporate criticism of public education during the 1980s, along with a flood of business-backed reform proposals and a relentlessly pro-business political environment, succeeded in opening wide the schoolhouse door for self-serving proposals, programs, and activities promoted by businesses that in a calmer, more balanced climate would probably have been rejected. Although often cloaked in the rhetoric of school improvement and school-business cooperation, these corporate efforts were not attempts to help educate the skilled workers that corporations said they needed in order to compete in a global market. Rather, they were attempts to turn the public schools themselves into centers of corporate profit.

Business efforts to gain access to public schools in order to sell products and establish name recognition as well as propagandize for their points of view have been common for most of this century. In the 1980s, however, a Rubicon of sorts was crossed. Not only did the volume of advertising reach new levels of intrusiveness, marketing efforts were often unashamedly characterized as legitimate contributions to curriculum content, as helpful teaching aids, and as good ways of promoting school-business cooperation. The decade of the 1980s was not a time to say no to business, and educators were desperate to prove their willingness to "cooperate." As the 1980s

(C)orporate America helped make the economic importance of public education the most potent justification for reform.

wore on, it became more common and more acceptable for public schools to be treated as cash cows to pump up a company's bottom line. The original economic justification for corporate leadership in educational reform was turned on its head by shifting the emphasis from the contributions good schools make to everyone's economic well-being to the use of public schools to increase the profits of a particular business or industry. This shift helped pave the way the commercialized reforms of the 1990s.

Channel One uses the lure of its technology as an incentive to entice cash-poor schools to deliver students to advertisers.

When Chris Whittle launched Channel One in the late 1980s, he demonstrated how relatively simple technologies such as satellite broadcasting and television monitors can be used to establish a connection between instructional innovation and corporate profit. Channel One uses the lure of its technology as an incentive to entice cash-poor schools to deliver students to advertisers. In return for the free use of television monitors, participating schools must guarantee that their students watch a twelve-minute "news/current events" broadcast that includes two minutes of commercials. Although the number of schools that actually use Channel One is difficult to pin down, Unplug, a student-led organization which opposes the broadcast, estimates that it is currently being shown in 8,500 American schools.

Serious as it is, advertising in schools was a familiar and much-debated problem long before the advent of Channel One. The real breakthrough achieved by the Channel One program was not that it contained advertising. Channel One's innovation was forging an explicit link between educational innovation and private profit. Although the amount of in-school advertising had been increasing throughout the 1980s, there remained some pretense that advertising to children in their schools and classrooms was an unacceptable marketing intrusion into an academic environment whose purposes should not be determined by commercial interests. After Channel One, advertising in schools was not only thinkable—it was touted as necessary to help fund and improve public education.

According to the *Tennessee Education Association (TEA) News*, Chris Whittle told the educators assembled at the 1988 TEA convention that "at least a fourth of the nation's advertising budget, as much as $100 billion annually, could be diverted into 'advertising in our classrooms.'" He went on to predict that "if educators send a signal to the business community that they will accept advertising sponsorship of teaching tools. . . . American teachers will soon have the best equipped, most modern classrooms in the world" ("Enlightened Commercialism," 1988).

Whittle's early successes in signing schools up for Channel One seemed to justify its creator's bold predictions. To many people, Chris Whittle had earned the title "educational visionary." Whittle quickly followed his successful introduction of Channel One with the announcement in 1991 that he had formed Whittle Schools and Laboratories to research and develop plans for a nation-wide system of for-profit schools. The Edison Project was born.

Despite outward appearances, all was not well in the Whittle empire. Channel One was the firm's only moneymaking operation. Even the luster of the Edison Project, whose future seemed secure when Whittle's friend and associate Lamar Alexander was Secretary of Education, faded with George Bush's defeat in 1992. By 1993, not even the most ardent Whittle fans could foresee the Edison Project turning into a profitable venture anytime soon. All of this increased Whittle's dependence on Channel One as a source of cash and credit.

Unfortunately for Whittle, Channel One had hit an earning plateau just as his need for capital to keep a variety of unprofitable ventures afloat was increasing dramatically. With his need for cash approaching crisis proportions, Whittle unleashed a furious lobbying campaign in New York in 1994.

New York State was Channel One's biggest potential growth market. However, the New York Board of Regents had twice driven a stake through its heart. In February of 1990, despite intense lobbying by Whittle (who had the editorial support of the *New York Times*), the regents adopted a regulation banning public schools from entering into any contract that compelled students to view televised commercials. Accepting New York Education Commissioner Thomas Sobol's argument—"We must provide safe havens for children free of commercial taint"—the regents reaffirmed their ban in June 1993.

Anticipating that his creation would die at the hands of the regents, Whittle had already devised a legislative strategy to resuscitate it. On February 16, 1993, the chair of the New York State Assembly Education Committee, Angelo Del Toro, introduced Assembly Bill 3688-A. An identical bill (S.B. 3671-A) was introduced in the Senate by Education Committee chair Charles D. Cook on March 17, 1993. The Del Toro-Cook bills had nothing to do with educational concerns. They were about advertising dollars and the political influence those dollars can buy. This striking example of special interest legislation was intended to overrule the regent's ban and grant local school boards the authority to decide whether or not to allow "supplementary electronic instructional materials containing commercial advertising" in their schools. If the Del Toro-Cook bills had become law, the only supplementary electronic instructional materials *not* subject to regents approval would have been those containing advertising.

In 1993, the Del Toro-Cook bills died in committee. But in New York, bills not voted on in the first year of a two-year legislative session are not finally dead until the end of the legislative session on the second year. Whittle had shown himself willing to spend big money to try and keep Channel One alive in the past. *The Wall Street Journal* reported that he spent more than $1 million lobbying the California legislature in the early 1990s to defeat legislation that would have banned Channel One (Reilly and Alexander, 1991). During that fight, Whittle retained lobbyists with connections on both sides of the aisle. To press the case for Channel One, he hired both Steven A. Merksamer, a chief of staff to former California Republican Governor George Deukmejian, and Bobbie Metzger, a former aide to California Assembly Speaker Willie Brown and one of Sacramento's most effective political consultants. State Senator Art Torres told the *Los Angeles Times* that he had never seen "this magnitude of lobbying on an education issue" (Trombley, 1991).

Whittle seemed determined to try and repeat his winning formula in New York. He hired the New York law firm of Bower & Gardner, one of the largest and most powerful lobbying operations in the state, to plead his case with the legislature. One of the Bower & Gardner senior partners is none other than Stanley Fink, the longtime Democratic speaker of the assembly who retired after the 1990 legislative session.

According to J. Robert Dagget, executive assistant to New York Commissioner of Education Sobol, the two people who did most of the arm-twisting in Albany are Kenneth Shapiro, former chief counsel to Fink when he was speaker, and Peter Piscitelli, a longtime lobbyist who formerly represented the City of New York and the New York School Board, among other clients. Each of these men is well connected to both Republicans and Democrats, and each is considered among the most effective and influential lobbyists in Albany. According to Daggett, it was necessary for Whittle to plunk down a $75,000 retainer just to start the Bower & Gardner meter running. The full amount that Whittle spent to secure their services won't be known until early 1995, when the legally required lobbyist disclosure statements are available for public scrutiny.

