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Legislation and Administration: Economic Institutions and Value Survey: The Consumer in the Marketplace -- A Survey of the Law of Informed Buying

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LEGISLATION AND ADMINISTRATION

ECONOMIC INSTITUTIONS AND VALUE SURVEY

THE CONSUMER IN THE MARKETPLACE — A SURVEY OF THE LAW OF INFORMED BUYING.

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THE CONSUMER IN THE MARKETPLACE — A SURVEY OF THE LAW OF INFORMED BUYING.

I. INTRODUCTION

If consumers are offered inferior products, if prices are exorbitant, if drugs are unsafe or worthless, if the consumer is unable to choose on an informed basis, then his dollar is wasted, his health and safety may be threatened, and the national interest suffers. On the other hand, increased efforts to make the best possible use of their incomes can contribute more to the well-being of most families than equivalent efforts to raise their incomes.¹
 President John F. Kennedy

The difficulties confronting the consumer today are manifested in countless forms and varieties. The abuses are, in some instances, flagrant; but, because the consumer is not effectively organized to present a unified front in his fight for fair treatment, his views often go unheard. Attention here is focused on the consumer's inability to purchase on an informed basis and the law's attempt to secure his protection.

More particularly, consideration will be directed to three important aspects of the problem: the labeling and packaging of goods, the credit terms of installment purchasing, and guarantees and warranties. The "consumer in the marketplace" is the topic of discussion. It may be a television commercial or magazine ad² which excites interest and prompts the consumer to enter the marketplace; but once within its confines he is met by the hard sell of attractive labels and packages, easy credit terms, lifetime guarantees as well as the salesman.

The section of the note dealing with labeling and packaging will examine the law as it exists today and incidentally trace its origins and development. Emphasis is here placed upon federal control, simply because of the greater stature it has attained in this field. State law, however, will be considered. Attention is also given to the federal "Truth in Packaging" Bill,³ introduced by Senator Philip Hart of Michigan, in order to assess future development in this field.

The purpose of the section concerned with credit protection is to analyze the efforts that have been made, both on the state and federal levels, to "disclose to borrowers in advance the actual amounts and rates which they will be paying for credit." The core of the discussion relates to state legislative activity. Here, in contrast to the above, the states have made the more significant law. But throughout the survey, various portions of Senator Paul Douglas' "Truth in Lending" Bill⁴ will be interjected in an attempt to expose the existing deficiencies of state law.

In the final area of study, once again both state and federal law have been assigned a role in protecting the purchaser. Here, the efforts of the Federal Trade Commission to prevent misrepresentation of manufacturers' guarantees are explored. Such efforts operate prospectively, as does the administration of the law in prior two sections. But the law of warranty, as embodied in the common law, the Uniform Sales Act and the Uniform Commercial Code, offers its remedy only after the purchase has been made—when the representations, whether express or implied, that induce sale have been discovered to be untrue. Particular scrutiny will be given the seller's attempt to limit these representations through disclaimer clauses in the contract of sale.

As a result, it is hoped that the reader will be aided in his accumulation of knowledge concerning an area of law which bids fair to be a paramount one.

1 Kennedy, *Consumers' Protection and Interest Program*, Message from the President of the United States, H. R. Doc. No. 364, 87th Cong., 2d Sess. 1-2 (1962) [hereinafter cited as *1962 Consumer Protection Message*].

2 See generally Handler, *The Regulation of Advertising*, 56 COLUM. L. R. 1018 (1956).

3 S. 387, 88th Cong., 1st Sess. (1963).

4 S. 750, 88th Cong., 1st Sess. (1963).

II. LABELING AND PACKAGING

If you found yourself in a typical American supermarket or drugstore for the first time, one would hardly blame you if you stood somewhat in awe upon viewing the seemingly infinite number of items on display. A rapid tour up and down the numerous aisles would be sufficient to convince you that a man-sized job lay ahead in making a good choice among products. No friendly corner grocer, for example, would be at hand to assist you in your dilemma. With the emphasis of modern merchandising on self-service, competing commodities on the shelves veritably cry out by means of their labels and packages urging your purchase.

Unquestionably, this is American marketing life today at the retail level. With the inanimate label and package giving most of the sales pitch, there is the possibility of deceiving the unwary buyer by leaving much unsaid. The "hidden persuaders" of color scheme and design and size of package may not always lend themselves to adequate disclosure of what lies behind the label or within the package. Obviously, the unscrupulous avail themselves of such possibilities with abandon. Hence, it follows that the consumer must be afforded some measure of protection in order to pursue his shopping ends with the assurance that he is actually getting what he thinks he is getting. Perhaps it is true that one cannot judge a book by its cover, but that in effect is what the consumer should be able to do in resorting to the labeling and packaging of the items he purchases. To secure this end stand two federal agencies, the Food and Drug Administration and the Federal Trade Commission, and related state law. But, it is currently felt in some quarters that additional law is now needed to cope with the problems of contemporary marketing practices. A "Truth in Packaging" Bill, recently introduced before Congress,⁵ is aimed at requiring stricter labeling and packaging standards in the consumer commodity field, which mainly includes so-called "kitchen and bathroom" items.

A. Historical Setting and General Principles of the Federal Law

It was not always thus. The doctrine of *caveat emptor*—"let the buyer beware"—was the prevailing doctrine until late in the 1800s. But as a result of the agitation over adulterated food in the early part of this century,⁶ the maxim began to wane. Governmental intervention appeared in the form of the Federal Food and Drug Act of 1906.⁷ As usually happens, however, the passage of time revealed the inadequacies of this legislation in view of changing conditions. Undoubtedly contributing to the several shortcomings of the act was the fact that it was the initial enactment in this area. Consequently, in 1938⁸ Congress repealed the Federal Food and Drug Act, replacing it with the significantly stronger Federal Food, Drug and Cosmetic Act, still in force and aided by recent amendments.⁹ Devices and cosmetics were brought within the scope of the new act. That this law manifested the recognition of the times that the consumer also deserved a "New Deal" was clearly indicated by Mr. Justice Frankfurter in *United States v. Dotterweich*:¹⁰ "The purposes of [the Federal Food, Drug and Cosmetic Act] thus touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection." Thus: "The 'high pur-

5 S. 387, 88th Cong., 1st Sess. (1963).

6 The outstanding, though inadvertent, example of this was Upton Sinclair's novel, *The Jungle*. Originally designed to provide Socialist propaganda, the book had the curious effect of calling attention to revolting meat-packing-house practices instead. Sinclair later remarked that he had aimed at the public's heart, but by accident had hit it in the stomach. See Regier, *The Struggle for Federal Food and Drugs Legislation*. 1 LAW & CONTEMP. PROB. 3 (1933).

7 34 Stat. 768 (1906).

8 This was a good year for consumers: Congress passed both the Wheeler-Lea Amendment and the Federal Food, Drug and Cosmetic Act in 1938, during the same session.

9 Drug Amendments of 1962, 76 Stat. 780 (1962); Food Additives Amendment of 1958, 72 Stat. 1784 (1950), discussed *infra*.

10 320 U.S. 277, 280 (1943).

pose' of the Federal Food, Drug and Cosmetic Act . . . is to protect consumers."¹¹ The act has, in large measure, achieved that lofty purpose. Liberal construction of it, in order to protect the public effectively, is the rule.¹²

The Federal Trade Commission Act of 1914¹³ made unlawful "unfair methods of competition in commerce."¹⁴ The act as a whole, and section 5 in particular, contained general prohibitions much along the same lines as the Sherman¹⁵ and Clayton¹⁶ Acts but was significantly broader than the latter statutes. Mr. Justice Douglas, in *FTC v. Motion Picture Advertising Service Co.*,¹⁷ described its scope in these words:

The "unfair methods of competition," which are condemned by §5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. . . . It is . . . clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipency acts and practices which, when full blown, would violate those Acts, as well as to condemn as "unfair methods of competition" existing violations of them.¹⁸

Under the original act the basis for the Commission's jurisdiction was injury to the competitor. However, this proved to be too narrow a view, especially insofar as the ultimate consumer was concerned. In rendering its decision in *FTC v. Raladam Co.*,¹⁹ the Supreme Court of the United States emphasized competition and minimized the factor of public interest.²⁰ The case was severely criticized, with the main line of attack indicating that the *Raladam* approach in reality left the consumer virtually unprotected by a weakening, if not actual nullification, of the express powers delegated to the Commission for the protection of the public.²¹

However, three years after the *Raladam* decision the Court evidenced a changed approach in *FTC v. R. F. Keppel & Bro.*²² in which it recognized that the Commission did possess jurisdiction in unfair trading cases, irrespective of whether the interests of the public or those of merely a particular class of competitors demanded that the complained-of practice be eliminated. This holding received Congressional approval in 1938 when it passed the Wheeler-Lea Amendment²³ which granted the Federal Trade Commission authority to challenge unfair practices on the basis of whether the proceeding was in the public interest, rather than solely on the restricted basis of whether the practice in question involved injury to competition.²⁴ The upshot of this change worked by the Wheeler-Lea Amendment was that the Commission was enabled to concern itself with protection of the consumer in a more direct fashion, whereas previously it could only protect him indirectly *via* protection of the competitor.

11 *Strey v. Devine's, Inc.*, 217 F.2d 187, 190 (7th Cir. 1954).

12 *United States v. Bodine Produce Co.*, 206 F. Supp. 201 (D. Ariz. 1962).

13 38 Stat. 717 (1914), 15 U.S.C. §§ 41-77 (1958).

14 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a) (1958).

15 26 Stat. 209 (1890).

16 38 Stat. 730 (1914).

17 344 U.S. 392 (1953).

18 *Id.* at 394-95.

19 283 U.S. 643 (1931).

20 Among other cases prior to 1938 holding that injury to competitors is the determinative criterion are *Berkey & Gay Furniture Co. v. FTC*, 42 F.2d 427 (6th Cir. 1930) (insufficient injury); *Lighthouse Rug Co. v. FTC*, 35 F.2d 163 (7th Cir. 1929) (sufficient injury).

21 See DERENBERG, *TRADE MARK PROTECTION & UNFAIR TRADING* 172, 173 (1936).

22 291 U.S. 304 (1934).

23 52 Stat. 111 (1938).

24 In *Progress Tailoring Co. v. FTC*, 153 F.2d 103, 105 (7th Cir. 1946), it was said: "[S]ince the [Wheeler-Lea] amendment . . . , the Commission has had jurisdiction of all cases in commerce affecting the public interest whether or not competition is involved; hence it is no longer necessary to show competition, if there is an act or practice in commerce inimical to the public interest."

The principal weapon utilized by the FTC in enforcing the provisions of the act is the cease-and-desist order. Its primary purpose is, in a sense, unique since it is unlike most of the usual remedies afforded by the courts: "Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future."²⁵ Thus, since the Commission is bent on preventing what could happen before it actually does, rather than remedying the wrong after it occurs through punishment of the wrongdoer, *no damage* to the public, in the ordinary sense of the word, need be shown.²⁶

Some 53 years ago, between the passage of the original Federal Food and Drug Act and the Federal Trade Commission Act, the following widely-quoted statement by Judge Coxe in *Florence Mfg. Co. v. J. C. Dowd & Co.*²⁷ aptly revealed the tendency of the times toward consumer protection:

The law is not made for the protection of experts, but for the public — that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions.²⁸

Not only was it thus felt that it would be best for the public to have protection of this sort, but it was also demonstrated that the group covered would be all-inclusive.

In protecting the "vast multitude," primary consideration is given to the effect that the various methods of labeling, packaging and advertising have in inducing the consumer to consummate a purchase. The peculiar circumstances and facts which may surround a particular unfair practice, from the standpoint of the marketer, are of relatively slight, if any, importance. Thus, a seller's lack of knowledge of the falsity of a representation is no defense to a charge of deception,²⁹ nor is his good faith.³⁰ Moreover, actual deception of the consumer is not essential before a violation of section 5 can be found.³¹ A showing of intent to deceive is likewise not necessary.³² Rather, the test which is generally applied is whether or not the representation has a *capacity* or *tendency* to deceive.³³

Furthermore, an ambiguous representation is unfair where one meaning is false;³⁴ and the literal truth of a representation is no excuse where a false impression is created.³⁵ Apparently, about the only representations that are not susceptible of being construed as violative of the act are those which contain the expression

25 *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

26 *National Harness Mfrs.' Ass'n v. FTC*, 268 Fed. 705 (6th Cir. 1920).

27 178 Fed. 73 (2d Cir. 1910).

28 *Id.* at 75. *Cf.* *United States v. 88 Cases Containing Bireley's Orange Beverage*, 187 F.2d 967, 971 (3d Cir. 1957), *cert. denied* 342 U.S. 861 (1951): "[T]he normal inference is that the legislature contemplated the reaction of the ordinary person *who is neither savant nor dolt*, who lacks special competency with reference to the matter at hand but has and exercises a normal measure of the layman's common sense and judgment." (Emphasis added.)

29 *Gimbel Bros., Inc. v. FTC*, 116 F.2d 578 (2d Cir. 1941).

30 *Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960).

31 *Feil v. FTC*, 285 F.2d 879 (9th Cir. 1960); *American Life & Acc. Ins. Co. v. FTC*, 255 F.2d 289 (8th Cir.), *cert. denied*, 358 U.S. 875 (1958); *Northern Feather Works v. FTC*, 234 F.2d 335 (3d Cir. 1956).

32 *Gimbel Bros., Inc. v. FTC*, 116 F.2d 578 (2d Cir. 1941); *Indiana Quartered Oak Co. v. FTC*, 26 F.2d 340 (2d Cir. 1928).

33 *Royal Oil Corp. v. FTC*, 262 F.2d 741 (4th Cir. 1959); *Goodman v. FTC*, 244 F.2d 584 (9th Cir. 1957); *Progress Tailoring Co. v. FTC*, 153 F.2d 103 (7th Cir. 1946); *Etablissements Rigaud, Inc. v. FTC*, 125 F.2d 590 (2d Cir. 1942). Typical of the judicial statements made with regard to the test to be applied is that of Chief Judge Gardner in *American Life & Acc. Ins. Co. v. FTC*, 255 F.2d 289, 293 (8th Cir.), *cert. denied* 358 U.S. 875 (1958): "The fact that there was no evidence that anyone had in fact been deceived . . . was not conclusive. The test was whether such advertisements were likely to deceive."

34 *United States v. 95 Barrels of Vinegar*, 265 U.S. 438 (1924).

35 *P. Lorillard Co. v. FTC*, 186 F.2d 52 (4th Cir. 1950).

of an honest opinion³⁶ and those of which it can legitimately be said are nothing more than harmless "puffing."³⁷

In many respects, the FDA and the FTC each deal with quite similar problems. Since both agencies have the common objective of preventing deception of the public through the misrepresentation of food, drugs, devices, and cosmetics, both have frequently been in simultaneous pursuit of the same practice. Through the misbranding provisions of the Federal Food, Drug and Cosmetic Act,³⁸ the FDA is concerned chiefly with the promotion of truthful and informative labeling. Through section 12 of the Federal Trade Commission Act,³⁹ added by the Wheeler-Lea Amendment of 1938,⁴⁰ the FTC is given authority to deal with false advertisements, *other than labeling*,⁴¹ of food, drugs, devices, and cosmetics. Although the jurisdictional lines appear thus to be clear, a problem is presented where material serves as both labeling *and* advertising in a given instance.⁴² In that situation, the FDA and the FTC have concurrent jurisdiction and efforts on the parts of both were being needlessly duplicated in many cases. To obviate this difficulty a working agreement between the two agencies was announced on June 9, 1954 in order to provide for better liaison, thereby cutting down on duplicate litigation except in those instances where two proceedings are considered to be to the interest of the public.⁴³ Generally, it was decided that the FDA is to be concerned with labeling alone and the FTC shall have jurisdiction over advertising.

B. Labeling

1. Under the Federal Trade Commission Act

What can be said as to the relative importance of labeling in the marketing process? As a suggested answer to this question, it was recently said in *Korber Hats, Inc. v. FTC*⁴⁴ that, as between labeling and advertising,

[T]here is good reason to insist upon a higher degree of veracity in [labeling]. It may well be argued that consumers accept labeling statements literally while perhaps viewing with a more jaundiced eye the vaunted claims of the advertising media.⁴⁵

If this is true, then labeling is an area of the marketing process which logically demands close scrutiny.

The *Korber Hats* case involved the labeling of hemp hats as "Milan," "Genuine Milan," and "Genuine Imported Milan." There was evidence that such terms on the tags in the crown or imprinted on the sweatbands connoted that the hats were made of wheat straw, and were consequently considered luxury items because they were lightweight, had a desirable feel, and possessed exceptional shape-retention

36 *Scientific Mfg. Co. v. FTC*, 124 F.2d 640 (3d Cir. 1941).

37 "Puffing" refers, generally, to an expression of opinion not made as a representation of fact." *Gulf Oil Corp. v. FTC*, 150 F.2d 106, 109 (5th Cir. 1945). In *Kidder Oil Co. v. FTC*, 117 F.2d 892 (7th Cir. 1941), such words on labels and advertising material as "amazing distance" and "perfect" in connection with the expounded advantages of petitioner's oil additive were held to be expressions having different meanings to different persons, and hence mere "puffing," since they were deemed to be largely matters of personal opinion and were not calculated to deceive.

38 Section 403, 52 Stat. 1047 (1938), 21 U.S.C. § 343 (1958); Section 502, 52 Stat. 1050 (1938), 21 U.S.C. § 352 (1958); Section 602, 52 Stat. 1054 (1938), 21 U.S.C. § 362 (1958).

39 Section 12, 52 Stat. 114 (1938), 15 U.S.C. § 52 (1958).

40 52 Stat. 111 (1938).

41 See Section 15(a)(1), 52 Stat. 116 (1938), 15 U.S.C. § 55(a)(1) (1958).

42 This was the case in *Kordel v. United States*, 335 U.S. 345, *rehearing denied* 335 U.S. 900 (1948), in which the Supreme Court said that although control over false advertising is in the FTC, Congress did not intend that the Federal Food, Drug and Cosmetic Act would not control that advertising which performs a labeling function.

43 *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary Pursuant to S. Res. 258*, 87th Cong., 2d Sess., pt. 3, at 827 (1962).

44 311 F.2d 358 (1st Cir. 1962).

45 *Id.* at 361.

qualities. Although the Commission's cease-and-desist order was set aside because its scope was too broad, the court found that there was substantial evidence that a prospective purchaser *might* be misled by the label into thinking he was obtaining a Milan hat and that this possibility was sufficient to subject petitioner to a proceeding charging a violation of section 5(a)(1). There was further testimony that a customer would most probably be unable to tell whether a given hat was a Milan by viewing and handling it.

Section 5 of the Federal Trade Commission Act⁴⁶ is the heart of that statute by which techniques of labeling are kept pure. Under that section, the FTC has a wide range of powers. Since the Wheeler-Lea Amendment,⁴⁷ the principal limitation upon the Commission's determination whether or not to initiate proceedings is that the conduct complained of must be prejudicial to the public interest.⁴⁸ Even though this restriction is the most prominent, the Commission itself nevertheless has broad discretion in deciding in the first instance whether or not a proceeding is in the public interest.⁴⁹ This is forcefully evidenced by the language of section 5(b) of the act:

Whenever the Commission shall have *reason to believe* that any . . . person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall *appear* to the Commission that a proceeding by it . . . would be to the *interest of the public*, it shall issue . . . a complaint. . . .⁵⁰

Section 5, however, is not the sole source of the agency's control over labeling. The Textile Fiber Products Identification Act,⁵¹ the Fur Products Labeling Act⁵² and the Wool Products Labeling Act⁵³ set forth a comprehensive body of rules for the labeling of the respective products of each law's concern. These acts are intended to protect the manufacturer and distributor, as well as the ultimate consumer against misbranding.

Under the current state of affairs, the consumer no longer need take the offensive to guard himself against purchasing deception with his goods. The burden has instead been shifted to the seller, for "there is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious."⁵⁴ Consequently, the marketer is charged with the obligation of seeing to it that, in the consumer-inducement process, truthfulness will reign supreme; that the purchaser will receive precisely what the representation purports he will receive and what it justifiably leads him to believe he will, in fact, receive. So overriding is this consideration that it has been extended to cover the situation where the consumer is shown to have been *benefitted* by having been induced to purchase because of the deception.⁵⁵ In applying the capacity-to-deceive test, rather than the actual-deception criterion, the only truly important factor is whether or not the purchaser was induced to buy because of the misrepresentation. If he was, section 5 of the act has been violated and it is of no significance that he did not lose actual value or quality by reason of being so induced.⁵⁶

46 Section 5, 38 Stat. 719 (1914), as amended, 52 Stat. 115 (1938), 15 U.S.C. § 45 (1958).

47 52 Stat. 111 (1938).

48 See VAN CISE, UNDERSTANDING THE ANTITRUST LAWS (1958).

49 DOCTOR W. B. CALDWELL, Inc. v. FTC, 111 F.2d 889 (7th Cir. 1940).

50 Section 5(b), 52 Stat. 112 (1938), 15 U.S.C. § 45(b) (1958). (Emphasis added.)

51 72 Stat. 1717 (1958), 15 U.S.C. §§ 70(a)-(k) (1958).

52 65 Stat. 175 (1951) 15 U.S.C. §§ 69 (a)-(j) (1958).

53 54 Stat. 1128 (1940), 15 U.S.C. §§ 68 (a)-(j) (1958).

54 FTC v. Standard Educ. Soc'y, 302 U.S. 112, 116 (1937).

55 National Silver Co. v. FTC, 88 F.2d 425 (2d Cir. 1937).

56 *Ibid.* In FTC v. Real Products Corp., 90 F.2d 617, 619 (2d Cir. 1937), it was said: "Nor is it necessary that the product misrepresented be inferior or harmful to the public. The deceptive misrepresentation suffices."

Of particular interest in this connection is a trio of recent cases involving the sale of previously-used motor oil. In *Royal Oil Corp. v. FTC*,⁵⁷ the company employed a process whereby impurities were removed from used oil causing it to be of high viscosity and good quality—in fact, comparable to oil which had never been used before. This oil was marketed in cans which bore the words “Reprocessed Oil” in large, plain type. Although the company was engaged in interstate commerce, most of its sales were in North Carolina where all that was required by way of disclosure on the containers was the phrase “Reprocessed Oil.” Despite this, and the fact that the petitioner’s oil was comparable to virgin oil, the court affirmed the FTC’s cease-and-desist order, holding that under the federal law this label did not sufficiently inform the public of the nature of the product and hence had a tendency to deceive. Although the Commission did not feel that the individual word “reprocessed” was deceptive of itself, the court agreed with the FTC that there should be a type of additional disclosure over and above that required by North Carolina law. In a similar case, *Mohawk Refining Co. v. FTC*,⁵⁸ there was a complete failure to disclose the prior use of the oil in both advertising and on the containers. In affirming the FTC’s order the court relied principally on evidenced adduced to the effect that the public preferred to purchase—and those in the trade preferred to distribute and sell—oil which had been refined from virgin crude rather than that which had been re-refined from crankcase drainings.⁵⁹ The court held it to be of no significance that the latter type of oil was as good as the former. Apparently, the rationale established by these cases is that the consumer ought actually get what he is being led to believe he is getting regardless of the fact that there is no qualitative difference between two items.⁶⁰ The third case,⁶¹ much along the same lines as the *Mohawk* decision, reinforced this rationale and added another principle: that adequate disclosure must be made for the consumer to indicate his preference fully apprised of all the facts, even though that preference is the outgrowth of “ill-founded sentiment, belief, or caprice.”⁶²

The law under the Federal Trade Commission Act covers a multitude of labeling sins. For example, there are numerous decisions involving the type of labeling which is required to accurately indicate the country of origin of the product. Such cases can be generally divided into two categories: those requiring affirmative disclosure and those concerning actual disclosure which has the capacity to mislead. In the former, an FTC cease-and-desist order which requires that the country of origin be disclosed both as to the product complained of and as to other similar products is a customary one which is consistently enforced by the courts.⁶³ In the latter situation, where labeling practices falsely indicate foreign origin of a product⁶⁴ under circumstances where such a product is preferred over a domestic one, the courts have not hesitated to enforce cease-and-desist orders.⁶⁵ Illustrative of a typical “foreign origin” case is *L. Heller & Son, Inc. v. FTC*, although here the preference was domestic origin rather than foreign.⁶⁶ There the petitioners removed from imitation pearls the tags which indicated that they were of foreign origin.

57 262 F.2d 741 (4th Cir. 1959).

58 263 F.2d 818 (3d Cir.), cert. denied 361 U.S. 814 (1959).

59 The idea that, in certain cases, the public prefers a particular item for one reason or another, has been recognized in cases involving other products. See, e.g., *Etablissements Rigaud, Inc. v. FTC*, 125 F.2d 590 (2d Cir. 1942) (perfume).

60 State courts have likewise recognized this rule and its rationale. See *Paraco, Inc. v. Department of Agriculture*, 118 Cal. App. 2d 348, 257 P.2d 981 (1953), a case involving reclaimed oil.

61 *Kerran v. FTC*, 265 F.2d 246 (10th Cir.), cert. denied 361 U.S. 818 (1959).

62 *Id.* at 248.

63 *American Tack Co. v. FTC*, 211 F.2d 239 (2d Cir. 1954) (per curiam).

64 Such practices would include the use of foreign words and addresses on the label, as well as English words which might connote foreign origin. See *Etablissement Rigaud, Inc. v. FTC*, 125 F.2d 590 (2d Cir. 1942).

65 *Etablissements Rigaud, Inc. v. FTC*, 125 F.2d 590 (2d Cir. 1942).

66 191 F.2d 954 (7th Cir. 1951).

The pearls were then fabricated into necklaces and sold without disclosure of that foreign origin. This was held to be a violation of the act on the grounds that it is deceptive to fail to affirmatively disclose material facts which, if known, would influence the consumer's decision whether or not to buy.

Misrepresentation of the composition or ingredients of a product, either by direct statement or by implication on the label, is likewise an unfair practice and is violative of section 5.⁶⁷ Where tolerances have been established, as in pillow labeling, deviations beyond those tolerances are likewise found offensive.⁶⁸ The simulation of a competing product through the use of packages which closely resemble the competitor's in size, shape, color, and printed matter constitutes an unfair practice on the theory that the resultant confusion caused among buyers is not to be tolerated.⁶⁹ And, where through use of the same devices, a seller simulates a widely-known product formerly manufactured by him but which in fact is an entirely different item and then advertises and sells it at a price significantly lower than that of the former product, such method is misleading to the public, unfair to competitors, and is hence a violation of section 5.⁷⁰

At a time when the FTC had only jurisdiction over unfair methods of competition in interstate commerce, a seller who labeled its imitation grape concentrate as "Good-Grape" was deemed to be engaged in unfair competition because this label falsely implied that the drink was wholly or partly composed of natural grape juice.⁷¹ Because of the jurisdictional limitation, the court based its decision on the fact that this practice was unfair to both petitioner's competitors who sold genuine grape juice, and to its competitors who sold imitations but truthfully labeled them. The court also noted that a buyer would make, at most, only a casual examination of the character of the beverage before purchasing it since it cost but five cents. This observation appears to have been an indication, albeit slight, that the consumer too was part of the picture and that consequently his interests should also be considered.

In *Pep Boys-Manny, Moe & Jack, Inc. v. FTC*,⁷² the petitioner, in marketing radios which were manufactured for it, affixed name plates thereto bearing the inscription "Remington." Since this was the name of, or part of the name of, several companies which were long-established and were favorably known by the public at the time, the court enforced the FTC's cease-and-desist order reasoning that the petitioner must have engaged in this practice because it recognized that the name "Remington" had certain valuable qualities of an intangible nature which would increase sales and thereby give petitioner an advantage over its competition.

From this cross section, it can be seen that a wide variety of deceptive labeling practices come within the prohibitions of the act. The FTC, for its part, has demonstrated by a long record of attacks that it is a formidable foe of such practices. Nevertheless, administrative red tape is often responsible for a certain weakening of the effectiveness of enforcement of the act through the cease-and-desist order. As the FTC's docket of cases becomes more and more crowded, the time which elapses between complaint and final disposition grows longer, with the practices continuing all the while. Perhaps giving the FTC power to issue temporary restraining orders pending the outcome of cases would be helpful, but thus far Congress has not seen fit to grant the Commission such authority where deceptive labeling and packaging are concerned. Further, the consequences may be too drastic

67 *Procter & Gamble Co. v. FTC*, 11 F.2d 47 (6th Cir.), *cert. denied* 273 U.S. 717 (1926).

