Case Western Reserve Law Review

Volume 23 | Issue 1 Article 9

1971

Book Comment: Consumerism, Edited by David A. Aaker & George S. Day

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BOOK COMMENT

CONSUMERISM. Edited by David A. Aaker & George S. Day. New York, New York: The Free Press. 1971. Pp. xx, 442. $4.95.

Consumer protection law has recently become a popular area of study among the increasingly idealistic and activist students in the law school community. But courses such as consumer protection law should not be considered a temporary submission to student cries for "relevance." The primary purpose of a professional school is to offer its students the knowledge and skills required in the practice of the profession, and certainly the law relating to the consumer is relevant in this regard. Furthermore, consumer law is as intellectually challenging and as susceptible to legal reasoning as the more traditional subjects in the curriculum. Also, there is much to be said for the frequent suggestion that if one of the primary, if not exclusive, functions of law school is to develop legal skills of analysis, the topics analyzed need not be exclusively business oriented. Finally, with the increasing opportunities for lawyers to represent the victims — as well as the beneficiaries — of the "dark side of the marketplace"[1] a fair number of our students find immediate practical use for a course in consumer protection.

As is usually true of new subjects, one of the critical problems is finding, in a digestible form, the written materials from which to acquire the necessary knowledge and skills. Unfortunately, those books most quickly rushed to print are not entirely satisfactory.[2] In the field of consumer protection, the only currently published materials designed for teaching law students are a casebook on consumer credit by Professor Homer Kripke, a 107-page pamphlet on consumer credit by Professor William F. Young, Jr., and two pamphlets in the Foundation Press Social Justice Through Law Series — *New Approaches in the Law of Contracts* by Professor Marion W. Benfield, Jr., and *New Approaches in the Law of Civil Procedure* by Professor Herbert Semmel.[3] All these materials show signs of the haste in which they were prepared and published. None pretends to cover all of the topics that would be included in even a narrow definition of consumer protection. The two pamphlets by Benfield and Sem-

[1] W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKET PLACE (1968).

[2] *See, e.g.*, Junger, Book Review, 22 CASE W. RES. L. REV. 598 (1971) (an unfavorable review by Professor Junger of the first casebook in Environmental Law).

[3] Materials have also been published for teaching legal services attorneys, but these are now out of print and not generally available.

mel, when read together, cover many of the most important topics. However, these pamphlets were designed to be included as part of the first year courses in contracts and civil procedure. The materials they include, while excellently chosen and arranged, are not sufficiently nourishing for a separate course. Professor Kripke's justly praised book is largely devoted to problems of consumer credit.[4]

Some subjects, clearly within any comprehensive definition of consumer protection, are either ignored or merely touched upon in the law school materials just mentioned. Examples include the law of warranties; the regulation of advertising, packaging, and labeling; and the regulation of product safety and performance standards. There is a partial explanation for these omissions. Warranties are often given extensive treatment in the course on sales or commercial transactions and some schools give independent courses in the increasingly important subject of product liability.[5] But the most frequent complaint of the consumer — middle-class and poor alike — is that the goods they purchase often fall apart or don't work and, as a practical matter, there is little they can do about it. Such problems are generally given little attention in the typical commercial law courses. Furthermore, the revitalized Federal Trade Commission (FTC) and the strengthened Food and Drug Administration (FDA) have become increasingly active in many areas of consumer protection, and recently an effort has been made to establish an independent federal consumer agency[6] which would ultimately consolidate most of the federal consumer protection programs.[7] Similar agencies have become active in a number of states and cities. More attention than is found in either the Kripke book or the other materials should be given to these developments and their potential future impact. Perhaps it is unfair to criticize the editors of the consumer credit books for not covering non-credit topics. But the point is that none of these materials is sufficiently comprehensive

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[4] H. KRIPKE, CONSUMER CREDIT (1970). This book is favorably reviewed in Miller, Book Review, 56 IOWA L. REV. 716 (1971); Felsenfeld, Book Review, 26 BUS. LAWYER 1369 (1971).

[5] An excellent new casebook, P. KEETON & M. SHAPO, PRODUCTS AND THE CONSUMER: DEFECTIVE AND DANGEROUS PRODUCTS (1970), gives comprehensive treatment to products safety and products liability law.

[6] *See, e.g.*, S. 4459 & H.R. 18214, 91st Cong., 2d Sess. (1970). For more recent efforts see N.Y. Times, Sept. 13, 1971, at 19, col. 2.

[7] Since 1964 there has been a Special Assistant to the President for Consumer Affairs, but the office carries little authority. There are at least 39 official agencies with significant responsibilities in consumer matters. *See* CONG. Q., Nov. 21, 1969, at 2351.

for someone interested in the law relating to "consumerism." And whatever their merits, none is of much utility without the benefit of classroom work and a knowledgeable teacher.

These books and pamphlets do raise the important legal, economic, and social issues affecting consumer credit, but they neither resolve them nor do they give a systematic picture of the present state of the law. The Kripke book in particular has been justly praised for its balanced presentation of the current issues involved in consumer credit, especially the economic issues.[8] Of course, most worthwhile books edited for law school teaching are designed to provoke thought and emphasize policy questions somewhat at the expense of the current law. This is especially true in a subject as diverse, complex and rapidly changing as consumer credit law. Thus, it would be impossible to teach each state's law and it would make little sense to teach the existing law, since the law that students will face in practice will be much changed.