Whittle retained lobbyists with connections on both sides of the aisle.

Whatever the amount Whittle may have spent lobbying to overturn the regents' ban in New York, it was not enough to buy success. The Del Toro-Cook bill died in committee for the second year in a row, in part the victim of the convoluted politics of the 1994 New York State budget deliberations and in part the result of the aggressive organizing and lobbying efforts of a coalition of educational, community, and labor groups.

Since the unsuccessful effort to gain entrance to the New York market, the Whittle empire has virtually collapsed. Chris Whittle's partners have forced him to resign as CEO of Whittle Communications, and Channel One has been sold to K-III, a company controlled by Kohlberg Krause Robert, a leverage buy-out firm. For the moment, *(F)aith that competition will somehow permit educational consumers to do what sovereign citizens can not is nonsense.*

Whittle remains chairman of Whittle Schools and Laboratories; however, there are widespread reports of friction between Whittle and Edison CEO Benno Schmidt, not to mention a looming capital shortfall that threatens to turn off the lights at Edison before it has taken over the management of a single school.

Chris Whittle's days as an "educational visionary" seem over. Nevertheless, the commercializing tide is still running strong and the pressure to "privatize" public schools and provide tax dollars to issue vouchers to educational "consumers" is likely to continue to build. And none of this is likely to produce much of value for the majority of the American people and their children. To be sure, educational policy and practice do need serious rethinking. However, faith that competition will somehow permit educational consumers to do what sovereign citizens can not is nonsense. The reduction of inalienable rights to market choices hardly seems a wise idea. Nor do a few crabbed ideas about a free market in which each person tries to fend for him- or herself seem like worthy replacements for an expansive vision of public education as a democratic, civic activity intended to help secure the common good through community participation and shared responsibility. These roles, after all, are at the heart of the democratic ideal.

What our children need is attention, goodwill, just treatment, and the example of citizens working together to create humane and effective public schools. Glib slogans and the mandatory viewing of commercials and educational "products" offer no substitute.

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A New Enforcement Approach for a New Era in FTC Consumer Protection Regulation

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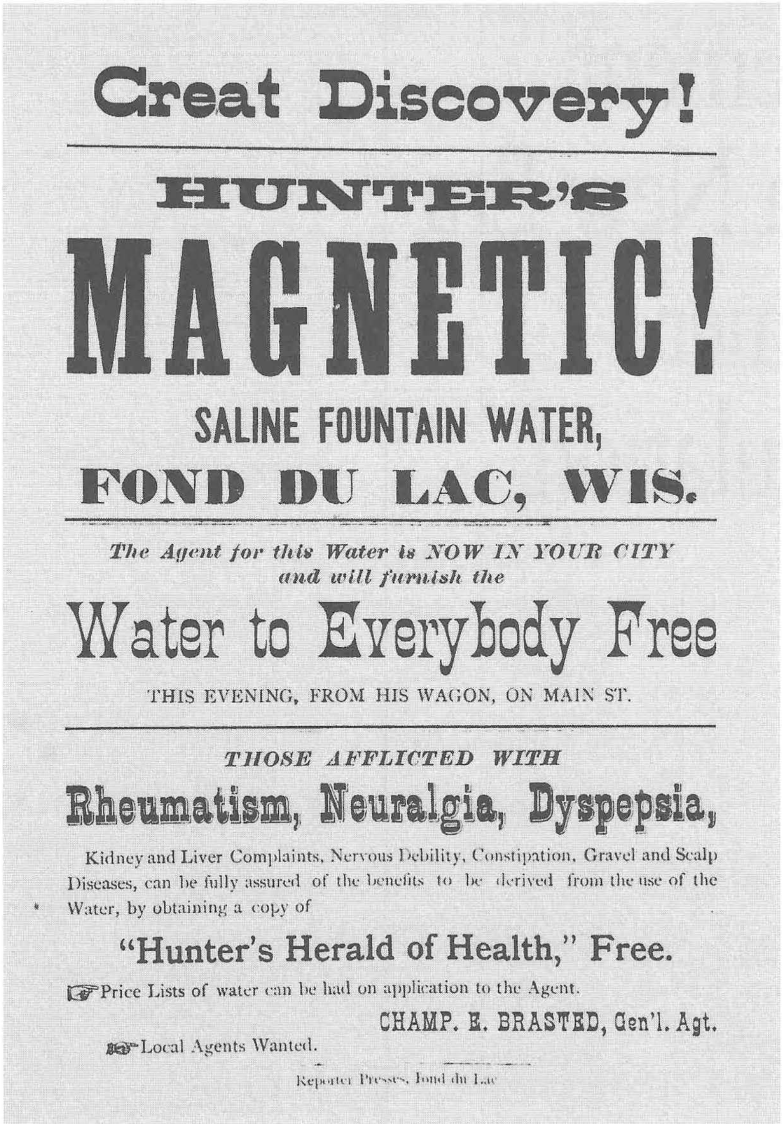
The FTC is about to enter a new era. The Senate has just confirmed the Clinton administration's first appointee to the agency, and it looks like Bob Pitofsky will soon become Chairman of the FTC. In less than a year, the White House will be making a third appointment to the five-member Commission.

It's a good time, then, to take a fresh look at the FTC's responsibilities in the area of advertising regulation. In the past, much of the discussion has concerned what steps the FTC should take in particular areas such as advertising for tobacco, alcoholic beverages, or foods. Now, in keeping with the new era that the agency is to enter, it is also time to discuss how the FTC goes about regulating unfair and deceptive advertising. From the outset, it should be noted that many of the following remarks also apply to how the FTC should regulate trade practices beyond the realm of advertising.

PAST ENFORCEMENT APPROACHES HAVE NOT BEEN ADEQUATE

Until the mid-1970s, the FTC relied primarily on a case-by-case approach to stopping unfair and deceptive ads. This approach has historically put the FTC on an endless treadmill. The agency has had to stop ads by bringing actions against individual companies one at a time, even though problems were occurring throughout the industry. In recognition of the shortcomings of this approach, Congress enacted the Magnuson-Moss amendments, which gave the agency new authority to



COURTESY OF THE STATE HISTORICAL SOCIETY OF WISCONSIN

Broadside advertisement for Hunter's Magnetic Saline Fountain Water, Fond du Lac, Wisconsin

regulate ads and other trade practices on an industry-wide basis. The new authority was supposed to empower the FTC to root out unfair and deceptive practices by issuing trade regulation rules. But to regulate an industry on an across-the-board basis, the agency was required to engage in a formal rulemaking process. This cumbersome scheme requires the agency to host extensive public hearings that can stretch on for years. FTC staff view it as an albatross that restrains agency action. Coupled with controversy over several of the Commission's specific initiatives, Magnuson-Moss rulemaking has fallen into disfavor.