68 *Northern Feather Works v. FTC*, 234 F.2d 335 (3d Cir. 1956).

69 *FTC v. Balme*, 23 F.2d 615 (2d Cir.), *cert. denied* 277 U.S. 598 (1928).

70 *Royal Baking Powder Co. v. FTC*, 281 Fed. 744 (2d Cir. 1922).

71 *FTC v. Good-Grape Co.*, 45 F.2d 70 (6th Cir. 1930).

72 122 F.2d 158 (3d Cir. 1941).

where a producer has innocently wrapped his product in a label or package which may or may not have a tendency to deceive.

2. Under the Federal Food, Drug and Cosmetic Act

The word "Label," in Food and Drug law, merits specific definition in section 201(k): ". . . a display of written, printed, or graphic matter upon the immediate container of any article; . . ."⁷³ And in section 201(m), "labeling" is defined as ". . . all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."⁷⁴ Misleading and deceptive labeling practices under the act all come within its misbranding provisions. Foods, drugs, devices, and cosmetics are "misbranded" if, among other things, their "labeling is false or misleading in any particular."⁷⁵

There are a great many cases involving misbranding of these four items. Such misbranding is especially damaging to the public simply because, by the very nature of food, drugs, devices and cosmetics, untold irreparable harm to the physical and mental health of the citizenry can easily result from dishonest labeling practices. This is particularly so where drugs are involved. Ill health seems to breed attempts to find the so-called quick "cure-all" in convenient, easy-to-take form. The irresponsible reap a financial harvest in exploiting such weaknesses of the sick.

There have, over the years, existed purported remedies for just about anything that could be mentioned. An example of such can be found in *United States v. 11¼ Dozen Packages*.⁷⁶ The words on the label in question were novel: "Mrs. Moffat's Shoo Fly Powders for Drunkenness." In finding that the drug was misbranded the court held that use of the phrase, "for drunkenness" was equivalent to a representation that it was a "cure, mitigation, treatment, or prevention"⁷⁷ of drunkenness. There was expert testimony that the only constituent of the powders was not helpful in the curing of drunkenness, and that the recommended dosage was dangerous to health. Undoubtedly, there were many who were taken in by the bland assertion on the label much to their subsequent disappointment.

That certain words or combinations thereof can constitute a representation that a drug will cure, alleviate, or prevent ailments was also recognized under the original Federal Food and Drug Act. In *Bradley v. United States*,⁷⁸ the court found that a mineral water was misbranded where the label on the containers indicated that it was "recommended in the treatment of" nine different ailments. This statement, said the court, implied that the water had a curative or therapeutic quality and was so held out to consumers. Bradley's contention that water is not ordinarily a drug in the true sense of the word was summarily disposed of by the court's reply that he could not be heard to say that now, where he had held it out to the public in the manner described.

Cigarettes have likewise been deemed to be a "drug," where leaflets accompanying the cartons suggested that the product was effective in preventing respiratory ailments. The rule announced in *Bradley* was adopted in the case of *United States v. 46 Cartons Containing Fairfax Cigarettes*.⁷⁹ A similar, more recent case concerned "Trim Reducing-Aid" cigarettes.⁸⁰ Following *Fairfax Cigarettes*, this case held that the cigarettes were a "drug" because they contained combustible

73 Section 201(k) 52 Stat. 1041 (1938) 21 U.S.C. § 321(k) (1958).

74 Section 201(m), 52 Stat. 1041 (1938), 21 U.S.C. § 321(m) (1958).

75 Section 403(a), 52 Stat. 1047 (1938), 21 U.S.C. § 343(a) (1958) (food); Section 502(a), 52 Stat. 1050 (1938), 21 U.S.C. § 352(a) (1958) (drugs and devices); Section 602(a), 52 Stat. 1054 (1938), 21 U.S.C. § 362(a) (1958) (cosmetics).

76 40 F. Supp. 208 (W.D.N.Y. 1941).

77 Section 201(g)(2), 52 Stat. 1041 (1938), 21 U.S.C. § 321(g)(2) (1958).

78 264 Fed. 79 (5th Cir. 1920).

79 113 F. Supp. 336 (D.N.J. 1953).

80 *United States v. 354 Bulk Cartons Trim Reducing-Aid Cigarettes*, 178 F. Supp. 847 (D.N.J. 1959).

tartaric acid intended to affect a bodily function.⁸¹ They were deemed to be misbranded on the basis of evidence that the tartaric acid contained therein was not effective in curbing the appetite. Further, where a seller orally represented to a purchaser that certain drugs were for the treatment of specified conditions, the drugs were misbranded when their labels failed to disclose that they were for the treatment of those conditions.⁸² In all these cases it is not necessary to show intent before a violation can be found.⁸³

Another requirement of the act with which a drug label must comply, under penalty of being adjudged misbranded, is that concerning adequate directions for use.⁸⁴ This requirement is not met where the label makes no reference to an affliction for which the drug is represented as an appropriate treatment by such promotion as advertising.⁸⁵ The requirement applies likewise to devices,⁸⁶ and, they are not exempted from this provision merely because they can only be used by licensed practitioners.⁸⁷

The word "device" as used in the Federal Food, Drug and Cosmetic Act appears to be a catchall term.⁸⁸ In *United States v. 23 Articles*,⁸⁹ a phonograph record designed for use in alleviating insomnia was held to be a "device," since it was intended to affect a bodily function⁹⁰—sleeping. Statements on the album jacket emphasized the "uncanny" and "phenomenal" ability of the recorded voice to induce sleep through the power of suggestion, even though that voice was not personally present. The evidence, however, demonstrated that the recording could not do all which was purported. In setting aside the decree of the district court dismissing the libel of condemnation, the court of appeals declared that the device was misbranded because it conveyed the impression that it was at least an adequate substitute for medication, if not a virtual cure-all for insomnia.

Where these self-styled "amazing discoveries" are involved, it is evident that the general attitude of the courts in condemning them lay in the recognition that the real danger is that by using them consumers are apt to postpone needed medical treatment to a point beyond which results could be disastrous.⁹¹ Thus, it is of no consequence that the device itself is harmless.⁹² The vain psychological hopes engendered by these products are powerful and must be corralled. This same rationale is carried over to the occasional case where the consumer is actually satisfied with an ineffective device believing that he has benefitted from its use.⁹³ Despite both the fact that the buyer wishes to keep the gadget and that it is not inherently dangerous, the Ninth Circuit has reasoned that his rights and desires must be subordinated to the duty of the government to seize and condemn the article under the circumstances of false and misleading labeling.⁹⁴

81 See Section 201(g)(3), 52 Stat. 1041 (1938), 21 U.S.C. § 321(g)(3) (1958).

82 *United States v. Cruetz*, 144 F. Supp. 229 (E.D. Ill. 1956).

83 *United States v. 11¼ Dozen Packages*, 40 F. Supp. 208 (W.D.N.Y. 1941).

84 Section 502(f)(1), 52 Stat. 1051 (1938), 21 U.S.C. § 352(f)(1) (1958).

85 *United States v. 38 Dozen Bottles Labeled in Part Tryptacin*, 114 F. Supp. 461 (D. Minn. 1953.)

86 Section 502(f)(1), 52 Stat. 1051 (1938), 21 U.S.C. § 352(f)(1) (1958). See *Drown v. United States*, 198 F.2d 999 (9th Cir. 1952), *cert. denied* 344 U.S. 920 (1953).

87 *United States v. Ellis Research Laboratories, Inc.*, 300 F.2d 550 (7th Cir. 1962), *cert. denied* 370 U.S. 918 (1962).

88 Section 201(h), 52 Stat. 1041 (1938), 21 U.S.C. § 321(h) (1958), defines "device" as meaning "instruments, apparatus, and contrivances, including their components, parts, and accessories. . . ."

89 192 F.2d 308 (2d Cir. 1951).

90 See § 201(h)(2), 52 Stat. 1041 (1938), 21 U.S.C. § 321(h)(2) (1958).

91 *United States v. 23 Articles*, 192 F.2d 308 (2d Cir. 1951).

92 *Drown v. United States*, 198 F.2d 999 (9th Cir. 1952), *cert. denied* 344 U.S. 920 (1953).

93 *United States v. Olsen*, 161 F.2d 669 (9th Cir. 1947), *cert. denied* 332 U.S. 768 (1947).

94 *Ibid.*

The lack of cosmetic cases under the Food, Drug and Cosmetic Act in this area is interesting. The one case found to concern itself with the misbranding of cosmetics⁹⁵ under the act does so incidentally. In fact, the case was brought by the FTC, acting under section 5 of its act. In *Houbigant v. FTC*,⁹⁶ the Second Circuit sustained an order "requiring the petitioners to desist (1) from using upon their products the words 'Paris' or 'Paris, France' or other terms indicative of foreign origin, and (2) from using the terms 'Houbigant,' 'Cheramy' or any other French or foreign words as trade names for toilet preparations compounded in the United States, without also stating that such products were compounded in the United States."⁹⁷ It was there stated that the FTC was not precluded from exercising jurisdiction over the labeling of perfumes by the 1938 Food, Drug and Cosmetic Act.

While cases under the act involving foods are many and varied, one of particular interest is *United States v. 651 Cases of Chocolate Chil-Zert*.⁹⁸ Therein, the product in question, "Chocolate Chil-Zert," was an ice-creamlike substance. The label stated in a prominent fashion that it was "not an ice cream." The Chil-Zert was nevertheless deemed to be misbranded, because the label in such a case must bear the word "imitation," followed immediately by the name of the imitated food, as explicitly required by section 403(c) of the act.⁹⁹ The court noted that the claimant could not be permitted to choose the means by which the public was to be informed that his product was not in fact the one imitated.

Although the court in the *Chil-Zert* case had no choice but to adhere to the plain wording of section 403(c), the government has requested the courts to go far even where such a strict statutory provision was not in issue. They have not always been willing to do so. For example, in a 1962 decision,¹⁰⁰ a label describing candy as "nut caramels" was held not to be false or misleading although the only nuts in the candy were peanuts. In other words, a peanut is a "nut" to the average consumer despite the fact that technically it is a "legume." The libel of condemnation was dismissed.

In section 401¹⁰¹ of the federal law, authority is given the Secretary of Health, Education and Welfare to "promulgate regulations fixing and establishing for any food, . . . a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of containers. . . ." The Secretary may exercise this power whenever his judgment dictates that "such action will promote honesty and fair dealing in the interest of consumers. . . ." It has been held that the purpose of this section is to substitute standards of identity of foods, sold under common names, for informative labeling to assure the consumer that he is getting what he reasonably expects to receive.¹⁰²

Labeling is not restricted to that information which is disclosed on the article itself, or on its container, or in matter attached thereto, for "It is not necessary that mislabeling, or misbranding within the meaning of the [Federal Food, Drug and Cosmetic] Act, shall actually be on the container, but . . . may accompany it, or, reach the user in some other manner."¹⁰³ Labeling thus extends to false and misleading literature which is an essential supplement to the labels that are attached to the package, even though the literature and the articles were separately shipped

95 Section 602, 52 Stat. 1054 (1938), 21 U.S.C. § 362 (1958).

96 139 F.2d 1019 (2d Cir. 1944), cert. denied 323 U.S. 763 (1944).

97 *Ibid.*

98 114 F. Supp. 430 (N.D.N.Y. 1953).

99 Section 403(c), 52 Stat. 1047 (1938), 21 U.S.C. § 343(c) (1958).

100 *United States v. 46 Cases of Welch's Nut Caramels*, 204 F. Supp. 321 (D.R.I. 1962).

101 52 Stat. 1046 (1938), 21 U.S.C. § 341 (1958).

102 *Fed. Security Adm'r v. Quaker Oats Co.*, 318 U.S. 218 (1943).

103 *United States v. Hoxsey Cancer Clinic*, 94 F. Supp. 464, 467-68 (N.D. Tex. 1950), *rev'd* 198 F.2d 273 (5th Cir. 1952), cert. denied 344 U.S. 928, *petition for rehearing denied* 345 U.S. 914 (1953).

in interstate commerce and at different times.¹⁰⁴ This rule appears sound, for if this were not the law persons could easily circumvent the act by substituting pamphlets for labels with the former containing the misleading information.

In misbranding cases under the act, the chief weapon in the FDA's enforcement arsenal is seizure and condemnation of the article in question.¹⁰⁵ The act further provides¹⁰⁶ that it is a misdemeanor to engage in acts prohibited by section 301.¹⁰⁷ Finally, the district courts are given authority to issue injunctions restraining violations of section 301, except for subsections (h) through (j). These remedies seem to be adequate to effectuate the purposes of the law. But it must be noted that effectiveness of enforcement of either the Federal Food, Drug and Cosmetic Act or the Federal Trade Commission Act, regardless of the excellence of the measures provided, may be seriously impeded by administrative delay. It is paradoxical that the same agencies which were originally created to help relieve crowded court dockets now have huge backlogs of cases themselves. Furthermore, effectiveness is also hampered because there is a lack of personnel for the enforcement process.¹⁰⁸

Relatively recent laws deal with labeling on a different front, *viz.*, the function it performs *after* the consumer has made his purchase. Included among these laws are the Drug Amendments of 1962.¹⁰⁹ Enacted October 10, 1962, they are the latest federal legislation pertaining to consumer protection in this area.

The amendments contain public safeguards regarding the safety, purity and identity of drugs, as well as provisions for tighter manufacturing controls. Before a new drug can be placed on the market, it must be approved by the Secretary of Health, Education and Welfare. Under this law, the Secretary is empowered to withdraw approval of a drug or refuse to approve a new drug if he finds a lack of substantial evidence to support its effectiveness. This effectiveness criterion is one of the broadening new features of the amendments; whereas safety was the sole test under the 1938 act, today safety plus effectiveness must be established. Also, the "Secretary may designate an official name for any drug if he determines that such action is necessary or desirable in the interest of usefulness and simplicity."¹¹⁰ This name is to be the only official name of the drug to be used in any official compendium. The only qualification to this authority is that no official name may be established so as to infringe a valid trademark. Another objective of the amendments is to make information on drugs more readily accessible to both physicians and the general public. Implementing this objective on a broader level, the proposed "Truth in Packaging" Bill would permit the Secretary of Health, Education and Welfare and the FTC to promulgate regulations to:

require (consistent with the requirements imposed by or pursuant to the Federal Food, Drug and Cosmetic Act, as amended) that sufficient information with respect to the ingredients and composition of any consumer commodity (other than information concerning proprietary trade secrets) be placed on a prominent position upon packages containing that commodity and upon labels affixed thereto.¹¹¹

Notable among the new drug provisions is that contained in the amendment to section 502(e) of the act, requiring, *inter alia*, that advertisements of prescription drugs disclose the established name of the drug in prominent print, the drug's formula, and information pertaining to side effects, contraindications, and effective-

104 *Kordel v. United States*, 335 U.S. 345 (1948), *rehearing denied* 335 U.S. 900 (1948). To same effect: *United States v. Urbuteit*, 335 U.S. 355 (1948). See also *United States v. Sullivan*, 332 U.S. 689 (1948).

105 Section 304, 52 Stat. 1044 (1938), 21 U.S.C. § 334 (1958).

106 Section 303(a), 52 Stat. 1043 (1938), 21 U.S.C. § 333(a) (1958).

107 Section 301, 52 Stat. 1042 (1938), 21 U.S.C. § 331 (1958).

108 *1962 Consumer Protection Message* at 3.

109 76 Stat. 780 (1962), amending 21 U.S.C. § 301 (1958).

110 *Id.* at 782, adding a new section, § 508(a) to the Federal Food, Drug and Cosmetic Act.

111 S. 387, 88th Cong., 1st Sess. § 3A(d)(1)(A)(6) (1963).

ness pursuant to regulations issued by the Secretary.¹¹² Furthermore, such advertisements are not to be subject to sections 12 through 17 of the Federal Trade Commission Act. Thus for the first time, the FDA is granted direct authority over advertising as such, as the FTC's jurisdiction over the limited field of prescription drug advertising is clearly pre-empted. It must now be wondered if this grant of authority to the FDA has provided the opening wedge from which ultimately the entire field of advertising of food, drugs, devices and cosmetics will be taken away from the FTC.¹¹³ Certainly, the packaging bill continues to draw the line by limiting the FTC's regulatory power to "all other commodities" than foods, drugs or cosmetics.¹¹⁴

Another recent labeling law is the Federal Hazardous Substances Labeling Act,¹¹⁵ enacted July 12, 1960. The purpose of this statute is to "provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold in interstate commerce and are intended or suitable for household use."¹¹⁶ The act seems to be primarily geared toward the protection of children, and includes such common household items as waxes, varnishes, cleaners, polishes, and products in aerosol containers.¹¹⁷

The concern of the law as to labeling is that the product standing behind the label is properly identified. The discussion now turns to packaging, a somewhat broader concept. A package is the container or wrapping which encloses the product for protection and display; and it usually carries the label. But attention has been focused on the size of the package in relation to its contents.

C. Packaging

1. Under the Federal Trade Commission Act

In the "good old days" before the advent of the chain store and the large supermarket, the proprietors and employees of the individual retail establishments were the ones who, in large part, were responsible for inducing the consumer to buy. Since in many cases a personal relationship developed between them because of repeated transactions over a period of time, the advice and recommendations of the seller were gospel and were to be relied upon as a matter of course. However, the marketing process has become increasingly impersonal so that now the inanimate package is, in many instances, the actual salesman, and, it may be added, a highly effective one. The consumer's consequent inability to cross-examine this salesman offers strong temptation to packagers. Many artifices can be worked through cleverly creative implementation of packaging methods. Such schemes are as much to be condemned under the Federal Trade Commission Act as are deceptive labeling practices.

The evils of deceptive packaging revolve about the central concept that, *via* this technique, the consumer is misled in most cases into believing that he is getting a greater quantity of product than he ends up actually receiving.¹¹⁸ For example, in *Trade Laboratories, Inc.*,¹¹⁹ pasteboard cartons containing the tube or container of respondent's product had a size and capacity much greater than what was actually needed to house that product. Because the consumer could not see inside the carton, and since he did not have the opportunity to examine the contents prior to purchase, the FTC issued a cease-and-desist order on the grounds that the public was being deceived and competitors were being damaged. Thus, it was

112 76 Stat. 780 (1962), amending 21 U.S.C. § 352(a) (1958).

113 For the legislative history of the Amendments, see 1962 U.S. CODE CONG. & AD. NEWS 2884.

114 S. 387, 88th Cong., 1st Sess. § 3A(d)(1)(B) (1963).

115 74 Stat. 372 (1960), 15 U.S.C. §§ 1261-73 (Supp. III 1962).

116 H.R. REP. No. 1861, 86th Cong., 2d Sess. 1 (1960).

117 For the legislative history of the Act, see 1960 U.S. CODE & AD. NEWS 2833.

118 *Marlborough Laboratories, Inc.*, 32 FTC 1014 (1941).

119 25 FTC 937 (1937).

felt that the disappointment of the consumer and the probable fact that he was persuaded to spend his money because of a reasonable belief that he was obtaining a larger quantity, could not be left unremedied.¹²⁰

The *Marlborough Laboratories* case,¹²¹ involving ordinary-sized tubes of shaving cream and toothpaste being packaged in significantly larger cartons, is almost identical to *Trade Laboratories* with the exception that the term "slack-filling" is used.

Another example of the FTC's attack on slack-filling is found in *Burry Biscuit Corp.*,¹²² where respondent placed the phrase, "Average 90 Crackers," in conspicuous type on the cardboard containers of its "Bisc-O-Bits." The Commission issued a cease-and-desist order upon findings that there were, on the average, substantially less than ninety crackers and that the containers were significantly larger in size than that required to house the ten ounces of product. This same approach was recently taken in *U.S. Packaging Corp.*,¹²³ where the respondents, by consent order, were prohibited from packaging their artificial snow in oversized pressurized containers and then advertising that, because these containers were larger than those of competitors', a larger amount of snow would be produced.

A presently pending case, involving deceptive packaging under FTC jurisdiction and one which seems to be typical of the practices which the Commission is in pursuit of currently, is that of *The Papercraft Corp.*¹²⁴ In an initial decision, the Examiner Schrup ruled that the respondent, a manufacturer and seller of gift wrappings had violated section 5 of the act. It was contended that the company packaged its assortment of rolls of wrapping paper in such a way that purchasers could not readily observe that certain of the papers were not as wide as the box in which they were contained. Two different types of display boxes were complained of: certain packages contained almost four inches of concealed empty end space—two inches at either end—and held either four or six rolls all of uniform length; the other type of package was designed in a manner partially covering the extended tubes of narrow width papers in an assortment. On each style display box was printed the actual measurements of the papers therein contained. However, the examiner saw a distinction; he found the first type deceptive and the second not. The reasoning is that the misleading first impression created by the oversized boxes containing gift wrapping papers of *uniform* width was not dispelled by actual measurements printed on the exterior; but where the boxes contained an *assortment*, which is clearly disclosed on the front cover, there is no deception caused by the external dimensions of the package. If the customer desires an assortment of sizes, necessity dictates that the box fit the largest size. It is evident that the approach taken by the Commission against the first type of packaging is based upon the theory that consumers, notwithstanding numbers on a package which truthfully reveal precisely what they are receiving, are in fact governed by appearances conveyed by the package or container itself. Therefore, technically correct labeling will not exonerate one who has deceptively packaged his product.¹²⁵

In this area of deceptive packaging under FTC jurisdiction, there is a dearth of reported decisions. The reason for this was explained in a letter¹²⁶ from Mr. Daniel J. Murphy, Director of the FTC's Bureau of Deceptive Practices, in which it is stated that while much deception involves "slack-filling," respondents ordinarily agree to discontinue complained-of practices in this area either by consent order

120 In a case prior to the Wheeler-Lea Amendment, *Baltimore Paint & Color Works, Inc.*, 9 FTC 242 (1925), the old criterion of injury to competition was applied where there was less than a half gallon and a gallon of paint in standard cans of those sizes.

121 32 FTC 1014 (1941).

122 33 FTC 89 (1941).

123 53 FTC 1174 (1957).

124 *Papercraft Corp.*, No. 8489, FTC Initial Decision, Apr. 17, 1963.

125 See *United States v. 116 Boxes Arden Assorted Candy Drops*, 80 F. Supp. 911 (D. Mass. 1948).

126 Letter From Daniel J. Murphy, Director, Bureau of Deceptive Practices, Federal Commission, to the *Notre Dame Lawyer*, Nov. 2, 1962, on file in Notre Dame Law Library.

or by stipulation.¹²⁷ It would seem that this phenomenon is due to the likelihood that by the time the FTC's machinery gets moving in a given case, the profits have already been made. In that event, the respondent certainly has nothing to lose by submitting to a consent order or a stipulation, especially since agreement to either does not constitute an admission that the respondent has violated the law. This administrative delay is probably the most serious threat to effective enforcement of the act where packaging is concerned.

In view of the fact that today's typical supermarket carries in excess of 6,000 separate items¹²⁸ — with the quantity growing every day — it would seem that the FTC's war against deceptive packaging is just beginning.

2. Under the Federal Food, Drug and Cosmetic Act

There are specific provisions under the Federal Food, Drug and Cosmetic Act which deal primarily with deceptive packaging.¹²⁹ While food, drugs and cosmetics are all thus covered, the few decisions which have dealt with the subject have been food cases under section 403(d). That section provides: "A food shall be deemed to be misbranded . . . if its container is so made, formed, or filled as to be misleading. . . ."¹³⁰

Only four reported judicial decisions to date have been concerned with that aspect of the section known as "slack-filling." For various reasons the government has lost all four. The first of these was *United States v. 738 Cases Containing Jiffy-Lou Vanilla Flavor Pudding*,¹³¹ in which the powder ingredient of the pudding occupied approximately 55% of the volume of the outer box. The libel was dismissed on the basis that the size of the box was recognized by the general public as being the standard size for this and similar products and that the proof did not show that the box was so made, formed, or filled as to be misleading.

Several months later, the First Circuit followed this same approach.¹³² The court refused to lay down a hard-and-fast rule as to what constituted slack-filling observing that the boxes and cartons containing the seized candy were similar in size, description, and contents to those of other manufacturers in the trade. Even though the candy occupied only about 45% of the entire volume of the carton the court affirmed the decree dismissing the libel.

The third case, *United States v. 116 Boxes of Arden Assorted Candy Drops*,¹³³ also involved a confection. In dismissing the libel, the court noted that modern machine-filling of such boxes was responsible for the 33% average of air space which resulted after settling but that the consumer must expect and accept "some slack or air space,"¹³⁴ because of the economies and sanitariness of such filling.

The recent decision of *United States v. 174 Cases of Delson Thin Mints*,¹³⁵ followed the principle laid down in the *Arden* decision. But, significantly, this case introduced the standard that a package, although its form or filling deceives the ordinary purchaser as to the quantity of contents, is not misbranded under the act if the form and filling are justified by considerations of safety and reason-

127 By the consent order process, a person or company is given the opportunity to settle a proposed complaint without trial and an adjudication that he has violated the law; but a formal complaint is filed. By the stipulation process, the person or company agrees not to engage in a practice informally challenged by the FTC; no formal complaint is filed.

128 1962 *Consumer Protection Message*, at 2.

129 Section 403(d), 52 Stat. 1047 (1938), 21 U.S.C. § 343(d) (1958) (food); Section 502(i)(1), 52 Stat. 1051 (1938), 21 U.S.C. § 352(i)(1) (1958) (drugs); Section 602(d), 52 Stat. 1054 (1938), 21 U.S.C. § 362(d) (1958) (cosmetics). For the historical background of the problems presented, see 38 U. DER. L.J. 664 (1961).

130 21 U.S.C. § 343(d) (1958).

131 71 F. Supp. 279 (D. Ariz. 1946).

132 *United States v. Cataldo*, 157 F.2d 802 (1st Cir. 1946).

133 80 F. Supp. 911 (D. Mass. 1948).

134 *Id.* at 913.

135 287 F.2d 246 (3d Cir. 1961).

ableness in light of available alternative safety features. The mint candies in question occupied only 44% of the total volume due to the presence of hollow cardboard dividers and end pieces. Even though uncontradicted evidence was presented by the government to the effect that consumers expected to find a considerably greater number of mints, the court concluded that the container would be justified if its efficacy outweighed its deceptive quality, provided that alternative available and efficacious means, if any, were not less deceptive than those actually employed. Thus, a "least deceptive container" would be permissible. The case was remanded for a finding of further facts, and thereupon, the libel was again dismissed.¹³⁶ On the second appeal, the Third Circuit affirmed *per curiam*.¹³⁷

From these *holdings*, it can be seen that the fact that package or container is only partially filled is certainly not conclusive of its violating the act. However, if a container is found to be violative, the fact that the weight of the contents is correctly stated thereon will not absolve the packager.¹³⁸

The suggestion has been made that the incensed consumer, upon discovering that a package is slack-filled, does not pause to consider how unrealistic it is to believe that a packager desires the use of oversized containers. Rather, the feeling is that packagers wish to cut down on the use of packaging materials wherever possible because, by doing so, the small profits per package are thereby increased. Furthermore, cushioning devices such as were present in the *Delson* case and which account for air space in the packages of some products are provided so that the consumer does not receive broken, unacceptable articles. Also, pilferage in self-service stores is so widespread that many stores refuse to handle packages which are small enough to be easily concealed in pocket or purse.¹³⁹

A glance at these decisions reveals that the government has trod a rough road in attempting to clamp down on alleged slack-filling. If it can be fairly established that today's consumers are in fact persuaded to buy because of the size of the package¹⁴⁰ rather than because of such factors as price or quantity stated thereon, the obvious result is that slack-filling practices will become a most formidable evil. Particularly is this so when it is considered that the selling function of the package has been so emphasized that its role as a source of public information has become obscured.¹⁴¹ It would follow, then, that either a stricter provision is needed in the act or that a changed attitude on the part of the courts is necessary. In view of the decision in the *Delson Thin Mints* case, it is difficult to conceive how the government will ever win a case under the present wording of section 403(d). Perhaps, recognizing the success that the FTC has had in this area with cases before its own tribunal, the "Truth in Packaging" Bill seeks to grant both the FDA and FTC power to establish regulations to "prevent the distribution of that commodity for retail sale in packages of sizes, shapes, or dimensional proportions which may deceive retail purchasers as to the net quantity of the contents thereof (in terms of weight, measure, or count)."¹⁴²

Finally, the 1958 Food Additives Amendment¹⁴³ to the Federal Food, Drug

136 *United States v. 174 Cases of Delson Thin Mints*, 195 F. Supp. 326 (D. N.J. 1961).

