Boston College Law Review

Volume 8
Issue 3 *Consumer Credit - A Symposium*

Article 12

4-1-1967

Trade Regulation

Walter Angoff

TRADE REGULATION

FEDERAL FAIR PACKAGING AND LABELING ACT

On November 3, 1966, President Johnson signed the Fair Packaging and Labeling Act (FPLA),[1] which was passed in October (effective July 1, 1967) after more than four years of controversial legislative consideration. The FPLA empowers the Secretary of Health, Education, and Welfare (through the Food and Drug Administration) and the Federal Trade Commission to regulate certain packaging and labeling practices in the sale of grocery-store and supermarket products. This note will consider the background and purposes of the FPLA, the provisions of the act, and the effects it will have on the problems it was designed to solve.

I. Background and Purposes

Congress passed the FPLA to curb marketing abuses which developed in the grocery industry as a result of three significant changes in that industry since World War II: the development of the self-service supermarket, the prepackaging revolution, and the proliferation of products and product sizes available for sale.[2] The supermarket has become the retail unit through which the majority of grocery products are sold. This change is important because it has diminished the influence of the grocery-store clerk and correspondingly has increased the influence of the package and its label. The package has become the "silent salesman" inside the store.[3] The prepackaging revolution has utilized new packaging materials (such as plastics) and new techniques (such as quick-freezing) to make available in convenient form products which before had been sold only in bulk. The proliferation of products and sizes is the most conspicuous change and is a result of the other two. Not only are products which had previously been sold in bulk now prepackaged for shelf sale, but the demands of aggressive competition among manufacturers have necessitated the development of a wide variety of new products and new combinations of old products. Instead of the fifteen hundred items for sale just after World War II, the modern supermarket boasts more than eight thousand products; the estimate for the mid-1970's is twenty thousand.[4] Equally as significant as the great number and variety of *products* is the seemingly limitless *quantities* in which a given product may be sold. Potato chips are marketed in seventy-one different quantities under three and one-half pounds;[5] instant coffee in at least ten quantities less than one pound.[6]

---

[1] 80 Stat. 1296 (1966), 15 U.S.C.A. §§ 1451-61 (Supp. 1967).

[2] Hearings Before the Senate Committee on Commerce, 89th Cong., 1st Sess., ser. 28, at 720 (1965) [hereinafter cited as 1965 Senate Hearings].

[3] Ibid.

[4] Hearings Before the House Committee on Interstate and Foreign Commerce, 89th Cong., 2d Sess., ser. 45, pt. 2, at 974 (1966) [hereinafter cited as 1966 House Hearings, pt. 2]; Cohen, The Packaging and Labeling Hearings, 17 Food Drug Cosm. L.J. 143, 144 (1962).

[5] 1965 Senate Hearings 719. But see 1966 House Hearings, pt. 2, at 1050.

[6] Id. at 777.

The effect of these developments is to place the purchaser at a severe disadvantage. Unable to see the contents of the package and having no one to ask about the merits of the product offered for sale, the consumer must rely on the information printed on the label to learn what and how much the package contains. Manufacturers have developed numerous practices to exploit consumer reliance on the package and its label. Practices relating to the manner in which the commodity is *packaged* include: (1) marketing of a great variety of sizes, often in fractional amounts, making it extremely difficult to calculate the price per unit of the package for comparison with other brands and sizes; and (2) use of packages whose shapes and sizes are misleading as to the amount of product actually contained therein.

Practices relating to the printed matter on the label include: (1) inconspicuous placement of contents or quantity statements on packages required by the Federal Food, Drug and Cosmetic Act to have such statements, and lack of these statements altogether on products not covered by existing law; (2) use of adjectives which exaggerate quantity statements, such as "giant half quart" and "jumbo half gallon" instead of one pint and two quarts; (3) indiscriminate use of adjectives such as "large," "jumbo," or "family size" which do not accurately characterize the package size; (4) use of pictures or illustrations on labels which mislead the consumer about the nature or quantity of the contents; (5) representation of the package yield in terms of "servings," where the quantity of each "serving" is not stated; and (6) representations on the label that the package is being sold at a reduced price ("cents-off"), although the manufacturer usually has no control over the retail price.[7]

In addition, there is a combined packaging and labeling practice wherein the manufacturer reduces the quantity or size of the contents while simultaneously changing the package shape and obscuring the contents statement so that the consumer is not aware that he is getting less for the same price.[8]

The overall effect of these practices is twofold: first, the consumer is deceived as to the quantity he is receiving; and second, he is faced with the extremely difficult task of computing the per unit price of each size in order to learn which is the least expensive. Unable to determine which size has the lowest per unit cost, the consumer is also unable to decide if the price difference between the least expensive brand and size and some other brand or size is justified.