The Reagan-Bush administration's answer to this quagmire was a return to the case-by-case approach. While the Commission has stridently defended this enforcement approach in terms of the number of cases brought, the reality is that, overall, the approach has not served consumers well—deceptive ads continue to abound. Furthermore, in recent years the FTC has taken notoriously long periods of time to complete action in particular cases. For example, a routine 1985 consumer group complaint over deceptive advertising involving Kraft Cheese was not finally resolved until 1992—seven years later! In fact, the case-by-case approach has not served the business community well either. Case-by-case enforcement was intended to ease regulatory burdens on business but, in reality, the approach has backfired. FTC staff have been forced to use inefficient enforcement methods that fail to provide advertisers with sufficient guidance and that keep honest companies guessing as to what the rules are.

Primary reliance on a case-by-case enforcement approach appears especially ill-suited for the FTC given the present structure of the agency. As studies by Professor Dee Pridgen (Pridgen, 1992) and others show, state agencies, headed by a single attorney general who typically delegates authority to a consumer division chief, resolve cases much more quickly than the FTC.[1] In contrast, the FTC is controlled by five appointed commissioners of both political parties. Not surprisingly, the agency takes considerably longer to act than state consumer agencies headed by a single administrator.

OPTIONS FOR NEW ENFORCEMENT APPROACHES

Given the inherent limits of both the case-by-case approach and Magnuson-Moss rulemaking, new enforcement approaches are clearly needed. Ideally, from the point of view of consumer groups, Congress would give the FTC new authority to issue industry-wide rules using simple notice-and-comment rulemaking procedures. With bipartisan support, Congress has taken this approach in areas such as "900" telephone number regulation, and it has recently enacted legislation aimed a curbing abusive telemarketing practices. The FTC should urge Congress to give the agency notice-and-comment rulemaking authority in additional areas such as food advertising, where industry-wide action is especially necessary. This process, however, may take several years.

Alternatively, Congress could streamline the FTC and remold the agency after the model of a state attorney general's office, which has been shown to operate more efficiently than the five-member FTC. At the moment, however, broad legislative reform of this nature is not a political reality.

The new members of the Commission can take important steps within the confines of the agency's current statutory mandate. Specifically, the Commission should adopt a new enforcement strategy based on the issuance of voluntary guidelines backed up by a trifold front of vigorous federal and state enforcement actions plus self-regulatory activities.

GUIDELINES

The FTC should work together with industry, state attorneys general, and consumer groups to develop industry-wide guidelines that clearly identify unfair and deceptive trade practices. By developing guidelines, the FTC could minimize the need for case-by-case adjudication by letting the business community know what the rules are in advance and thus stop many problems before they occur. This approach avoids the need for lengthy administrative proceedings and provides responsible companies with the guidance they need to avoid trouble. Guidelines also make it easier for companies to plan long-term marketing efforts and are in line with the Clinton administration's interest in easing burdens on industry while maintaining standards that protect the public. The FTC has recently experimented with this approach by issuing guidelines for environmental claims in advertising. By broadening this experiment and issuing guidelines for numerous other areas, the agency could help ensure a level, competitive playing field, increase its efficiency, and help responsible members of the business community stay out of trouble.

SHARING THE ENFORCEMENT BURDEN

Most members of an industry will comply with guidelines once they are issued. Thus, resources devoted to develop such guidelines will reap immediate rewards in terms of deterrence and compliance. However, while most companies will comply with FTC guidelines, there will always be some firms that risk enforcement action. In light of cutbacks that the FTC has suffered from current fiscal limits, the agency will need assistance from state and local consumer protection officials, as well as self-regulatory authorities, to be effective in enforcing the agency's guidelines. To obtain this assistance, the FTC will have to coordinate its enforcement activities with others in a systematic manner. This is already happening in areas such as telemarketing fraud. Currently, however, the FTC has no strategic plan for involving state and local officials in its overall enforcement activities.

Responsibilities for enforcement should be systematically assigned to federal, state, local, and self-regulatory bodies, depending on each agency's authority, expertise, and resources. Routine violations of guidelines prohibiting false or deceptive advertising, for example, could be referred to self-regulatory authorities such as the National Advertising Division of the Council of Better Business Bureaus (NAD). The NAD has operated a voluntary arbitration service that accepts complaints over false or unsubstantiated advertising from both aggrieved competitors and consumers. With more than two decades of experience, the NAD is well-equipped to handle such matters. As part of a "New Covenant"[2] between advertisers and the federal government, the advertising industry may wish to provide the NAD with greater resources in return for greater FTC delegation of authority to this self-regulatory body.

The FTC should work together with industry, state attorneys general, and consumer groups to develop industry-wide guidelines that clearly identify unfair and deceptive trade practices.

Better coordination between the FTC and NAD is essential. For example, the FTC recently issued a decision prohibiting deceptive advertising by the Stouffer Food Corporation, which makes Lean Cuisine. The company had advertised that Lean Cuisine frozen entrees had "less than a gram of sodium," thereby implying that the product was low in sodium. Nutritionists, however, measure the sodium content of foods in milligrams, not grams, and most Lean Cuisine products contain more than 900 milligrams of sodium, an amount considered high by most health officials.

As noted in the FTC opinion preventing Stouffer from engaging in such advertising, the company itself had filed a complaint with the NAD over similar claims concerning the sodium content of a frozen food produced by a competitor. At that time, the FTC had not announced any enforcement policy regarding nutrition claims in food advertising. When NAD failed to act on Stouffer's complaint, the company began using the same misleading technique in its own ads. The FTC then filed an individual case against Stouffer.[3] Had the FTC issued guidelines in the area, NAD may have been more likely to act in the first instance. The FTC enforcement action would then have been unnecessary, and a level, competitive playing field would have been maintained without the years of litigation that occurred in this matter.

More complicated violations of FTC guidelines prohibiting unfair or deceptive advertising should be handled by state attorneys general or the FTC itself. The Commission should not assume that complex cases involving national advertising should automatically be handled at the federal level. State attorneys general, both acting alone and together in multi-state task forces, have demonstrated that they can stop unfair and deceptive trade practices that are occurring nationally more quickly than the FTC. Accordingly, the division of responsibility for particular enforcement actions should depend on which agency possesses the necessary legal authority (e.g., criminal authority, unfairness jurisdiction, etc.), the relevant expertise, and the best resources for quick action.

State attorneys general, both acting alone and together in multi-state task forces, have demonstrated that they can stop unfair and deceptive trade practices....

FACILITATING JOINT ENFORCEMENT

To facilitate joint enforcement, the FTC should host a national consumer protection conference on a semi-annual basis. This conference should be scheduled to coincide with semi-annual conferences already held by the National Association of Attorneys General and conferences held by the National Association of Consumer Agency Administrators. The NAD and other self-regulatory authorities should be invited to attend all portions of such conferences that are open to the public. At such conferences, participating parties would identify priorities and indicate areas in which various agencies are willing to assume enforcement responsibility.