137 *United States v. 174 Cases of Delson Thin Mints*, 302 F.2d 724 (3d Cir. 1962).

138 *United States v. 116 Boxes Arden Assorted Candy Drops*, 80 F. Supp. 911 (D. Mass. 1948).

139 *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary Pursuant to S. Res. 52, 87th Cong., 1st Sess., pt. 1, at 146 (1961)* [hereinafter cited as *Hearings on Packaging and Labeling Practices, Part I*].

140 That this is the reason people buy is suggested in Larrick, *Some Comments on Packaging*, 17 *FOOD DRUG COSM. L.J.* 442 (1962). The contrary has been judicially found to be a fact, but this occurred over 17 years ago. *United States v. 738 Cases Containing Jiffy-Lou Vanilla Flavor Pudding*, 71 F. Supp. 179 (D. Ariz. 1946).

141 *Ibid.*

142 S. 387, 88th Cong., 1st Sess. § 3A(e)(2) (1963).

143 72 Stat. 1784 (1958). For the legislative history of the amendment, see 1958 U.S. CONG. & AD. NEWS 5300.

and Cosmetic Act is relevant insofar as packaging requirements under the Act are concerned. The amendment prohibits the use in food of additives whose safety has not been established through adequate testing. By virtue of the amendment, packaging materials which may reasonably be expected to become a component of food as a migratory substance from a container or otherwise affect the characteristics of the food are now specifically included in the definition of food additives.¹⁴⁴ The effect of this is that, for the first time, packaging materials are covered by a regulatory plan intended to insure their safety to the consumer.¹⁴⁵

D. State Law

Controls over labeling and packaging practices do not, of course, stop with those regulations set down by the Federal Trade Commission Act and the Food, Drug and Cosmetic Act. The states, too, have a very real interest in protecting their citizens from the evils engendered by the various practices proscribed by these two federal statutes. Since federal law can have no application where the manufacturing and market processes are wholly intrastate, the several states must have their own legislation in this area so as to perpetuate the good health and well-being of their people.

In the broad area of trade regulation, there are no state laws which are closely modeled after the Federal Trade Commission Act.¹⁴⁶ Many states, however, have statutes of a general nature which are aimed at achieving objectives similar to those of the federal act, such as the prevention of unfair competition and false and misleading advertising.

California, for example, provides that the Attorney General or any district attorney may bring an action to enjoin "Any person performing or proposing to perform an act of unfair competition within [the] State."¹⁴⁷ "Unfair competition" is defined to include "unfair or fraudulent business practice and unfair, untrue or misleading advertising. . . ."¹⁴⁸

A most important development in state regulation of advertising has been the adoption of the Printers' Ink Model Statute. This was originally drafted in 1911 for *Printers' Ink*, the advertising trade journal; and, over the years, it has been widely accepted by the states.¹⁴⁹ The part pertinent to this discussion, declares, in the words of the New York Legislature:

Any person, firm, corporation or association, or agent or employee thereof who, with intent to sell or in any wise dispose of merchandise, . . . directly or indirectly, to the public for sale or distribution, or with intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, . . . publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in . . . label, or tag, . . . an advertisement, announcement or *statement* of any sort . . . which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading, shall be guilty of a misdemeanor.¹⁵⁰

It is noted that this statute does not demand proof of the intent to deceive. Some states,¹⁵¹ however, have injected the element of scienter into their statutes. The over-all effort is certainly praiseworthy, yet enforcement has not been successful. "The criminal nature of the sanction, the inclusion of the requirements of intent,

144 Section 201(s), 72 Stat. 1784 (1958), 21 U.S.C. § 321(s) (Supp. III 1962).

145 See Larrick, *Some Comments on Packaging*, 17 FOOD DRUG COSM. L.J. 442 (1962), and Kuniholm, *Are Empty Containers Food?*, 15 FOOD DRUG COSM. L.J. 637 (1960).

146 ELKOURI, TRADE REGULATION 241 (1957).

147 CAL. CIV. CODE § 3369(2).

148 CAL. CIV. CODE § 3369(3). See also CAL. BUS. & PROF. CODE § 17500 for definition of false or misleading statements.

149 Handler, *The Regulation of Advertising*, 56 COLUM L. R. 1018, 1058 (1956); SIMON, THE LAW FOR ADVERTISING AND MARKETING 266 (1956).

150 N.Y. PEN. LAWS § 421.

151 FLA. STAT. ANN. § 817.06 (Supp. 1961).

materiality, and other restrictive elements, and the failure to provide administrative machinery for enforcement as the federal government has done, have severely limited the effectiveness of these statutes in suppressing false or misleading advertising."¹⁵²

In the food and drug area, most of the states have enacted the Uniform State Food, Drug and Cosmetic Bill which closely resembles the present federal law.¹⁵³ Other states still pattern their food and drug laws on the 1906 federal enactment.¹⁵⁴ Uniformity would certainly be desirable, but there is a larger problem which afflicts the states. "This is the problem of raising the administration of the state food, drug and cosmetic laws generally, to the high level consistent with the public welfare and health protection, from every standpoint of its organization and equipment and appropriations. . . ."¹⁵⁵ In a word, the lack of money, personnel and facilities is the primary reason for unsatisfactory enforcement.¹⁵⁶

Although such state laws are designed to reach the intrastate transaction, into whose domain federal law does not extend, problems are created where interstate commerce is also involved and is affected. Since it is not the intention here to treat the numerous laws on a state-by-state basis, attention will be directed to the never-ending dilemma of coexisting federal and state law.

There may be occasions where both federal and state laws are applicable to a particular label or package. The problem arises where the state imposes higher requirements than the national law. The determinative criterion which has been consistently applied is whether or not the state requirement is such that it *directly conflicts* with the federal law.¹⁵⁷ Where there is such a conflict, even though it is recognized that the state has the right to insist upon a particular requirement, its provision must yield to the federal statute.¹⁵⁸

Even where there is no provision in the federal law with which a state requirement could conflict, there is a trend in the direction of invalidating the state law anyway, because it is felt that the federal government has the exclusive authority to protect the labeling pattern right down to the actual sale.¹⁵⁹ Thus, it seems that the government has almost completely occupied the labeling field, evidently on the theory that the federal labeling pattern is both detailed and complete.¹⁶⁰

E. "Truth in Packaging" Bill

President Kennedy's remarks in his consumer protection message to Congress on March 15, 1962 were obviously intended to prompt anew revitalized concern for the mounting dilemmas faced by today's average consumer in his constant exposure to ever-changing marketing techniques.

One response to the President's pleas came from Michigan Senator Phillip A. Hart, who introduced his "Truth in Packaging" Bill¹⁶¹ on September 24, 1962,

152 Handler, *supra* note 149, 1064-65.

153 E.g., COLO. REV. STAT. ANN. § 66-22-1 (Permanent Supp. 1960).

154 E.g., ARIZ. REV. STAT. §§ 32-1961 (Drugs) and 36-901 (Food) (1956).

155 'Dunn, *Uniformity of State Food and Drug Laws — Informal Remarks*, 14 FOOD DRUG COSM. L.J. 187, 188 (1959).

156 Randall, *Factors Affecting the States' Adoption of Food-Additives Law as Well as Other Recent Amendments to the Federal Food, Drug and Cosmetic Act*, 14 FOOD DRUG COSM. L.J. 172 (1959).

157 This principle was enunciated as early as 1912 by Justice Hughes in *Savage v. Jones*, 225 U.S. 501; 525 (1912): "[W]hen the local police regulation has real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority."

158 See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960).

159 *United States v. Sullivan*, 332 U.S. 689 (1943); *United States v. Pinocchio Brand Oil*, 289 F.2d 343 (2d Cir. 1961), *cert. denied* 368 U.S. 831 (1961). See further Note, *The Interstate Ingredient of Section 304 (a) — Federal Food, Drug and Cosmetic Act*, 37 NOTRE DAME LAWYER 408 (1962), reprinted in 17 FOOD DRUG COSM. L.J. 380 (1962).

160 Conner, *A National Labeling Pattern*, 6 FOOD DRUG COSM. L.J. 20 (1951).

161 S. 3745, 87th Cong., 2d Sess. (1962).

near the close of the 87th Congress. The original bill has since been revised¹⁶² and was reintroduced before the Senate on January 21, 1963, about which time Congressman Emanuel Celler of New York presented a companion bill¹⁶³ in the House of Representatives.

The "Truth in Packaging" Bill is proposed as an amendment to the Clayton Act of 1914, and, in the words of Senator Hart, it

[I]s designed to restore rational buying to the market place and to remove . . . the gantlet of psychological traps, successive confusions and outright deceptions that today's consumer must run whenever he passes down a supermarket aisle.¹⁶⁴

In extensive hearings carried on over a nine-month span prior to introduction of the bill, Senator Hart and his colleagues discovered, among other things, that it is the package that today largely performs the selling function at the point of sale. The hearings further revealed that many manufacturers were being compelled by competitive demands to employ unethical packaging and labeling techniques simply because everyone else was doing so—all to the consumer's ultimate disadvantage. By establishing standards for the packaging and labeling of consumer commodities, the bill purports to first benefit the consumer and secondly to provide some measure of security for the manufacturer who will realize that he and his competitors will both be required to adhere to the same set of standards.

Regarding the consumer, Senator Hart points out that one of the keystones to the favorable operation of our competitive economy is that the consumer must be able to make an informed, rational choice as to the items he buys. To enable him to effectively do this certain basic information must be presented on the packages and labels of consumer goods. Through the "Truth in Packaging" Bill, Senator Hart hopes to reduce the desire of manufacturers to compete in nonprice areas, such as are packaging and labeling, and to restore price and quality as the more meaningful factors in competition.¹⁶⁵

This proposal goes considerably beyond existing federal control. Specifically, it attacks unfair and deceptive methods of labeling and packaging by authorizing the Secretary of Health, Education and Welfare (for food, drugs and cosmetics) and the Federal Trade Commission (for all other commodities) to *immediately promulgate regulations* to which the labeling and packaging of consumer commodities must conform.¹⁶⁶ The more notable of these regulations would: (1) require that the net quantity of contents statement appear on the front panel of packages of goods covered by the bill and on their labels;¹⁶⁷ (2) require that minimum standards be established with regard to the location and prominence of such statement which also includes matters involving type faces and sizes;¹⁶⁸ (3) prohibit the use of qualifying words or phrases in connection with the net quantity of contents statement.¹⁶⁹ Thus, such interesting terms as the "big two-ounce size" and the "giant-size full pound" would be things of the past; and (4) prohibit any illustrations or pictorial matter on packages which may deceive purchasers as to the contents thereof.¹⁷⁰

Furthermore, the FDA and the FTC would be given *discretion* to issue additional regulations on a product-by-product basis where necessary to establish or preserve fair competition or to prevent consumer deception. These supplemental regulations would:

162 S. 387, 88th Cong., 1st Sess. (1963).

163 H.R. 2382, 88th Cong., 1st Sess. (1963).

164 108 CONG. REC. 19265-66 (daily ed. Sept. 24, 1962).

165 *Id.* at 19266-67.

166 S. 387, 88th Cong., 1st Sess. § 3A (d)(1) (1963).

167 *Id.* at § 3A (c)(1).

168 *Id.* at § 3A (c)(2).

169 *Id.* at § 3A (c)(3).

170 *Id.* at § 3A (c)(6).

(1) establish reasonable weights or quantities, or fractions or multiples thereof, in which that commodity shall be distributed for retail sale;

(2) prevent the distribution of that commodity for retail sale in packages of sizes, shapes, or dimensional proportions which may deceive retail purchasers as to the weight, quantity, or number of the contents thereof (in terms of weight, measure, or count);

(3) establish and define standards of designations of size (other than statements of net quantity of contents) which may be used to characterize quantitatively the contents of packages containing that commodity;

(4) establish and define the weight, quantity, or number of any commodity (in terms of weight, measure, or count) which shall constitute a serving, if that commodity is distributed to retail purchasers in a package or with a label which bears a representation as to the number of servings provided by the net quantity of contents contained in that package or to which that label is affixed;

(5) establish and define standards for the quantitative designation of the contents of packages containing any consumer commodity of a kind the net quantity of contents of which cannot meaningfully be designated in terms of weight, measure, or count; and

(6) require that (consistent with requirements imposed by or pursuant to the Federal Food, Drug and Cosmetic Act, as amended) sufficient information with respect to the ingredients and composition of any consumer commodity (other than information concerning proprietary trade secrets) be placed in a prominent position upon packages containing that commodity and upon labels affixed thereto.¹⁷¹

The rules promulgated under this discretionary power must be based upon consultation with other governmental agencies having special competence in the area involved and with persons or companies who may be affected by the proposals. Notice of intention to promulgate such regulations must appear in the Federal Register to assure all interested parties an opportunity to be heard. Further, the regulations are subject to modification when changes in marketing methods or techniques make it necessary.¹⁷²

Violations of FDA regulations issued pursuant to the bill would be subject to the penalties provided by the Federal Food, Drug and Cosmetic Act,¹⁷³ while violations of FTC regulations would subject violators to cease-and-desist orders under the Federal Trade Commission Act.¹⁷⁴ The injunctive relief afforded to private litigants under section 16 of the Clayton Act¹⁷⁵ is also available.¹⁷⁶ Moreover, there is provision for a criminal penalty in a limited situation. The promulgating authority is authorized to make a written request to any producer or distributor for a correct sample of any label or package which he is using or intends to use. Any party who, with intent to avoid compliance of the law, fails to forward the requested samples shall be fined not more than \$1000 or imprisoned not more than one year, or both.¹⁷⁷

"Consumer Commodities" are the products covered by the bill. The definition of this term,¹⁷⁸ according to Senator Hart, largely limits it to so-called "kitchen and bathroom" items, which are the vast majority of goods sold in modern supermarkets. Further, it is submitted that the bill's jurisdiction clause offers an opportunity to further expand the concept of interstate commerce. It states that wholesalers and retailers are exempt from this command, "except to the extent that such persons (1) are engaged in the packaging or labeling of such commodities, or (2) determine by any means the nature, form, or content of packages in which such commodities are contained or labels affixed to such commodities."¹⁷⁹

171 *Id.* at § 3A (e).

172 *Id.* at § 3A (f).

173 *Id.* at § 3A (h) (1).

174 *Id.* at § 3A (h) (2).

175 38 Stat. 737 (1914), 15 U.S.C. § 26 (1958).

176 S. 387, 88th Cong., 1st Sess. § 3A (h) (3) (1963).

177 *Id.* at § 3A (g).

178 *Id.* at § 3A (k) (1).

179 *Id.* at § 3A (b). (Emphasis added.)

Senator Hart explains the purposes to be achieved by the bill:

Our aim is threefold: First, that the spirit and substance of the antitrust laws be extended to the relatively new form of nonprice competition represented by packaging. Second, that the American manufacturer be freed from the unfair trade practices that have grown up in this area beyond the reach of present law. Third, that the American consumer can know what she is buying and paying for.¹⁸⁰

Despite this lofty objective, the Senator and his bill have not gone uncriticized. Some members of Congress already have charged that the proposed legislation, if enacted, will mean less freedom and higher prices.¹⁸¹ Leading the assault is Senate Minority Leader Everett M. Dirksen of Illinois who argues that consumers can be adequately protected by more effective enforcement of existing laws.¹⁸² Joining Dirksen in opposition to the bill is Republican Senator Roman L. Hruska of Nebraska, who maintains that the bill is "a mislabeling in itself"¹⁸³ because its purpose does not coincide with the plan to have it amend the Clayton Act.

One of the most interesting arguments for rejecting the bill was set forth by Mr. Ernest Dichter, President of Institute for Motivational Research, Inc. He contends:

The point is that packages and labels can best sell merchandise only once or twice. Once he detects an inferior product or spots a fraudulent advertising claim, the consumer will reject that product regardless of how attractive the package or label may be. Most intelligent companies have learned that what they are really spending their advertising dollar on is the creation of a solid brand image.

A brand image is like a signature on a check. No matter how elegant the signature may be, if the check bounces you are not going to do business with that person again.¹⁸⁴

Nevertheless, the bill seems praiseworthy to the extent that it appears to solve the peculiar problems posed by practices presently used in connection with the unique institution that is the modern supermarket. It would thus be expected that passage of the bill would make such practices skeletons in the closet of the past. "Our economy is based on freedom of choice. Let us give the consumer a chance to make that choice a good one."¹⁸⁵

III. CONSUMER CREDIT AND DISCLOSURE STATUTES

The drugstore and supermarket are not the only sources of deceptive selling and confused buying. The department store, the appliance house and the used car lot, down the street or at the other end of the shopping plaza, can present the consumer with misrepresentation and bewilderment of a different sort — how much does the product cost? Here an individual is bombarded by such inducements as "no money down," "easy credit terms," "up to 18 months to pay," and "pennies a day." The Sixth Circuit some time ago succinctly stated the problem:

The average individual does not make, and often is incapable of making, minute calculations to determine the cost of property purchased on the deferred payment plan. Mechanization, industrialization, and urbanization have transformed the structure of our society and raised to the proportions of a major social problem, the protection of the installment purchaser against his own ignorance and the pressure of his need.¹⁸⁶

"The variety and complexity of finance . . . arrangements and the charges for them are such as almost to defy comprehension."¹⁸⁷ The retailer, it would appear,

180 109 CONG. REC. 604 (daily ed. Jan. 21, 1963).

181 Chicago Sun-Times, Mar. 7, 1963, p. 9, col. 1.

182 *Ibid.*

183 *Id.* at col. 2.

184 *Hearings on Packaging and Labeling Practices, Part 1*, at 175.

185 108 CONG. REC. 19267 (daily ed. Sept. 24, 1962).

186 *Ford Motor Co. v. FTC*, 120 F.2d 175, 182 (6th Cir. 1941).

187 Statement of Theodore Yntema, vice-president in charge of finance, Ford Motor Co., testifying before the Senate Hearings on Automobile Financing, as quoted in *Hearings Before a Subcommittee of the Committee on Banking and Currency on S. 1740*, 87th Cong., 2d Sess. 404 (1962) [hereinafter cited as 1962 *Hearings on Truth in Lending*].

can find many techniques to camouflage the actual cost of buying on time. To prevent this abuse, the major device employed in all regulatory statutes is based, at least in part, on the philosophy of disclosure.¹⁸⁸ The reasons for disclosure laws seem quite sensible: the man in the marketplace ought to know what his purchase will cost him. Accordingly, disclosure will place the consumer in a better position to determine whether his financial resources are sufficient to meet "18 easy monthly payments." Further, the knowledge of the true costs of competing and comparable merchandise will permit the purchaser to make an economically wise choice in his selection. Lastly, equipped with an awareness of actual credit costs, the consumer is able to determine the relative advantages of accepting the financial arrangement offered by the vendor or borrowing the amount of the purchase price from another source.

A final qualification—credit disclosure—will be discussed only insofar as statutes deal with the information relevant to costs which must be made known at the time of initial purchase in a vendor credit¹⁸⁹ transaction. These provisions may be found in many types of legislative enactments, as, for example, retail installment sales acts, motor vehicle financing acts, conditional sales contracts acts, and motor vehicle codes. However, here disclosure will be broadly considered. No distinction will be made as to the types of legislation in which these provisions appear. All legislation embodying credit and cost disclosure provisions are categorically referred to as disclosure statutes.

A. *Historical Growth of Disclosure Statutes*

The earliest attempt in the United States to insure disclosure of financial charges was probably under the Russell Sage Foundation's Uniform Small Loan Law, which included a provision that at the time of making the loan the borrower was to be given a clear statement of the exact terms of the loan.¹⁹⁰ This principle has been followed to the present day and forms the basis for disclosure statutes in the retail sale of consumer goods.

Following the early loan law, various efforts to bring about full disclosure in the installment sales field were made at both the federal and state levels. In 1933, unsuccessful efforts to agree on uniform trade practices were made under the National Industrial Recovery Act.¹⁹¹ But, in that same year, the principle of disclosure gained important stature when Congress passed the Security Act of 1933.¹⁹² President Roosevelt, in a speech before Congress, underscored the policy behind the "Truth in Securities" Law: "This proposal adds to the ancient rule of caveat emptor, the further doctrine 'let the seller also beware.' It puts the burden of telling the whole truth on the seller."¹⁹³ With this impetus, Indiana pioneered the way for the states by passing the Retail Instalment Sales Act in 1935.¹⁹⁴ This was the first statute to require the vendor to fully disclose all terms of purchase costs to the installment buyer.¹⁹⁵

All of the activity, however, did not shift to the state legislative arena. The federal government made another attempt at control over consumer sales in the

188 Hogan, *A Survey of State Retail Installment Sales Legislation*, 44 CORNELL L.Q. 38 (1958).

189 Vendor credit is basically a transaction wherein the consumer buys directly from a retail merchant on an installment plan, the payments being deferred in payment of a finance charge. When the consumer goes to a source other than the vendor and borrow funds to pay for his purchase, paying interest for his loan, he is then relying upon lender credit.

190 Robinson & Nugent, *REGULATION OF THE SMALL LOAN BUSINESS* 96 (1935); 16 U. CHI. L. REV. 609 (1949).

191 See 2 LAW & CONTEMP. PROB. 200 (1935).

192 48 Stat. 81 (1933), 15 U.S.C. § 77j (1958).

193 Speech made to Congress by President Franklin D. Roosevelt, March 29, 1933.

194 Ind. Acts 1935, ch. 231 [NOW IND. ANN. STAT. §§ 58-901 to -934 (1961 Replacement)].

195 For an excellent discussion of the historical background of retail installment sales statutes, see 53 Nw. U.L. Rev. 137 (1958).

form of Regulation W.¹⁹⁶ Under a presidential order, Regulation W was first issued on September 1, 1941 as a defense measure.¹⁹⁷ Its basic purpose was to place a ceiling over prices of consumer goods. Noteworthy, however, were the provisions which required specific disclosure of all credit terms in the sale of durable consumer goods which cost \$5,000 or less. Regulation W was allowed to expire in 1952.¹⁹⁸

When the Uniform Commercial Code was first proposed, the drafters considered incorporating credit disclosure requirements within its provisions. Section 9-205 of the Proposed Final Draft contained extensive disclosure requirements, not unlike those now found in most state statutes.¹⁹⁹ But, on January 14, 1951, the Council voted to delete this section, and the executive session of the Editorial Board agreed.²⁰⁰ However, this is not to say the problem is unworthy of study and attention — "Since it is the policy of the Commissioners on Uniform State Laws not to draft statutes of a highly regulatory nature at least *when regulation is in the experimental stages*, this Part does not attempt to meet abuses which may exist."²⁰¹ Today, neither the Uniform Commercial Code nor the Uniform Sales Act contains disclosure provisions.

During this same period, widespread dealer abuses in the sale of motor vehicles led the Federal Trade Commission to hold a series of extensive hearings. Here, the gap between the regulations provided by a few states and the general need for such regulation, came to the attention of the Commission. As a result of the investigation on February 6, 1951, the Commission adopted the Trade Practice Rules governing automobile financing.²⁰² Based on Section 5 of the Federal Trade Commission Act, these rules were designed to eliminate and prevent deceptive practices in the installment sales of automobiles. Although the FTC did not attempt to define the precise application of the Trade Practice Rules, the rules are necessarily limited to transactions in interstate commerce because of the constitutional and statutory restrictions on the Commission's jurisdiction.²⁰³ Thus, the reach of the regulations has not offered effective protection for installment buyers because of the intrastate character of most automobile purchases. From the standpoint of consumer protection, the chief effect of the rules appears to have been the indorsement which they gave to the enactment of state regulatory rules.

A related influence spurring state activity was the notoriety of deceptive dealer practices in the sale of motor vehicles. The "Findings and Declarations of Policy" found in the Pennsylvania Motor Vehicle Sales Finance Act typifies the need then recognized for such legislation: "An exhaustive study . . . discloses nefarious, unscrupulous and improper practices in the financing of the sale of motor vehicles . . . which are unjustifiably detrimental to the consumer and inimical to the public welfare."²⁰⁴ The act concludes that these pernicious practices "have existed to such an extent that regulation of the installment selling of motor vehicles is necessary to the adequate protection of the public interest."²⁰⁵ The ice having been broken with the widespread enactment of disclosure statutes in the sale of motor

196 See 63 HARV. L. REV. 874 (1950).

197 Exec. Order No. 8843, Aug. 9, 1941, 3 Code Fed. Regs. ch. 2 (Cum. Supp. 1943).

198 12 C.F.R. § 222.6(c) (1949), *revoked* 14 Fed. Reg. 3742 (1949) *reinstated* 32A C.F.R. ch. XV, §6(2)(c) (1951), *suspended*, 17 Fed. Reg. 4256 (1952).

199 Uniform Commercial Code, Proposed Final Draft, Spring 1950, 742-44. See also §7-611(1).

200 6 BUS. LAW. 119 (1951).

201 Uniform Commercial Code, May 1949 Draft, § 7-601, Comment. (Emphasis added.) At the time of the proposed section thirteen states had retail installment acts requiring disclosure. 16 LAW & CONTEMP. PROB. 27, 37-38 (1951).

202 16 Fed. Reg. 1059 (1951).

203 See FTC v. Bunte Bros., 312 U.S. 342 (1949), holding that FTC jurisdiction does not extend to intrastate commerce.

204 PA. STAT. ANN. tit. 69, § 602 (Cum. Supp. 1961). The act "was enacted for the protection of the purchaser of automobiles. . . ." *Roxy Auto Co. v. Moore*, 180 Pa. Super. 603, 122 A.2d 87, 88 (1956).

205 *Id.* at § 602.

vehicles, legislatures in the last decade have been quick to expand coverage by passing statutes which require disclosure in the sale of other consumer goods as well.

The period between 1957 and 1963 has seen a flurry of new legislation.²⁰⁶ Presently, 42 states have statutes requiring disclosure either in the sale of motor vehicles, all other consumer goods, or both.²⁰⁷ Many states also have disclosure requirements in connection with revolving credit plans and add-on contracts.²⁰⁸ On the federal level, the "Truth in Lending" Bill, after difficult going in committee for the past three years, has been reintroduced by Senator Douglas.²⁰⁹ One of the provisions of this bill presently causing the greatest stir among retailer groups is section 4(b), which sets forth disclosure requirements for revolving or open-credit plans.

It is apparent that disclosure has become an accepted fact of life in the field of installment sales. Therefore, the remainder of this section will be directed toward an analysis of how the principle is applied and how such application may be effectively improved.

B. *What Goods Are Covered*

To reiterate, the fundamental principle of disclosure is to *inform the uninformed* of the full cost of merchandise offered for sale under financing plans. Thus it would seem elementary that the disclosure statutes should be equally applicable to the sale of all consumer purchases, irrespective of the kind of the goods bought, the nature of their use, their cost, or the security interest which the seller retains in them. But this proposition is not at all descriptive of the existing disclosure statutes.

1. Coverage According to Kind of Goods

A look at the disclosure statutes reveals that the most variant item as to coverage is the treatment of consumer protection on the basis of the kind of goods which are involved in the sale. The broad categorization is twofold: those statutes which require disclosure in the sale of motor vehicles and those termed "all-goods" statutes which provide for disclosure in the sale of consumer goods other than motor vehicles. Forty-two states currently have disclosure statutes of one type or another. A numerical breakdown of these statutes²¹⁰ would reveal that: (1) thirty-nine states require disclosure in motor vehicle sales; (2) sixteen states require disclosure only in connection with the sale of motor vehicles; (3) twenty-eight states have separate statutes relating to the sales of motor vehicles; (4) eleven states have both motor vehicle acts and all-goods statutes; (5) twenty-six states have statutes of the all-goods variety; and (6) twelve of the states having all-goods statutes include motor vehicles within their coverage.

On the federal level, the Trade Practice Rules of the FTC regulate only motor vehicle sales, though the proposed "Truth in Lending" Bill would extend the federal regulation to all consumer goods. Since the definition of "credit" in this bill is all-inclusive,²¹¹ Senator Douglas has indicated that there would be a substitution

206 See 13 PERS. FIN. L.Q. REP. 99 (1959); *Id.* at 136; 14 PERS. FIN. L.Q. REP. 153 (1960); 16 PERS. FIN. L.Q. REP. 129 (1962).

207 See chart *infra* and accompanying notes 1c and 2c.

208 Disclosure under a revolving credit plan involves furnishing the purchaser with a monthly statement of his purchases, unpaid balance, and the finance charge on that balance. See e.g., FLA. STAT. ANN. § 520.35 (1962).