During 1961 and 1962, Senator Philip A. Hart, Chairman of the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, in response to growing consumer discontent, held extensive hearings on packaging and labeling practices in the "kitchen and bathroom" products industry.[9] As a result of the testimony, Senator Hart introduced

[7] 1965 Senate Hearings 719-20.

[8] Hearings Before the House Committee on Interstate and Foreign Commerce, 89th Cong., 2d Sess., ser. 44, pt. 1, at 237-38 (1966) [hereinafter cited as 1966 House Hearings, pt. 1].

[9] Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 87th Cong., 1st & 2d Sess. (1961-62).

S. 3745 in September 1962.[10] No final Senate action was taken on the bill in that session, and in January 1963 he proposed S. 387.[11] The Senate again took no final action. Senator Hart submitted S. 985 in February 1965, and the Senate Committee on Commerce held hearings in April and May of that year.[12] In March 1966, President Johnson emphasized the need for the passage of fair-packaging legislation.[13] The Senate amended and passed S. 985 (72 to 9) in June 1966, and sent the bill to the House of Representatives, where forty-one versions of packaging legislation had previously been proposed.[14] The House Committee on Interstate and Foreign Commerce held hearings in July, August, and September; on October 3 the House passed S. 985 (300 to 8) with a number of amendments. Thereafter, a conference committee considered the differences between the Senate and House versions and recommended adoption of most of the House version.[15] In October, both the House and Senate agreed to the conference committee report,[16] and President Johnson signed the FPLA into law shortly thereafter.

II. Provisions of the Act

The policy of the FPLA, as declared in section 2, is to "enable consumers to obtain accurate information as to the quantity of the contents and [to] . . . facilitate value comparisons." As originally proposed, S. 985 had no policy declaration, nor did Senator Hart's prior bills, S. 3745 and S. 387. The Senate Commerce Committee had suggested a policy declaration identical to the final one except that the word "price" was used instead of the word "value."[17] The word "value" was substituted by the House Committee on Interstate and Foreign Commerce;[18] the conference committee accepted the House version because it felt that the ideas of value and value comparisons were more comprehensive than the idea of "price."[19] The change, however, is an improvement only to the extent that the remainder of the act is consistent with the broader concept of value. It is submitted, and will be hereafter supported, that the remainder of the FPLA does not provide the consumer with information necessary to make value comparisons appreciably easier, and thus the change of wording is not significant.

Section 3 contains a general prohibition clause, making it unlawful for anyone engaged in the packaging or labeling of consumer commodities to distribute in interstate commerce any product with a label which does not

---

[10] S. 3745, 87th Cong., 2d Sess. (1962).

[11] S. 387, 88th Cong., 1st Sess. (1963).

[12] 1965 Senate Hearings, supra note 2.

[13] 112 Cong. Rec. 5990-91 (daily ed. March 21, 1966).

[14] 1966 House Hearings, pt. 1, at 1-2.

[15] H.R. Rep. No. 2286, 89th Cong., 2d Sess. (1966) [hereinafter cited as H.R. Rep. No. 2286].

[16] 112 Cong. Rec. 26064 (daily ed. Oct. 17, 1966) (House); 112 Cong. Rec. 26565 (daily ed. Oct. 19, 1966) (Senate).

[17] S. Rep. No. 1186, 89th Cong., 2d Sess. 32 (1966) [hereinafter cited as S. Rep. No. 1186].

[18] H.R. Rep. No. 2076, 89th Cong., 2d Sess. 1 (1966).

[19] H.R. Rep. No. 2286, at 9.

conform to the FPLA and the regulations promulgated under its authority. Section 3(b), however, specifically exempts wholesalers and retailers from the general prohibition unless they also package or label commodities or exercise any control over the manner in which commodities are packaged or labeled. This exemption limits the scope and effectiveness of the act because, in several instances, the abuses which Congress intended to control could be treated more completely by regulating the retailer as well as the manufacturer.[20]