One of the greatest obstacles to such coordination is the fact that the FTC still follows a maverick definition of a deceptive trade practice, first adopted by the Reagan Administration in 1983, which was designed to reduce the scope of FTC activity. Traditionally, the FTC had defined a deceptive trade practice as one that had a "tendency or capacity to deceive consumers." In 1983, the agency eschewed more than 40 years of precedent and announced that it would now consider deceptive only practices that were "likely to deceive reasonable consumers to their detriment."

This narrow definition of a deceptive trade practice, which has been criticized by the House Committee on Energy and Commerce, makes it difficult for the FTC to coordinate with state and local officials in matters that do not involve outright fraud. In discussing this matter, it must be remembered that the language of the FTC Act was never changed by Congress—only the way it was interpreted was changed by the Reagan-Bush Commission.

Most states have ignored the FTC's interpretation of what constitutes "deception." States that are not bound by state law to adhere to the FTC's revisionist views have largely ignored what they consider a misguided reinterpretation of longstanding law.[4] Some states, such as Missouri, have amended their laws to delete an exemption that had existed for advertisements which complied with statutes enforced by the FTC.

Having two legal definitions of a deceptive trade practice, one at the federal level, and another at the state and local level, hurts consumers and creates turmoil for the business community. Businesses want one uniform national standard, and consumers deserve the same degree of protection from the federal government as they now receive under state law. This problem should be rectified as soon as possible so that federal, state, and local consumer officials can systematically coordinate their activities and develop a national strategic consumer protection enforcement plan.

CONCLUSION

By issuing guidelines and creating a strategic enforcement plan with state, local, and self-regulatory bodies, the FTC will perform its national leadership role more effectively and fulfill its statutory mandate to protect consumers from unfair and deceptive practices more completely. These steps are no more than "good government" and should appeal to both the business and consumer communities.

NOTES

This article is an extended version of a paper presented at the 2nd Annual Consumer Law Conference, University of Wisconsin-Madison, 8 October, 1994.

1. The Center for Science in the Public Interest commissioned a study comparing FTC and state advertising enforcement actions during 1991 and 1992. The study, conducted by Professor Dee Pridgen, examined eight national advertising cases resolved by the FTC during the period surveyed in which one or more states or local agencies had also pursued legal action against the same advertiser. In seven of the eight cases, the state or local consumer protection agency was able to obtain a final settlement from the same advertiser more quickly than the FTC. Also, in six of the eight cases, the state or local government agency obtained a larger monetary penalty than the FTC. Indeed, in five of the cases, the FTC obtained no monetary penalty at all.

2. President Clinton has often referred to the "New Covenant" as a principle by which government provides opportunities to both individuals and businesses in exchange for their assuming greater responsibility to act in the public interest.

3. In the matter of *Stouffer Foods Corporation*, Docket No. 9250, Final Order, October 4, 1994.

4. See *Ward v. Fireman's Fund Insurance Companies*, 152 Ariz. 211, 731 P.2d 106 (1986); *People v. All American Aluminum & Construction* Co., 121 Ill. App. 3d 27, 524 N.E. 2d 1067 (1988).

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The Law and Advertising Claims

(Preston's) central claim is that similar products being sold under different brands creates incentives for marketers to head down "the slippery slope" toward falsity.

Ivan L. Preston (1994), *The Tangled Web They Weave: Truth, Falsity, and Advertisers.* Madison, Wisconsin: The University of Wisconsin Press, $22.50.

Ivan Preston's new book is an interesting and often humorous look at the various ways advertising can create misleading or deceptive messages. The effectiveness of public and private regulation of advertising is discussed at length, with a special focus on areas where consumer protection laws have allegedly failed. Preston distinguishes between various types of falsities, including literally false claims, claims that omit relevant and important facts (selected facts), claims that focus on product attributes that have a minimal relationship to the true quality of the product (minimal facts), and claims that have nothing to do with the product under promotion (non-fact claims). Preston discusses at length how well regulation deals with each type of falsity. His central claim is that similar products being sold under different brands creates incentives for marketers to head down "the slippery slope" toward falsity. Believing that most brands in a product category are so similar that firms have incentives to promote deceptively small differences (minimal facts) as significant or to use claims that have no relevance to the brand itself (non-facts), Preston calls for significantly more regulation of advertising, especially with regard to these two kinds of claims.

Preston's book raises interesting issues relating to the regulation of advertising. First, is there sufficient punishment for firms that engage in false and misleading advertising, so that other firms are deterred from using similar practices? Second, does the branding of products create strong incentives to engage in false and misleading advertising?

I. IS THERE SUFFICIENT PUNISHMENT FOR FIRMS THAT ENGAGE IN FALSE AND/OR MISLEADING ADVERTISING?

Preston's analysis of advertising regulation suggests that certain types of advertising claims (minimal fact and non-fact claims) are not the focus of regulatory action and are thus not sufficiently deterred. However, his assessment of law enforcement in areas where regulatory agencies have focused their activity is much more favorable. Preston summarizes this point by claiming that "the cases I have described show advertisers at their worst and the law functioning at its best. We know from these events that the regulators display a high resolve toward eliminating deceptiveness as they know it. Now we need to get the regulators to identify the rest of the falsity that's out there and turn their energy toward it" (Preston, 1994, p. 172).

Preston's belief that the law functions well in eliminating certain types of false and misleading advertising is not shared by many critics of the FTC, who question specifically the adequacy of the FTC's case-by-case approach. This questioning is especially important since at first glance the types of remedies the FTC seeks suggest that cease and desist orders give firms a "free bite of the apple" and are not ample punishment for firms found in violation of the law. Yet, the limit on the FTC's abilities to impose monetary penalties does not imply a lack of deterrence because the enforcement of advertising regulations can impose other significant costs on firms. In addition to putting restrictions on current and future advertising, a firm's reputation can be damaged by involvement with any of the institutions that regulate advertising. FTC and Lanham Act (private advertising litigation) cases receive regular coverage in the *Wall Street Journal* and other newspapers. Such publicity may raise consumer doubts concerning the truthfulness of the ads in question and perhaps all of the advertising of that firm. In addition, potential investors in the firm may bid less for shares because of concern about the management of the firm. How real or big are these effects? Consider some of the cases Preston discusses in his book.

Early in the book, Preston discusses the Sears dishwashing case. Sears claimed that its Kenmore dishwasher could completely clean dishes without prior rinsing or scraping. The FTC, for a variety of reasons, found these advertisements to be completely false, and Preston discusses these reasons in detail. Stock market data show that when the Federal Trade Commission's final order was made public, Sears suffered an abnormal drop in its share price of almost four percent. Given the market value of Sears' shares, this "punishment" is more than any conceivable monetary penalty. This case is representative of the experience of firms targeted by the FTC. Examination of over 120 FTC actions from the 1960s to 1980s indicates that, on average, firms suffered an abnormal loss in share price following the announcement of a complaint (1.2%), following an unfavorable administrative law judge decision (1.8%), and following a FTC final order (1.9%) (see Mathios and Plummer, 1989). Consequently, it is likely that there is a significant deterrence effect for the types of cases pursued by the FTC. Of course, we cannot determine if this constitutes "sufficient" deterrence, but it does suggest that the use of monetary penalties are likely to be dwarfed by these capital market effects.