209 20 Cong. Rec. 1905 (daily ed. Feb. 7, 1963) (S. 750).

210 For a state-wide listing of these statutes, along with their full citation, see chart *infra* and accompanying notes 1c and 2c.

211 "Credit" means any loan, mortgage, deed of trust, advance, or discount; any conditional sales contract; any contract to sell, or sale, or contract of sale of property or services, either for present or future delivery, under which part or all of the price is payable subsequent to the making of such sale or contract. . . ." S. 750, 88th Cong., 1st Sess. § 3(2) (1963).

of the Federal Reserve Board, which is charged with enforcing the bill, for the FTC in the regulation of motor vehicle sales.²¹²

As demonstrated by the mere number of statutes, legislative recognition of the need for disclosure has been readily granted the purchasers of motor vehicles. A look behind the motor vehicle statutes, to the reasons for this disparity based on the kind of goods purchased, will provide a valuable yardstick of determination for future legislative activity. Undoubtedly the greater cost of motor vehicles, as compared with the other purchases of the consumer, was an influencing factor. Of historical significance is the fact that when the application of the disclosure principle to consumer purchases was still in its embryonic stage, installment buying was itself still limited. Motor vehicles were costly. It was natural, therefore, that installment plan buying first made its mark upon our contemporary economy in that field. Motor vehicle dealers were therefore in a position to refine subtle screens to deceive consumers, unmindful of the intricacies of this new easy-money mode of buying. The schemes were varied but included such practices as lumping the insurance cost with the finance charge to give the appearance of low credit charge and advertising automobiles for \$100 down and \$10 a month, without indicating the interest or carrying charges. But with the continued popularity of installment buying²¹³ the abuses soon were uncovered. The earlier notoriety of these abuses no doubt is the key reason for the wider recognition of the need for an informed consumer in the automobile market.

Though these factors show a historical explanation of the limitation of disclosure principles to motor vehicle sales, they do not justify its continuance. The costs of goods are high. As the deferred payment plan becomes more and more an integral part of every consumer's economic existence,²¹⁴ the justification for a disparity of consumer credit protection on the basis of the kind of goods purchased becomes incomprehensible.

2. Coverage According to Use of Goods

In a small number of states the consumer is not entitled to the protection of the disclosure statutes if his purchase of goods is made for a commercial use.²¹⁵ Typical of the statutory language excluding commercial purchases from coverage is that of the Delaware statute, which defines "goods" as "tangible chattels bought for use primarily for personal, family or household purposes, as distinguished from commercial or agricultural purposes."²¹⁶ The proposed "Truth in Lending" Bill provides no blanket exclusion of commercial transactions,²¹⁷ but "credit transactions involving extensions of credit to business firms"²¹⁸ may be excepted from the act. Practical policy arguments would strongly favor the exclusion of the great bulk of daily commercial transactions. If such transactions were not excluded the state would be called upon to police the activities of firms well able to protect themselves. Staffed with competent buyers and statisticians, there is little likelihood that a large enterprise will be uninformed as to the true costs of its purchases.

212 Letter from Senator Paul H. Douglas to the *Notre Dame Lawyer*, Mar. 15, 1963 on file in Notre Dame Law Library.

213 See generally, United States Board of Governors of the Federal Reserve System, *Consumer Instalment Credit*, pt. 1, vol. I, c. 8 (1957) (hereinafter cited as *Federal Reserve System Bulletin*).

214 See generally, *Id.* at ch. 6.

215 ALASKA STAT. § 45.10.220(2) (1962); CAL. CIV. CODE § 1802.1; DEL. CODE ANN. tit. 6, § 4301 (Cum. Supp. 1962); FLA. STAT. ANN. § 520.31 (1) (1962); ILL. ANN. STAT. ch. 121½, § 223 (Smith-Hurd 1960); KY. REV. STAT., Acts 1962, S 97, § 1(1) (Cum. Issue 1962); N.Y. PERS. PROP. LAWS §§ 401, 64-a; TENN. CODE ANN. § 47-1902(a) (Cum. Supp. 1962); WASH. S 415, 38th Sess. (Feb. 12, 1963). The Idaho statute is not applicable to sales of household goods and furniture, musical instruments, motor vehicles, farm implements, and machinery. IDAHO CODE ANN. § 64-805 (1948).

216 DEL. CODE ANN. tit. 6, § 4301 (Cum. Supp. 1962).

217 S. 750, 88th Cong. 1st Sess. § 3(2) (1963).

218 *Id.* at § 5(a).

However, if all commercial purchases were exempted, protection of the law would be denied to the Main Street shopkeepers, salesmen, and others like them, in the purchase of supplies and equipment essential to earning their livelihood.²¹⁹ It is necessary to weigh both the practicability of burdening the state with protecting the large private enterprise in its commercial purchases and the need of the small businessman in his buying transactions. Perhaps the best solution is to extend the coverage of these statutes to all goods, regardless of their use, and impose dollar limits upon the cost of the goods covered.

3. Coverage According to Cost of Goods

In a handful of states the protection given consumers is limited to goods of a prescribed cost. Disclosure of the terms of sale is required only in sales of a specified cost. Such dollar limits are found in both the all-goods and motor vehicle statutes. With little exception, these statutes place a ceiling upon the cost of the goods covered.²²⁰ In some states,²²¹ however, a floor is placed under the cost and all goods over that amount are covered by the statute. Minimum limits can be found only in all-goods statutes.

To evaluate the protection rendered the consumer in one of these states, as compared with the purchaser in a state whose statute has no dollar limits, it is again necessary to consider the basic principle of disclosure. Under statutes having no dollar limits, all purchases fall within their coverage. Enacted to provide the consumer with knowledge of the full cost of his purchase, it is certain that more comprehensive protection is afforded by these disclosure statutes. But practical considerations weigh heavily. Under no-limits statutes enforcement agencies have an almost infinite number of sales transactions to police, ranging all the way from a disgruntled purchaser of a lawn mower to the unhappy buyer of a 58-foot yacht. Enforcement in those states might well be less effective because of this unwieldy burden. Thus, it would seem that more vigorous protection could be given the consumer in those states limiting the scope of their acts. This is especially true of limitations in the all-goods statutes. The only hindrance to stringent enforcement under motor vehicle statutes with no dollar limits is the inclusion of commercial purchases of vehicles.

The question that is really crucial would seem to be that of determining what dollar limits are best. By setting a minimum limitation states may eliminate many spurious complaints. Some statutes²²² seem to have been prompted by the notion that purchases of under \$75 or \$100 are of too little value to be of concern to the state. From the practical standpoint of enforcement, it is probably true that placing upon the state the responsibility of protecting the consumer in these small purchases would result in many more complaints than could be effectively handled. But this might well defeat the fundamental purpose of the disclosure statutes by not protecting the average wage-earning consumer where he most needs protection — his weekly and daily encounters with vendor credit. It is not inconceivable that the greater number of abuses take place at this level of consumer purchases, for, not only are the greater number of the consumers in this bracket likely to be less-educated, wage earners, but also they are less likely to take pencil in hand and compute the actual cost of an item which they purchase where the amount involved is so small. It might well be, then, that this is the fertile soil in which the unscrupulous tradesman toils his craft. Maximum dollar limits, on the other

219 See 19 ROCKY MT. L. REV. 135 (1947).

220 Conn. (\$6000); Fla. motor vehicle statute (\$7500); Ind. (\$9999); Ky. motor vehicle statute (\$5000); La. (\$7500); Md. (\$2000); Miss. (\$7500); Mo. (\$7500); N.H. motor vehicle statute (\$7500); N.J. (\$7500); N.Y. conditional sales contract statute (\$3000); Utah (\$7500).

221 Del. all-goods statute \$75 (unless a security interest is retained); Idaho (\$100).

222 *Ibid.*

hand, seem desirable. Such limits eliminate many of the large interbusiness purchases from the coverage of the act even where there is no blanket exclusion of commercial transactions. Placing a limit of \$7,500²²³ upon the cost of goods and motor vehicles appears reasonable. In an all-goods statute such a limitation certainly should include most items which a consumer and small business will buy on the installment plan, while drawing the line where the larger commercial transactions are likely to begin. In the motor vehicle statutes, a \$7,500 figure is adequate to protect today's average car buyer, while excluding from the terms of the act the commercial purchases of motor vehicles. Certainly the dollar amount can be re-evaluated from time to time in light of economic conditions. In this regard, the experience of Indiana should serve as a guide for other states. Initially setting the dollar limit at \$1,500 when the statute was enacted in 1935,²²⁴ the Legislature has progressively raised it through the years, increasing it to \$2,500 in 1947,²²⁵ \$5,000 in 1955,²²⁶ and its present limit of \$9,999 in 1961.²²⁷

4. Coverage According to Interest in Goods Which Seller Retains

In the majority of the states²²⁸ the consumer is unprotected by disclosure statutes unless the seller retains a security interest in the goods sold. This interest may be retained either by way of a conditional sales contract,²²⁹ purchase money chattel mortgage,²³⁰ or bailment lease. The limitation may have been motivated by the desire to delegate to the enforcement agencies a manageable number of transactions. However, in denying protection to the consumer who buys goods of nominal value or perishable nature where no security interest is retained,²³¹ a good part of the disclosure theory is ignored. If statutes are to secure information for the consumer, they should secure that information in all of his purchases, not just those in which the seller considers the goods of such value as to formally retain a security interest. Realizing this, several state statutes and the "Truth in Lending" Bill require that no security interest need be retained in order for the disclosure provisions to apply.

C. What Must Be Disclosed

The Fourth Circuit has noted: "Because of the misleading or ambiguous manner of stating the finance rate and other charges in the usual installment contract few installment buyers are aware of the rate or charges which they are actually paying."²³² Disclosure statutes seek to eliminate this problem by demanding that the seller set forth separately each of the items comprising the total cost of the goods purchased. Specific statutory language to this regard is essential. Failing to require such a separate itemization, the Washington motor vehicle statute²³³ has led dealers to employ "hazy itemizing—grouping costs together under general heads and not specific itemization"²³⁴ and concealment of specific contract terms by ambiguous or catch phrasing.²³⁵

223 This is the generally agreed upon ceiling in those states setting dollar limits. See *supra* note 220.

224 Ind. Acts 1935, ch. 231, § 1 [now IND. ANN. STAT. § 58-901 (1961 Replacement)].

225 Ind. Acts 1947, ch. 238, § 1 [now IND. ANN. STAT. § 58-901 (1961 Replacement)].

226 Ind. Acts 1955, ch. 16, § 1 [now IND. ANN. STAT. § 58-901 (1961 Replacement)].

227 Ind. Acts 1961, ch. 324, § 1 [now IND. ANN. STAT. § 58-901 (1961 Replacement)].

228 Among the minority group of states not requiring such an interest to be retained under all-goods statutes, are Cal., Del., Fla., N.H., Ohio, and Tenn.

229 See *e.g.*, IDAHO CODE ANN. § 64-806 (Cum. Supp. 1961).

230 See *e.g.*, N.M. STAT. ANN. § 61-8-15 (1953 Replacement).

231 See ROCKY MT. L. REV. 135 (1947), and 63 HARV. L. REV. 874 (1950).

232 United States v. Bland, 159 F. Supp. 395, 396 (D. Md. 1958).

233 WASH. REV. CODE ANN. § 46-70-130 (1962).

234 Letter From Roger A. Jones, Motor Vehicle Administrator, Washington, to the *Notre Dame Lawyer*, Feb. 28, 1963, on file in Notre Dame Law Library.

235 *Ibid.*

The New Jersey all-goods statute²³⁶ exemplifies the manner in which various items must be specifically disclosed:

Every retail installment contract shall set forth the following separate items:

- (a) The cash price of the goods which are the subject matter of the retail installment contract;
- (b) The down payment made by the retail buyer, indicating whether made in cash or in goods or partly in cash and partly in goods. The amount of the payment in cash and in goods shall be shown separately. A description of the goods, if any, sufficient for identification, shall be shown;
- (c) The unpaid cash balance . . . ;
- (d) The amount of, if any, if a separate charge is made therefore, included for insurance and other benefits, specifying the coverages and benefits;
- (e) The amount of official fees;
- (f) The principal balance;
- (g) The amount of the time price differential;
- (h) The time balance . . . owed by the retail buyer to the retail seller, the number of installments required, the amount of each installment expressed in dollars and the due date or period thereof;
- (i) The time sales price. . . .

The disclosure provisions found in the motor vehicle statutes are of substantially the same language and content.²³⁷ The Trade Practice Rules of the FTC are basically the same, and the "Truth in Lending" Bill, with slight variation, is also similar.

1. How is Disclosure Made

Before discussing the terms which must be disclosed, a preliminary requirement deserves consideration: how is disclosure of the terms made.

Basic of course to the whole theory of disclosure is that the contract, or an itemization of the costs, be put into writing. All the disclosure statutes, including the FTC Trade Practice Rules and the "Truth in Lending" Bill, require such a writing. This seems merely to be in recognition of the assumption that the consumer would not long remember these individual costs if orally stated. To assure the consumer's observance of the itemized costs many statutes²³⁸ take even greater precautionary measures by requiring that both buyer and seller sign the agreement or contract.

Of equal importance is the requisite that the executed writing be delivered to the buyer. To secure information before obligation, delivery should be made before the consummation of the purchase. It is unfortunate because in many instances even though delivery of the writing must be made, disclosure is defeated by placing the cart before the horse—requiring delivery of the writing after the contract of sale is executed. In summary, the statutes can be categorized as follows: (1) about half of the disclosure statutes require delivery at the time of contract execution;²³⁹ (2) a great number of the statutes require that the seller deliver or mail a copy of the contract to the buyer. If there is no delivery of the motor vehicle or goods, then, until such delivery is made, the buyer can rescind;²⁴⁰ (3) some statutes permit delivery prior to or concurrent with the execution of the contract²⁴¹ if requested; otherwise delivery is to be made within 10 days after execution;²⁴² (4) in other states, a seller must mail or deliver the executed writing before the

236 N.J. STAT. ANN. § 17:16G-27 (Cum. Supp. 1961).

237 See *e.g.*, COLO. REV. STAT. ANN. § 13-16-6(2) (1953); IOWA CODE ANN. § 322.3(6) (Cum. Supp. 1962); MISS. CODE ANN. § 8075-13(b) (Cum. Supp. 1960).

238 See *e.g.*, ME. REV. STAT. ANN. ch. 59, § 254(I) (A) (Cum. Supp. 1961); MINN. STAT. ANN. § 168.71(a)(1) (1960); NEV. REV. STAT. § 97.020(1) (1957).

239 Ala.; Cal. (motor vehicle statute); Colo.; Conn.; Idaho; Ind.; Iowa; Ky. (motor vehicle statute); Mich.; Minn.; Neb.; Nev.; N.H. (all-goods statute); N.J.; N.M. (all-goods statute); Ohio; Pa.; S.D.; Utah; Vt.

240 Ariz.; Del. (motor vehicle statute); Fla. (motor vehicle statute); Hawaii; Ill.; Kan.; Ky. (all-goods statute); La.; Me.; Md.; Miss.; Mo.; Mont.; N.H. (motor vehicle statute); N.M. (motor vehicle statute); N.Y.; N.D.; Ore.

241 Mass. (motor vehicle statute).

242 Va.; Wis.

day the first payment is due;²⁴³ (5) in two states the seller has the option of delivering the instrument when executed or afterwards, but until the buyer receives a copy of it he is not obligated to pay more than the cash price;²⁴⁴ (6) in one state the delivery must be made prior to, or about the time of, the delivery of the motor vehicle;²⁴⁵ and, (7) the FTC Trade Practice Rules and the "Truth in Lending" Bill demand that the seller furnish the buyer with an itemization before consummation of the sale.

It would seem that each of these categories, with the exception of the last, is in patent conflict with the basic concept of disclosure. They do nothing more than the public-spirited citizen who phones the fire department after his neighbor's home has been razed to a heap of ashes. They provide remedies for an uninformed purchaser, such as allowing him to rescind, and relieving him of the obligation to pay the finance charge, but do little to inform him before he commits himself to that purchase. The only requirement consonant with the principle of full disclosure is that of the FTC and the proposed federal "Truth in Lending" Bill which provide for a complete itemization of all costs prior to the time the sale is consummated.

2. Cash Price and Down Payment

All disclosure statutes require the cash price to be stated. Most statutes permit the seller to include in the cash price figure the charges for accessories, delivery, installation, repair or other services upon the goods.²⁴⁶ In some states, however, a separate statement of these charges must be made.²⁴⁷

Under substantially all of the disclosure statutes²⁴⁸ the consumer will receive an itemization which sets forth the amount of the down payment or turn-in credit. This amount usually must be accompanied by a description of such trade-in or part payment. The statement of the amount of the unpaid balance of the cash price is customarily required.²⁴⁹ An occasional statute,²⁵⁰ however, requires no disclosure of the unpaid balance. Providing for a separate statement of the unpaid balance imposes very little additional clerical burden on the retail dealer. Since it provides the consumer with a complete record of the credit transaction it is a desirable feature of the disclosure statutes.

3. Statement of the Insurance

In the typical installment sale the seller will procure insurance protection for the goods sold. The expense of this coverage constitutes part of the buyer's cost. All²⁵¹ statutes, therefore, specifically state that the cost of the insurance must be set forth. A common provision, especially in the motor vehicle acts, demands that the seller not only reveal the cost of the insurance but also that he indicate the coverage which it provides.²⁵²

²⁴³ Fla. (all-goods statute); Mass. (all-goods statute); Tenn.

²⁴⁴ Cal. (all-goods statute); Del. (all-goods statute).

²⁴⁵ N.C.

²⁴⁶ See chart *infra* and accompanying notes 1c and 2c for listing of states and full citation of statutes.

²⁴⁷ The only states in which a separate statement of these charges is required are Md. and N.Y. (all-goods statute). The Ala. all-goods statute requires a separate statement of each item comprising the cash price. See chart *infra* and accompanying notes for a complete listing of the states and a full citation of the statutes.

²⁴⁸ See chart *infra*.

²⁴⁹ *Ibid*.

²⁵⁰ Alaska (motor vehicle statute); Idaho; N.H. (all-goods statute); N.C.; Tex.; Va.; Wis., FTC Trade Practice Rules. See chart *infra* and accompanying notes 1c and 2c for a complete listing and full statutory citations.

²⁵¹ The New Hampshire all-goods statute is a general "disclosure" law, specifically intended to require the dealer to disclose the finance charge. However, since the purpose of the statute is disclosure, inferentially at least, it requires a separate statement of the insurance cost, even though the statute does not specify that such a statement must be made.

²⁵² The most comprehensive statute in this regard is KAN. GEN. STAT. ANN. § 16-507(f) (Supp. 1961).

Disclosure of insurance costs is vital. Although this is recognized by statutory provision, the statutes vary in an important aspect. There is a parting of ways as to the method and precision of stating this cost and the time when the exact cost should be disclosed:²⁵³ (1) the majority require that a separate statement of the insurance cost be included in the itemization delivered to the consumer;²⁵⁴ (2) in Pennsylvania, and under the FTC's Trade Practice Rules, if the precise cost of the insurance is unavailable at the time the contract is signed, an estimated amount, ascertained from a chart or recognized rate manual, may be set forth in the contract. Further, the contract must state that the cost of the insurance is estimated and contain a notice to the buyer that the difference between the estimated cost and the actual cost, including the finance charges on such amount, will be adjusted at the time of final payment. A statement of the amount of the adjustment has to be furnished the buyer simultaneously with the delivery of the insurance policy; (3) in Michigan, if the precise cost of the insurance is not available at the time the contract is signed, an estimated amount, ascertained from the current applicable manual of a recognized standard insurance rating bureau may be set forth in the contract; (4) in other states²⁵⁵ the insurance cost may be lumped with the amount of the finance charge. The seller is then under a duty to send the buyer the exact cost of both within a specified number of days; and, (5) in Wisconsin, the Commissioner of Banking may permit the motor vehicle dealer to combine the insurance cost and finance charge in one statement under such rules and regulations as the Commissioner may from time to time prescribe.

It is noted that the majority approach allows neither an estimation of the cost nor lumping. This clearly seems to be in the best interest of an informed consumer, notwithstanding the oftentimes difficult task of determining the exact insurance cost which such statutes impose upon the seller. However, dealers have recurrently claimed that because they are frequently unable to ascertain the exact amount of the insurance at the time of sale, they should be entitled to estimate its cost. The Proposed Final Draft of the UCC (Spring 1950) attempted to satisfy those making such claims. It permitted the insurance to be stated as an approximated cost if the buyer was notified within 30 days of its exact cost.²⁵⁶ Writing in support of the statement of the insurance cost as an estimated amount, J. Francis Ireton, secretary of the American Bar Association, argued that because of the multifarious models of vehicles and therefore many class rates it is almost impossible to know, at the time of sale, the exact cost of insurance.²⁵⁷ There is merit in this argument. It would seem that Pennsylvania, the FTC, and Michigan have struck a harmonious chord. Under their statutes an estimate of the insurance cost may be recited, based upon recognized charts or manuals. The buyer is then to be notified of the exact cost shortly thereafter. Adjustments are permitted in case of an overstatement of the estimate. Since the estimate is based on a recognized standard, adherence to the principle of disclosure is still present. If it can be assumed that insurance costs among dealers would not be substantially different from those in the standard rate chart, then it could not be said that the consumer was uninformed for he would have to pay a similar premium elsewhere. The cost of insurance would not then be a decisive factor in his choice of goods. However,

253 For a complete listing of the states see chart *infra*. Full citations to the statutes may be found in the notes 1c and 2c accompanying the chart.

254 Alaska; Ariz.; Cal.; Colo. (all-goods statute); Conn.; Del.; Fla.; Hawaii; Idaho; Ill. (sale of all goods other than motor vehicles); Iowa; Kan.; Ky.; La.; Me.; Md.; Mass.; Minn.; Miss.; Mo.; Mont.; Neb.; Nev.; N.H. (motor vehicle statute); N.J.; New York (all-goods statute); N.C.; N.D.; Ore.; S.D.; Tenn.; Tex.; Utah; Vt.; Va.; F.T.C. Trade Practice Rules; Federal Truth in Lending Bill.

255 Colo. motor vehicle statute (30 days); Ill. motor vehicle sales only (20 days); Ind. (25 days); N.Y. conditional sales contracts statute (25 days); Ohio (25 days).

256 Uniform Commercial Code, Proposed Final Draft, Spring 1950, § 9-205(2).

257 Letter From J. Francis Ireton to Judge Herbert F. Goodrich, Apr. 24, 1950, in 6 Bus. LAW. 119, 135 (1951). See also, 16 LAW & CONTEMP. PROB. 27, 37, 38(191).

if the costs of insurance are variable, objections may be raised as to the wisdom of permitting the seller to estimate the cost of insurance, for then the consumer would not be able to compare costs of competing goods. These objections would be especially valid under statutes permitting the consumer the choice of buying his insurance directly from the dealer or from his own broker.

Different considerations are involved when one measures the utility and effects of lumping the insurance cost with the finance charge. The objective of disclosure seems defeated under those statutes permitting the seller to divulge only a single combined markup that lumps together the cost of insuring the goods with the finance charge. The separate figures must be known to the dealer in order for him to ascertain the lumped sum, so it seems no undue burden to require him to disclose those figures individually. Lumping of these costs enables the unscrupulous dealer to convince buyers that "costly" insurance coverage constitutes the bulk of the lumped markup. Thus consumers regard installment buying as costing little more than a purchase for cash. Shielded by consumer ignorance, the dealer may then exact exorbitant charges with small fear of timely detection. Of course, if lumping were considered as an evil only insofar as retail sellers are concerned, then itemization would be useless, for buyers could compare lumped charges as easily as itemized charges. Commenting upon the separation offered in the Proposed Final Draft of the UCC (Spring 1950),²⁵⁸ Mr. Ireton saw the situation in the same light, arguing that the "separation of the finance charge and insurance charge is a wholly unnecessary burden on industry, without compensating benefits to the public."²⁵⁹ But lumping, when considered in the broader area of the competitive race for the consumer's credit, prevents comparison of vendor and lender credit costs. Accordingly, the statutes requiring a separate statement of these costs are unquestionably more sound than those in which lumping is permitted. The FTC concurs in this conclusion. States whose motor vehicle disclosure statutes permit lumping are not considered to be adequately effective by the FTC and therefore these states are not excepted from the regulation of the Trade Practice Rules.²⁶⁰

4. Official Fees and Principal Balance

Most of the disclosure laws require a separate statement of the official fees, such as registration and filing fees, and other charges paid by the dealer in connection with the sale.²⁶¹ If these fees and charges must be paid in conjunction with a sale, and constitute a part of the buyer's cost, it is consistent with the theory of disclosure that they be separately stated.

The principal balance, which is the unpaid balance of the cash price plus the cost of insurance and official fees, generally must be disclosed.²⁶² This provision, though not entirely essential, is important insofar as it enables the consumer to follow the mechanics of the transaction through each successive step in the calculations.

5. Finance Charge

All statutes require the disclosure of the finance charge.²⁶³ The charge imposed is often referred to as the time price differential, representing the excess of the time price over the cash price which the consumer agrees to pay for the privilege of buying on the deferred payment plan. But revealing only the figures,

²⁵⁸ See *supra* note 256.

²⁵⁹ Letter From J. Francis Ireton, *op. cit. supra* note 257.

²⁶⁰ "... legislation permitting the lumping of finance, insurance, and other charges and a non-disclosure as to the amount of each to the purchaser *before consummation of purchase* . . . would be regarded by the Commission as inadequate. . . ." 5 PERS. FIN. L. Q. REP. 35, 37 (1951).

²⁶¹ See chart *infra* and accompanying notes 1c and 2c.

²⁶² *Ibid.*

²⁶³ *Ibid.*

other than the finance charge, which the seller relied upon in arriving at the time sales price is not sufficient. A California court has maintained that:

The very purpose of the code section would be defeated and nullified if the buyer was required to determine the time price differential by a mathematical process arrived at from an analysis of the seller's figures. The law requires that this item must be recited in the contract and not left to a mathematical compilation by the buyer.²⁶⁴

In the greater number of the statutes the finance charge need only be set forth as an amount, expressed in dollars and cents.²⁶⁵ Variations of the dollar amount statement are to be found in eight state statutes,²⁶⁶ which permit the seller to state the finance charge as a rate. This accords with the earnest claims which have been made that the finance charge should be expressed both as a dollar amount and as a rate of interest per annum, or rate of interest per month on a declining balance.²⁶⁷ Although the statutes in these eight states give the seller the option of stating the finance charge as a dollar amount or rate, Section 4(a)(7) of the "Truth in Lending" Bill requires that, in addition to the statement of the dollar amount, the writing set forth "the percentage that the finance charge bears to the total amount to be financed expressed as a simple annual rate on the average outstanding unpaid balance of the obligation."²⁶⁸

Formulations of finance charges in terms of rates are urged because they would enable the buyer to judge better the cost of competing means of financing his purchase. Thus the proponents of the Douglas Bill favor disclosure of this charge in the form of both a dollar amount and a rate. Their contention is that with such disclosure the consumer is then equipped with a yardstick with which to compare costs.²⁶⁹ The opponents of the bill, on the other hand, point to the burden such a computation would put upon retailers and their clerks.²⁷⁰ As pointed out, on the state level the claims for a rate statement have received very little response from the legislatures. It has been suggested that this is because of the fear of cluttering up the installment contract.²⁷¹ Further, there may be the fear that such an enactment will lead to the adoption of the dollar amount method in the solicitation of lender credit agencies.²⁷² Herein lies the greatest virtue of the Douglas Bill. By requiring all credit agencies, both lender and vendor, to solicit consumer patronage according to a uniform method of charge statement, the consumer will have a truly enlightened choice in selecting from among competing sources of credit.

Although the amount of the finance charge is not of primary concern to the disclosure principle, there remains one final control over finance charges which bears need of mention. Since bona fide installment sales are free of the usury laws,²⁷³ many states have prescribed dollar limits on the amount of the finance charge.²⁷⁴ If the thrust of disclosure statutes is to protect the unwary buyer from all abusive

264 *Adams v. Caruso Enterprises*, 134 Cal. App. 2d 403, 285 P.2d 1022, 1026 (1955); *accord*, *Foster v. Masters Pontiac Co.*, 158 Cal. App. 2d 481, 322 P.2d 592 (1958).

