No Glory

Thomas W. Christopher

The new North Carolina consumer-protection legislation is discussed at length by Professor Smith in the article that commences on page ____. Dean Christopher's editorial article, which appears below, includes his general observations concerning that legislation.

NO GLORY

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Consumer protection by way of legislation generally has come as a result of an emotional crisis. Something shocking comes to our attention and we suddenly become concerned, rush through a law, and pass on to the next fad.

Our first general federal law on food and drugs was not enacted until 1906,[1] and then only after the public was scandalized by revelations of conditions in meat plants. The 1906 act was not at all adequate, not even fully covering fake cancer cures, but we made do until 1938 when some ninety people died from a bad drug. Thereupon public opinion rose to a fever pitch and a stronger statute was enacted.[2] More than a decade later, stories of people dying from overdoses of sleeping pills led to the passage of a somewhat stronger drug law.[3] The thalidomide tragedy in the early 1960's set off another crisis, leading at long last to a fairly substantial statute for public protection from drugs.[4]

When we do wake up to a need, we immediately set about clearing our own consciences of blame by seeking out scapegoats. There has to be a devil who got us into the mess. An individual provides a suitable devil, especially if he is rich, and big business is also a prime candidate. If nothing else appears, a faceless government agency will serve.

An illustration of how the scapegoat practice works is the clamor in recent years against the Federal Food and Drug Administration. This agency has been a far better than average governmental agency for over sixty years, with untold numbers of dedicated, courageous, long-suffering employees. It has worked under an inadequate statute,[5] with inadequate appropriations and personnel and inadequate support from Congress and from the public. In addition, it has been caught in recent

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[1]Act of June 30, 1906, ch. 3915, 34 Stat. 768.

[2]Act of June 25, 1938, ch. 675, 52 Stat. 1040.

[3]Act of Oct. 26, 1951, ch. 578, 65 Stat. 648.

[4]Act of Oct. 10, 1962, Pub. L. No. 87-781, 76 Stat. 780.

[5]*See* notes 1-2 & accompanying text *supra*.

decades by the avalanche of medical discoveries and advances. Under the circumstances it has turned in a remarkable performance. Yet, when weaknesses in consumer protection in the food and drug areas became generally apparent, blame was placed not on Congress and on the public where it belonged but on this hard-working agency.

Once we have indicted our devil, we then proceed, often times, by creating laws that are weak or poorly thought out or both. Advertising is an example. If anything in this country is a disgrace, it is our advertising, and it has been a disgrace for two centuries. The position that the sole function of advertising is to sell goods is a cynical one, and it is not acceptable for American society.

The press, of course, has not done an adequate job in protecting the consumer from deceptive advertising. But the real problem has been that the laws regulating advertising have been toothless. Until recently the regulation of drug advertising, for example, was under a formless statute[6] in the wrong agency—made weak and put there to prevent effective policing of advertising.

Courts, too, must share in the blame for our lack of adequate consumer protection. Scores of judges, including Oliver Wendell Holmes,[7] have subscribed to the native American belief that a sucker has only himself to blame. This belief runs deep in our society, and therein lies the source of much of our difficulty.

At times, of course, no one is to blame, since new needs continually arise and replace old ones. A pressing danger today may not have been so pressing thirty years ago. It is not exactly fair to blame Grover Cleveland for not pushing for automobile exhaust controls. Some part of our present problem with consumer protection results from the rapid advance of science, with new evils arising from progress itself. This makes it difficult to pinpoint the devil, and so the frustration is greater.

In order to turn the situation around and secure needed consumer protection, several things are necessary.

First, new, strong, effective, fair laws and regulations are essential. Frequently these laws and regulations should be on the federal level for the sake of uniformity, and they often should not be in the hands of the courts.

Next, we should have leadership in the consumer field by hard-headed, practical, calm people who know how to get things done, how

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[6] 15 U.S.C. §§ 41-58 (1970).

[7] *See* United States v. Johnson, 221 U.S. 488 (1911).

to write a statute, how to enforce it with firmness and yet with fairness, and how to provide leadership that is skillful, realistic, and dedicated. Spirit and sermons are important in cleaning up America, but in the end we should have the execution of any plan in the hands of people who understand the art of keeping the bull in the pasture.

We must spend money—lots of it. Speeches and marches will not do the job.