The deterrence potential of the regulatory institutions leads Preston to conclude that the focus of advertising should be expanded to deal with certain types of advertising that are typically not the focus of FTC actions. The areas of inaction include the regulation of selected fact claims, minimal fact claims, and "non-fact" claims. Selected fact cases are those where the firm only describes a subset of the important relevant facts about a product, with the potential to create a misleading overall impression of the product. Minimal fact cases are those advertisements that in Preston's view overemphasize small and largely irrelevant differences among products. Finally, non-fact cases are those where the claims "are not facts about the advertised brand, although they are intended to be perceived by consumers as though they are" (Preston, 1994, p. 88). Another term for these cases might be "image advertising." Preston believes that in markets where there are several brands of the same type of product, firms face increased incentives to focus on selected facts, minimal differences, and non-fact claims because there are no "real" differences among the products.

Preston's view discounts the likelihood that products not offering real value to the consumer are less liable to be repurchased.

II. DOES BRANDING OF PRODUCTS CREATE STRONG INCENTIVES TO ENGAGE IN FALSE AND MISLEADING ADVERTISING?

The view that a variety of brands for similar products creates an incentive to focus on minimal facts is illustrated by Preston's bicycle example. "My kids' bikes had ten speeds but they never used them all. . . . BUT the typical consumer has no real use or need for a twenty-one speed bike" (Preston, 1994, p. 67). Preston claims that sellers create these differences to differentiate their products even though such product variety has almost no effect on the performance of the product. Criticism of this kind is essentially a condemnation of how monopolistic competitors compete.
Opponents of this type of advertising believe that market economies serve up wastefully high levels of product variety. Fewer brands

and varieties would lead to lower costs (economies of scale), and consumers would be better off because there is little true difference between the products. While the ultimate consumer welfare consequences of branding and monopolistic competition are difficult to ascertain and are well beyond the scope of this essay, I will discuss here some of the potential benefits of this type of advertising—benefits that are not discussed or seriously considered by Preston.

(S)mall differences across many products may add up to have a large impact on performance. A few more speeds on the bicycle, a slightly more efficient gear shifter, a slighter thinner tire, may have a dramatic impact on my plan to ride around Cayuga Lake.

A. Advertising, Signalling, and Performance Bonds

Preston's view discounts the likelihood that products not offering real value to the consumer are less liable to be repurchased. If consumers decline to repurchase products that do not offer real value, then the negative aspects of selected, minimal and non-fact claims are less clear. As long as the consumer can evaluate these claims (assuming they were not skeptical of the claims in the first place) after purchase, repeat purchases will be affected. Those firms whose products are superior in achieving repeat purchases will find advertising to be more profitable. If this is true, advertising has the potential to serve as a signal of high quality, since firms that can profitably maintain large advertising budgets are those that must be stayers in the market. Thus, advertising has the potential to be of value to consumers (see Nelson, 1974).

Advertising can also serve as a way for a firm to "post a performance bond." Suppose a firm agreed to "blow up its factory" if its product were found to be below the quality it claimed. If this contract were enforceable, most consumers would believe a claim of high quality, since costs to the firm for violating the consumer trust would be high. Advertising expenditures on brand names can serve the same function, since the firm loses the value of that investment if it cheats on quality (see Klein and Leffler, 1981).

B. Branding and the Internalization of Advertising Benefits

There are concerns with other types of advertising related to brand-name competition. Kellogg's All-Bran advertisements focused on the link between high fiber diets and lower cancer rates with claims that its cereal contained high levels of fiber. One might interpret such an advertisement as a claim that Kellogg's cereal is superior to other brands' cereals because it contains fiber, despite the fact that many cereals of various brands have fiber. Preston argues that there may be deception in these types of claims.

The economics of information predicts that, because information is considered a public good, there will be, in many circumstances, an undersupply of information dissemination. In other words, the benefits of a firm disclosing the link between fiber and cancer would accrue to all firms that sell a high fiber cereal, thereby deterring a single firm from investing in the dissemination of the information. Associating a general fact to a particular brand helps overcome this issue. Research on the original Kellogg's advertisements shows that they experienced larger gains than other cereal manufacturers (Levy and Stokes, 1987). Consequently, if the regulatory agencies adopted policies that would deter brand-name advertising of specific features shared by many brands in a product category, the flow of information to consumers might diminish. Such a prohibition might, in fact, lead to more of the "image" advertising discussed above.

C. Branding, Minimal Facts, and Competition

The focus of advertising on small differences in product attributes is another type of advertising Preston believes to be on the "slippery slope" toward falsity. Since these types of claims were the subject of much debate in the Food and Drug Administration's (FDA) implementation of the Nutrition Labeling and Education Act (NLEA), I will use this example to analyze some of the pros and cons of regulating these claims. The FDA, in an attempt to eliminate trivial or irrelevant comparisons, proposed to limit what products may be compared and required that products achieve minimum absolute and percentage reductions before qualifying to make particular pre-approved claims. The proposed regulations would certainly eliminate minimal comparisons across products. However, because these regulations would also eliminate objective comparisons that could help consumers select more nutritious food, the proposals could be counterproductive.

Consider a consumer who intends to eat a sandwich of whole wheat bread, lean ham, cheddar cheese, and a mayonnaise–type salad dressing for lunch. This sandwich would contain 19.6 grams of fat, according to USDA nutrition data. Substituting a sandwich of reduced–calorie whole wheat bread, skinless white turkey, swiss cheese, and reduced–calorie salad dressing would save the consumer 6 grams of fat, or almost 8 percent of the Daily Recommended Value for fat. Yet none of the individual substitutions could make a fat comparison claim because no individual item would meet the minimum thresholds set by FDA. In other words, small differences across many products may add up to have a large impact on performance. A few more speeds on the bicycle, a slightly more efficient gear shifter, a slighter thinner tire, may have a dramatic impact on my plan to ride around Cayuga Lake. Based on Preston's analysis, each of these claims would likely fall into a "minimum fact" claim and should be deterred. Moreover, regulatory proposals that restrict these types of claims may discourage producers from making small but steady improvements in their products, the accumulation of which can have substantial effects. Notice that the production of bicycles did not evolve from one speed to twenty-one speeds. Instead, the progression was from 1 speed to 3 speeds to 5 speeds to 10 speeds, etc. If regulation had determined that the difference between 3 speeds and 5 speeds was a minimal fact and therefore deceptive, it is possible we would have never seen the 10 or 21 speeds that are available today.

III. CONCLUSION

Preston raises many interesting issues in his book on deception in advertising. Brand-level competition may well lead to questionable advertising practices. The regulation of this advertising, however, must recognize the important roles that brand competition plays in the steady development of products, and in the flow of information to consumers. Eliminating the claims that Preston calls into question may not only deter misleading claims but stifle the flow of useful information to consumers. What would be the net effect? This is an empirical question.