265 See chart *infra* and accompanying notes 1c and 2c.

266 Alaska (all-goods statute); Fla. (all-goods statute); Hawaii; Ill.; N.H.; (all-goods statute); N.Y. (all-goods statute, and conditional sales contract statute); N.D.; Ohio. Full citations of these statutes are included in the notes 1c and 2c accompanying the chart *infra*.

267 See, 2 LAW & CONTEMP. PROB. 189 (1935); 19 ROCKY MT. L. REV. 135 (1947); 44 CORNELL L.Q. 38 (1958).

268 S. 750, 88th Cong., 1st Sess. § 4(a)(7) (1963).

269 See, Testimony of Edward Gudeman, Under Secretary of Commerce, 1962 *Hearings on "Truth in Lending,"* at 19-23.

270 *Id.*, Wallace F. Bennett, Senator from Utah, at 15, 17, and 46.

271 44 CORNELL L.Q. 38 (1958).

272 *Ibid.*

273 2 LAW & CONTEMP. PROB. 148 (1935); 114 Nw. U.L. REV. 137, 167-68 (1958); *Van Asperen v. Darlings Olds, Inc.*, 254 Minn. 62, 93 N.W.2d 690 (1958).

274 See *e.g.*, COLO. REV. STAT. ANN. § 121-2-4 (1960 Perm. Supp.); HAWAII REV. LAWS § 201A-31 (Supp. 1961); N.J. STAT. ANN. § 17:16C-41 (Cum. Supp. 1961); WIS. STAT. ANN. § 218.01(6)(b) (1957).

practices of the unscrupulous tradesman, then this is a welcomed development in the law.

6. Time Balance and Time Sales Price

With small exception,²⁷⁵ all disclosure statutes require a statement of the amount of the time balance, that is, the amount of the principal balance plus the finance charge. Also, substantially all the statutes declare that the itemized writing set forth the number, amount, and date of each installment payment.²⁷⁶ The "Truth in Lending" Bill is notably absent from this group.

As to the requirement of stating the installment sales price, also known as the time sales price, the statutes split ranks. A statement of this figure, which represents the sum of the down payment and the time balance, is demanded by only a handful of statutes.²⁷⁷ As with the Douglas Bill, this item need not be stated under statutes permitting the statement of the finance charge in terms of a rate.²⁷⁸

D. Enforcement

The disclosure statutes all²⁷⁹ seem to exhibit a legislative agreement that some penalty provision is necessary for the effective enforcement of the disclosure provisions, perhaps because of the experience of California, where an act without any penalty provision was passed.²⁸⁰ In *Carter v. Seaboard Finance Co.*,²⁸¹ the court held that the proper inference to be drawn from the omission of a penalty section was that a contract not complying with the disclosure provisions would be unenforceable. Although there is general appreciation of the need for some penalty, a distinct split exists as to what types of penalty provisions are the most effective.

1. Licenses

A common means of ensuring compliance with the disclosure laws is requiring retail sales dealers to be licensed. In many states such a requisite can be found.²⁸² But, the tripartite nature of most installment sales transactions has prompted many states to require only sales finance companies, engaged in the business of purchasing the contracts of retail installment sellers to be licensed.²⁸³ This ". . . tends strongly to insure that compliance with the statutes is being done by the licensees, and the retail sellers from whom they purchase retail instalment contracts."²⁸⁴ Several states require that both retail installment dealers and sales finance companies be licensed.²⁸⁵ Although in these states compliance may also be sought by the imposition of a civil or criminal penalty,²⁸⁶ the thrust of this method of control is in the vested power of the state to suspend or revoke these licenses. Most statutes provide

275 The time balance need not be stated in the N.H. and N.M. all-goods statutes, nor in the Truth in Lending Bill. See chart *infra* and accompanying notes 1c and 2c for complete listing of states and statute citations.

276 The schedule is not required to be stated under the Alaska, Neb., and Va. motor vehicle statutes, nor the N.H. all-goods statute and "Truth in Lending" Bill.

277 See chart *infra* and accompanying notes 1c and 2c.

278 See *e.g.*, N.D. REV. CODE § 51-13-02(5) (1960).

279 The Nev. statute is the only notable exception. NEV. REV. STAT. § 97.060 (1957) provides for a civil action against a seller who exceeds the prescribed time differential limits or acceleration provisions, but provides no penalty for a violation of the disclosure provisions. See chart *infra* for other states.

280 CAL. CIV. CODE § 2982(e) (1954) (now violations are provided for in CAL. CIV. CODE §§ 2983, 2984).

281 33 Cal. App. 2d 564, 203 P.2d 758 (1949).

282 See chart *infra* and accompanying note 3c.

283 *Ibid.*

284 Letter From Reinhard J. Bardeck, Deputy Bank Commissioner, Connecticut to the *Notre Dame Lawyer*, Feb. 27, 1963, on file in Notre Dame Law Library.

285 See chart *infra* and accompanying note 3c.

286 *Ibid.*

for the suspension or revocation of the license only if the violation of the disclosure provisions is intentional.²⁸⁷

Under all of the statutes a violation on the part of the licensee may be brought to the attention of the enforcement agency by the consumers. To determine whether the licensee is complying with the disclosure provisions, statutes permit the state to conduct investigations of their books, records, and accounts. If only the finance company is required to be licensed, the statutes usually provide that the state may also investigate the records of the retail sellers from whom it purchases its retail installment sales contracts upon registration of complaint. When the burden of reporting the violation is upon the retail buyer he must file a written complaint. The state banking commissioner, typically the official charged with enforcement, is then empowered to conduct an investigation. This is followed by a formal hearing, which could result in the license suspension or revocation. Rather than putting the full burden of disclosing violators upon the consumer, under most statutes the states retain the right of a general investigatory power, having free access to all pertinent records of the licensee at any time.²⁸⁸ Typically these statutes are interpreted as providing for periodic examinations. The cost of such examinations is often charged to the licensee.²⁸⁹ If only finance companies are required to be licensed, the state may not examine the records of sellers in the absence of a registered complaint. Under many of the licensing provisions this general investigatory power over licensees may be exercised only if there exists a reasonable belief that the licensee is violating the disclosure statute.²⁹⁰ It would seem that this provision permits investigation only upon complaint, though it need not be in writing. Thus, investigations here too are made to depend upon the consumer. Most statutes enable the state agency to conduct investigations either upon its own initiative, or upon the written complaint of a retail buyer.²⁹¹ Those statutes which grant general investigatory powers to the state, even without reason to suspect a violation, are clearly the more effective. If a written complaint is the primary motivating force behind the state's investigatory power it seems unlikely that the state will be called upon to enforce its disclosure statute very often, for "if people have to write letters they postpone filing complaints it seems."²⁹²

In the absence of licensing provisions, it has been suggested that enforcement of the statutes by criminal prosecutions to imprison the violator, and/or to recover an authorized fine, is apt to fail, if for no other reason than that the prosecuting officials are usually too overburdened with prosecutions of other crimes to be much concerned with seemingly technical statutory violations in consumer credit transactions.²⁹³

287 Ariz.; Del.; Fla. (motor vehicle statute); Ind.; Kan.; La.; Me.; Md.; Minn.; Miss.; Mont.; Neb.; N.H.; N.J.; N.M.; N.Y.; N.C.; S.D.; Vt.; Va.; Wis.

288 Conn. (free access); Del. (power to investigate at any time); Fla. motor vehicle statute (investigations at intermittent periods); Ind. (may investigate at any time); Kan. (power to make such investigations as are deemed necessary); Mass. (whenever in the public interest); Mich. (any time during regular business hours); Miss. (investigations at intermittent periods); Mont. (power to make such investigations as are deemed necessary); Neb. (power to make such investigations as are deemed necessary); N.M. (power to make such investigations as are deemed necessary); N.Y. (power to make such investigations as are deemed necessary); Penn. (investigate at any time); Wis. (licensor may inspect).

289 See *e.g.*, KAN. GEN. STAT. ANN. § 16-505(a) (Supp. 1961); MISS. CODE ANN. § 8075-10 (Cum. Supp. 1960); NEB. REV. STAT. § 45-312(13) (1960 Reissue).

290 Ariz. (reasonable belief of violation); Fla. all-goods statute (inspect records to determine compliance); La. (reasonable belief of violation); Me. (reasonable cause); N.H. (for any reasonable cause); N.J. (if reasonable cause to believe violation); S.D. (reasonable belief of violation); Vt. (reasonable belief of violation).

291 A few states seem to permit investigation only upon the complaint of the retail buyer: Colo.; Iowa; Md.; Minn.; N.C.; Va.; Wash.

292 Letter From Joseph V. Riley, Supervisor, Division of Small Loans and Consumer Credit, Indiana, to the *Notre Dame Lawyer*, Feb. 26, 1963, on file in Notre Dame Law Library.

293 53 Nw. U.L. REV. 137 (1958).

2. Criminal Penalties

Another generally accepted approach to the enforcement of the disclosure provisions is the imposition of criminal penalties. These are often included even in statutes providing for the suspension or revocation of licenses.²⁹⁴ Including both of these provisions is essential to states where it is the sales finance company which must be licensed. Without direct recourse to the dealer, provided by the criminal penalties, the only party to suffer would be the finance company, thus leaving the violator unscathed. The penalty provisions require either the imposition of a fine up to a specified amount (usually \$500 or less), or imprisonment of a maximum period (usually six months or less), or both.²⁹⁵ To be liable under these provisions the violation must usually be intentional.²⁹⁶ Many statutes classify violations of the disclosure provisions as misdemeanors.²⁹⁷

Looking to the federal controls one finds more stringent penalties. When a violation of the FTC Trade Practice Rules is found, a cease-and-desist order will issue which, if not obeyed, will subject the violator to a civil penalty of not more than \$5,000 for each transgression.²⁹⁸ Each separate violation is considered a separate offense. Under the "Truth in Lending" Bill a willful violator would be fined not more than \$5,000 or imprisoned not more than one year, or both.²⁹⁹

Relying solely upon criminal sanctions, or criminal sanctions in conjunction with civil remedies for the buyer, for the enforcement of disclosure statutes seems to be of questionable wisdom. A vast majority of consumers are poorly equipped to avoid the infliction of a wrong or obtain its redress even though unethical sellers act in defiance of the law. Even the *in terrorem* effect of these provisions is lost if the dealers can rely on their silent partner — consumer ignorance — to keep their misdeeds from the eyes of the law. In the final analysis, therefore, licensing regulations coupled with the power of periodic investigations seem to offer the best solution to the enforcement problem.

3. Civil Remedies

In addition to the remedial actions by states through the imposition of license suspension and revocation and/or the imposition of criminal penalties,³⁰⁰ many states grant the consumer a direct remedy. This is done by allowing the recovery of charges paid by the buyer, or by barring the seller's recovery of any time price differential, delinquency or collection charges, or both.³⁰¹ Here again distinctions are made between violations which are intentional and those which are not.³⁰²

On the federal level, the FTC Trade Practice Rules offer little direct consolation to the consumer who has dealt with a dealer violating the regulations, because of case holdings that the Federal Trade Commission Act grants injured consumers no private cause of action against violators.³⁰³

But the proposed "Truth in Lending" Bill would give greater direct remedies to the consumer. Section 7(a) provides that a willful violator will be liable to the consumer "in the amount of \$100, or in an amount equal to twice the finance

294 See chart *infra*.

295 *Ibid.*

296 See *e.g.*, ILL. STAT. ANN. ch. 121½, § 243 Smith-Hurd (1960); MO. STAT. ANN. § 408.370(1) (Cum. Supp. 1962); N.J. STAT. ANN. § 17:16C-56 (Cum. Supp. 1961).

297 See *e.g.*, ARIZ. REV. STAT. ANN. § 44-295(A) (Cum. Supp. 1962); DEL. CODE ANN. tit. 6, § 4347 (Cum. Supp. 1962); ME. REV. STAT. ANN. ch. 59, § 258(I) (Cum. Supp. (1961)).

298 38 Stat. 719 (1914), as amended, 15 U.S.C. 45(1) (1958).

299 S. 750, 88th Cong., 1st Sess. § 7(c) (1963).

300 A bill soon to be introduced in the Minnesota legislature would declare violations of the statutes to be public nuisances.

301 See chart *infra* and accompanying notes.

302 See *e.g.*, CONN. GEN. STAT. ANN. § 42-99 (1960); MONT. REV. CODES ANN. § 74-611(b) (1947 Replacement); N.D. REV. CODE § 51-13-07 (1960).

303 *Samson Crane Co. v. Union National Sales*, 87 F. Supp. 218 (D. Mass. 1949).

charge . . . whichever is greater, except that such liability shall not exceed \$2000. . . ."³⁰⁴ This section of the bill concludes by stating that "the creditor shall be liable for reasonable attorney's fees and court costs as determined by the court."³⁰⁵

These provisions would put sharpened teeth into the consumer's remedies. However, the persistent problem of litigation apathy over small amounts and the need of effective promulgation of statutory protection still prevail. On the other hand, requiring the fine to be paid to the buyer might well lead to a flood of spurious claimants willing to wage legal battle where the stakes of victory are set so high.

The Douglas Bill attempts to give some protection to the erring seller. Section 7(a) provides that "no person shall be entitled to recover such penalty solely as the result of the erroneous computation of any percentage . . . if the percentage required . . . to be disclosed . . . was in fact greater than the percentage required . . . to be disclosed."³⁰⁶ If, however, the percentage disclosed is smaller than that actually due, though the computation was erroneously made, the creditor is still penalized. The harshness of this penalty might well lead sellers to overstate these percentages as a matter of routine for their self-protection, thus defeating the very purpose of this "truth" bill.

4. Corrections

Finally, many states³⁰⁷ permit a seller to correct his violation. If he is notified in writing by the buyer and makes a correction within a specified number of days³⁰⁸ he is exempted from both³⁰⁹ civil and criminal penalties. Permitting corrections to relieve the violator of his liability under the statute is certainly a compromising measure, intended to protect the retail sellers against the imposition of penalties for unintended errors. The provision, however, defeats the purpose of the disclosure statutes. This conclusion has been recognized in Florida, where the all-goods statute permits the correction of violations.³¹⁰ It has been said of this statute:

Penalties for violations are inadequate, and from a practical point of view nonexistent. The law is deprived of force by the provision that no penalty may be imposed unless the seller has failed to correct a violation within 30 days after having been notified by the purchaser or the Administrator of his failure to comply with provisions of the act.³¹¹

In effect, therefore, these provisions would seem to be instructing the seller to comply with the disclosure requirements *if he desires to do so* for, even if his violation is discovered he is still left with sufficient time to absolve himself from all liability.

E. Effectiveness

The foregoing discussion is clear evidence that the need for disclosure statutes has attained widespread recognition. Today attention should be focused on the effectiveness of the disclosure statute.

304 S. 750, 88th Cong., 1st Sess. § 7(a) (1963).

305 *Ibid.*

306 *Ibid.*

307 CAL. CIV. CODE §§ 1812.8, and 2984; DEL. CODE ANN. tit. 6, § 4349 (Cum. Supp. 1962); FLA. STAT. ANN. § 520.39(4) (1962); HAWAII REV. LAWS § 201A-21 (Supp. 1961); ILL. ANN. STAT. ch. 121½, § 243 (Smith-Hurd 1960); KY. REV. STAT., Acts 1962, S. 97, § 6(3) (Cum. Issue 1962); MO. ANN. STAT. § 408.370(3) (Cum. Supp. 1962); N.Y. PERS. PROP. LAWS §§ 414(3), and 307(3); ORE. REV. STAT. § 83.990(3) (1961 Replacement); TENN. CODE ANN. § 47-1907(d) (Cum. Supp. 1962).

308 Cal. (30 days); Del. (10 days); Fla. (30 days); Hawaii (10 days); Ill. (10 days); Ky. (10 days); Mo. (10 days); N.Y. (10 days); Ore. (10 days); Tenn. (30 days).

309 The Illinois statute exempts the violators only from any criminal penalties.

310 *Supra* note 307.

311 Letter From N. E. Miller, Jr., Executive Assistant, Office of the Comptroller, Florida, to the *Notre Dame Lawyer*, Mar. 5, 1963, on file in Notre Dame Law Library.

1. How Effective is the Present Method of Stating the Finance Charge

Disclosure statutes serve a dual purpose. On the one hand, they are intended to inform the consumer of the cost of his purchase in order that he might make a selection from among goods of comparable quality before making his purchase. On the other, these statutes should enable the consumer to compare the cost of the credit offered him by the vendor with that offered by competing credit agencies. Any attempt to adequately consider the effectiveness of the statement of the finance charge must proceed with both of these aims in mind.

Presently the finance charge must be stated as a dollar amount under the existing type of disclosure statutes.³¹² Clearly, this enables the consumer to make a comparison of the costs of other comparable goods before obligating himself to make his purchase. However, it fails to provide the consumer with any common denominator with which to compare other available sources of credit. The statement of the charge as a rate, if employed by all credit agencies, would furnish this common denominator. Perhaps pregnant in the history of disclosure statutes is the rationale of the method of stating the finance charge in terms of a dollar and cents amount, rather than as a rate. The finance charge has traditionally been thought of as part of the cost of goods purchased on the deferred payments plan,³¹³ in contradistinction to the cost of a loan. The latter, known as interest, is considered as an increment of the monies borrowed. To meaningfully express this increment, the interest has been stated as the percentage representing the proportion which the increment bears to the principal borrowed. But the finance charge, contrariwise, has been viewed as a cost rather than an increment. From the seller's position it represents the clerical expense which he incurs in granting the consumer the privilege of extending his payments over a period of time.³¹⁴

Consequently legislatures, when first enacting disclosure statutes, reached the conclusion that since the finance charge is an item of cost, it should then be expressed as all other items of cost—as a dollar amount.³¹⁵ Agreement upon this form of statement was probably also influenced by the circumstances surrounding the early recognition of the need for disclosure statutes.³¹⁶ Unscrupulous dealers were employing devious means to conceal the full cost of the finance charge. It was no doubt felt that the consumer ought to know exactly how much he was paying the dealer for each item comprising the final sales price. Attention was directed to pointing up to the consumer the portion of the purchase price attributable to his buying on credit rather than for cash. Stating the finance charge as a dollar amount was plainly satisfactory to achieve that purpose. But when attention is shifted from the more limited purpose of disclosure—a meaningful evaluation of the credit charge for a particular transaction by itself—to the broader purpose of providing an effective comparison of competing credit prices offered by different credit extenders, this form of statement is clearly inadequate.

It could be said in support of the dollar amount statement that the consumer is primarily interested in how his purchase will affect his pocketbook. He wants to know how much, in dollars and cents, his purchase will cost him. This is un-

312 See *supra* note 265 and accompanying text. See also, *supra* note 266 and accompanying text for the eight states which permit the statement to be in the form of a dollar amount or percentage rate.

313 2 LAW & CONTEMP. PROB. 148 (1935).

314 See *e.g.*, CONN. GEN. STAT. ANN. § 42-83(1) (1960). "‘Finance charge’ means the amount in excess of the cash price of the goods agreed upon by the retail seller and the retail buyer, to be paid by the retail buyer for the privilege of purchasing the goods under the retail instalment contract or instalment loan contract."

315 This analysis finds support in the fact that the first statutes in this area — the Indiana all-goods act, the Wisconsin motor vehicle statute, and the F.T.C. rules — all required only a dollar amount statement. See chart *infra*.

316 See *supra* notes 202 and 204 for a discussion of how the nefarious practices of dealers in concealing the cost of an installment purchase led to the enactment of the disclosure statutes.

controverted, but it avoids entirely the question of the merits of this form of statement as a yardstick of measurement when the consumer attempts to evaluate competing credit costs. With so many different methods of computing the amount of the finance charge available,³¹⁷ it is of little wonder that that even with this disclosure the perplexed consumer would still be in a quandary when he attempted to determine the most attractive source of credit. The dollar amount statement is valuable insofar as it informs the consumer as to the cost of the privilege of paying in installments rather than for cash. It eases the comparison of costs with other goods. The dollar amount statement should be retained for these purposes. But with manifold variations in the method of statement among competing credit agencies, a common basis for comparing alternative credit sources must also be provided. Requiring a dollar amount statement, supplemented by a statement of the charge in terms of a percentage that is figured on a common base period, equally applicable to all credit suppliers, would seem to satisfy this need.³¹⁸ This form of statement would "facilitate instant and easy evaluation and comparison of finance charges by all borrowers and buyers on credit."³¹⁹

This in a nutshell is what the Douglas Bill purports to do. Section 4(a) requires that the seller disclose "the finance charge expressed in terms of dollars and cents"³²⁰ and "the percentage that the finance charge bears to the total amount to be financed expressed as a simple annual rate on the average outstanding unpaid balance of the obligation."³²¹

2. How Effectively Have the Disclosure Statutes Been Enforced

In practically every state of the Union today³²² the consumer is protected in most of his installment purchases by disclosure statutes of varying degrees of comprehensiveness. One indicium of how effective these statutes have been in gaining the sellers' full disclosure may be the number of complaints about deceptive practices that have been made since their enactment. A sampling of the states as to the number of complaints brought within the past year has shown that few complaints have been registered.³²³ However, reliance cannot be posited solely on the small number of complaints as testimony of the effectiveness of disclosure statutes. There remains the hard fact that consumers are often unaware of their rights and, even when aware of these rights, are often unwilling to complain because of the minor amounts involved. Realizing this, most states do not leave enforcement solely to the will or whim of the consumer, but, instead, require licenses and provide for state-initiated investigations of the licensee's records.³²⁴

A seller might continue to employ deceptive practices, shielded by consumer

317 See 2 LAW & CONTEMP. PROB. 188, 188-89 (1935) where the author lists eight broad classifications of methods of computing the charge, based on his survey of 60 stores.

318 Five states — Minn., N.M., N.D., S.D., and Wis. — require as a matter of law that the finance charges on small loans be stated in terms of annual rates as well as monthly rates. See, MINN. STAT. ANN. § 56.14 (Cum. Supp. 1962); N.M. STAT. ANN. § 48-17-44 (Supp. 1961); N.D. REV. CODE § 13-03-15 (Cum. Supp. 1961); S.D. CODE § 6.04B25 (Supp. 1960); WIS. STAT. ANN. § 214.13 (1957).

319 Testimony of Edward Gudeman, Under Secretary of Commerce, 1962 Hearings on Truth in Lending, at 20.

320 S. 750, 88th Cong. 1st Sess. § 4(6) (1963).

321 *Ibid.* at § 4(7). A provision comparable to this can be found in the bill introduced in the Wisconsin assembly and proposal soon to be introduced in the Minnesota legislature. See *infra* note 345 and accompanying text.

322 See chart *infra*.

323 Conn. all goods ("few in number"); Conn. motor vehicles ("none"); Del. ("none"); Idaho ("none"); Kan. ("275, of which $\frac{3}{4}$ had no real foundation"); Mich. ("reduced to a minimum"); Mont. ("very limited number"); N.H. ("none"); N.J. ("800"); N.M. ("very few"); N.Y. ("2,968 complaints and inquiries"); N.C. ("fewer than before"); N.D. ("none"); Pa. ("75 legitimate complaints"); S.D. ("none"); Tenn. ("no complaints"); Utah ("very few"). Letters From State Banking Officials to the *Notre Dame Lawyer*, Feb. 25 to Mar. 15, 1963, on file in Notre Dame Law Library.

324 See chart *infra*.

ignorance or apathy,³²⁵ but will not long avoid detection by state investigations. The importance of licensing provisions, with correlative investigatory powers, has been generally recognized. The Director of the Consumer Credit Bureau of Pennsylvania is of the opinion that "while full disclosure is most important when considering remedial legislation it is not the entire answer and . . . strict examination follow-up in addition thereto is the true test for good effective administration."³²⁶ This opinion is bolstered by the concurring views expressed by officials of several other states with disclosure statutes. The Deputy Bank Commissioner of Connecticut, for instance, credits the effectiveness of the full disclosure statute to the "Authority of the Bank Commissioner to examine the books and account records of Sales Finance Companies."³²⁷ The need for licensing provisions is recognized even in Florida where the all-goods statute has no such provisions. Pointing to this as one of the deficiencies of the law, the Executive Assistant to the Comptroller has written that "No provision is made for the licensing of purchasers of installment contracts, or for the periodic examination of the books and records of the installment seller or the contract holder. We consider licensing and supervision of the latter essential to good enforcement."³²⁸ Besides periodic examinations, the Michigan Deputy Commissioner of Banking would add: "Another deterrent is surprise examinations."³²⁹

Licensing provisions would undoubtedly seem to be the most thorough assurance that dealers are making installment sales in full compliance with disclosure statutes. Until consumer ignorance is replaced by consumer enlightenment, and a willingness to report violators displaces consumer languishness, then enforcement through licensing remains the only effective alternative.

3. Area of Federal Regulations — FTC Trade Practice Rules

An inherent weakness of federal regulation in this area is the limit placed on the jurisdiction of the enforcing agency. Under its governing statute,³³⁰ the FTC's jurisdiction extends only to transactions in "interstate commerce."³³¹ But before exercising its regulatory powers, even over interstate transactions, the Commission first looks to the state legislation.³³² Only where the state motor vehicle disclosure statute is not adequately effective, or where none exists, will automobile installment sales come under FTC surveillance.³³³ Even where no effective statutes provide adequate disclosure, however, the jurisdiction of the FTC is greatly limited. Under the Federal Trade Commission Act the Commission is powerless over intrastate activities even though they "affect" interstate commerce.³³⁴ Although "commerce"

325 Commenting on the absence of licensing provisions in the Ohio statute the First Deputy Superintendent of Banks states that "It is possible that the major weakness of this law in Ohio is the fact that no enforcement facilities were included therein." Letter From A. F. Myers, First Deputy Superintendent, Division of Banks, Ohio, to the *Notre Dame Lawyer*, Feb. 28, 1963, on file in Notre Dame Law Library.

326 Letter From J. M. Robb, Director of Consumer Credit Bureau, Department of Banking, Pennsylvania, to the *Notre Dame Lawyer*, Feb. 26, 1963, on file in Notre Dame Law Library.

327 Letter From Reinhard J. Bardeck, Deputy Bank Commissioner, Connecticut, to the *Notre Dame Lawyer*, Feb. 27, 1963, on file in Notre Dame Law Library.

328 Letter From N. E. Miller, Jr., Executive Assistant, Office of the Comptroller, Florida, to the *Notre Dame Lawyer*, Mar. 5, 1963, on file in Notre Dame Law Library.

329 Letter From Wm. L. Roy, Deputy Commissioner, Banking Department, Michigan, to the *Notre Dame Lawyer*, Feb. 28, 1963, on file in Notre Dame Law Library.

330 38 Stat. 719 (1914), as amended, 15 U.S.C. 45 (1958).

331 See *Chas. A. Brewer & Sons v. Federal Trade Commission*, 158 F.2d 74 (6th Cir. 1946).

332 Letter From Wm. A. Ayres, Acting Chairman of the Federal Trade Commission, to *Personal Finance Law Quarterly Report*, in 5 PERS. FIN. L.Q. REP. 35, 36 (1951).

333 *Id.* "While the Federal Trade Commission intends to leave local consumer protection to states with equivalent disclosure laws, automobile instalment sales in other states will be under the Commissioner's surveillance." Letter From Jas. M. Mead, Chairman, Federal Trade Commission, to *Yale Law Journal*, Nov. 6, 1951, in 61 YALE L.J. 718, 725 (1952).

334 *FTC v. Bunte Bros.*, 312 U.S. 349 (1941).

may be present either by reason of the interstate movement of an automobile or the interstate movement of the papers and monies constituting the financial arrangements,³³⁵ the FTC's comparatively slight control over local practices may still permit a host of abuses to flourish.³³⁶ Even when a transaction is considered to be "in" interstate commerce, ". . . the Commission's scant enforcement staff cannot stalk a horde of violations."³³⁷ So, as indicated early, the most notable effect of these rules has been the impetus given motor vehicles disclosure statutes on the state level.

F. Present Legislative Activity

Disclosure statutes have made remarkable gains during the last half decade. This support is continuing, as evidenced by current activity for the enactment of such legislation on both the state and federal levels.