Perhaps the most difficult assignment will be to overcome the sucker philosophy, and that will be a tough one. And the public must stay after the problem. Never mind the devils; we are to blame. There is no glory ahead—no silver plaques to honor us. Tens of thousands must work in the ranks with skill and dedication through the years, day after day.

Having said this, and especially having said that strong laws and hard work are needed, I want to "unsay" everything to some degree, for there are broader, more complex aspects to consumer protection that merit attention and thought.

Professor Smith's article, which follows, deals with the North Carolina act on consumer protection in credit sales and makes clear some of the problems in providing consumer protection. The article demonstrates the difficulty in writing a statute that will accomplish the desired results without undesirable side effects. Among other things, it seems to me that one side effect of this statute will be an increase in the cost of doing business. That means, of course, higher prices for the buyer. To illustrate, following the federal credit legislation of recent years, many firms, including oil companies, doctors, and veterinarians, who never before had charged interest on unpaid accounts began to do so on a regular basis. Another increase in cost resulted when even honest firms had to add additional personnel to take care of the paper work. Another side effect of this and similar legislation will be to complicate greatly the doing of business, with the chief beneficiary being the legal profession.

If legislatures are to enact consumer statutes in minute detail with all of the modern due process that we think is necessary, then our codes are going to double, triple, and quadruple in size in the next few years. The technicalities are going to swallow us. We are already approaching the era of Common Law Pleading of the Middle Ages in criminal matters—a situation in which guilt or innocence may become incidental in our court maneuvers—and we can very well get into the same position

in our business affairs. America is now, perhaps, in its most contentious, litigation-minded era; we go to court over everything and judges act as Solomons on any subject. With the present trend in consumer legislation to give everybody a cause of action and a profit in exercising it, we are bound to have an orgy of litigation. Lawyers will get rich.

I believe that general legislation often is preferable, with competent administrative agencies to fill out the details and to enforce. The concept of the Federal Trade Commission Act,[8] although it has worked in practice only in minimal fashion, is nevertheless the desirable approach in many situations. We should give a good agency the power, people, protection, and funds and let it have at the problem. Canada offers experience here that can be helpful. In food and drug matters, for example, Canada[9] can move quickly and with far less of the red tape, delay, and dilution that are the hallmarks of the American experience in the field. The red tape and technical sparring in this country that come with our elaborate methods of doing things result in less than desired results.

But a deeper problem, faced by the preacher in the past, has become one for the lawyer also. This is the matter of basic morality. The low morality of sellers is not far below, if at all, the morality of buyers. We are all crooks when we stand to profit and can get away with it.

So, I am suggesting that two things are required for the achievement of reasonable consumer protection: One is simple, direct, nonlitigious, fast ways to deal with cheats. Another, more fundamental and even more essential, is an acceptance by the population of some basic norms of principle and honesty—norms that the people believe in and seek to live by. Perhaps it was the rise of the inanimate corporation, perhaps it was the decline of traditional religion, perhaps it is the times that have led to the present attitude of "get mine"; but whatever the cause, laws alone will not make honest women of us.

Involved are high stakes. I do not see how a democratic system can govern if we continue down the road of Common Law Pleading, where every business and personal transaction is covered in minute detail by a volume in the code. Soon every second person will be a lawyer, every third a judge, and every fourth a jailer. And I do not see how a democratic government can last if there does not exist both civility among people and a reasonable agreement on what is right and wrong.

With detailed and technical laws, necessary as these may be, we are

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[8]15 U.S.C. §§ 41-77 (1970).

[9]Food and Drugs Act, 1 Eliz. II, c. 38 (Can. 1952).

adopting simplistic solutions for complicated, deep-rooted problems, and we must inevitably be disappointed. Lawyers must turn to philosophy. In a democratic society we have to live by general principles, broad concepts. What will happen to us when the first amendment becomes five volumes of technical regulations? Speaking in another context, one writer has written words that can be applied to the consumer protection movement:

> [W]e must be aware of the dangers which lie in our most generous wishes. Some paradox of our nature leads us, when once we have made our fellow men the objects of our enlightened interest, to go on to make them the objects of our pity, then of our wisdom, ultimately of our coercion.[10]

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[10]L. TRILLING, THE LIBERAL IMAGINATION 214 (1954).