Most consumer credit law is regulated by state statute. There is much in the way of doctrine and structure common to most of the states, and the Consumer Credit Protection Act of 1968[9] imposed an important degree of uniformity in the form of a national standard of disclosure for consumer interest rates. In addition, many aspects of consumer transactions are governed by the Uniform Commercial Code (UCC). However, the UCC allows for diversity among the states on many of the most critical consumer issues,[10] and many states have passed legislation superceding parts of the UCC which govern consumer transactions.[11] While most states have some form of a retail installment sales act and small loan legislation, there is more diversity than uniformity among the states with regard to interest rates, licensing requirements, regulation of the terms of consumer

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[8] *See* book reviews cited in note 4 *supra.*

[9] 15 U.S.C. §§ 1601-77 (Supp. IV, 1968). The CONSUMER CREDIT PROTECTION ACT OF 1968 [hereinafter cited as CCPA], also restricts garnishments and several other less significant matters. The federal law completely controls garnishments only insofar as it is more restrictive than the prevailing state law in all respects. Hodgson v. Cleveland Municipal Court, 326 F. Supp. 419 (N.D. Ohio 1971). *See* 15 U.S.C. § 1677 (Supp. IV, 1968). Since many states restrict garnishments at least in some respects more than the CCPA, it would seem that uniformity among the states is only partial.

[10] *E.g.*, UNIFORM COMMERCIAL CODE § 9-206 (the validity of waiver of defense clauses) [hereinafter cited as U.C.C.]; U.C.C. § 2-318 (the persons to whom implied warranties run).

[11] *See, e.g.*, CAL. CIV. CODE §§ 1801.0-12.1 (West Supp. 1971); MASS. GEN. ANN. LAWS ch. 255D, §§ 1-32 (Supp. 1971).

sales and loan agreements or, for that matter, any other aspect of consumer credit.[12]

Indeed, within a single state a rational pattern of legislation seldom exists. In nearly every state consumer credit regulation has evolved sporadically as a response to a particular problem or need.[13] Once enacted, each piece of legislation encourages the rise of institutions which soon develop vested interests in the status quo and discourage later fundamental change. As a result, the consumer credit market is greatly segmented, and there is little uniformity in the treatment of functionally similar transactions. For instance, if a consumer wishes to purchase a new air conditioner but doesn't have the cash, he might be able to borrow money from a bank, a small loan company, a Morris Plan Bank, a credit union or any number of other financial institutions. In each case the maximum rate of interest established by law, the officials responsible for regulating the lending institution, and the other aspects of regulation are likely to be different. Alternatively, the consumer might open a regular charge account with the seller and agree to pay within a certain time. He might charge the purchase on a revolving charge account operated by the seller. He might charge the purchase by using a third-party credit card, issued by a bank or an independent credit card company. He may even enter into an installment loan agreement with the seller, with or without an accompanying note, and the seller may in turn assign the contract and note to a consumer finance company or a bank. In each of these cases the consumer gets his air conditioner on credit, but the law regulating the credit aspects of each transaction will be subject to different statutory and administrative regulation, or non-regulation. This is true even though functionally, and from the consumer's point of view, all or nearly all of the transactions are the same.

Professor Kripke avoids this morass to some extent by utilizing the provisions of the Uniform Consumer Credit Code (UCCC) as a model for rational and systematic consumer credit regulation.[14] While the UCCC has been severely criticized and seems to have no chance of gaining the degree of acceptance of the UCC, it does pro-

[12] *See* B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 158-329 (1965) where the statutes as of January 1, 1966 have been compared.

[13] *See generally* Curran, *Legislative Controls As A Response To Consumer Credit Problems*, AM. BAR FOUNDATION RESEARCH CONTRIBUTIONS, NO. 1 (1968).

[14] The UNIFORM CONSUMER CREDIT CODE [hereinafter cited as U.C.C.C.], was drafted and, on 1968, approved by the National Conference of Commissioners on Uniform State Laws. The UCCC was approved by the American Bar Association in 1968 but has been adopted only in Colorado, Idaho, Indiana, Oklahoma, Utah and Wyoming.

vide a touchstone for travel through the murky waters of state legislation. The principal rival of the UCCC, the National Consumer Act[15] (NCA) drafted by Professor Williar and the National Consumer Law Institute, has a distinctively more pro-consumer orientation than does the UCCC and is frequently used by Professor Kripke for comparison.

While all of the materials discussed are useful in sorting out the policy issues, and while Kripke has at least a comprehensive model statute to study, none of the books give much guidance as to the current state of the law in the various jurisdictions. Curran's monumental book, *Trends in Consumer Credit Legislation,*[16] is helpful in this regard with its many charts and tables comparing the statutes of various states, but much has happened since January 1, 1965, the last date she used for comparison purposes. Practitioners and others seeking current statutes in the 50 states can keep abreast through one of the Consumer Credit Services, such as that published by Commerce Clearing House.[17]

But even this picture is incomplete because the courts have recently taken a more active role in the reform and regulation of consumer credit practices. The most familiar and influential examples are *Unico v. Owen,*[18] *Sniadach v. Family Finance Corp. of Bayview,*[19] and *Williams v. Walker Thomas Furniture Co.*[20] In *Unico,* the New Jersey Supreme Court held invalid as unconscionable a waiver of defense clause in a retail installment contract and refused to grant holder in due course status to a consumer finance company which had some knowledge of the questionable behavior of its assignor.[21] In *Sniadach* the United States Supreme Court held that Wisconsin's prejudgment wage garnishment procedure violated due process. *Williams* was one of the first cases in which a court exercised its powers under section 2-302 of the UCC to invalidate

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15 The NATIONAL CONSUMER ACT (First Final Draft, 1970) [hereinafter cited as N.C.A.], is available from the National Consumer Law Center, Boston College Law School, Brighton, Massachusetts. The Kripke book contains neither the UCC nor the NCA.