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Consumer Law Cases of Note From Around the Country

FAIR CREDIT REPORTING ACT

***Wiggins v. Equifax Services*, 848 F. Supp. 213 (D.D.C. 1993)**

On January 2, 1990, District Cablevision Incorporated (DCI) requested that the Cleveland Equicenter of Equifax Services, Inc. (Equifax), perform a criminal records check on DCI's then employee James Russell Wiggins. On January 3, 1990, the Cleveland office contacted the Equifax regional office in McLean, Virginia, requesting the records check. One of Equifax's employees called the Superior Court of the District of Columbia and asked if Mr. Wiggins had a criminal record. The Equifax employee was informed by a clerk of the court that a James R. Wiggins had a 1989 drug-related conviction. This information was relayed back through the standard Equifax channels until on January 10, 1990, when Equifax relayed the information to DCI. On January 11, 1990, DCI informed Equifax that Mr. Wiggins was disputing Equifax's report. On January 16, 1990, the Virginia office obtained a ‚hard copy‚ of the criminal record, which showed that the individual convicted of the drug offense was a James Ray Wiggins. On or about January 17, the Virginia office contacted the Cleveland office and informed it of the error. While the Virginia office reinvestigated whether Mr. Wiggins had a criminal record, the Cleveland office sent a copy of its initial report to DCI showing that Mr. Wiggins had a drug conviction. Mr. Wiggins' employment was terminated by DCI on January 18th. On January 19th, Mr. Wiggins presented himself at the Virginia office and requested disclosure of all information in his file. Due to some confusion (his file was in the desk of an absent supervisor), Mr. Wiggins received a copy of Equifax's original report (showing the conviction). On either January 19 or January 22, the Virginia office completed its reinvestigation and on January 23 made the Cleveland office aware that Mr.

Wiggins had no criminal record in Washington D.C..

Mr. and Mrs. Wiggins sued Equifax and an employee of that company, claiming, *inter alia* willful violation of the Fair Credit Reporting Act (FCRA) and violation of civil rights. The plaintiffs claimed that Equifax disseminated a report to Mr. Wiggins' then-employer, incorrectly stating that Mr. Wiggins had a felony conviction for possession of cocaine. Both parties moved for summary judgment.

The court denied summary judgment on most counts on the grounds that there were disputed issues of fact regarding the existence and execution of the procedures employed by Equifax in this case. The court felt that the evaluation of the adequacy of such procedures was best left to the trier of fact because such evaluation involves weighing the potential harm from inaccuracy against the burden of safeguarding against such inaccuracy. The court also held that the FCRA does not hold consumer reporting agencies strictly liable for the dissemination of inaccurate information.

However, the court granted summary judgment to the defendant on the plaintiffs' civil rights claims. There was no evidence of state action, a necessary element of §1983 claims. Moreover, the §1981 claim failed because there was no evidence from which a jury could find that the defendant intentionally discriminated against or was aware of plaintiffs' race.

The court also granted summary judgment to the defendant on the plaintiffs' claims for loss of society, companionship, consortium, and domestic services. The court held that Mrs. Wiggins was not entitled to relief because a lawful marital relationship must exist at the time of the tortious conduct, and Mrs. Wiggins was married to a third party at that time. In addition, the court held that only parties to whom the credit report relates have standing to bring an action under the FCRA.

Hodge v. Texaco, Inc., 975 F.2d 1093 (5th Cir. 1992)

The plaintiff, an oil-field pumper employed by Texaco, submitted to an unannounced drug test. After failing to track a moving point of light with his eyes, the plaintiff was required to provide the company conducting the random drug tests, Mobile Health Services (MHS), with a urine sample. MHS sent the urine sample to Laboratory Specialists, Inc. (LSI), a laboratory under contract to Texaco. LSI informed Texaco that the plaintiff's sample showed evidence of marijuana use. Texaco immediately suspended the plaintiff and began termination proceedings. Upon request from the plaintiff's family, Texaco instructed LSI to send a portion of the urine sample to Dr. Forrest Tennant, a drug rehabilitation counselor who had helped set up Texaco's drug policy. Dr. Tennant in turn sent the sample to American Biotest Laboratory, Inc. (ABL), which confirmed the results of the first test. The plaintiff was subsequently terminated for violation of Texaco's drug-abuse policy.

Plaintiff brought an action under the Fair Credit Reporting Act (FCRA) against Texaco, the laboratories which had conducted drug tests on his urine, and Dr. Tenant. The complaint alleged that the laboratories were consumer reporting agencies and had violated the FCRA by failing to use reasonable procedures to guarantee maximum possible accuracy in their "consumer reports." The complaint also alleged that Texaco violated the FCRA by failing to disclose the name and addresses of the drug-testing laboratories when it terminated the plaintiff. The district court granted the defendant's motion for summary judgment, holding that the FCRA does not apply to urinalysis reports.

On appeal, the circuit court held that the plain language of the FCRA does not categorically exclude drug-test reports from coverage under the Act, even though such reports seem "far from the original purposes behind the Act." However, the report from LSI to Texaco fell under §1681a(d)(A) of the Act, which excludes any report containing information solely as to ‚transactions or experiences‚ between the consumer and the person making the report (e.g., a retailing firm's disclosure of its own ledger experience with a customer or a bank's report of its own experience with its customers). Thus, as long as the report is not based on information from an outside source, but on ‚the reporter's own first-hand investigations of the subject, the report will fall within the "transactions and experiences" exception. The court concluded that the laboratory's experience with Hodge was "first-hand" because it did not rely on any information from any source but Hodge in preparing its urinalysis report.

The claim against the drug rehabilitation counselor failed because the plaintiff did not establish that the counselor was a consumer reporting agency under the meaning of the Act, since there was no evidence that he regularly engaged in the collection of information on consumers for the purpose of furnishing consumer reports.

Stevenson v. TRW Inc., 987 F.2d 288 (5th Cir. 1993)

The plaintiff, a 78-year-old real estate and securities investor, began receiving telephone calls from collection agencies regarding arrearages on accounts that were not his in late 1988 or early 1989. The plaintiff contacted a credit reporting agency, Chilton's, regarding this matter. When Chilton's was purchased by TRW, the plaintiff began calling the TRW office in Irving, Texas. Upon his request, the plaintiff received a credit report from TRW, dated September 6, 1989, which contained approximately 16 errors. Among the errors were accounts belonging to another John Stevenson living in different city and the plaintiff's estranged son, John Stevenson, Jr. Instead of following the dispute procedures printed on the reverse of the credit report, the plaintiff called TRW and followed up his call with a letter to the President and CEO of TRW, requesting that the appropriate corrections be made to his report. This letter arrived at TRW's Consumer Relations Department on or about October 20, 1989, and on November 1, 1989, TRW began its investigation. The plaintiff understood that the process would take approximately 3 to 6 weeks. As a result of the initial investigation several of the disputed accounts were removed from the plaintiff's report. Others were not deleted, either because the TRW subscribers questioned insisted that the information was accurate or because the reports from the TRW subscribers contained what TRW calls "positive information." It also became apparent that the plaintiff's estranged son had fraudulently obtained some of the disputed accounts by giving the plaintiff's social security number. A warning was added to the plaintiff's report that his identifying information had been used without his consent. On February 9, 1990, TRW completed its investigation, claiming that all disputed accounts containing "negative information" had been removed from his report. The inaccurate information, however, continued to appear on the plaintiff's reports, or was re-entered after TRW had deleted it.