1. State Legislative Activity

Activity on the state level bears witness to the fact that legislatures are paying heed to suggestions that the coverage of disclosure statutes ought to be expanded to include all consumer goods. A bill has been enacted in the current session of the Washington legislature³³⁸ and one has been introduced in Oregon.³³⁹ Bills have been introduced in both houses of the Arizona legislature.³⁴⁰ Further, a bill patterned after the Douglas Bill has been introduced in the Wisconsin assembly,³⁴¹ and arrangements are now being made to introduce a similar bill in the Minnesota legislature.³⁴² If passed,³⁴³ these bills would extend the coverage of disclosure statutes in states which presently require disclosure only in motor vehicle installment sales.³⁴⁴ Worthy of note in the Wisconsin bill and the Minnesota proposal, patterned after the Douglas Bill,³⁴⁵ is the requirement that the written statement set forth the percentage that the finance charge bears to the amount to be financed, expressed as a simple annual percentage rate on the anticipated average outstanding unpaid balance of the obligation.³⁴⁶

2. Federal Legislative Activity

The spotlight of federal legislative activity is centered on the "Truth in Lending" Bill. Finding that "economic stabilization is threatened by untimely use of credit

335 *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); *Ford Motor Co. v. FTC*, 120 F.2d 175 (6th Cir. 1941). See also *FTC v. Cement Institute*, 333 U.S. 683 (1947).

336 In spite of this lack of control, Texas passed a statute shortly after the adoption of the FTC rules which provides that the seller *is permitted* to make disclosures in accordance with these rules. TEX. REV. CIV. STAT. ANN. art. 5074a (1951).

337 Letter From Jas. M. Mead, *supra* note 333.

338 S. 415, 38th Sess. (Feb. 12, 1963).

339 S. 122, 52nd Leg. Ass., Reg. Sess. (Feb. 1, 1963).

340 H.B. 243, § 44-870, 26th Leg., 1st Reg. Sess. (Feb. 28, 1963); S. 255, § 44-356, 26th Leg., 1st Reg. Sess. (1963).

341 H.B. 330, A., § 115-25(3) Ass. (Feb. 27, 1963).

342 A Bill for an Act to Require Truth in Lending; Providing Penalties, Minn. (1963).

343 Passage of the Minnesota proposal is highly unlikely. Letter From Joseph P. Summers, Special Assistant, Attorney General, Consumer Protection Unit, Minnesota, to the *Notre Dame Lawyer*, Feb. 28, 1963, on file in Notre Dame Law Library.

344 ARIZ. REV. STAT. ANN. § 44-287 (Cum. Supp. 1962); MINN. STAT. ANN. § 168.71(5) (b) (1960); ORE. REV. STAT. § 83-520(3) (1961 Replacement); WIS. STAT. ANN. § 218-01 (6) (b) (Cum. Supp. 1962).

345 Last year a bill was introduced in the Michigan legislature, also patterned after the "Truth in Lending" Bill, which required a statement of the finance charge both in a dollar amount and a percentage expressed in terms of simple annual interest. S. 1148, 71st Leg., Reg. Sess. Feb. 5, 1962. This bill was not reported out of committee. No bill of this nature has been introduced in the 1963 Session. Letter From David R. Bishop, Office of the Director, Legislative Service Bureau, Michigan, to the *Notre Dame Lawyer*, Mar. 11, 1963, on file in Notre Dame Law Library.

346 *Supra* notes 341 and 342.

for the acquisition of property and services" and that this "results frequently from a lack of awareness of the cost thereof to the user," it is the stated purpose of this bill "to assure a full disclosure of such cost with a view to preventing the uninformed use of credit to the detriment of the national economy."³⁴⁷

However, the scope and jurisdiction of federal controls under the proposed law are far from clear. Section 3(1) designates the Board of Governors of the Federal Reserve System as the enforcement agency.³⁴⁸ This is apparently an attempt to avoid the "interstate" limitations placed upon the jurisdiction of the FTC under the commerce clause, by placing this act under the money clause of the Constitution. Justification for this may be found in the bill's declaration that its purpose is "economic stabilization."³⁴⁹ However, the Board of Governors has not been especially receptive to this purported delegation.³⁵⁰ President Kennedy has even stated: "Inasmuch as the specific credit practices which such a bill would be designed to correct are closely related to and often combined with other types of misleading trade practices which the Federal Trade Commission is already regulating, I recommend that enforcement of the new authority be assigned to the Commission."³⁵¹ If the Board enforced the act under the money clause, then there would be little question of the government's power to probe all credit transactions on every level of activity.³⁵² But if the FTC were to replace the Board, then, if the bill was to attain its goal, it would have to be amended so that the Commission's jurisdiction would not be restricted to acts and practices in "commerce" as that term is defined in the Federal Trade Commission Act. If the Commission's jurisdiction were not expanded, then not only would the FTC be helpless in the area of local transactions, but also it would be unable to regulate the disclosure operations of banks.³⁵³ This, of course, would defeat one of the primary purposes of the bill — the aim of a uniform method of stating the finance charge in order to provide the consumer with a yardstick of comparison among competing credit sources.

The heart of the lending bill lies in section 4 — "Disclosure of Finance Charges." The first part of this section provides that the creditor must set forth in writing to each person to whom credit is extended, prior to the consummation of the transaction, the following information: first, the cash price or delivered price of the property or service to be purchased; second, the amount, if any, to be credited as down payment and/or trade-in; third, the difference between the amounts set forth above — the amount of the purchase price to be financed; fourth, the charges, individually itemized, which are paid or to be paid by any borrower in connection with the transaction which are not incident to the extension of credit; fifth, the total amount to be financed; sixth, the finance charge expressed in terms of dollars and cents; finally, the percentage that this total finance charge bears to the total amount to be financed expressed as a simple annual rate on the average outstanding unpaid balance of the obligation. Senator Douglas has explained that the last two points are:

indispensable measures of the price of credit. The first tells you how much more in dollars and cents you have to pay if you buy on credit rather than for cash. Secondly, the bill requires that the price of credit be reduced to a common denominator — a common standard or yardstick — in terms of an

347 S. 750, 88th Cong., 1st Sess. § 2 (1963).

348 *Id.* at § 3(1).

349 This delegation would apparently be constitutional and it would permit regulation even of local credit operations. See Letter From Nicholas deB. Katzenbach, Deputy Attorney General to Senator A. Willis Robertson, Aug. 22, 1962, in 1962 *Hearings on Truth in Lending*, at 112-15 (1962).

350 See, Statement by William McChesney Martin, Jr., Chairman, Board of Governors, Federal Reserve System, in 1962 *Hearings on Truth in Lending*, at 32-34.

351 1962 *Consumer Protection Message*, at 8.

352 See Katzenbach *supra* note 349.

353 Testimony of Paul Rand Dixon, Chairman, Federal Trade Commission, in 1962 *Hearings on Truth in Lending*, at 148-49, and 151-53.

annual percentage rate on the amount actually owed, which enables every consumer to shop around and compare various credit offers.³⁵⁴

The second part of section 4 exempts revolving or open-end credit plans from the above and sets forth its own requirements. These are credit plans "under which the total amount of credit to be utilized, the dollar amount of the finance charge to be assessed, and the amounts and times of repayment are not specified at the time an agreement to extend credit pursuant to such plan is entered into."³⁵⁵ Such plans are offered by large mail order houses, local department stores and other retailers. These business firms would find it impractical to meet the demands of part one, because "the customer is granted wide discretion in both the times and amounts of repayment."³⁵⁶ Instead, the creditor must here furnish the purchaser with the credit cost both at the time of sale and at the end of each monthly period.

Opposing the bill, Senator Wallace F. Bennett of Utah contends that it "will be impossible in many types of consumer credit transactions to know in advance what either the actual dollar charge or the simple annual interest will be."³⁵⁷ To support his argument he points to the difficulty imposed by "the requirement that the sales clerk compute the simple annual rate to be charged on any transaction before making a credit sale."³⁵⁸

Under section 5(a)³⁵⁹ of the bill, certain acts of Congress would be excepted from the regulations of the bill. Senator Douglas has indicated that the bill would replace the Trade Practice Rules of the FTC.³⁶⁰

Section 6(a) asserts that only state laws inconsistent with the act will be construed so as to be annulled, thereby exempting any creditor from compliance with such statutes.³⁶¹ Again, it is not clear whether the enforcement agency would consider inconsistent the state statutes which permit the lumping of the finance charge and insurance cost. One would surmise that the Board would follow the position of the FTC and hold these statutes inconsistent, and thus of no effect.

Section 6(b) would permit the Board to except any "transactions which it determines are effectively regulated under the laws of any State so as to require the disclosure by the creditor of the same information as is required under section 4 of this act."³⁶² The simple annual rate on the average unpaid balance required to be disclosed by section 4(a)(7) is not required to be set forth by any of the state disclosure statutes.

Having been returned to committee once again, the future of the bill seems uncertain. Senator Bennett seems to think that "the passage of time favors the opponents of the bill."³⁶³ Continued difficulty looms in the future of the bill according to Senator Williams of New Jersey, a member of the Senate Committee on Banking and Currency.³⁶⁴ On the other hand, Senator Douglas is

convinced that sooner or later the Congress will enact the truth in lending bill. After all, we have enacted in the past the fur products labeling act, a

354 Statement of Paul H. Douglas, Senator from Illinois, 1962 *Hearings on Truth in Lending*, at 14-15.

355 S. 750, 88th Cong., 1st Sess. § 4(b) (1963).

356 1962 *Hearings on Truth in Lending*, at 13.

357 Letter From Senator Wallace F. Bennett to the *Notre Dame Lawyer*, Feb. 28, 1963, on file in Notre Dame Law Library.

358 Statements of Wallace F. Bennett, Senator from Utah, 1962 *Hearings on Truth in Lending*, at 15. This contention has been countered by the proponents of the bill who claim that the need for complicated computations would be eliminated by the use of rate books. See *supra* note 319 at 30.

359 S. 750, 88th Cong. 1st Sess. § 51a (1963).

360 Letter From Senator Paul H. Douglas to the *Notre Dame Lawyer*, Mar. 15, 1963, on file in Notre Dame Law Library.

361 S. 750, 88th Cong., 1st Sess. § 6(a) (1963).

362 *Id.* at § 6(b).

363 *Supra* note 357.

364 Letter From Senator Harrison A. Williams, Jr., to the *Notre Dame Lawyer*, Feb. 25, 1963, on file in Notre Dame Law Library.

wool products labeling act, a textile labeling act, and an automobile price disclosure act as well as food and drug disclosure laws and the truth in securities legislation.³⁶⁵

Perhaps the fate of the bill has been forecast accurately by Senator Case of New Jersey, who believes "that it or some other similar legislation will ultimately be passed by the Senate."³⁶⁶ This prediction evokes the thought that ultimately one must come to grips with an important consideration in the evaluation of this bill. Whether the "Truth in Lending" Bill succeeds or fails in its bids for passage during this session of Congress, it has advanced the basic principle of disclosure, thus paving the way, even in the event of its nonpassage, for future legislation on both the state and federal levels. The example of Wisconsin and Minnesota may be an indication of the role which history will credit this bill for playing in the advancement of disclosure statutes.³⁶⁷

IV. GUARANTEES AND WARRANTIES

Another important area in which the consumer may be misled is that concerning guarantees and warranties. The terms are frequently used interchangeably, but a distinction must be made. The term "guarantee," as used here, is understood as a collateral agreement (often a conditional one) against some default or event in the future, while "warranty" is taken as a statement of fact respecting the quality or character of goods sold, made by the seller to induce the sale, and relied on by the buyer. The former is usually embodied in a writing attached to the product by the manufacturer; the latter, however, may be expressed orally or in writing by the seller or implied by law. Perhaps, the representations of guarantees and warranties are a more subtle form of inducement. Very often the consumer is not consciously concerned with their terms until his product has failed.

Nevertheless, terms such as "Lifetime Guarantee" and "Unconditionally Guaranteed" play their part in urging a sale. Recently, Chrysler Corporation issued a "Five Full Years or 50,000 miles" guarantee on its 1963 automobiles, when only a few years ago the standard automobile guarantee was "12 months or 10,000 miles." Chrysler, seeking to establish the image of dependability for its cars, clearly spells out the terms of the new guarantee:

Your authorized Imperial Dealer's Warranty against defects in material and workmanship in 1963 cars has been expanded to include parts replacement or repair for 5 years or 50,000 miles, whichever comes first, on the engine block, head and internal parts; transmission case and internal parts; torque converter, drive shaft, universal joints (excluding dust covers), rear axle and differential, and rear wheel bearings, provided the vehicle has been serviced at reasonable intervals according to the Chrysler Certified Car Care schedules. Factory-approved remanufactured parts may be used for replacement.³⁶⁸

Important also are the representations of the retailer himself.

The great difficulty, however, arises when the consumer is faced with the reality that what has been represented to him is not what the actual guarantee or warranty secures for him. The latter determine whether the consumer is getting what he thought he was getting.

Often the bold-faced phrase "Unconditionally Guaranteed," appearing on the front of the product's package, is conditioned by terms near the bottom or on the back of the package. The buyer's clue is an inconspicuous asterisk. To meet the

365 Letter From Senator Paul H. Douglas to the *Notre Dame Lawyer*, Feb. 14, 1963, on file in Notre Dame Law Library.

366 Letter From Senator Clifford P. Case to the *Notre Dame Lawyer*, Feb. 18, 1963, on file in Notre Dame Law Library.

367 As a matter of fact Senator Douglas has expressed the hope that this bill "would encourage the States to promptly enact legislation identical in substance so that State agencies may take over supervision enforcement of these disclosure provisions." Letter From Senator Paul H. Douglas to the *Notre Dame Lawyer*, Mar. 15, 1963, on file in Notre Dame Law Library.

368 Chrysler Corporation's Imperial Dealer's Warranty on file in the Notre Dame Law Library.

problem, the FTC has issued cease-and-desist orders where advertising relating to guaranties fails to adequately state what the guaranty is. Further, in April, 1960, the agency adopted Guides, enumerating "the major principles applicable to the advertising of guarantees. . . ." ³⁶⁹

In the area of warranties, the written terms act as a disclaimer or limitation on all that was represented to the consumer to induce his purchase. A most common form of disclaimer reads: "There are no other warranties, express or implied, other than those expressly stated herein." The law here arises from three main sources: the common law of sales, the Uniform Sales Act, ³⁷⁰ and the Uniform Commercial Code. ³⁷¹ One or more of these sources has a direct effect on every court's determination of what protection will be given a consumer when he seeks redress on the basis of an alleged breach of warranty.

Note that the viewpoint here changes somewhat. The FTC acts preventatively, attempting to fully inform the credulous. Warranty law, on the other hand, is remedial. It operates *ad hoc*, although the possibility of a lawsuit offers some deterrence.

A. Unfair Practices in the Representations of Guarantees

1. FTC Action in Pre-Guide Era

Acting again under the jurisdictional grant of section 5 of its act, the FTC has sought to prevent the use of deceptive representations concerning the nature of guaranties which manufacturers attach to their products. The chief abuse is the failure to fully state what the guaranty is. The holding out of consumer goods as "Unconditionally Guaranteed," "Guaranteed for Life," or "All Parts Guaranteed" has been held to be an unfair trade practice, when the products were not in fact so guaranteed but carried only a limited and highly restrictive guaranty.

The leading case of *Parker Pen Co. v. FTC* ³⁷² serves well to demonstrate the Commission's activity in this area. In advertising its product, Parker Pen depicted a pen in the hands of such persons as brides, graduates and court reporters. A small blue diamond always appeared on the cylinder of the pen and in the adjacent area of the ad a large blue diamond keyed attention on the phrase "Guaranteed for Life by Parker's Blue Diamond." However, in a less prominent place, usually at the bottom of the promotion, and in smaller and lighter print, there appeared the following qualification, preceded by yet another little diamond: "Pens marked with the Blue Diamond are guaranteed for the life of the owner against everything except loss or intentional damage, *subject only to a service charge of 35¢ for postage, insurance and handling, providing the complete pen is returned for service.*" ³⁷³ The FTC ordered Parker to cease and desist from using the words "guaranteed for life," "life contract guarantee" or any other words carrying a similar meaning unless the manufacturer actually did make all repairs and replace parts, except in cases of wilful damage, without any charge to the consumer. In the alternative, the order allowed Parker Pen to represent that service on its pens was guaranteed for life or other designated periods so long as the terms of that guarantee, including

369 25 Fed. Reg. 3772 (1960); note The Guides are merely cited at 16 C.F.R. § 13.1053.

370 The Uniform Sales Act (hereinafter cited and referred to in text as the *Sales Act*) is presently in force in the following 23 states: Ala., Ariz., Calif., Colo., Del., Hawaii, Idaho, Ind., Iowa, Me., Md., Minn., Neb., Nev., N.Y., N.D., Ore., S.D., Tenn., Utah, Vt., Wash., Wisc., and D.C.

371 The Uniform Commercial Code (hereinafter cited and referred to in text as the *Code*) is presently in force in the following 15 states: Alas. (1-1-63), Ark. (1-1-62), Conn. (10-1-61), Ga. (4-1-63), Ill. (7-1-62), Ky. (7-1-60), Mass. (10-1-58), N.H. (7-1-61), N.J. (1-1-63), N.M. (1-1-62), Ohio (7-1-62), Okla. (1-1-63), Pa. (7-1-54), R.I. (1-2-62), Wyo. (1-2-62).

Three other states have adopted the *Code* but it has not yet gone into force: Mich. (1-1-64), N.Y. (9-27-64) and Ore. (9-1-63).

372 159 F.2d 509 (7th Cir. 1946).

373 *Id.* at 510-511. (Emphasis added.)

the charge made for the service, are clearly and conspicuously displayed in immediate conjunction with the representation.

On appeal to the Seventh Circuit, Judge Evans rejected Parker's argument that the large blue diamond appearing next to the short phrase of guarantee served as an asterisk and directed the consumer's attention to the smaller blue diamond and the qualified statement of guarantee. Instead, he agreed with the Commission that the advertisement was misleading:

Ordinarily the word guarantee, or warranty, is incomplete unless it is used in connection with other explanatory words. To say a pen or other subject is guaranteed is meaningless. What is the guarantee? The answer to this question gives meaning to the word, "guaranteed." The same is true of the words, "guaranteed for life" or "life guarantee."³⁷⁴

The implication properly derived from the representation was that the buyer, without more, was entitled to free repair or replacement if his pen did not function correctly.

But the court found that the Commission had been "overmeticulous in denying the petitioner all right to use the phrase 'Life Guarantee' or words of similar import, except on the condition that it make no further charge for repairs."³⁷⁵ Therefore, the Commission modified its original order to permit the Parker Pen Company to continue using such phrases, even where a charge is imposed, subject to the condition that the limitations and charges are placed close to the terms of inducement and in print of the same size as the other regular printed matter in the advertisement.³⁷⁶ Perhaps, the court itself was being somewhat picayune. The alternative provision of the FTC's first order, which remains in the second, seems to say the same thing. Apparently the point of the modification was to explicitly allow the employment of the well-phrased inducement in a proper setting.

In a case before the agency's own tribunal, a hearing examiner found that Free-Westinghouse sewing machines were misrepresented as carrying a "20 Year Guarantee," the implication being that the entire machine was so guaranteed, while only certain parts were covered. Examiner Lewis stated:

In the opinion of this examiner, in order to properly inform the public that the guarantee was limited to parts, either the word "parts" should have been inserted in the prominently used phrase "20 Year Guarantee," or the separate phrase, "20 Year Parts Guarantee" should have been placed in close proximity to the phrase "20 Year Guarantee" and in letters of substantially the same size.³⁷⁷

Finally, in one of the more recent cases to arise prior to the issuance of the Guides,³⁷⁸ Clinton Watch Company was ordered to stop advertising that its watches possessed an all-inclusive lifetime guarantee, when the slips accompanying their sale revealed on the reverse side that a service charge would be made for all repairs. The Seventh Circuit's Court of Appeals, citing its decision in *Parker Pen*, was quick to conclude that "Advertising of a so-called 'lifetime guarantee' without clear disclosure that a charge is made in conjunction therewith is an unfair and deceptive trade practice."³⁷⁹

These few cases, it is hoped, evince the aim of the FTC to secure full disclosure of the actual terms of the guarantee in the banner representations thereof. Based on these decisions and others like them, on April 26, 1960, the FTC adopted a set of Guides enumerating the general principles applicable to the advertising of guarantees.

2. The Guides

Here the reader will find much of the Guides set out in full. Examples of

³⁷⁴ *Id.* at 512.

³⁷⁵ *Id.* at 511.

³⁷⁶ *Parker Pen Co.*, No. 4338, FTC Modified Final Order, Dec. 17, 1946.

³⁷⁷ *Household Sewing Machine Co.*, 52 F.T.C. 250, 275 (1955).

³⁷⁸ The FTC's complaint was issued March 11, 1959.

³⁷⁹ *Clinton Watch Co. v. FTC*, 291 F.2d 838, 840 (7th Cir. 1961), *cert. denied* 368 U.S. 952 (1961).

actual FTC complaints, cases or orders, however, are provided to illustrate the principles stated. These illustrations have not in every instance come from activity under the Guides; some arise out of the pre-Guide era.

The following Guides have been adopted by the Commission to educate the businessman and consumer, with the hope of voluntary compliance, and for the use of the agency's staff in evaluating the advertising of guarantees:³⁸⁰

I. Guarantees in general. In general, any guarantee in advertising shall clearly and conspicuously disclose:

(a) *The nature and extent of the guarantee.* This includes disclosure of:

(1) What product or part of the product is guaranteed,

For example, an automobile dealer was ordered to cease and desist advertising that "all cars are guaranteed," when in most instances the Commission found that the used cars were sold "as is" or the guarantee had limitations which were not fully disclosed.³⁸¹

(2) What characteristics or properties of the designated product or part thereof are covered by, or excluded from, the guarantee,

(3) What is the duration of the guarantee,

Where a bedding company was advertising a "King Koil 10 year Guarantee" on its mattresses, deception was found in that the mattresses were fully guaranteed for one year only and thereafter an adjustment charge which was not disclosed in the ads had to be paid.³⁸²

(4) What, if anything, anyone claiming under the guarantee must do before the guarantor will fulfill his obligation under the guarantee, such as return of the product and payment of service or labor charges; and

In March of 1962, Examiner Buttle determined that claims that watches were "fully guaranteed" and "sold with a factory guarantee" were deceptive, because the customer was not informed that the guarantee was limited and that he must pay service charges and, in some instances, postage fees before the Savoy Watch Company would honor its guarantee.³⁸³

(b) *The manner in which the guarantor will perform.* . . .

It is not enough for the guarantor to simply stand behind a product, he must specify what he undertakes to perform—whether he will repair, replace, refund or do something else.

(c) *The identity of the guarantor.* . . .

In a case where the distributors of tableware represented in their magazine ads that the manufacturer provided the guarantee, the evidence disclosed that the respondents alone offered the guarantee.

[The] clear meaning of the advertisement is that the guarantor is the International Silver Company, and the advertisement does not specifically identify respondents, even as the sellers. There can be little doubt that a guarantee by a nationally known manufacturer . . . is likely to cause a substantial segment of the purchasing public to have greater confidence in the merchandise involved than the same guarantee, however well performed, by these respondents, and to purchase the merchandise on that basis. Such a misrepresentation is unfair both to consumers and to competitors.³⁸⁴

II. Pro rata adjustment of guarantees. Many guarantees are adjusted by the guarantor on a pro rata basis. The advertising of these guarantees should clearly disclose this fact, the basis on which they will be prorated, e.g., the time for which the guaranteed product has been used, and the manner in which the guarantor will perform.

If these guarantees are to be adjusted on the basis of a price other than that paid by the purchaser, this price should be clearly and conspicuously disclosed.

Concerning the latter situation, it often happens that a product lists for a certain

380 25 Fed. Reg. 3772 (1960).

381 G & M, Inc., No. 7910, FTC Final Order, Feb. 8, 1961.

382 U.S. Bedding Co., No. 7332, FTC Consent Order, June 6, 1959.

383 Savoy Watch Co., Inc., No. 8080, FTC Initial Decision, Feb. 26, 1962.

384 Heavenly Creations, Inc., No. 8448, FTC Initial Decision, Jan. 11, 1963.

price but is marked down half price with a guarantee for perhaps 12 months. If the guarantor seeks to adjust on the basis of the list price, he must so state.

III. "*Satisfaction or your money back*" representations. "Satisfaction or your money back," "10 day free trial," or similar representations will be construed as a guarantee that the full purchase price will be refunded at the option of the purchaser.

IV. *Lifetime guarantees*. If the words "Life," "Lifetime," or the like, are used in advertising to show the duration of a guarantee, and they relate to any life other than that of the purchaser or original user, the life referred to shall be clearly and conspicuously disclosed.

An extreme example of the problem that is covered by Guide IV would be a case where a watch is advertised "Guaranteed for Life," with no further qualification. When the watch stops running one week after the purchase, the buyer may be told that the guarantee referred to the life of the article sold; since the watch no longer operates, its "life" has ended and the guarantee is no longer in force.

V. *Savings guarantees*. . . .

Some typical advertisements of this type are "Guaranteed to save you 50%," "Guaranteed never to be undersold," "Guaranteed lowest price in town."

These advertisements should include a clear and conspicuous disclosure of what the guarantor will do if the savings are not realized, together with any time or other limitations that he may impose.

VI. *Guarantees under which the guarantor does not or cannot perform*. . . .

In a 1961 initial decision, it was held that claims by distributors of women's shoes and wearing apparel that "you must be 100% satisfied as to fit and quality or every penny will be refunded" and "you must be 100% satisfied or your money back" were misleading, because the purchase price was seldom refunded on demand except after the intervention of the Better Business Bureau on behalf of the purchaser.³⁸⁵

VII. *Guarantee as a misrepresentation*. Guarantees are often employed in such a manner as to constitute representations of material facts. If such is the case, the guarantor not only undertakes to perform under the terms of the guarantee, but also assumes responsibility under the law for the truth of the representations made.

This last sentence of Guide VII serves as an introduction to the law of warranties. Where the seller affirms a fact concerning the product he sells, he must bear the responsibility "for the truth of the representations made."

B. Warranty Representation and Disclaimers

1. Express Warranties

The usual warranty occurs through the seller's representations which are justifiably relied upon by the consumer.³⁸⁶ Again a distinction should be made. Concern is not here given to fraudulent representations, antecedent to the sale. The essential element there is scienter or conscious misstatement. Where there has been fraudulent representation, it is universally recognized that the buyer may rescind the sale and recover the damages he has suffered. A disclaimer will not bar this action.

Illustrative of the usual warranty is the recent New York case of *Statewide Food Corp. v. Simpson*,³⁸⁷ where an action for breach of a retail installment contract was brought by the seller corporation against the buyer. Plaintiff's president called at the residence of defendant, Mrs. Simpson, and informed her that a Zenith combination freezer-refrigerator unit sold by his corporation was equipped with

385 *Transair, Inc., and Prudential Mfg. Inc., No. 8409, FTC Initial Decision, Oct. 18, 1961*. This was adopted by the Commission in its Final Order of Apr. 5, 1962.

386 U.C.C. § 2-313; U.S.A. § 12, see *e.g.*, *Nashburn v. Thornton*, 35 Tenn. App. 216 244 S.W.2d 179 (1952) and *MacAndrews & Forbes Co. v. Mechanical Mfg. Co.*, 367 Ill. 288, 11 N.E.2d 382 (1938).

387 231 N.Y.S.2d 463 (Sup. Ct. 1962).

fully automatic defrosting units and that the combination unit would fit into the space occupied by her old refrigerator. Relying on these statements, defendant signed the retail installment contract. But upon delivery, defendant discovered both that the unit would not fit into the space occupied by her old refrigerator and that the model delivered was not fully automatic. Defendant telephoned the president, told him of these facts and demanded that the unit be picked up. He refused. Since the refrigerator-freezer combination delivered did not meet either of Mrs. Simpson's requirements, the court concluded that the plaintiff corporation had breached the express warranty orally made by its president, and defendant, having offered to return the unit had effectively exercised her right to rescind the sale.

In the great majority of cases, however, the courts are faced with the preliminary problems of establishing (1) that an express representation has, in fact, been made and (2) that the buyer has relied on it. In regard to the first, where the seller makes statements concerning the character of his goods to induce purchase, and these declarations become a basic part of the sale, he will generally be held to have expressly warranted those goods.³⁸⁸ But many times the statements of a seller are merely "sales talk" or product "puffing" and this type of representation will not usually create an express warranty.³⁸⁹ This is opinion as opposed to a statement of fact. The determination of what is "sales talk" or "puffing" is left by both the *Sales Act* and the *Code* to the courts;³⁹⁰ but the *Code*, unlike the *Sales Act*, contemplates a very narrow range in which the seller may "puff."³⁹¹ Some of the more obvious examples are: "the greatest deal since the wheel," "the best of the high class," "the one product that really has it," and "a truly modern brand."