16 B. CURRAN, *supra* note 12.

17 *E.g.*, CCH CONSUMER CREDIT GUIDE REP. This reporter is limited to credit legislation.

18 50 N.J. 101, 232 A.2d 405 (1967).

19 395 U.S. 337 (1969).

20 350 F.2d 445 (D.C. Cir. 1965).

21 Even though the instruments in *Unico* were executed before the effective date of the UCC, the case was decided upon code principles.

contracts or contract terms found "unconscionable."[22] Except for *Sniadach*, which is based upon the Federal Constitution, the authority of these cases in other jurisdictions is questionable. Although none establishes a new principle, they all represent important steps in the movement towards legal reform in the consumer area. Thus, the developing case law seems to add another layer of complexity to the maze of laws throughout the states. Consequently, any statement of what the law is becomes more uncertain, and the study of what should be happening in the law, rather than what has happened, becomes more useful to the legal profession as the pace of development increases.

The more rapidly the law develops, the faster any book becomes obsolete.[23] Professor Kripke's book has anticipated much of this development and seems to be holding up well. For instance, it now appears clear that the holder in due course doctrine and the waiver of defenses clause in consumer credit transactions are both finished or soon will be. The combined attack of the courts,[24] the FTC,[25] and the state legislatures[26] will soon make the issue academic in the case of assignments. The important battleground of the future will involve direct loans and credit cards. Should the consumer who borrows from a bank or small loan company in order to buy an air conditioner have any right to stop his bank payments if the air conditioner ceases to work?[27] Does it make any difference that the salesman escorted the consumer to the bank and helped him fill out the forms? If the purchase had been made using a credit card can the consumer stop those payments if the air conditioner stops working?[28]

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[22] *Williams* was also a pre-Code application of the UCC.

[23] One reviewer has suggested, half in jest, that Kripke should have provided daily supplements. Felsenfeld, *supra* note 4, at 1372.

[24] *See, e.g.*, Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967).

[25] *See, e.g.*, proposed FTC Reg. § 433.1, 36 Fed. Reg. 1211 (1971).

[26] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 255D, § 25A (Supp. 1971). *See also* Brandel & Leonard, *Bank Charge Cards: New Cash or New Credit?*, 69 MICH. L. REV. 1033, 1055 n.73 (1971), where the authors have listed the 30 state statutes which affect third party freedom from defenses.

[27] The answer is no except in Massachusetts. *See* MASS. GEN. LAWS ANN. ch. 225, § 12F (Supp. 1971) (creditor subject to all defenses of borrower if he "knowingly participated in or was directly connected with the consumer sale or lease transaction"). *See generally* Littlefield, *Preserving Consumer Defenses: Plugging the Loophole in the New UCCC*, 44 N.Y.U.L. REV. 272 (1969). The UCCC would not change this but section 2.407 of the NCA would.

[28] The agreement between the cardholder and card issuer always contains a waiver of defenses clause. Ordinarily the terms of such agreements would be enforceable subject to the unconscionability test (although the direct applicability of U.C.C. § 2-302 is questionable). There are no reported cases raising the issue. Brandel & Leonard, *supra* note 26, at 1040. New York is considering legislation that would allow the credit card

Professor Kripke in his extensive section on third party freedom from defenses discusses the direct loan problem, although he underrates its importance. Here the problems of policy are more difficult and the problems of legislative drafting and judicial line-drawing more troublesome than in the case of assignments. Professor Kripke anticipates some of these questions, although, as is generally true of all the materials discussed, too little attention is given to the increasingly important credit card.[29]

These prefatory remarks should demonstrate that, despite all the literature currently available, no book comes close to exhausting the field of consumer protection. The student, teacher, practicing lawyer, and policymaker who seeks a comprehensive picture of the whole range of problems of consumer protection cannot depend upon one or two books. The serious researcher can supplement his reading with the large number of available law review articles and several symposia[30] which cover the whole range of consumer problems. While there is much repetition and not all articles are first rate, the general quality is high. The problem is that there is too much material for anyone to become educated in the whole range of problems without a great deal of time and someone to collect the best material in each topic.

Some assistance is found in an anthology of articles collected and edited by Carol Katz, as part of the New York University Project on Social Welfare Law.[31] The Katz book contains an extensive bibliography of articles and materials not included in the anthology. Although the book was designed for use by poverty lawyers and focuses upon the problems of the poor, it still has general importance, since various classes of consumers share many of the same problems. Its limitations are threefold. First, it was published in 1968 and much has transpired since then. For example, some of the most important activity of the FTC has taken place in the last two years and the UCCC, the proposed Uniform Consumer Sales Practices Act, and much of the state reform legislation came too late to receive atten-

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holder to raise as defenses claims arising out of the sales transaction. *See* N.Y. Times, Sept. 2, 1971, at 47, col. 2. A recent Massachusetts statute may do the same thing. *See* MASS. GEN. LAWS ANN. ch. 225, § 12 F (Supp. 1971).