Plaintiff filed suit under the Fair Credit Reporting Act (FCRA), alleging negligent and willful violations of the Act (15 U.S.C. §§ 1681e(b), 1681i(a), 1681i(d)) and libel. The district court awarded actual and punitive damages to the plaintiff and the defendant appealed. The circuit court affirmed the award of actual damages, finding that TRW had violated the FCRA by failing to delete inaccurate and unverifiable information promptly, allowing deleted information to reappear, and failing to provide the plaintiff with proper notice of his rights with respect to his credit report . The court also upheld the award of damages for mental anguish on the grounds that the plaintiff had provided evidence that it was a "terrific shock" to him to discover his bad credit rating after maintaining a good credit rating since 1932, that he had had to go "hat in hand" to the president of a local bank to explain his problems with TRW, and that he had experienced considerable embarrassment in explaining his situation to a variety of other business associates and creditors. However, the court reversed the award of punitive damages on the grounds that the record did not reveal willful non-compliance with the FCRA on the part of the defendant.

TRUTH IN LENDING ACT

First National Bank of Council Bluffs, Iowa v. Office of the Comptroller of the Currency, **956 F.2d 1456 (8th Cir. 1991)**

In 1986, the First National Bank of Council Bluffs, Iowa (Bank) began offering discounted variable interest rate consumer installment loans. The initial rate for the first year was below the market rate and the rate for the remainder of the loan was for the going rate, which varied. Between June 1986 and June 1988, the bank made 691 loans of this type, on which the discounted "teaser" rate ranged from 7.9 to 9.9 %. On all 691 loans, the bank disclosed the discounted rate, the circumstances under which the rate would increase, limitations on the increase, the effect of the increase, and an example of the payment terms that would result from the increase. The bank, however, failed to disclose the composite rate as required by the commentary to Regulation Z of the Truth in Lending Act (TILA). The bank claimed that the officials in charge of the loan were not aware of this requirement. During the same period, the bank did disclose the composite rate on certain real estate loans, which were handled by a different department.

The bank was also required to disclose finance charges on loans. Between March 26 and November 6, 1987, the bank made 15 real estate loans that required the buyer to purchase private mortgage insurance (PMI). The parties stipulated that the PMI would constitute part of the total finance charge. In 13 of the 15 loans, the disclosed finance charge did not reflect the cost of the PMI. The bank claimed that the error was caused by a clerk who did not know the PMI was to be included in the finance charge. The bank discovered this error and sent the borrowers a corrected disclosure.

The bank appealed an order of the Office of the Comptroller of Currency, (Comptroller) which had determined that the bank had violated TILA and Regulation Z by failing to disclose the composite interest rate on discounted variable interest loans and by failing to include the cost of the PMI in the finance charge.

In affirming the decision of the Comptroller, the circuit court held that the bank's disclosure of only the artificially low teaser rate as the annual percentage rate for the loan defeated "the fundamental purpose of the Act, . . . to require creditors to disclose the 'true' cost of consumer credit, so that consumers can make informed choices among available methods of payment." The court also held that although the commentary to Regulation Z states that disclosure of discounted variable rate consumer loans "should" reflect the composite rate, this term nevertheless imposes a mandatory duty to disclose the composite annual percentage rate. In addition, the court ruled that the period for which reimbursement was to be made for the bank's nondisclosures ran from the date of the last bank examination prior to the examination that identified the violations, even though that particular examination did not include the bank's compliance with TILA and Regulation Z.

Price v. FCC National Bank, 4 F.3d 472 (7th Cir. 1993)

FCC National Bank (Bank) offers Visa and Mastercard under the name "First Card." The privileges and obligations are detailed in the cardholder agreement (agreement) which all the plaintiffs acknowledge having received. Before April 1991, the agreement provided that cardholders had 25 days after the receipt of their statement to pay the outstanding balance without incurring a finance charge. This "grace period" was disclosed on the cardholder's billing statement. The agreement was amended so that after April 1991, the finance charge would accrue unless payment was made on or before the payment due date, which was printed on the billing statement. After April 1, 1991, the plaintiff's billing statements reflected a grace period of 20 days. Plaintiffs maintain (and the bank does not dispute) that when they contacted the bank to inquire why the grace period had been shortened they were told that it was still 25 days but showed only 20 days on the bill to encourage prompt payment.

Credit card holders filed suit, alleging that the bank's policy of not disclosing their practice of not imposing a finance charge for fixed periods after their disclosed grace period violated the Truth in Lending Act (TILA). The district court dismissed the complaint. In affirming the dismissal, the circuit court noted that §127(b)(9) of the TILA provides that the bank must disclose in each periodic billing statement the date by which payment must be made to avoid additional finance charges. The creditor may, at its discretion and without disclosure, impose no such additional finance charge if the payment is received after such date. Thus, the court held, the bank's practice clearly complied with the relevant provision of the TILA.

Rodash v. AIB Mortgage Co., 16 F.3d 1142 (11th Cir. 1994)

On January 18, 1991, the plaintiff obtained a home equity mortgage on her principal residence with AIB Mortgage Company (AIB). The plaintiff executed a promissory note in favor of AIB evidencing an obligation to repay $102,000 and a mortgage securing repayment of the note to AIB. That same day AIB assigned its interest to Empire of America Realty Credit Corporation (Empire). At the loan closing, AIB gave the plaintiff four documents: (1) a federal Truth-In-Lending Disclosure statement; (2) a mortgage settlement statement; (3) a Notice of Right to Cancel, which stated that the plaintiff had three days to rescind the mortgage; and (4) an Acknowledgement of Receipt of Notice of Right to Cancel and Election Not to Cancel. The settlement statement reflected a $22 charge for a Federal Express delivery, $204 for intangible Florida taxes, and $6 for assignment of the mortgage. The charges were itemized under the "amount financed" in the transaction. The plaintiff signed the Election Not to Cancel on January 18, 1991, and the proceeds of the loan were distributed on or about January 23, 1991. On July 1, 1991, the plaintiff stopped making her mortgage payments and on December 26, 1991, the plaintiff's attorney wrote to AIB and Empire stating that she (the plaintiff) was rescinding the transaction under the Truth in Lending Act (TILA) and was seeking cancellation of the security interest. Empire subsequently accelerated the balance due and filed a foreclosure action.

Plaintiff sued the lender and assignee in order to rescind the home equity mortgage and obtain penalties under the TILA. The district court granted summary judgment in favor of the lender and assignee and the plaintiff appealed. The circuit court held that: (1) preprinted forms used by the lender to waive the consumer's right to rescind the consumer credit transaction which would encumber the title to her home within three days violated the TILA; (2) presenting the plaintiff with the preprinted waiver form on the day of the transaction confused the plaintiff as to her right of recision and thus violated the TILA; and (3) the lender did not make the necessary disclosures when it included the Federal Express charge and the Florida intangible tax securing the loan under the "amount financed" rather than the "finance charge" section of the loan disclosure statement. Since such fees fall within the TILA's definition of "finance charge," the defendant's failure to include them in that category violated the TILA.