The second preliminary step, reliance on the part of the buyer, is an important factor of express warranties only in the *Sales Act* and common law jurisdictions.³⁹² The question — what constitutes justifiable reliance — is not easy to answer. However, an attempt is made in the official comments to the *Code* — the buyer may rely on the statements of the seller when he himself is without complete information and the seller is or purports to be better informed.³⁹³ Most cases of nonjustifiable reliance are those where the buyer asks for the goods by a brand or patent name,³⁹⁴ or is as well informed as the seller about the quality or kind of the goods.³⁹⁵ But even under these circumstances the problem of when the buyer may rely on the statements of the seller has been eliminated by the *Code*, for it specifically does away with the "brand name" exception.³⁹⁶ Further, in those jurisdictions which have adopted the *Code*, any affirmation of fact or any promise made by the seller to the buyer may create an express warranty regardless of whether the buyer relied on those statements or not.³⁹⁷

The *Code* takes yet another liberal step. It provides that an express warranty may be created after the sale has taken place.³⁹⁸ However, in those jurisdictions which have either adopted the *Sales Act* or apply the common law, creation of

388 1 WILLISTON, SALES § 202 (rev. ed. 1948).

389 U.C.C. § 2-313(2), Comment 8.

390 U.C.C. § 2-313(2); U.S.A. § 12.

391 In reference to § 2-313(2), Comment 8.

392 U.S.A. § 12. Definition of express warranties: "Any affirmation of fact or any promise by the seller relating to the goods is an express warranty . . . if the buyer purchases in reliance thereon." See *e.g.*, *MacAndrews & Forbes Co. v. Mechanical Mfg. Co.*, 367 Ill. 288, 11 N.E.2d 382 (1938).

393 U.C.C. § 2-313, Comment 8.

394 U.S.A. § 15(4) specifically states: "In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose."

395 *Fleenor v. Erickson*, 35 Wash. 2d 891, 215 P.2d 885 (1950).

396 U.C.C. § 2-313, Comment 3.

397 U.C.C. § 2-313, Comment 3.

398 U.C.C. § 2-313, Comment 7.

an express warranty after the sale is not possible because of the reliance requirement. The importance of the extended protection given the consumer by the *Code* in this area can readily be seen in the following fact situation. A Mr. Fleenor, desiring to build a refrigerated locker plant in the basement of his grocery store, sought the aid of a local lumber and hardware dealer who sold insulating material. The dealer informed the consumer that he had no personal knowledge on how to install the material but he would send an agent with the material when it was delivered to help with the installation. The consumer then purchased the insulating material from the dealer and, following the instructions of the representative who delivered it, placed only one layer of the material on the concrete floor of the basement. A short time after the locker plant was in operation, the ground beneath the basement floor froze, causing the entire building to buckle. In a suit by the consumer against the dealer for breach of warranty, Washington's Justice Donworth ruled that statements made subsequent to a sale create no express warranties and are not actionable in the absence of new consideration, thus affirming the general doctrine that a buyer must rely on the seller's statements in making his purchase before any express warranty is created.³⁹⁹ Had Mr. Fleenor made his purchase in a *Code* jurisdiction the question would have been decided differently, because reliance is immaterial and because the *Code* permits a contract to be altered without the addition of new consideration.⁴⁰⁰

Another important factor in the creation of express warranties is the knowledge of the buyer concerning any defects in the goods purchased. Almost all courts, in all jurisdictions, hold that representations made by the seller do not extend to any defect of which the buyer has knowledge and understanding.⁴⁰¹

The consumer then, to qualify for the protection afforded him by the express warranties of affirmation of fact or promises, must show first that such affirmation was made; second, that the statement was not mere sales talk; and, finally, if the transaction occurred in a *Sales Act* or common law jurisdiction, that he justifiably relied thereon.

Two other innovations of the *Code* should here be mentioned — goods sold by description and those sold by sample or model are classified as express warranties. Prior to the adoption of the *Sales Act*, the majority of case law in this country held that sales by description created express warranties.⁴⁰² The reasoning was that a description of goods is, in reality, a positive statement of fact concerning the goods.⁴⁰³ However, *Sales Act* legislation overruled this, specifically providing that a sale by description creates an implied warranty.⁴⁰⁴ Now the *Code* has returned to the older case law.⁴⁰⁵ Secondly, the *Code* states: "Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model."⁴⁰⁶

This difference in classification is material in those cases where the consumer brings an action based on an alleged breach of warranty and is met by a disclaimer clause applicable only to implied warranties. Under the *Code*, such disclaimers will have no effect on description or sample warranties and the buyer's action will be preserved.⁴⁰⁷

2. Implied Warranties

"Implied warranties are warranties imposed by law because of tacit represen-

399 Fleenor v. Erickson, 35 Wash. 2d 891, 215 P.2d 885 (1950).

400 U.C.C. § 2-209.

401 See e.g., Roscher v. Band Box Cleaners, 90 Ohio App. 71, 103 N.E.2d 404 (1951).

402 U.C.C. § 2-313, Comment 1, e.g., El Zarape Tortilla Factory v. Plant Food Corp., 90 Cal. App.2d 336, 203 P.2d 13 (1949). *Contra*, Anderson v. Thomas, 184 Kan. 240, 336 P.2d 821 (1959) (§ 14 of the Uniform Sales Act is merely declaratory of the common law).

403 U.C.C. § 2-313, Comment 5, e.g., El Zarape Tortilla Factory v. Plant Food Corp., 90 Cal. App.2d 336, 203 P.2d 13 (1949).

404 U.S.A. § 14.

405 U.C.C. § 2-313(1)(b).

406 U.C.C. § 2-313(1)(c).

407 Fairbanks, Morse & Co. v. Consolidated Fisheries Co., 190 F.2d 817 (3d Cir. 1951).

tations or broader considerations of policy.⁴⁰⁸ Therefore, they may exist outside of and in spite of any contractual provisions made between the buyer and the seller.⁴⁰⁹ This does not mean that the old maxim of freedom of contract is no longer valid; rather, it means that in some cases the law will infer from the nature of the sale, unless a contrary position is clearly stated, that the parties intended to provide for certain warranties.⁴¹⁰

(a) The Implied Warranty of Merchantability

Under the provisions of the *Sales Act* an implied warranty that the goods shall be of merchantable quality may exist where and *only* where the goods are bought by description from a seller who deals in such goods.⁴¹¹ The *Code*, however, does not limit the implied warranty of merchantability to sales by description. Instead, it provides that where the seller is a merchant, a warranty, unless excluded or modified, that the goods shall be merchantable, is implied in their sale.⁴¹² Both the *Sales Act* and the *Code* imply this warranty only in those cases where the seller ordinarily trades in the type of goods sold.⁴¹³ but neither limit the warranty to cases where the seller is also the manufacturer of the goods.⁴¹⁴

The term "merchantable quality" is not defined in the *Sales Act*. Courts dealing with this question apply such tests as "the goods must be of fair medium quality" or the merchandise must "conform to the standards of quality set by the usage of the trade in question."⁴¹⁵ Probably the most comprehensive definition of the term is the *Code's* section 2-314(2):

Goods to be merchantable must be at least such as

- (a) pass without objection in the trade under the contract description; and,
- (b) in the case of fungible goods, are of fair average quality within the description; and,
- (c) are fit for the ordinary purpose for which such goods are used; and,
- (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all the units involved; and,
- (e) are adequately contained, packaged and labeled as the agreement may require; and,
- (f) conform to the promises or affirmations of fact made on the container or label if any.

While the *Sales Act* declares that goods which are purchased by their patent or trade name carry no implied warranty of fitness for a particular purpose,⁴¹⁶ there is some question as to whether the implied warranty that the goods be of merchantable quality is nonetheless imposed. Though a consumer who purchased a loaf of bread by its brand name was not shielded by the warranty of fitness, a New York court concluded she was protected by an implied warranty that the goods were of merchantable quality.⁴¹⁷

The *Code* eliminates the problem — a specific designation of the goods by the buyer does not exclude the seller's obligation that the goods sold be fit for the general purpose appropriate to such goods.⁴¹⁸

Both the *Sales Act* and the *Code* have provisions that an examination of the goods by the buyer may destroy any warranty as to defects which such inspection

408 VOLD, SALES § 84 (2d ed. 1959).

409 *E.g.*, *Bekkevold v. Potts*, 173 Minn. 87, 216 N.W. 790 (1927); *Lee v. Cohort*, 57 S.D. 387, 232 N.W. 900 (1930). See also 1 WILLISTON, SALES §§ 195-197 (Rev. ed. 1948).

410 *Ibid.*

411 U.S.A. § 15(2).

412 U.C.C. § 2-314(1).

413 U.C.C. §§ 2-314(1); U.S.A. § 15(2).

414 U.S.A. § 15(2) "seller . . . whether he be grower, manufacturer or not . . ."; U.C.C. § 2-314, Comment 2: "The absence from this section of the language used in the U.S.A. in referring to the seller whether he be grower, manufacturer, or not does not restrict the applicability of this section."

415 LLEWELLYN, CASES AND MATERIALS ON SALES 270.

416 U.S.A. § 15(4).

417 *Ryan v. Progressive Stores, Inc.*, 255 N.Y. 388, 175 N.E. 105 (1931).

418 U.C.C. § 2-314, Comment 5.

should reveal.⁴¹⁹ But the *Sales Act* leaves unanswered the question of whether an implied warranty of merchantability exists where the buyer has been given the opportunity to inspect the goods but does not. At least one authority maintains that section 15(3) of the *Sales Act*, which states, in effect, that an examination of the goods by the buyer precludes any implied warranties as to noticeable defects, extends only to actual inspection by the buyer and does not cover a mere opportunity to inspect.⁴²⁰ The *Code*, on the other hand, announces that no warranty is imposed against the defects which an examination ought to have revealed, where the buyer has either inspected the merchandise or refused to take advantage of the opportunity.⁴²¹ The *Sales Act*, here, appears to offer the consumer greater protection than the new *Code*. But the latter's provision is qualified to the extent that if an offer of examination is accompanied by factual statements by the seller regarding the goods and the buyer clearly indicates that he is relying on these statements rather than on his examination, an express warranty is created.⁴²² The result is that a warranty that the goods are merchantable may be found to have been expressly incorporated into the agreement even where the implied warranty of merchantability would not be imposed.⁴²³ Both the *Sales Act* and the *Code* extend the warranty of merchantability to merchants as well as to the manufacturers of the goods.⁴²⁴ It must be noted, however, that neither the *Sales Act*, the *Code*, nor the common law requires that a seller be a merchant for the creation of an express warranty.⁴²⁵ A second point of note, under the common law it was generally held that no implied warranties attached to the sale of secondhand goods.⁴²⁶ Yet, the *Sales Act*⁴²⁷ and the *Code*⁴²⁸ have, where adopted, overruled this and have either directly or indirectly stated that implied warranties can be imposed on the sale of such goods.

In concluding this discussion of implied warranties of merchantability, it may be well to reconsider a part of the *Code's* definition: "(2) goods to be merchantable must be at least such as (f) conform to the promises or affirmations of fact made on the container or label if any."⁴²⁹ The provision would appear to change a warranty that is generally regarded by all jurisdictions as express by affirmation of fact or promise into an implied warranty. Further, in light of the *Code* provision on express warranty, that any affirmation of fact or promise by the seller creates an express warranty,⁴³⁰ it would seem that a contradiction exists. While an explanation of this apparent contradiction is not given in the official comments to the *Code*, it is suggested here that it was the intention of the framers to increase rather than restrict the protection given to a consumer who relied on statements made on the label or in advertising concerning the product.⁴³¹ Most courts are more disposed to extend the coverage of an implied warranty to protect the ultimate consumer because such a warranty is not based on any contractual relationship between the parties.⁴³² Courts, however, have had difficulty extending the protection of express warranties to an ultimate consumer who has had no contractual relations with a dealer.⁴³³ Because it is the ultimate consumer who, having pur-

419 U.S.A. § 15(3); U.C.G. § 2-316(3)(b).

420 VOLD, SALES § 90 (2d ed. 1959).

421 U.C.C. § 2-316(3)(b).

422 U.C.C. § 2-316(3)(b), Comment 8.

423 U.C.C. § 2-316(3)(b), Comment 8 para. 2.

424 U.S.A. § 15(1); U.C.C. § 2-315, Comment 4.

425 U.S.A. § 12, U.C.C. § 2-313.

426 Standard Brands Inc. v. Consolidated Badger Co-op, 89 F. Supp. 5 (E.D. Wis. 1950).

427 Standard Brands, *supra* note 426, noted that there was no exclusion of secondhand goods from the implied warranty sections of the Act, and therefore that the term "goods" must be understood to include all chattels.

428 U.C.C. § 2-314, Comment 8.

429 U.C.C. § 2-314(2)(f).

430 U.C.C. § 2-313.

431 *But see*, Note, *Impact of U.C.C. on California Law of Sales Warranties*, 8 U.C.L.A. L. Rev. 281, 311 (1961).

432 *E.g.*, Greenman v. Yuba Power Products, Inc., 205 Advance Cal. App. Reports 525, 23 Cal. Rpts. 282 (1962).

433 *See e.g.*, Collum v. Pope & Talbot, Inc., 135 C.A.2d 653, 288 P.2d 75 (1955).

chased from a retail dealer and not from the manufacturer, is most often injured by mislabeled or falsely advertised goods, the practical effect of the *Code's* providing an implied warranty in these cases is to enable the courts to find that the consumer has an action against the manufacturer even though no privity of contract exists.⁴³⁴

(b) The Implied Warranty of Fitness for a Particular Purpose

Where a consumer informs the seller of the particular purpose for which the goods are required and he relies on the seller's selection of the goods, warranty that the goods shall be reasonably fit for such purpose is implied.⁴³⁵ Though the wording of the applicable provision of the *Code* is slightly different than that used in the *Sales Act* and found in the older common law, the protection afforded the consumer is essentially similar.⁴³⁶

For the imposition of a particular purpose warranty, the *Code*, the *Sales Act* and the common law require that the seller be informed of the buyer's particular purpose and that the buyer actually rely on the seller's skill or judgment.⁴³⁷ As to the requirement that the seller be informed of the buyer's particular purpose, it is not necessary that the buyer actually tell the seller of his purpose, it is enough that the seller has reason to know of this purpose.⁴³⁸ Both the *Sales Act* and the *Code* demand *actual* reliance by the buyer.⁴³⁹

Mere knowledge on the part of the seller that the buyer intends to make a particular use of the goods does not necessarily establish a warranty that the goods are adapted to such use. Under the *Sales Act* the buyer's justifiable reliance on the seller's skill or judgment is alone important.⁴⁴⁰

The question of when the consumer's reliance is justifiable is regarded as a question of fact to be determined by the particular circumstances of the sale.⁴⁴¹

The *Sales Act*, however, states, in effect, that whenever a consumer purchases goods by their patent or trade name without more, no warranty of fitness for any particular purpose can be implied.⁴⁴² But a fine distinction must be made, for it is generally recognized that when the consumer tells the seller of his purpose and the seller selects goods that have a trade or brand name the rule does not apply.⁴⁴³ The rationale is that the consumer has in fact relied on the seller's selection. The *Code* eliminates altogether the "patent or trade name" exception and makes the brand name request by the consumer merely one of the facts that must be considered in determining whether or not a particular purpose warranty exists.⁴⁴⁴

Where a consumer informs the seller of his particular purpose but is given the opportunity to inspect the goods selected by the seller, it is generally held that an actual inspection precludes justifiable reliance with regard to all defects which are discoverable.⁴⁴⁵ Reliance by the consumer is not, however, precluded by the

434 *Greenman v. Yuba Power Products, Inc. supra* note 432; *Harmon v. Digliani*, 148 Conn. 710, 174 A.2d 294 (1962).

435 U.S.A. § 15(1); U.C.C. § 2-315.

436 *Compare* U.S.A. § 15(1) with U.C.C. § 2-315.

437 U.S.A. § 15(1); U.C.C. § 2-315, Comment 1.

438 U.S.A. § 15(1); U.C.C. § 2-315, Comment 1.

439 "The buyer, of course, must actually be relying on the seller." U.C.C. § 2-315, Comment 1.

440 1 WILLISTON, SALES pp. 609-610 (Rev. ed. 1948).

441 U.S.A. § 15(1): ". . . and it appears that the buyer relies on the seller's skill . . ." U.C.C. § 2-315, Comment 1: "a question of fact to be determined by the circumstances."

442 U.S.A. § 15(4).

443 1 WILLISTON, SALES 616 (Rev. ed. 1948): "[A]n implied warranty of fitness for the buyer's particular purpose is not excluded if the buyer under § 15 subsection 4 of the Uniform Sales Act, when he discloses his particular purpose to the seller, relies on the seller's skill and judgment to furnish appropriate goods and the seller then selects goods which have a patent or trade name."

444 U.C.C. § 2-315, Comment 5.

445 U.S.A. § 15(3); U.C.C. § 2-316(3)(b); see *e.g.*, *Lindberg v. Cloutches*, 167 Cal. App.2d 828, 334 P.2d 701 (1959) wherein court noted the general rule that if a defect is apparent, the buyer who inspects buys on his own judgment but held that since the defect here was not apparent the buyer's inspection did not preclude his reliance on the seller as regards to such defect.

fact that the seller is not the manufacturer or grower of the goods. The only requirement is that the seller be a merchant with regard to the goods sold.⁴⁴⁶ A problem arises when the seller possesses the requisite skill and knowledge concerning the general purpose for which a commodity is used, but neither he nor the buyer has knowledge of the merchandise in relation to the special circumstances for which the buyer wishes to employ it. Where, then, the consumer is actually or constructively informed that the seller cannot, with knowledge, select goods for his particular purpose he may not justifiably rely on any selection made by the seller. The seller will be held to have warranted only that the goods are fit for the *general* purpose for which they were made in contradiction to warranting that they are fit for the *particular* purpose for which they were purchased.⁴⁴⁷

Both the *Sales Act* and the *Code* recognize that the warranty of fitness for a particular purpose and the warranty of merchantability may coexist in any given sale.⁴⁴⁸ In one case, seller's agent told the consumer that the boat in question would fulfill his stated needs and would be ready to sail when delivered. On launching, the boat sank. The court found that both the warranty of fitness for the general purpose for which the article was made and the warranty of fitness for the consumer's particular purpose existed in the sale and were breached.⁴⁴⁹ When both warranties are, in fact, found to exist in the sale, it will generally be held that a breach of the general purpose warranty constitutes also a breach of the particular purpose warranty.⁴⁵⁰

Finally, the warranty of fitness for a particular purpose does not guarantee the consumer that he will be furnished goods that may be used by him with absolute safety or are perfectly fitted to his intended use, rather, the courts insure him only that he may demand such goods as are "reasonably fit" for his specific purpose.⁴⁵¹

3. Disclaimer and Modification of Warranties

(a) In General

The precise problem faced by the courts when dealing with clauses in the sales agreement which purport to disclaim or modify warranties is simply this: May all of the obligations assumed by the seller in the form of express warranties and imposed on the seller in the form of implied warranties be reduced to a mere illusion by an oral or written disclaimer or modification of those warranties? In examining this problem, the distinction pointed out by Professor Vold's "three-pronged" analogy⁴⁵² — the first representing express warranties, the second signifying implied warranties which arise out of the seller's tacit representations, and the last standing for those implied warranties which are imposed by law because of broad policy considerations — is particularly appropriate. It is only when the courts recognize that all warranties are not based on the contractual agreements of the parties that they can properly limit the effect of clauses which purport to disclaim all warranties, and can extend to the consumer the full protection afforded him by the law of warranties.⁴⁵³

With regard to those clauses which purport to disclaim or modify all express warranties not specifically retained in the agreement, there has been general judicial recognition that because such warranties are based on contractual agreements they may likewise be effectively disclaimed or modified by further contractual agreements. The one limitation that is placed on such clauses is that the consumer be actually

446 U.S.A. § 15(1); U.C.C. § 2-315, Comment 5.

447 VOLD, SALES 439 (2d ed. 1959).

448 U.S.A. § 15(1) & (2); U.C.C. § 2-317; e.g., Crotty v. Shartenberg's - New Haven, Inc., 147 Conn. 460, 162 A.2d 513 (1960).

449 Mack v. Coogan, 8 Chest Co. Rep. 233 (Pa. 1957).

450 *Ibid.*

451 U.S.A. § 15(1): "[T]here is an implied warranty that the goods shall be *reasonably* fit for such purposes." (Emphasis added.)

452 VOLD, SALES § 84 (2d ed. 1959).

453 *Ibid.*

or constructively aware of their existence.⁴⁵⁴ In that it contains no provision dealing with the disclaiming or modifying of express warranties, the *Sales Act* has been interpreted to adopt this general rule.⁴⁵⁵ The *Code*, however, limits the rule with the promulgation:

Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed whenever reasonable as consistent with each other; but subject to the provisions of this Article on parol and extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.⁴⁵⁶

This section is intended to protect the consumer from all unexpected disclaimers or modifications which are inconsistent with the express warranties previously created.⁴⁵⁷ It would seem also, that it directs those courts that have not yet done so to look at the relative positions of the seller and consumer; to determine not only that the consumer knew of the disclaimer but also that he was in the position to accept or reject it; and finally, to deny effect to those disclaimers that the consumer was forced to accept and are clearly inconsistent with the express warranties previously existing in the sales.⁴⁵⁸ If this supposition becomes, in fact, the manner in which the courts will scrutinize all disclaimers of express implied warranties, then the spirit as well as the letter of warranty law will be used to protect the consumer in his purchases.

General clauses which purport to disclaim all warranties not expressly included in the written contract stand at the heart of the problem of consumer warranty protection. They attempt to reach not only the omitted express warranties but also those warranties that would normally be imposed by law on the sale in question.⁴⁵⁹ When courts realize that implied warranties are imposed by law quite apart from any contractual agreements of the parties, such general disclaimers should be strictly construed to apply only to those express warranties not included in the agreement and should have no operative effect on warranties imposed by law.⁴⁶⁰ The *Sales Act* provides that all implied warranties may be disclaimed or modified by express agreement.⁴⁶¹ In applying this provision the courts are left to determine, without the aid of specific standards, when the parties have in fact agreed to the exclusion or modification in question. Decisions have varied extensively in answering what constitutes an express agreement.⁴⁶² Some courts hold that a seller may destroy all his obligations under the sale by statements which are no more than vague general clauses purporting to disclaim all warranties not expressly included in the agreement.⁴⁶³ Other courts, however, have recognized that the buyer often has no chance to bargain about these clauses and have accordingly limited their effectiveness.⁴⁶⁴

In conformity with the policy of the courts that have sought to limit the effect of general disclaimers, the *Code*, sets out specific standards which must be followed before a disclaimer of implied warranties will be held effective. Section 2-316 states:

454 *E.g.*, *Kennedy v. Cornhusker Hybrid Co.*, 146 Neb. 230, 19 N.W.2d 51 (1945).

455 *Ibid.*

456 U.C.C. § 2-316(1).

457 U.C.C. § 2-316, Comment 1.

458 *Ibid.*

459 *Lee v. Cohrt*, 57 S.D. 387, 232 N.W. 900 (1930); *Hoe v. Sanburn*, 21 N.Y. 552, 78 Am. Dec. 163 (1960).

460 *E.g.*, *Beckevold v. Potts*, 173 Minn. 87, 216 N.W. 790 (1927).

461 U.S.A. § 71.

462 *Compare Henningson v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960) with *Kennedy v. Cornhusker Hybrid Co.*, 146 Neb. 230, 19 N.W.2d 51 (1945).

463 *Kennedy v. Cornhusker Hybrid Co.*, 146 Neb. 230, 19 N.W.2d 51 (1945). Disclaimer read: "We give no warranty, express or implied, as to the productiveness of the seeds or corn we sell and we will not be in any way responsible for the crop."

464 *Beckevold v. Potts*, *supra* note 460. Disclaimer read: "No warranties have been made in reference to said motor vehicle by the seller to the buyer unless expressly written hereon at the date of purchase."

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention and in case of a writing must be *conspicuous*, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and *conspicuous*. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "there are no warranties which extend beyond the face hereof."

(3) Notwithstanding subsections (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranties; and

(b) when the buyer before entering into the contract examines the goods or the sample as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him.⁴⁶⁵

Further, this section provides, as indicated earlier, that general statements of the seller may effectively disclaim all warranties, but only when such statements are consistent with previous statements made and are commonly understood to have such effect.⁴⁶⁶ With emphasis on the word "conspicuous," the fine print disclaimer, the "bane of the American consumer,"⁴⁶⁷ is not to be given effect.⁴⁶⁸

The *Code* makes two other changes in the common law and *Sales Act* decisions in this area. First, to disclaim the warranty of merchantability the seller must make specific reference to the term "merchantability," and second, only a conspicuous written disclaimer will be given effect in disclaiming the warranty of fitness.⁴⁶⁹ Finally, it is not the intention of the new legislation to negate all warranties in those cases where the buyer either inspects the goods or is given the opportunity to do so.⁴⁷⁰ Rather, in line with the general case law on the question, the extent to which the buyer relied on the warranty rather than on the inspection and the experience of the buyer and the nature of the defects, if any, are to be considered by the courts. The over-all effect of this section, therefore, is to protect the consumer from all uncomprehended, unexpected, unbargained for, and inconsistent language.⁴⁷¹

(b) The Increasing Use of the "Standard Manufacturer's Warranty"

The problem of the widespread use of the "standard warranty" is succinctly stated in the following quote:

Many manufacturers . . . have formed trade organizations and agreed to the universal use of these limited warranty clauses. Many buyers have no choice. If they desire to purchase an automobile, a radio, or a storage battery, they must accept the standard, uniform contract.⁴⁷²

Where a manufacturer has extensively advertised the merits of his product and has made numerous representations to the consuming public for the purpose of promoting its sale, may he, by the use of a standard limiting warranty clause, effectively destroy those obligations that would normally attend the sale? Older case law did not have this problem to contend with.⁴⁷³ The drafters of the *Sales Act*, likewise not faced with this problem, set no standards for determining its answer.⁴⁷⁴ Even the *Code* with its specific provision on the disclaiming or modifying of warranties does not provide definitive answer. It is the courts that have, in the

465 U.C.C. § 2-316. (Emphasis added.)

466 U.C.C. § 2-316, Comment 1.

467 Note, *Impact of U.C.C. on California Law of Sales Warranties*. 8 U.C.L.A. LAW REV. 281, 314.

468 U.C.C. § 2-316, Comment 1.

469 U.C.C. § 2-316(2), Comment 5.

470 U.C.C. § 2-316, Comment 8.

471 U.C.C. § 2-316, Comment 1.

472 BOGERT AND FINK, *Business Practice Regarding Warranties in the Sale of Goods*, 25 ILL. L. REV. 400, 413 (1930).

473 *E.g.*, *Greenman v. Yuba Power Products Inc.*, 205 Advance Cal. App. Reports 525, 23 Cal. Rpts. 282, 284, "The liability of a manufacturer predicated upon representations concerning his product . . . through labels or advertising materials . . . [is] an obligation attendant upon a new era. . ."

474 *Ibid.*

main, offered the solution.⁴⁷⁵ While it can be said that the trend is toward a very strict interpretation of these standard warranties, decisions continue to go both ways. An examination of the policy considerations which support each side may at least raise a doubt as to whether the cases are really in conflict.

On the one hand, we have those cases that place a very narrow interpretation on the "standard warranty." In a recent California case, plaintiff purchased a lathe from co-defendant, The Hayseed, a retail merchandising corporation. Prior to the purchase he was shown a brochure issued by the other defendant, Yuba Power Products, the manufacturer. This brochure contained various statements concerning the lathe such as the type of work for which it could be used, its safety features and others. But its safety features evidently left something to be desired. Plaintiff was injured when a piece of wood which he was turning came loose, flew off and fractured his skull. In sustaining a jury verdict for the plaintiff the reviewing court said:

The liability of a manufacturer predicated upon representations concerning his product made by him to the consuming public through labels or advertising materials, is a comparatively recent development of the law; has been referred to as based on a breach of express warranty under an exception to the rule requiring the existence of privity between the parties . . .; has been sustained in other decisions which, in an effort to conform to classic concepts, have been based on conflicting and sometimes fantastic reasons . . . but when considered by the law as a living thing, has been recognized as an obligation attendant upon a new era, which dictates that the manufacturer should be held responsible to the consuming public for representations manifestly made by him to them for the purpose of promoting the sale of his product. . . .