[29] The excellent article by Brandel & Leonard, *supra* note 26, is a welcome addition to the curiously small number of articles dealing with credit cards.

[30] *See e.g.*, four symposiums on consumer protection appearing in 8 B.C. IND. & COM. L. REV. 387 (1967); 33 LAW & CONTEMP. PROB. 639 (1968); 64 MICH. L. REV. 1197 (1966); 44 N.Y.U.L. REV. 1 (1969).

[31] C. KATZ, THE LAW AND THE LOW INCOME CONSUMER (1968).

tion in the Katz anthology.[32] Second, the sources are all from legal journals and many of the articles deal only with law in the narrow sense. Finally, a 400 page book of selected articles must necessarily omit much important material.

As previously mentioned, one of the limitations of the Katz book is that it was primarily written by lawyers for lawyers. For many years law schools have been criticized for not incorporating sufficient non-legal materials into the law school curriculum, and for not making use of the scholarly contributions of economists, sociologists, psychologists and others.[33] In the new field of consumer protection that criticism is largely unjustified, in part because change in the field is so rapid that policy — what should be as opposed to what is — has been all important. Many policy matters in the field ultimately become questions of values and problems of reconciling conflicting interests, areas about which no discipline has any special claim to expertise. Before reaching these value judgments, however, it is necessary to know a great deal about our socio-economic institutions, consumer behavior, and applied economic theory.

For instance, we have for centuries attempted to regulate the maximum rates of interest at which credit can be granted.[34] While the initial reason for regulation was religious, today's usury laws are judged from the viewpoint of social and economic policy.[35] The present weight of knowledgeable opinion recommends that we depend primarily upon competition to regulate the price of credit, just as we depend upon competition to regulate the price of goods.[36] This opinion is essentially based upon economic theory and history. First, theory and practice tell us that competition which is allowed to operate freely will work to control prices of both goods and credit. Second, in an economy in which the profit motive determines investment decisions, credit will be extended only when the return will be sufficient to pay the cost of money, the overhead costs of administering the credit granting institution, the cost of collection

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[32] *See* H. KRIPKE, *supra* note 4, at 262, where the not yet approved second working draft of the UNIFORM CONSUMER SALES PRACTICES ACT can be found.

[33] *See, e.g.*, Haskell, *Some Thoughts About our Law Schools*, 56 GEO. L.J. 897 (1968).

[34] *See* Bernstein, *Background of a Grey Area in Law: The Checkered Career of Usury*, 51 A.B.A.J. 846 (1965).

[35] *E.g.*, Benfield, *Money, Mortgages and Migraine — The Usury Headache*, 19 CASE W. RES. L. REV. 819 (1968); Jorday & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387 (1968); Shay, *The Uniform Consumer Credit Code: An Economist's View*, 54 CORNELL L. REV. 491 (1969).

[36] *See, e.g.*, Johnson, *Rate Competition*, 26 BUS. LAWYER 777 (1971).

or the risk of uncollectability, and still provide some increment of profit. We know that it costs more to extend credit to poor people because a smaller loan is proportionately more expensive to administer than a larger loan and there are greater risks in collecting from poor people. The greater risks encountered with the poor do not stem from any recalcitrance, but rather from an inability to pay,[37] which often has its origin in poor health and fluctuating job opportunities. With few assets any minor setback becomes a major disaster.

Thus, any maximum interest rate which is realistic for the poor would be irrelevant as applied to the middle class. And any maximum interest rate which is realistic as applied to the middle class would effectively bar the poor from all legal channels of credit. This would result in either the poor's receiving no credit — which means no major appliances, automobiles or other durable goods — or the development of a black market for credit in the form of loan sharks.[38]

Clearly, the first alternative of eliminating consumer credit for the poor would place a damper on our economy. It is uncertain whether consumer credit makes our economy more volatile or whether it instead has a counter-cyclical effect.[39] In any case, there is little chance that we would purposely cut off the poor from all participation in our consumer economy.

And it is also clear that the regulatory force of competition has been reduced by the establishment of maximum interest rates, restrictive licensing and limitations on the types of credit any one institution can grant. But competition depends upon more than just freedom of entry for the suppliers of credit. If consumers are uninformed or misinformed as to the costs of credit[40] or if our institutional and consumer behavior fails to fit our theoretical models,[41] then the regulatory effect of competition is also diminished.

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[37] *See, e.g.*, Note, *Resort to the Legal Process in Collecting Debts from High Risk Credit Buyers in Los Angeles — Alternative Methods for Allocating Present Costs*, 14 U.C.L.A.L. REV. 878, 894 (1967). This conclusion was reached on the basis of interviews with representatives of creditors.

[38] The unattractiveness of these two alternatives is the usual reason given to explain the UCCC's unusually high maximum interest rates. *See, e.g.*, Johnson, *Regulation of Finance Charges on Consumer Installment Credit*, 66 MICH. L. REV. 81 (1968); Shay, *The Uniform Consumer Credit Code: An Economist's View*, 54 CORNELL L. REV. 491 (1969).