Burnett v. Ala Moana Pawn Shop, 3 F.3d 1261 (9th Cir. 1993)

In late 1989 the plaintiff, in need of cash, accepted $550 from the Ala Moana Pawn Shop (Pawn Shop) for his camera, which had a fair market value of $1,000. Plaintiff agreed to pay $660 within 30 days to reacquire his camera. He entered into a similar arrangement in accepting $140 for his ring, which had a fair market value of $560 (and which he eventually reacquired for

$300). The slip for each transaction was marked as an "agreement of sale" and presented an option to repurchase the item within 30 days for 120% of the purchase price. The slips specified no interest rates or other financing terms. The pawn shop's practice was to extend the repurchase deadline by another 30 days upon payment of a 20% "service fee." More than 75% of the pawn shop's transactions resulted in eventual repurchases.

Plaintiff sued the pawn shop for violation of the Truth in Lending Act (TILA) and Hawaii law prohibiting deceptive trade practices. The district court entered a judgment for the plaintiff and the pawn shop appealed. On appeal the circuit court held that: (1) TILA is liberally construed to protect the consumer, and the court can look past the form of the transaction and focus on its economic substance to see if the Act applied; (2) the transaction between the plaintiff and the pawn shop was a loan rather than a sale, and was thus subject to the TILA; and (3) the pawn shop failed to disclose the financing terms (in this instance the difference between the amount loaned and the amount required to have property returned to the consumer) and thus violated the TILA.

EQUAL CREDIT OPPORTUNITY ACT

Jones v. Citibank, Federal Savings Bank, 844 F. Supp. 437 (N.D.Ill. 1994)

On or about March 20, 1991, the plaintiffs, seeking to refinance their condominium, submitted a mortgage application to Citibank, Federal Savings Bank (Citibank). On April 22, 1991, Citibank denied their application, contending that the Joneses had an unsuitable credit record with the Maryland National Bank of America. The Joneses allege that Citibank denied the application because they are African American and that they never received a written notice of rejection, in violation of Federal Reserve Regulation 202.9. For its part, Citibank claimed that it had mailed a letter of rejection on May 9, 1991. The parties stipulated that the plaintiffs received oral notice of the rejection on May 17, 1991.

The plaintiffs sued Citibank, alleging that the denial of their mortgage application was based on race in violation of, among other things, the Equal Credit Opportunity Act (ECOA). Citibank moved for summary judgment on the grounds that the two-year statute of limitations had expired. In rejecting Citibank's motion the court held: (1) the statute of limitations begins to run when the plaintiff discovers his injuries (i.e., the date that the plaintiffs received the notice of the rejection), not on the date that the injury occurred (i.e., the date when Citibank decided to reject the plaintiffs' application); and (2) there was an issue of material fact as to when the plaintiff was notified of the rejection of his application.

FAIR DEBT COLLECTION PRACTICES ACT

Lindbergh v. Transworld Systems, Inc., 846 F. Supp. 175 (D.Conn. 1994)

The plaintiff allegedly incurred a debt in the approximate amount of $1,559 to a Dr. Walter Leckowicz (Doctor) for services rendered in December 1982. The plaintiff continued to see the doctor through March 1993. Transworld Systems, Inc. (Transworld), a debt collector under the Fair Debt Collections Practices Act (FDCPA), had an agreement with the doctor to collect debts owed to the doctor by any of his patients. That agreement instructed the doctor that no files should be forwarded to Transworld which involved bankrupt accounts or accounts which were beyond 12 months from the date of the last payment or charge. In May of 1993, the doctor forwarded the file of the plaintiff with the date of the last payment or charge being March 31, 1993. Transworld began collections efforts shortly thereafter.

Plaintiff sued Transworld, claiming several violations of the FDCPA. First, he claimed that Transworld's collection efforts were barred by the applicable statute of limitations. Second, he claimed that Transworld's use of a symbol on one of its envelopes (a bold blue stripe upon which was printed in white letters the word "TRANSMITTAL") violated the FDCPA. And third, he claimed that Transworld violated the FDCPA by failing to license its California place of business with the Connecticut Banking Commissioner.

Both parties moved for summary judgment. In denying summary judgment for plaintiff and granting summary judgment for defendant the court held that: (1) there was no evidence that Transworld knowingly or intentionally tried to collect a debt barred by the statute of limitations; (2) plaintiff failed to demonstrate that the symbol on Transworld's envelope pertained to debt collection; and (3) letters sent by Transworld's California office did not violate the FDCPA because the defendant had a satellite office in Connecticut and its collection practices had been reviewed by the appropriate state authorities.

REDLINING

N.A.A.C.P. v. American Family Mutual Insurance Co., 978 F.2d 287 (7th Cir. 1991)

Plaintiffs sued American Family, claiming that the insurance company was engaged in a form of racial discrimination known as redlining, whereby it either declined to insure or charged higher rates for people in certain, well-defined areas. The district court dismissed the claims related to the Fair Housing Act (FHA) and the State Insurance Code, finding that the FHA does not apply to the property and casualty insurance business and that Wisconsin does not recognize a private right of action to enforce the antidiscrimination portions of its insurance code. Plaintiffs appealed. The circuit court reversed the district court's decision regarding the FHA, holding that §3604 of the FHA applies to discriminatory denials of insurance and discriminatory pricing that effectively preclude ownership of housing because of the race of the applicant. The court also held that the McCarran-Ferguson Act, which allows state laws to prevail over general federal laws that do not specifically relate to insurance, does not preclude application of the FHA to allegations of racially discriminatory redlining. Finally the court held that Wis. Stat. §§625.11(1) and 628.43(3) do not provide a private right of action for claims against discrimination in the business of insurance.

PRIVACY

Hrubec v. National Railroad Passenger Corp., 829 F. Supp. 1502 (N.D.Ill. 1993)

Plaintiffs brought suit against the defendants alleging that the defendants disclosed federal income tax return information without authorization. The district court dismissed the complaint holding that the plaintiff's complaint failed to allege facts sufficient to state a cause of action under 26 U.S.C. 7431, which establishes a private cause of action against anyone who knowingly, or by reason of negligence, discloses any tax return or return information with respect to a taxpayer in violation of any provision of 26 U.S.C. 6103. On appeal, the circuit court reversed and remanded, holding that the complaint stated sufficient facts for a claim under 26 U.S.C. 7431. On remand the district court held that actual damages in the statute authorizing recovery for knowing or negligent disclosure of federal income tax return information includes compensation for emotional distress. The court did not impose Rule 11 sanctions against the defendant because the issue as to what constitutes actual damages was a question of first impression and as such warranted examination and provided a legitimate basis for the defendant's motion to strike.

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