In any event, the obligation in question, strictly speaking, is not the result of a contract; is not dependent upon the existence of contractual privity; and exists independently of any buyer-seller relationship. . . .⁴⁷⁶

While the court above was confronted with the problem of lack of privity rather than the existence of a standard warranty form, the policy laid down in its decision is equally applicable to either problem.

In another case where the existence of a standard warranty was a factor, the Pennsylvania Superior Court found that the warranty did not deal with the question of the manufacturer's liability where the failure of a defective part resulted in personal damages. Thus construed, the standard warranty did not expressly disclaim warranties of merchantability and fitness for use.⁴⁷⁷ In 1955, this same Pennsylvania court had to evaluate the following provision in a conditional sales agreement:

This contract contains the entire agreement between the Seller and the Buyer; there are no other representations, warranties or covenants by either party. This contract may not be modified except in writing.⁴⁷⁸

Here, Judge Hirt held that the provision did not expressly disclaim implied warranties and, therefore, did not negate the warranty of merchantable quality.⁴⁷⁹

Finally, one of the leading cases on this question is *Henningson v. Bloomfield Motors*.⁴⁸⁰ There, New Jersey's Supreme Court, after an extensive examination of the existing policy considerations, decided that standard warranties which, in effect, act as disclaimers of those obligations that normally attend a sale are not favored by the better-reasoned recent decisions and must be strictly construed against dealers and manufacturers.

In apparent opposition to the cases just discussed, some courts have held that the seller, regardless of the advertising done or representations made to induce

475 *E.g.*, *Henningson v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960); *Jarnot v. Ford Motor Co.*, 191 Pa. Super 422, 156 A.2d 568 (1959); *Greenman v. Yuba Power Products Inc.*, 205 Advance Cal. App. Reports 525, 23 Cal. Rpts. 282 (1962).

476 *Greenman v. Yuba Power Products, Inc.*, 205 Advance Cal. App. Reports 525, 23 Cal. Rpts. 282, 284-85 (1962).

477 *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1959).

478 *Frigidiners, Inc. v. Branchtown Gun Club.*, 176 Pa. Super. 643, 109 A.2d 202 (1954).

479 *Ibid.*

480 32 N.J. 358, 161 A.2d 69 (1960).

the sale, may effectively disclaim all of his obligations, both express and implied.⁴⁸¹ The great majority of these cases, however, can be factually distinguished from those which limit the effect of the standard warranty. Perhaps a leading example is *Kennedy v. Cornhusker Hybrid Co.*⁴⁸² which involved the sale of seed. Due to the peculiar nature of the goods sold and the uncertainties naturally attached to such goods, the court reasoned that the seller must be allowed to disclaim all of his obligations as long as the consumer is actually or constructively aware of such disclaimer and there is no bad faith, fraud or concealment involved. From this decision and others like it the so-called "seed cases" have evolved. Rather than classify them in direct opposition to the decisions like that in *Henningson*, however, it is more correct to state that they constitute a necessary exception to the modern doctrine that the seller may not reduce to an illusion his obligations arising from the sale.

North Dakota, recognizing the extreme inequality of bargaining power between the seller and the consumer, has legislatively provided that in certain sales the right of the parties to waive all warranty obligations is limited.⁴⁸³ The statute prohibits, in cases of sales of farm machinery, any agreement whereby the warranty of fitness is purported to be disclaimed and provides that the buyer shall have a reasonable time after delivery to examine and test the machinery to determine if it complies with the warranty of fitness.⁴⁸⁴ This statute becomes part of all agreements involving the sale of farm machinery and is to be read into them regardless of any provisions in the contract to the contrary.⁴⁸⁵

Admittedly, this legislation covers only a minute part of the vast area of sales and guarantees protection, nonetheless it serves as a guidepost to those states that have recognized the nature of the problem. "It may be that a still larger development of statutory warranties may be imposed upon sellers in the future for the buyer's protection; warranties which cannot be waived by contractual disclaimers."⁴⁸⁶

V. CONCLUSION

One cannot help but be impressed by the dimension and scope of the problem of informed consumer buying. The gross national product is the highest that it has ever been in the history of our economy. Consumer purchasing power is at an all-time high; yet, it seems, his buying acumen can only be measured at the other end of the scale. Certainly, one can question how well the principle of *caveat emptor* has been eradicated.

To meet this problem in labeling and packaging practices, both federal and state governments have enacted successively stronger legislation. Even now stricter regulatory measures are in the offing. Yet the decried practices have persisted and will continue to do so, simply because there will always be someone who thinks that he can put one over on the public and is willing to take the necessary risk.

Present-day marketing tools in this area are geared toward a psychological appeal to consumers. It has been the aim of the law, on the other hand, to take the "psycho" out of "psychological" and to restore "logic" to the market place. In so doing, the suggestion has been made that it would be wise to *educate* consumers to act more rationally in making their purchases⁴⁸⁷ — to train them to look for the information that they need — besides publicly condemning deceptive practices through regulatory legislation. The hope is that consumers will become aware of their own emotions and that they will know exactly what they are doing when they decide to buy. But it has been contended: "What people actually spend their money on are the psychological differences, brand images permitting them to express

481 *Kennedy v. Cornhusker Hybrid Co.*, 146 Neb. 230, 19 N.W.2d 51 (1945).

482 146 Neb. 230, 19 N.W. 2d 51 (1945).

483 N.D. REV. CODE § 51-0707 (1960).

484 *Uhrig v. J. I. Case Threshing Mach. Co.*, 64 N.D. 189, 250 N.W. 922 (1933).

485 *Dwinnell v. Boehmer*, 60 N.D. 302, 234 N.W. 655 (1931).

486 *VOLD, SALES* § 91 (2d ed. 1959).

487 *Hearings on Packaging and Labeling Practices, Part I*, at 175.

their individuality. . . . It is because of the improved quality and reliability of our merchandise that we can allow ourselves the luxury of making our decisions on the basis of more purely psychological factors.⁴⁸⁸ As long as the consumer continues to generate from that complex organism, *homo sapiens*, training him is a step in the right direction, albeit slight.

As the survey of the credit disclosure laws indicates, the difficulty here is not a dearth of codified laws. The statutes are there; what is needed is to strengthen them.

In its attempt to assist the principle of disclosure to full maturity, the "Truth in Lending" Bill is experiencing difficulty. Many object that this is not the concern of the federal government.⁴⁸⁹ Others have suggested that a more acceptable solution would be to incorporate disclosure provisions into the Uniform Commercial Code.⁴⁹⁰ Again there is the possibility of a publicity campaign sponsored by consumer groups which would blare the clarion call to awaken the consumer to his statutory rights. The most promising proposal, however, is a statutory prescription of a uniform contract form.⁴⁹¹ In this way the consumer would soon come to expect certain information to be revealed when he makes an installment purchase. In addition, it would eliminate, to a great extent, another major problem — the consumer's unwillingness to risk his own time and funds to protect his statutory rights. With uniform contract forms required by law, state-initiated investigations could more readily detect noncomplying contracts.

Consumer protection through the imposition of warranties is largely remedial. The FTC, of course, attempts to secure proper representation of guarantees. But it can only oversee the national manufacturer and distributor; it does not reach the local salesman and his representations of a product's capacity or quality. Here, the consumer must vindicate his rights through the provisions of the Uniform Sales Act or the Uniform Commercial Code. But for the most part, his lot is improving. The vanguard has been exhibited in such noticeable trends as the protection afforded by express warranties, the expansion of policy considerations upon which implied warranties are based, the limitation, judicially, of disclaimers, and the gradual erosion of the archaic doctrine of privity.

One may question the amount of government intervention into these methods of marketing, but consider:

It is the function of the market place, through the intercourse of informed buyers and sellers, to accelerate production, distribution, and consumption where they are required, and brake them where necessary. *The functioning of our economic system depends, therefore, on the absence of unreasonable restraints, on the free flow of information, on the ability of the public to exercise its best judgment, and on the general observation of accepted standards of good business and human conduct.*⁴⁹²

Where the consumer has not been able to accomplish this on his own, the law has lent its aid.

Robert C. Findlay
Frank J. Miele
Robert M. Hanlon

⁴⁸⁸ *Id.* at 173.

⁴⁸⁹ See *e.g.*, Testimony of Prescott Bush, Senator from Connecticut, 1962 *Hearings on Truth in Lending*, at 131.

⁴⁹⁰ This proposal was made in 1950. It was rejected because disclosure efforts were still in the experimental stage. At that time the proposal may have had validity, since only 13 states had retail installment acts requiring disclosure. Today, however, 42 states have such statutes.

⁴⁹¹ The New York conditional sales contracts statute prescribes a form which all conditional contracts are to follow. N.Y. PERS. PROP. LAWS § 64-a(e). In North Dakota, uniform forms are available through banks or from commercial printing companies. Letter from Eugene Rich, State Examiner, North Dakota, to the *Notre Dame Lawyer*, Feb. 25, 1963, on file in Notre Dame Law Library.

⁴⁹² Prepared statement of Alexander Wiley, Senator from Wisconsin, *Hearings on Packaging and Labeling Practices, Part 1*, at 3. (Emphasis added.)

DISCLOSURE STATUTES ON THE STATE AND FEDERAL LEVELS

STATE	TYPE OF STATUTE			DISCLOSURE OF TERMS						
	All-Goods ¹	Motor Vehicle ²	License Required ³	Cash Price ⁴	Part Payment; Trade-in	Unpaid Balance	Cost of Insurance ⁵	Official Fees; Other Charges	Princip Balance	
Alabama		None ¹¹								
Alaska	{ ALL MV	x		Each Item	x	x	x	x	x	
Arizona	{ ALL MV	Proposed ¹³	x ¹²	Finance Co. ¹⁴	x	x	x	x	x	
Arkansas			x	Both	x	x	x	x	x	
California	{ ALL MV	x	x		x	x	x	x	x	
Colorado	{ ALL MV	x	x	Both	x	x	x	Lumped	x	
Connecticut		x	All-Goods	Finance Co. ¹⁵	x	x	x	x	x	
Delaware	{ ALL MV	x		Both	x	x	x	x	x	
District of Columbia			x ¹⁶							
Florida	{ ALL MV	x	x	Dealer Dealer	x	x	x	x	x	
Georgia										
Hawaii		x	All-Goods		x	x	x	x	x	
Idaho		x			x	x	x	x	x	
Illinois		x	All-Goods		x	x	x	Lumped	x	
Indiana		x	All-Goods	Finance Co.	x	x	x	Lumped	x	
Iowa		None ¹⁷	x	Both	x	x	x	x	x	
Kansas		x	All-Goods	Finance Co.	x	x	x	x	x	
Kentucky	{ ALL MV	x	x		x	x	x	x	x	
Louisiana			x	Both	x	x	x	x	x	
Maine			x	Finance Co. ¹⁸	x	x	x	Lumped	x	
Maryland		x	All-Goods	Finance Co.	Each Item	x	x	x	x	
Massachusetts	{ ALL MV	x ²⁰	x	Both	x	x	x	x	x	
Michigan			x ²¹	Both	x	x	x	Estimate	x	
Minnesota	{ ALL MV	Proposed	x	Both	x	x	x	x	x	
Mississippi			x	Finance Co. ²²	x	x	x	x	x	
Missouri		x			x	x	x	x	x	
Montana		x	All-Goods	Finance Co.	x	x	x	x	x	
Nebraska	{ ALL MV	x	x ²⁴	Both	x	x	x	x	x	
Nevada			x		x	x	x	x	x	
New Hampshire	{ ALL MV	x ²⁵	x	Both	x	x	x	x	x	
New Jersey		x	All-Goods	Both ²⁷	x	x	x	x	x	
New Mexico	{ ALL MV	x ²⁸	x	Finance Co.	x	x	x	x	x	
New York	{ ALL MV	x ²⁹	x	Finance Co. ³⁰	Each Item	x	x	Lumped ³¹	x	
North Carolina			x ²⁴	Both	x	x	x	x	x	
North Dakota		x	All-Goods		x	x	x	x	x	
Ohio		x	All-Goods		x	x	x	Lumped	x	
Oklahoma										
Oregon	{ ALL MV	Proposed	x		Each Item	x	x	x	x	
Pennsylvania			x	Both	x	x	x	Estimate	x	
Rhode Island		None ²⁶								
South Carolina			x	Finance Co.	x	x	x	x	x	
South Dakota										
Tennessee		x			x	x	x	x	x	
Texas			x ²⁸		x	x	x	x	x	
Utah		x			x	x	x	x	x	
Vermont		Proposed			x	x	x	x	x	
Virginia			x	Finance Co.	x	x	x	x	x	
Washington	{ ALL MV	x	All-Goods	Both	Each Item	x	x	x	x	
West Virginia			x ³⁷	Dealer						
Wisconsin	{ ALL MV	Proposed	x	Both	x	x	x	Lumped	x	
Wyoming										
FTC Rules			x		x	x	Estimate	x		
Truth in Lending Bill		Proposed			x	x	x	x	x	

DISCLOSURE STATUTES ON THE STATE AND FEDERAL LEVELS

DISCLOSURE OF TERMS				PENALTIES			
Amount of Finance Charge ^a	Amount of Time Balance [†]	Number, Amount, Date of Installments	Time Sales Price	Denial, Suspension or Revocation of License	Fine (Maximum Amount)	Imprisonment [‡] (Maximum Term)	Buyer's Recovery, [§] Seller's Bar [¶]
Rate	x	x			\$ 1000	6 months	x
x	x	x	x	x	100		
x	x	x			1000		
x	x	x			500		x
x	x	x	x				x
x	x	x	x				x
Lumped	x	x	x	x			x
x	x	x	x	x	25-500		x
x	x	x	x		500		x
x	x	x		x	500		x
Rate	x	x			500		x
x	x	x		x	500		x
Rate	x	x	x		500		x
x	x	x	x		500		x
Lumped-Rate	x	x	x		500		x
Lumped	x	x		x	1000	1 year	
x	x	x		x	500		x
x	x	x	x	x	500	6 months	x
x	x	x			500	6 months	x
x	x	x			500		x
x	x	x		x	500	6 months	x
Lumped	x	x	x	x	500	6 months	x
x	x	x		x	500		x
x	x	x	x		100 ¹⁹		x
x	x	x	x		100-500		x
x	x	x	x	x	500	6 months	x
x	x	x		x	500 ²²		x
Both	x	x		x			x
x	x	x		x	500		x
x	x	x	x		500		x
x	x	x	x	x	500	6 months	x
x	x	x		x	500	6 months	x
x	x	x	x	x	500	6 months	x
x	x	x		x	10-100	90 days	
Rate	x	x			500 ²⁵	60 days	
x	x	x		x	500		x
x	x	x	x	x	500		
x	x	x	x		25-100		
Lumped-Rate ²³	x	x	x	x	500		x
x	x	x	x	x	500		x
x	x	x	x	x	500		x
Rate	x	x		x	Discretion of Court	Discretion of Court	
Lumped-Rate	x	x			500	1 year	x
					1000	1 year	
x	x	x	x		500		x
x	x	x	x		500		x
x	x	x		x	500		
Both	x	x		x	500	1 year	x ¹⁹
Lumped					25-100	90 days	
x	x	x			5000		
Both					5000	1 year	x ⁴⁰

1 Those statutes whose disclosure provisions are of the all-goods variety are: ALASKA STAT. § 45.10.030(a) (1962); ARIZ. H.B. 243 § 44-870, 26th Leg., 1st Reg. Sess. (Feb. 28, 1963); ARIZ. S. 255 § 44-856, 26th Leg., 1st Reg. Sess. (1963); CAL. CIV. CODE § 1803.3; COLO. REV. STAT. ANN. § 13-16-6(2) (1953); CONN. GEN. STAT. ANN. § 42.84(a) (1960); DEL. CODE ANN. tit. 6, § 4305 (Cum. Supp. 1962); FLA. STAT. ANN. § 520.34(1) (1962); HAWAII REV. LAWS § 201A-3 (Supp. 1961); IDAHO CODE ANN. § 64-806 (Cum. Supp. 1961); ILL. ANN. STAT. ch. 121½, § 225 (Smith-Hurd 1960); IND. ANN. STAT. § 58-904 (1961 Replacement); KAN. GEN. STAT. § 16-507(f) (Supp. 1961); KY. REV. STAT., Acts 1962, S. 97, § 2(5) (Cum. Issue 1962); MD. CODE ANN. art. 83, § 129(a) (1957); MASS. ANN. LAWS ch. 255, § 12 (Cum. Supp. 1961); A Bill for an Act to Require Truth in Lending; Providing Penalties, Minn. (1963); MO. ANN. STAT. § 408.260(5) (Cum. Supp. 1962); MONT. REV. CODES ANN. § 74-607(f) (1947 Replacement); NEB. REV. STAT. § 45-303 (1960 Reissue); N.H. REV. STAT. ANN. § 399-B:2 (Supp. 1961); N.J. STAT. ANN. § 17:16C-27 (Cum. Supp. 1961); N.M. STAT. ANN. § 61-8-15 (1953 Replacement); N.Y. PERS. PROP. LAWS §§ 402(3), and 64-a(e); N.D. REV. CODE § 51-13-02(5) (1960); OHIO REV. CODE § 1317.02 (Anderson 1954); ORE. S. 122, 52nd Leg. Ass., Reg. Sess. (Feb. 1, 1963); TENN. CODE ANN. § 47-1903(a) (Cum. Supp. 1962); UTAH CODE ANN. § 15-1-2a(B) (1953 Replacement); VT. H.B. 161, Gen. Ass., Reg. Sess. (1963); WASH. S. 415, 38th Sess. (Feb. 12, 1963); S. 750, 88th Cong., 1st Sess. (1963); H.B. 330, A., § 115-25(3), Wis. Ass. (Feb. 27, 1963).

2 Those statutes whose disclosure provisions are limited to the sale of motor vehicles are: ALASKA STAT. § 28.10.050(b) (1962); ARIZ. REV. STAT. ANN. § 44-287 (Cum. Supp. 1962); CAL. CIV. CODE § 2982(a); COLO. REV. STAT. ANN. § 13-16-6(2) (1953); DEL. CODE ANN. tit. 5, § 2906(a)(4) (Cum. Supp. 1962); FLA. STAT. ANN. § 520.07(2) (1962); IOWA CODE ANN. § 322.3(6)(c) (Cum. Supp. 1962); KY. REV. STAT. § 190.100(2) (1962); LA. STAT. ANN. § 956(E) (Cum. Supp. 1961); ME. REV. STAT. ANN. ch. 59, § 254(II) (Cum. Supp. 1961); MASS. ANN. LAWS ch. 255B, § 9 (Cum. Supp. 1961); MICH. STAT. ANN. § 23.628(13)(b) (1957); MINN. STAT. ANN. § 168.71(5)(b) (1960); MISS. CODE ANN. § 8075-13(b) (Cum. Supp. 1960); NEB. REV. STAT. § 60-617 (1960 Reissue); NEV. REV. STAT. § 97.020(2) (1957); N.H. REV. STAT. ANN. § 361-A:7(II) (Supp. 1960); N.M. STAT. ANN. § 50-15-7(B) (1953 Replacement); N.Y. PERS. PROP. LAWS § 302(5); N.C. GEN. STAT. § 20-303(b) (Cum. Supp. 1961); ORE. REV. STAT. § 83.520(3) (1961 Replacement); PA. STAT. ANN. tit. 69 § 614(B) (Cum. Supp. 1961); S.D. CODE § 6.04C03(5) (Supp. 1960); TEX. REV. CIV. STAT. ANN. art. 5074a (1951); VT. STAT. ANN. tit. 9, § 2355(f) (Cum. Supp. 1961); VA. CODE ANN. § 46.1-545(b) (1958 Replacement); WASH. REV. CODE ANN. § 46.70.130 (1962); WIS. STAT. ANN. § 218.01(6)(b) (Cum. Supp. 1962); 16 C.F.R. § 197.2(b) (Supp. 1957). If motor vehicles are included within the coverage of the all-goods statute the column is marked accordingly.

3 Those states which require the licensing of retail dealers and/or finance companies which purchase retail installment sales contracts are: ARIZ. REV. STAT. ANN. § 44-282 (Cum. Supp. 1962); ARIZ. H.B. 243, § 44-852, 26th Leg., 1st Reg. Sess. (Feb. 28, 1963); COLO. REV. STAT. ANN. § 13-16-2 (1953); CONN. GEN. STAT. ANN. §§ 14-52, and 36-255 (1960); DEL. CODE ANN. tit. 5, § 2902 (Cum. Supp. 1962); FLA. STAT. ANN. § 520.03 (1962); IND. ANN. STAT. § 58-911 (1961 Replacement); IOWA CODE ANN. § 322.3(1) (1949); KAN. GEN. STAT. ANN. § 16-503(a) (Supp. 1961); LA. STAT. ANN. § 6:952(B) (Cum. Supp. 1961); ME. REV. STAT. ANN. ch. 59, § 250(1) (Cum. Supp. 1961); MD. CODE ANN. art. 83, § 154 (1957); MASS. ANN. LAWS ch. 255B, § 2 (Cum. Supp. 1961); MICH. STAT. ANN. § 23.628(3) (1957); MINN. STAT. ANN. § 168.67(a) (1960); MISS. CODE ANN. § 8075.02 (Cum. Supp. 1960); MONT. REV. CODES ANN. § 74-603(a) (1947 Replacement); NEB. REV. STAT. §§ 45-312(1), and 60-619 (1960 Reissue); N.H. REV. STAT. ANN. § 361-A:2(1) (Supp. 1961); N.J. STAT. ANN. § 17:16C-2 (Cum. Supp. 1961); N.M. STAT. ANN. § 50-15-3 (1953 Replacement); N.Y. PERS. PROP. § 492; N.C. GEN. STAT. § 20-287 (Cum. Supp. 1961); PA. STAT. ANN. tit. 69, § 604 (Cum. Supp. 1961); S.D. CODE § 6.04C09 (Supp. 1960); VT. STAT. ANN. tit. 9, § 2352 (Cum. Supp. 1961); VA. CODE ANN. § 46-1523 (1958 Replacement); WASH. REV. CODE ANN. § 46.70.020 (1962); WIS. STAT. ANN. § 218.01(2) (1957).

4 The cash price includes any repairs, charges for delivery, cost of servicing or improving goods, costs of accessories, and installation or other costs normally included in the delivered cash price of goods, unless the statement of each separate item is indicated in the column.

5 The cost of insurance must be exactly and separately stated unless indicated in the column to the contrary.

6 The finance charge must be separately stated as a dollar amount unless indicated in the column that may be lumped with the cost of insurance and/or may be stated in terms of a rate, or in terms of both a dollar amount and rate.

7 In most of the statutes permitting the finance charge to be stated in terms of a percentage rate the amount of the time balance may be omitted when the dollar amount statement is not used.

8 All statutes providing for the imprisonment of the violator state that such violator will be punished by fine or imprisonment, or both.

9 Those states which enable the buyer to recover the charges he has paid when the seller violates the disclosure provisions are: Cal.; Del. (all-goods statute); Fla. (motor vehicle statute); Hawaii; Ill.; Minn.; N.Y. (conditional sales contracts statute); Tenn.; Utah. Recovery of reasonable attorney fees and court costs are usually allowed the prevailing party.

10 Those states which bar the violating seller's recovery of any time price differential, delinquency or collection charge are: Alaska; Ariz.; Cal. (all-goods statute); Colo.; Conn.; Del.; Fla. (all-goods statute); Idaho (rather than barring recovery, the statute in this state denies the seller the right to register or record the conditional sales contract); Ill.; Kan.; Ky.; La.; Me.; Md.; Mass.; Miss.; Mo.; Mont.; N.H. (motor vehicle statute); N.M. (motor vehicle statute); N.Y. (motor vehicle statute); N.D.; Ore.; Va. Reasonable attorney's fees and court costs are usually awarded to the prevailing party. The seller is ordinarily permitted to recover the cash price of the goods sold and also the cost of any insurance which he has purchased in connection with the goods.

11 A very comprehensive bill of the all-goods variety was introduced in the 1959 Regular Session of the Alabama Legislature S. 174, Leg. Reg. Sess. (1959). However it was never reported out of the committee to which it was referred. Letter From Charles M. Cooper, Director, Legislative Reference Service to the *Notre Dame Lawyer*, March 11, 1963, on file in Notre Dame Law Library.

12 The disclosure provisions are part of the Motor Vehicle Act. The dealer must furnish the purchaser a Statement of Motor Vehicle Sale prior to the consummation of the sale. Disclosure under this statute is very incomplete and unsatisfactory.

13 H.B. 243, § 44-870, 26th Leg., 1st Reg. Sess. (Feb. 28, 1963); S. 255, § 44-856, 26th Leg., 1st Reg. Sess. (1963).

14 Retail sellers holding contracts exceeding \$10,000 are included. *Ibid.*, H.B. 243.

15 Only motor vehicle dealers, in addition to the sales finance companies, must be licensed.

16 The Installment Sales of Motor Vehicles act does not contain disclosure requirements.

17 The current session of the Iowa General Assembly has had a bill for the creation of the office of consumer counsel introduced before it. H.B. 453, 60th Gen. Ass. (Feb. 28, 1963).

18 Retail sellers holding contracts which in the aggregate exceed \$25,000 any calendar year must also be licensed.

19 Each subsequent offense is punishable by a fine of not over \$500.

20 As a disclosure statute these provisions are largely ineffective since the information must be disclosed by the secured party only to the extent that it is known at the time of the execution of the security agreement.

21 The Motor Vehicle Finance Act of 1950 [MICH. STAT. ANN. § 23.628 (1957)] did not provide for the repeal of either the Motor Vehicle Installment Sales Act [MICH. STAT. ANN. § 19.415(2) (1957)] or the Motor Vehicle Code Provision [MICH. STAT. ANN. § 9.151 (1957)].

22 For any subsequent offense, the violator is subject to a like fine and/or imprisonment for not over one year.

23 Sales finance companies purchasing retail sale installment contracts, and dealers holding retail installment contracts exceeding a total aggregate outstanding indebtedness of \$50,000, must be licensed.

24 These provisions are part of the Motor Vehicle Dealer's License Act. The disclosure is not comprehensive and seems to have been intended more as a means of record-keeping than as a method of informing the consumer.

25 NEV. REV. STAT. § 97.060 (1957) provides for civil actions against a seller for exceeding the prescribed time price differential limits or acceleration provisions, but provides no penalty for a violation of the disclosure provisions.

26 This statute requires only the disclosure of the cost of the credit. It is largely ineffective insofar as fully informing the consumer of the full costs of his purchase.

27 *Supra* note 196.

28 This statute provides only for disclosure when the seller retains a chattel mortgage in the personal property sold. Its requirements are neither comprehensive nor complete.

29 In addition to an all-goods statute with disclosure provisions for retail installment contracts, there is also a statute requiring disclosure in conditional sales contracts. N.Y. PERS. PROP. LAWS § 64-a.

30 A bill has been introduced at the present Legislative Session which, if enacted, would require all retail installment sellers who hold more than \$25,000 of installment paper to be licensed as sales finance companies. Letter From Vincent H. Crawford, Supervising Bank Examiner, New York to the *Notre Dame Lawyer*, February 26, 1963, on file in Notre Dame Law Library.

31 Lumping is permitted only under the conditional contract statute. N.Y. PERS. PROP. LAWS § 64-a(g).

32 The finance charge may be expressed as a simple interest charge on the unpaid balance only under the conditional sales contract statute. N.Y. PERS. PROP. LAWS: § 64-a(c).

33 *Supra* note 198.

34 These provisions are embodied in the Motor Vehicle Dealers and Manufacturers Licensing Laws. They do not offer complete disclosure protection.

35 A bill to establish a consumer counsel failed to pass the 1962 session of the General Assembly. S. 15, Gen. Ass., Jan. Sess. (Jan. 16, 1962). The bill still has retained considerable interest. Letter from John F. Cicilline, Research Assistant, Legislative Council to the *Notre Dame Lawyer*, March 12, 1963 on file in Notre Dame Law Library.

36 This statute merely leaves disclosure regulations to the FTC.

37 These provisions are found in the Motor Vehicles Code. They are neither complete nor comprehensive.

38 The disclosure provisions are described in the statute as the "details to be given by the mortgagor." They relate to the execution of a contract or chattel mortgage, or the consummation of the sale of any motor vehicle, and require very limited disclosure. As a disclosure statute its value is very minimal. Motor vehicles are now probably covered under the recently enacted all goods statute. S. 415, 38th Sess. (Feb. 12, 1963).

39 The violator would be liable to the purchaser in the amount of \$100 or in an amount equal to twice the finance charge, whichever is greater. Liability would not exceed \$2,000.

40 *Ibid.*