A. *Quantity, Servings, and Size Characterization*

Sections 4 and 5 contain the heart of the FPLA: the regulatory authority of the Secretary of Health, Education, and Welfare, and of the FTC. Under section 4, the agencies are directed to establish specific labeling requirements. Some of these requirements concern *what* is printed on the label; the others concern the *appearance* of the information on the label. Under section 4(a), the following information *must* be on the label: the identity of the commodity; the name and place of business of the manufacturer, packer, or distributor; the net quantity of the contents; and the net quantity of each serving of the commodity if any statement of the servings yield appears on the label. No qualifying words or phrases may appear on the label *in conjunction with* the required statement of the net quantity.[21] Section 4(b) permits the appearance elsewhere on the package of supplemental statements which are nondeceptive and do not exaggerate the quantity of weight, measure, or count.[22]

Manufacturers often state on the label that a package will yield a

---

[20] Senator Morton of Kentucky proposed an amendment to extend the FPLA's coverage to retail pricing practices. 112 Cong. Rec. 12161-62 (daily ed. June 9, 1966) (amendment no. 576). The amendment was tabled. Id. at 12164-65. It was apparently felt that the abuses revealed in the hearings were problems generally relating to packaging and labeling practices of manufacturers rather than pricing practices of retailers. Senator Hart voted in favor of tabling amendment no. 576. Id. at 12165. During debate on another amendment, Senator Hart said it would be unfair to regulate those to whom the provisions would apply before they had been given a chance to testify. He also stated that "it would be prudent to defer extension of the broader coverage until we have had some experience under the bill." Id. at 12166. Perhaps the same reasoning would apply to amendment no. 576.

[21] Section 4(a)(3) provides that the net quantity of packages less than four pounds or one gallon is to be expressed in terms of the smaller units of measure and the total number of larger units. For instance, a liquid commodity would be labeled "18 liquid ounces, one pint 2 liquid ounces"; a commodity measured by weight would be labeled "18 avoirdupois ounces, one pound 2 avoirdupois ounces." Commodities measured in length would be labeled in total inches and total feet or yards; those measured in area would be marked in total square inches and square feet or yards. The net quantity must be stated conspicuously in legible type which contrasts with the background and in a type size which will be established in relation to the area of the "principal display panel" of the label. This panel is, under § 10(f), the one most likely to be seen by the consumer as he shops in the supermarket. The specificity of these provisions indicates that the FPLA will be effective in regulating quantity statements.

[22] Section 4(a)(2) requires that the quantity statement appear separately at a uniform location on the principal display panel of the label.

certain number of servings. A problem arises when the quantity of each serving is less than the consumer expected.[23] In order to make a meaningful decision where a package contains a servings representation, the consumer should know the following: the total quantity which the contents will produce when prepared; the number of *reasonable* servings which the contents will yield; and the total price of the package. Section 4(a)(4) of the FPLA, however, only requires the manufacturer to state the *quantity* of each serving.

Section 4(a)(4) is inadequate for three reasons. First, it assumes that a per serving quantity statement will be meaningful to the consumer. This assumption is unrealistic; most consumers do not know how many ounces of a commodity comprise an adequate serving.[24] Second, the act does not provide the consumer with the statistic that would be most meaningful: the total quantity that a package will produce when prepared. This information is extremely important on packages whose powdered or otherwise concentrated contents require the addition of ingredients such as eggs, milk, or water. In such cases, the mandatory net quantity statement of the package is not a very useful value comparison tool because it does not indicate the total amount of end product. The consumer must multiply the number of servings times the quantity per serving to find the total yield for each competing package of that commodity, and then compare the amounts and prices to determine which is the best value. Most consumers will probably not take the time and trouble necessary to make this computation. Third, the act fails to provide for the establishment of standards defining the minimum amount which must be in each serving. If this were done, the consumer could at least be sure of getting a reasonable amount per serving. Since the regulation would only establish a minimum amount, the quantity given per serving would very likely become a competitive factor, with consequent consumer benefits.

According to the sponsors of the act, the only way a consumer can make an intelligent purchasing decision is as follows: First, he must compute the price of the smallest common unit of measure of each brand and size; second, he must determine which is the least expensive on the per unit price basis; third, he must decide if the increased price of a more expensive item is justified.[25]

---

[23] In one instance, the same manufacturer marketed two packages of the same product containing identical quantities, but with different statements of servings yields. 1966 House Hearings, pt. 1, at 232.

[24] For example, if one label represented that the contents would produce seven 3.6-ounce servings and another that the contents would produce nine 2.8-ounce servings, substantial deception is likely. The consumer might think he is buying enough for seven or nine people when, in fact, neither 3.6 ounces nor 2.8 ounces is an adequate serving for one person. The deception is intensified if, as in this example, the two packages yield the same total amount—25.2 ounces. Furthermore, if the price of the nine-servings package is even slightly less than the seven-servings package, the consumer is deceived into believing he is getting more for less money.