[39] *See Installment Credit*, 7 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 354 (1968).

[40] *See* U.C.C.C. § 2.201, comment 1.

[41] *See* Shay, *A Portrait of the Consumer Credit Market*, 26 BUS. LAWYER 761

The above analysis of one of the most important issues of consumer credit basically depends upon an examination of economic theory and history, social anthropology, and empirical studies. In the area of rate regulation the lawyers and the legislatures concerned with consumer protection have recently had considerable guidance from economists. Professor Kripke, to his credit, has included a great deal of non-legal economic material in his book, and even the law reviews have allowed the economists to invade their sacred pages.[42]

The study of most other areas of consumer protection, such as regulation of advertising and safety standards, and standardization of packaging, must also rely on the contributions of non-lawyers. The most significant contribution to understanding the consumer problems of the poor unquestionably comes from empirical studies such as the pioneering work of David Caplovitz, *The Poor Pay More*,[43] and the Federal Trade Commission's study of installment sales practices in the District of Columbia.[44]

The need for economic theory, empirical studies and an understanding of business practice has been well-recognized by everyone involved with consumer protection — the scholars,[45] the regulatory agencies,[46] and the courts.[47] Consequently it was with great interest and anticipation that I read *Consumerism,* described as "the first organized collection of critical articles dealing with the activities of government, business, and independent organizations in the field of consumer interest."[48] The authors, Aaker and Day, are professors in the business schools of the University of California at Berkeley

(1971); White & Munger, *Consumer Sensitivity to Interest Rates: An Empirical Study of New-Car Buyers and Auto Loans*, 69 MICH. L. REV. 1207 (1971). The UCCC would break down the barriers of competition and allow unusually high interest rates.

[42] *See* Johnson, *supra* notes 36 & 38. *See also* Shay, *supra* note 41.

[43] D. CAPLOVITZ, THE POOR PAY MORE (1963).

[44] FTC, ECONOMIC REPORT ON INSTALLMENT CREDIT AND RETAIL SALES PRACTICES OF DISTRICT OF COLUMBIA RETAILERS (1968). One significant conclusion reached by this study is that the merchants in low income neighborhoods charge high prices but their profits are no higher than other merchants' profits.

[45] In addition to articles already cited *supra* notes 36, 38 & 41, see Birmingham, *The Consumer as King: The Economics of Precarious Sovereignty*, 20 CASE W. RES. L. REV. 354 (1969); and articles found in Part III, *Consumer Protection*, 23 J. LEG. ED. 151 (1971). In particular see the skeptical article by Dunham, *Empiricism, Law Reform and Consumer Protection*, 23 J. LEG. ED. 153 (1971).

[46] *See, e.g.*, FTC, *supra* note 44.

[47] The testimony of David Caplovitz, author of *The Poor Pay More*, played an important part in a recent case involving cognovit notes. *See* Swarb v. Lennox, 314 F. Supp. 1091 (E.D. Penn. 1970).

[48] D. AAKER & G. DAY, CONSUMERISM (1971) (back cover of book) [hereinafter cited as AAKER & DAY].

and Stanford University, respectively. They have assembled 35 articles, primarily from business journals, dealing with various aspects of consumer protection. For all of the contributions made by the economists and others, too little attention has been given by lawyers interested in consumer protection to the motives, thought patterns, and practices of businessmen. The viewpoints of businessmen and business scholars should provide a useful perspective in the analysis of various consumer issues. I had hoped that Professors Aaker and Day would partially fill this void, but unfortunately my hope was largely unfulfilled.

In their introduction "A Guide to Consumerism," the editors attempt to give an overall picture of the complaints of today's consumer and to outline some of the causes of his increasingly vocal discontent.[49] Although the discussion is at times unclear and it overemphasizes the importance of the single word "consumerism," Aaker and Day are reasonably successful in pinpointing the causes of the heightened awareness of our society to consumer complaints. These causes are basically: (1) the increasingly impersonal nature of the mass marketplace; (2) the rising expectations and impatience of the general public which is exacerbated by exaggerated advertising claims; (3) the rapid technological changes which place the consumer at the mercy of machines that produce complicated and fragile products which are not fully understood; and (4) the effectiveness of consumer protection advocates such as Ralph Nader.

The introduction also touches upon some points which are ignored in the body of the book. For instance, the editors mention that antitrust policies, insofar as they help to maintain competition among suppliers, are of fundamental importance to the protection of the consumer.[50] The only other discussion of antitrust matters is a misleading and unoriginal defense of retail price maintenance.[51] The editors also mention the consumer class action as one of the developing legal techniques which will have a significant impact upon business practice. The proposed consumer class action legislation introduced in the last Congress[52] raised a great deal of controversy. Some idea of the importance of this procedural device is evidenced by the vehemence with which the business community

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[49] *Id.* at 7.

[50] *Id.* at 6.

[51] Levitt, *Branding on Trial*, in AAKER & DAY 107. The title is misleading. The function of branding is more skillfully discussed by Bauer & Greyser, *The Dialogue that Never Happens*, in AAKER & DAY 59, 64.