[25] "If two products are of similar quality, or if they are different in quality, price per unit is the initial basic determination that must be made. Is the additional quality, if any, worth the additional cost?" 1965 Senate Hearings 720 (statement of Senator Hart).

Before the FPLA, per unit price computations were extremely difficult because the net quantity statement was not uniformly expressed. One liquid commodity made by three different manufacturers might be labeled "16 ounces," "one pint," or "½-quart." In order to make a per unit price computation, the consumer would first have to ascertain a common basis of size comparison. Section 4 of the FPLA now provides the common basis, but, since the quantities, although expressed in uniform units, will usually be unequal, the computation is still too complex and time consuming for most people to bother with. The inconvenience required to divide the total price of each brand and size by its quantity to arrive at the per unit price is too great. The consumer probably will never know whether the unit price of a 22.5-ounce size is significantly more or less expensive than an 18.3-ounce size.[26] One study found that forty-three per cent of the time, the women tested were unable to determine which brand and size was the least expensive, although they were given three times longer than the average shopper to make each decision. In this study, college-educated women were told to choose the least expensive packages of twenty products; as a result of their errors they paid nine per cent more than was necessary.[27]

The congressional intent "to facilitate value comparisons" is not accomplished when the consumer is assured only of knowing the total number of common units of measure necessary to start the price per unit computation. If, however, section 4 contained a provision requiring retailers to stamp the per unit price *in addition* to the total price, the consumer would be able to compare prices easily.[28] A 9-ounce jar of instant coffee selling for $1.27 would be stamped $1.27 *and* 14.11 cents per ounce. The shopper could, with a minimum of time and effort, compare the per ounce prices of the brands and sizes which interest him. Having the per unit prices of all the brands and sizes, the consumer would be able to make his choice with an awareness of the additional money he is spending for nonprice considerations such as package size and shape. For example, under present practices, prepackaged meats are usually sold with the per pound price as well as the total price printed on the label. The purchaser may easily compare the unit price of one cut or grade of steak with the unit price of another cut or grade. Further-

[26] Mr. Paul Rand Dixon, Chairman of the FTC, cited an instance where it was less expensive to purchase two 14-ounce bottles of a 49¢ mouthwash than it was to buy one 1-pint, 4-ounce bottle of the same mouthwash for 88¢. The 14-ounce bottle cost 3.5¢ per ounce and the 1-pint, 4-ounce bottle cost 4.4¢ per ounce. 1966 House Hearings, pt. 1, at 39.

[27] Friedman, Truth in Packaging in an American Supermarket, as reported in 1966 House Hearings, pt. 1, at 154-60. It is interesting to note that no errors were made in selecting granulated sugar or solid shortening, both of which are marketed in only a few standard quantities (sugar in one, five, and ten pounds; solid shortening, in one and three pounds). In contrast, not one of the thirty-three subjects was able to select the least expensive powdered detergent, and only one subject chose the least expensive liquid bleach. Powdered detergents are not sold in standard quantities. 32 Consumer Reports 115 (1967) listed sixteen brands of powdered detergents found on the shelves of a New York A & P; all but one of those brands came in more than one size, and there were twenty different sizes for sale.

[28] See 1966 House Hearings, pt. 2, at 866.

more, he is able to see the meat while making his purchasing decision. The need for per unit pricing is even greater when, as is the case with most supermarket products, the contents are not visible.[29]

Section 5 of the FPLA provides discretionary authority for the FTC and the Secretary of Health, Education, and Welfare to regulate certain packaging and labeling practices on a commodity-wide basis.[30] Section 5(c)(1) authorizes the agencies to "establish and define standards" for size characterization. The frequently-cited example of the abuse is that the smallest size of toothpaste sold is often labeled "large."[31] It is difficult to predict exactly how the agencies will regulate the practice. One possible approach is as follows: First, the agencies will survey a product line and learn the sizes in which the product is sold; second, they will divide the entire size range into three or four size categories; third, they will determine which size designations manufacturers may use to characterize each size category.[32]

If the treatment given the proliferation problem in section 5(d)[33] does not significantly reduce the number of sizes in which commodities are sold, section 5(c)(1) is less likely to be effective. As long as there are enough sizes in any product line to require more than three or four size characterizations, there will be consumer confusion. If only three characterizations such as "small," "medium," and "large" are allowed, regardless of the number of sizes which each characterization category includes, the characterization will be too general to be informative to the consumer. Congress apparently did not recognize that a characterization such as "family size" competes with the net quantity statement for the consumer's attention. No matter how its use may be limited, the size characterization is a poor and confusing substitute for what should be the only guide to size—the net quantity statement. It would have been simpler and more consistent with the act's policy if size characterizations had been eliminated from labels completely.

---

[29] Approximately 85% of the products sold in supermarkets are prepackaged. Id. at 1034. The majority of these products are not visible through the package.

[30] This is a significant change because, according to George Larrick, then Commissioner of Food and Drugs, the FDA was authorized to act only on a case-by-case method, bringing seizure and condemnation proceedings against a particular item. 1965 Senate Hearings 24. Under the authority of the Federal Trade Commission Act, the FTC can issue cease-and-desist orders only against an individual company for violations of that act. Id. at 84 (statement of Mr. Paul Rand Dixon, Chairman of the FTC). See generally Forte, The Food and Drug Administration, the Federal Trade Commission and the Deceptive Packaging of Foods, 40 N.Y.U.L. Rev. 860 (1965).

[31] 1965 Senate Hearings 719.

[32] The problem with this approach centers around how the agencies will determine which names properly describe a particular size category. Should the category of smallest sizes be "small," "junior," or "regular"? Should the middle category be "medium," "regular," or "average"? Should the category of largest sizes be "large," "jumbo," "family," "king," or "giant"? A consumer could easily be confused trying to remember which characterization represented the particular size that he wanted to buy in that product line.

[33] See pp. 635-37 infra.

B. *"Cents-Off"*

"Cents-off" is a sales promotion technique which manufacturers use to market their commodities. For example, a retailer might usually purchase a commodity from a manufacturer for 50 cents and sell it to the consumer for 75 cents. The manufacturer may decide to offer his product on a "cents-off" promotion and label the commodity to that effect: "10¢ off regular price." He then sells the commodity to the retailer for 40 cents, intending that the retailer will pass on the full 10-cent price reduction to the consumer. There are two ways in which the manufacturer's "cents-off" label can be deceptive. First, it promises that the consumer will receive a price reduction when, in fact, the manufacturer usually has no control over the price that the retailer charges.[34] Retailers often give less than the full discount or no discount at all.[35] Second, the practice is deceptive if it is used so often that the reduced price is really the usual price and there is no discount at all.[36]

Section 5(c)(2) permits the Secretary of Health, Education, and Welfare and the FTC to regulate "cents-off" in order, under the general authority of section 5(c), to prevent consumer deception or to facilitate value comparisons.[37] To be successful, the Secretary and the FTC must be able to control both deceptions set out above. It is submitted, however, that because there is nothing in section 5(c)(2) which permits the agencies to regulate the *retailer*, the section is unlikely to succeed in eliminating the first deception. Section 5(c)(2) of the FPLA should, on the other hand, control the second deception. This is a practice that is entirely within the manufacturer's control, because he alone decides how often his product is labeled for sale at a reduced rate.

Congress could have enacted one of three provisions to insure that the consumer would not be subjected to the first deception. Congress could have prohibited "cents-off" promotions entirely, the easiest way to deal with the problem. It was apparently felt, however, that Congress should regulate rather than prohibit, because "cents-off" does sometimes afford the consumer a discount, and because it is one of the most effective sales techniques that a small manufacturer can use to compete against larger companies.[38] A second possibility is a fair-trade provision whereby manufacturers would exercise control over the prices retailers charge. This proposal was also rejected.[39] Finally, Congress could have provided express authority in section 5(c)(2) for the agencies to prohibit retailers from charging any more than the regular price minus the labeled discount. This is different from a fair-trade law because the manufacturers would not be controlling regular or discount

---

34 1965 Senate Hearings 569, 668.

35 See 1966 House Hearings, pt. 2, at 722.

36 1965 Senate Hearings 99.

37 Although discussion here is limited to the "cents-off" practice, § 5(c)(2) was worded to apply to any representation made on the package or on the label that "a . . . price advantage is accorded to purchasers . . . by reason of the size of that package or the quantity of its contents." Therefore, labels stating that the package was the "economy size" would be regulated. See S. Rep. No. 1186, at 6.

38 1965 Senate Hearings 97.

39 See note 20 supra and accompanying text.

prices. The last suggestion is the best, because it would not interfere with the pricing relationship between manufacturers and retailers, yet it would guarantee that the consumer could rely on the discount promise made on the label.