[52] S. 1980, 91st Cong., 1st Sess. (1969).

opposed this legislation.[53] One consumer spokesman has even stated that "a really sound class-action statute would be worth all of the rest of the consumer legislation put together."[54] And yet the articles do not consider the matter.

The editors view current consumer problems as divisible into three broad categories: (1) "protection against clear-cut abuses;" (2) "provision for adequate information;" and (3) "protection of the consumers against themselves and other consumers."[55] They correctly consider the first category as neither new nor particularly controversial. Few would say that notions of freedom of contract, individual liberty or anything else should bar governmental action against the proverbial salesman of the Brooklyn Bridge. An excerpt from Senator Warren Magnuson and Jean Carper's book, *The Dark Side of the Marketplace* (found in the book's "selling practice" section, and worth reading if only to appreciate the sophistication of today's merchant swindlers) describes some of the recent flagrant frauds. The problem here lies not so much in the law as in the enforcement of the law. Like mugging, it is clearly immoral and illegal, but not easily prevented. This is not to say it is always easy to draw the line between permissible puffing and fraudulent misrepresentation.[56] Nor is it easy to draft a workable and legally enforceable statute to effectively prohibit such elusive practices as the bait and switch.[57] In addition, it is difficult to get local prosecutors, who are understandably preoccupied with crimes of violence, to expend the time and effort to enforce the antifraud laws that exist. A partial solution might lie in an adequately manned FTC with expanded jurisdiction that would work with similar agencies in each state and major urban area.[58] In any event, the editors wisely devote little time to this aspect of consumer protection.

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[53] *See, e.g.*, 1970 CONG. Q. ALA. 616-20.

[54] N.Y. Times, Sept. 2, 1971, at 55, col. 6. In assessing the quote from James T. Prendergast, Director of the New York Legal Aid Society, one should understand that New York has an unusually limited class action procedure by vitue of the recent case of Hall v. Cobrun Corp. of Am., 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 893 (1970). Other states are more liberal. *See, e.g.*, Daar v. Yellow Cab Co., 167 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). Both Kripke and Young have materials dealing with class actions, but their materials are insufficient to provide full understanding of the difficulties and possibilities of this superficially simple device.

[55] AAKER & DAY 3.

[56] *See* U.C.C. § 2-313, comment 8.

[57] *See In re* Household Sewing Machine Co. v. FTC. [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 18,882 at 21,214 (FTC 1969).

[58] Many states have recently created separate agencies or divisions in the state attorney's office to handle consumer matters. A number of cities, most notably New York, have done the same.

The editors' second category, "provision for adequate information," is given the most attention in the articles selected, which is fortunate since the materials discussed earlier say little about this aspect of consumer protection. Included is an excerpt from Professor Kripke's article expressing his well-founded opinion that the Federal Truth in Lending Act is of minimal value.[59] It is now generally recognized that honest and uniform disclosure of interest rates, while undeniably a healthy reform, is basically middle-class legislation which solves few problems. The other articles within this category deal with advertising, labeling, and packaging.

The contribution by E. G. Weiss, a columnist for *Advertising Age* and one of the few authors whose background is identified, consists principally of an exhortation to Madison Avenue to clean its own house.[60] Basically he wants advertising people to: (1) tone down exaggerated and meaningless claims, since the consumer has become sufficiently sophisticated and cynical to destroy advertising's credibility; and (2) eliminate the sex element which is offensive to many customers. The valuable part of the Weiss article is a long quotation from a talk given by Clarence E. Eldridge, the man in charge of advertising for General Foods. Mr. Eldridge suggests that people consciously react to only a small portion of advertising and that a third of those persons reacting do so negatively. Because the products of various manufacturers are substantially the same, and because advertising is not successful in misleading the consumer into believing that differences exist, Mr. Eldridge asserts that manufacturers are forced to rely extensively upon promotions and off-price specials (*i.e.*, price competition). If what Mr. Eldridge says is true,[61] it has great significance for understanding monopolistic competition and merits consideration in determining the manner and scope of advertising regulation.

More familiar to the lawyer interested in consumer protection is Gaylord A. Jentz's general review of the history of federal regulation of advertising and his description of representative FTC cases.[62] But any student of consumer protection would do better to skip Jentz's article and read the *Harvard Law Review* Note which

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[59] Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1 (1969). Reaching the same conclusion is Note, *Truth in Lending: The Impossible Dream*, 22 CASE W. RES. L. REV. 89 (1970).

[60] Weiss, *Advertising's Crisis of Confidence*, in AAKER & DAY 123.

[61] Mr. Eldridge's statistics came from an American Association of Advertising Agencies study.

[62] Jentz, *Federal Regulation in Advertising*, in AAKER & DAY 133.

he cites.[63] Both, however, are somewhat out-of-date. Also out-of-date are Dorothy Cohen's mild criticisms of the FTC.[64] The Commission has recently been the subject of much more thorough and biting criticism by an American Bar Association Commission,[65] one of Ralph Nader's teams,[66] and a Presidential Advisory Council.[67] Moreover although the FTC has been the subject of numerous critical studies in the past, the latest attacks seem to have revitalized the Commission.[68]

The problem of deceptive packaging and labeling continues to be a subject of great interest to the consumer movement even after the enactment of the ineffectual Fair Packaging and Labeling Act. Robert L. Birmingham analyzes the effects and defects of that Act, the economic theory justifying it and other laws designed to ensure consumers more complete and accurate information about the products they buy.[69] Although this analysis makes the economic theory appear more forbidding than it is, such explicit reference to the economic underpinning of reform legislation is welcome.

A research psychologist prepared the subsequent article which is a tedious description of a study made of consumer reaction to deceptive packaging, in which packages of different sizes contained the same amount of goods.[70] It would have been sufficient in a book of such broad coverage to state the conclusions concisely: (1) that few consumers detect the deception in packaging; and (2) that if the merchant cheats too much, the consumer seems to prefer the smaller, more nearly full package. Other than as an example of the type of empirical research that can and should be done, such an article wastes the reader's time. Although the results may be interesting, it is difficult to see what they prove or how they can be of any use.

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[63] Note, *Developments in the Law — Deceptive Advertising*, 80 HARV. L. REV. 1005 (1967).

[64] Cohen, *The Federal Trade Commission and the Regulation of Advertising in the Consumer Interest*, in AAKER & DAY 149.

[65] *See* ABA COMM. TO STUDY THE FTC (1969).

[66] E. COX, R. FELLMETH & J. SCHULZ, THE NADER REPORT ON THE FEDERAL TRADE COMMISSION (1969).

[67] PRESIDENT'S ADVISORY COUNCIL ON EXECUTIVE ORGANIZATION (ASH COUNCIL), A NEW REGULATORY FRAMEWORK — REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES (1971).

[68] One of the first results of the recent studies was the appointment of Miles W. Kirkpatrick, the head of the ABA study, as the new Chairman of the FTC.

[69] Birmingham, *The Consumer as King: The Economics of Precarious Sovereignty*, in AAKER & DAY 169.

[70] Naylor, *Deceptive Packaging: Are the Deceivers Being Deceived*, in AAKER & DAY 184.

Similar comments are applicable to the study, included later in the book, which assesses dealer discounting of high and medium priced automobiles.[71]

One of the few attempts at analysis in the book is found in the editors' Introduction, where they suggest that the consumer's need for greater information is not uniform throughout the marketplace.[72] Complete and accurate information is critical for products which are infrequently purchased, subject to rapid technological change, likely to be used over a period of time, and whose performance characteristics are not readily apparent. The consumer's need for information becomes increasingly important as the marketing system becomes more impersonal.[73] In light of the material on packaging and Kripke's article on the Federal Truth in Lending Act, it becomes apparent that consumers also need assistance when it comes to mathematical calculations. Consequently, it is strange that the book does not contain some discussion of the current efforts to aid the consumer by persuading or requiring supermarkets to mark the unit price on their goods.[74] The possible alternative of standardized weights and quantities is discussed favorably by Louis L. Stern in his business-oriented article.[75]

The increasing need for data about performance standards is a topic that is likely to get more attention in the future and is given some treatment in *Consumerism*. Consumer's Union and other private groups have been testing and reporting product performance for some time, but their impact is slight. Suggestions that the Federal Government get into the act have gotten nowhere, except for product safety[76] and the recent activity of the FDA regarding the efficacy of drugs.[77]

In their third category of current consumer problems, "protection of the consumers against themselves and other consumers," the editors combine two different concepts which they collectively label "paternalism." The National Traffic and Motor Vehicle Safety Act

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[71] Jung, *Price Policy and Discounts in the Medium and High-Priced Car Market*, in AAKER & DAY 211.

[72] AAKER & DAY 8.

[73] Stern, *Consumer Protection Via Increased Information*, in AAKER & DAY 94, 96.

[74] *See, e.g.*, N.Y. Times, July 21, 1970, at 45, col. 4.

[75] *See* Stern, *supra* note 73.

[76] *See, e.g.*, 21 U.S.C. § 355 (1964) (drugs); 15 U.S.C. § 1261(f) (1964) (toys).

[77] *See, e.g.*, Upjohn Co. v. Finch, 422 F. 2d 944 (6th Cir. 1970). Some consumer product information compiled by the Federal Government for its own use has recently been made public. *See* N.Y. Times, Oct. 24, 1970, § 1, at 18, col. 3.

of 1966[78] illustrates features of both concepts. Minimum standards of safety for automobile tires protect the consumer from both himself, and from others with whom he shares the roads. But as in the case of performance standards unrelated to safety, the problem is that the average consumer is not really capable of learning whether the product he purchases is necessary or will meet his reasonable expectations of performance. In any event, the extent to which society should attempt to protect the consumer from himself is no simple problem and is not subject to any single answer applicable equally to rich and poor, or to textiles and prescription drugs. Unfortunately, no attempt is made to analyze the problem in *Consumerism*.

Related to the paternalism issues are the two articles on trading stamps[79] which simply suggest that trading stamps are, like advertising and promotional games, merely a form of imperfect or monopolistic competition. But this is merely sidestepping the more fundamental questions, for trading stamps, advertising and promotional games are all subject to serious questioning as uneconomical and wasteful.

Consumerism also covers warranties and the problems peculiar to the poor consumer. But except for three articles, the warranty section is too over-simplified for a lawyer, and the articles are often incomplete, misleading, or out-of-date and are occasionally wrong. The *Report of the Task Force on Appliance Warranties and Service* by the FTC[80] is worthwhile because it offers an opportunity to understand the manufacturer's problems and suggests the economic limitations inherent in any reform proposals.[81] Also recommended is the address by the vice president of Whirlpool Corporation which suggests how a consumer products company can, in response to consumer complaints, make their warranty both understandable and satisfactory to the average consumer and at the same time be consistent with corporate goals.[82] If the program of simplified and amplified

[78] 15 U.S.C. § 1381-1425 (Supp. III, 1966).

[79] Bell, *Liberty and Property, and No Stamps*, in AAKER & DAY 235; Beem & Isaacson, *Schizophrenia in Trading Stamp Analysis*, in AAKER & DAY 248.

[80] FTC, *Report of the Task Force on Appliance Warranties and Service*, in AAKER & DAY 259.

[81] The complexity of many consumer products and the shortage of trained repairmen often make repairs uneconomical. No simple solution to the problem is apparent. With respect to automobile warranty repairs, see the excellent article by Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 WIS. L. REV. 1006.

[82] Upton, *The Use of Product Warranties and Guarantees as a Marketing Tool*, in AAKER & DAY 277.

warranties works for Whirlpool, then the consumer movement will have achieved a significant victory. The Whirlpool article also points out the problem of the uniformly severe warranty disclaimer and other harsh provisions found in the typical consumer sales contract. The legal literature on unbargained contracts and unconscionable contract terms is enormous. This problem is amply discussed in the materials discussed earlier, but is not mentioned in *Consumerism*.

Finally, the paper by the president of the Clark Equipment Corporation should intrigue anyone interested in the developing law of products liability.[83] Although he bemoans the movement toward strict liability and away from privity (which he calls "deterioration in the law"), he accepts it and explains how the corporation must act in order to live with these facts. He calls for close scrutiny of all advertising claims by a responsible company official, greater control of salesmen's puffing, and greater quality control in manufacturing. His paper is strong evidence of the prophylactic impact of tort liability, even when that liability is not founded upon traditional notions of fault.

The last section of the book dealing with the case of the ghetto consumer is uniformly good. It contains a portion of an excellent law review Note that outlines the problems of the poor consumer.[84] A more complete picture is found in the Caplovitz book mentioned earlier, a portion of which is also included here. This section also contains a detailed summary of the FTC's *Economic Report on Installment Credit and Retail Sales*, also mentioned above. Finally, it contains two articles describing studies that compare the relative costs of food and other goods in the ghetto with those in middle-class shopping areas.[85] These and other available studies do not agree in all respects, but one can reasonably conclude that the poor probably pay more for goods and certainly for the credit they require. The reasons for this are many, and the policy implications are complex. Part of the problem stems from the fact that the poor are unskilled consumers and the stores in the ghetto are usually small, inefficiently run, and subject to extraordinary expenses due to theft and high insurance rates. An additional problem is that the ability of

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[83] Schirmer, *Products Liability and Reliability: The View from the President's Office*, in AAKER & DAY 328.

[84] Schnapper, *Consumer Legislation and the Poor*, in AAKER & DAY 339 (Omitted by the editors is the law review author's provocative but flawed model statute).

[85] Marcus, *Similarity of Ghetto and Nonghetto Food Costs*, in AAKER & DAY 382; Sturdivant, *Better Deal for Ghetto Shoppers*, in AAKER & DAY 390.

the poor to obtain goods of any kind is so tied up with their needs and ability to get credit that the competition for their business is limited to the neighborhood stores which are willing to extend credit at high risks. In any event, it is clearly impossible to understand the problem of the ghetto consumer while ignoring completely the many problems of consumer credit, as Aaker and Day have done.

It is worth noting that guaranteeing the ghetto consumer all his rights and protections is an important matter for all, not just those professionally concerned with the poor or those with empathetic or liberal impulses. As is pointed out, many of the ghetto consumers are on welfare; the money they spend is ours. If only for selfish motives, we should assure ourselves that we get our money's worth.

The editors have collected a number of valuable articles. Their bibliography at the end of the book gives citations to many more articles and books. Both the book and the bibliography would have been more useful if the first-rate and the poor, and the current and the outdated, had not been included indiscriminately. The editors have ignored entirely, or only suggested, many important topics, most notably the critical area of consumer credit. It is also surprising that two business professors would omit consideration of the better business bureaus, trade associations, and other voluntary associations[86] of businessmen and consumers who act outside the framework of governmental authority to improve the ethical standards of merchants, aid the lone consumer, and press for legislative reform. The question of how legitimate and important a role such private agencies will and should have in future consumer protection efforts deserves more attention than it has received to date.[87]

Although *Consumerism* does not contain enough to recommend its purchase by many lawyers, it does offer some new material not readily available in the conventional law texts and legal periodicals. One hopes that there will be additional contributions by business-oriented professionals and academics to the important issues of consumerism.

SPENCER NETH

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[86] One of the most militant and successful groups is the Consumer's Education and Protection Association which started in Philadelphia and has a chapter in Cleveland and perhaps other cities. They get satisfaction for their consumer members principally by picketing. Cleveland also has a group called the Consumer Protection Association which is directed more at consumer education and lobbying for reform legislation.

[87] For the only substantial piece available in the law reviews on the topic, see Note, *Extrajudicial Consumer Pressure: An Effective Impediment to Unethical Business Practices*, 1969 DUKE L.J. 1011.