C. *"Slack-Filling"*

Section 5(c)(4) of the FPLA permits the agencies to "prevent the nonfunctional-slack-fill of packages containing consumer commodities." Slack-filling is the practice of filling a package to less than the entire capacity.[40] The FPLA defines "nonfunctional" slack-filling as filling packages to a level *substantially* less than capacity, unless protection of the contents, or the machines used to pack the containers, prevent the packages from being full.

Previous tests of whether packages were sufficiently full have proven somewhat less than adequate. Section 403(d) of the Federal Food, Drug and Cosmetic Act states that a food is misbranded "if its container is so made, formed, or filled as to be misleading." The test is one of deception: would the ordinary purchaser be deceived as to the quantity of the contents?[41] The FTC derives its authority over deceptive packaging from Section 5 of the Federal Trade Commission Act,[42] which prohibits unfair methods of competition and deceptive trade practices. Again, the test is deception: would a substantial portion of the purchasing public be deceived as to the quantity of the package?[43]

Section 5(c)(4) should be considerably more effective in solving the slack-filling problem than the Federal Food, Drug and Cosmetic Act. In the four major slack-filling cases brought by the Food and Drug Administration under section 403(d), the government has lost each time: twice on the grounds that ordinary purchasers would not be deceived;[44] once on a finding that the machine could not fill the container any fuller without jamming its mechanism;[45] and once on the ground that the package was not deceptive, and even if it were, slack-filling was necessary to protect the contents.[46] It is submitted that if the first two cases were now litigated under the FPLA, the government would be more successful. In *United States v. 738 Cases of Jiffy-Lou Vanilla Flavor Pudding*,[47] the box was fifty-five per cent full, and in *United States v. Cataldo*,[48] the carton was only forty-five per cent full. Such percentages would probably qualify the packages

---

[40] See 1965 Senate Hearings 90-91.

[41] United States v. 174 Cases of Delson Thin Mints, 287 F.2d 246, 247 (3d Cir.), aff'd on rehearing, 195 F. Supp. 326 (D.N.J. 1961), aff'd per curiam, 302 F.2d 724 (3d Cir. 1962).

[42] 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a)(6) (1964).

[43] United Drug Co., 35 F.T.C. 643, 647 (1942).

[44] United States v. Cataldo, 157 F.2d 802, 804 (1st Cir. 1946); United States v. 738 Cases of Jiffy-Lou Vanilla Flavor Pudding, 71 F. Supp. 279, 281 (D. Ariz. 1946).

[45] United States v. 116 Boxes of Arden Assorted Candy Drops, 80 F. Supp. 911, 913 (D. Mass. 1948) (machine's limits held to be imputed to the consumer).

[46] United States v. 174 Cases of Delson Thin Mints, supra note 41, at 247.

[47] 71 F. Supp. 279 (D. Ariz. 1946).

[48] 157 F.2d 802 (1st Cir. 1946).

as being "filled to substantially less than [their] . . . capacity." Assuming no defense of machine packing or contents protection, the slack-filling would be regulated in order to prevent consumer deception or to facilitate value comparisons. The essential difference between the Federal Food, Drug and Cosmetic Act and the FPLA is that, under the former, the government had to prove that a package was filled so as to deceive before the package could be declared mislabeled; under the latter, the government merely has to prove that the package is less than substantially full.

Whether the difference in treatment is illusory or not will depend on cases litigated under section 5(c)(4). It may turn out that the courts will choose to construe "substantially" in such a way as to require the package to be filled to less than thirty or forty per cent of the capacity before regulation would be justified. This would be an unfortunate construction of 5(c)(4), because Congress probably did not intend to make it more difficult for the agencies to regulate slack-filling. Slack-filling is a significant problem which requires effective control. Congress has indicated that strong measures should be taken, and the courts should not construe section 5(c)(4) as retaining the rules of cases litigated under the old test of deception.

D. *Size Proliferation*

The last provision of section 5 was the most hotly contested during the Senate and House hearings. Section 5(d) of the FPLA grants authority to the Secretary of Commerce to request the creation of a voluntary product standard when the Secretary decides "that there is undue proliferation of the weights, measures, or quantities in which any consumer commodities are being distributed for sale . . . and such undue proliferation impairs the reasonable ability of consumers to make value comparisons. . . ." The voluntary product standard would be developed with manufacturer, packer, distributor, and consumer interests represented. If, after one year, a satisfactory standard is not submitted, or if the one submitted is not followed, the Secretary is authorized to request legislation from Congress.

The FPLA treatment of the proliferation-of-size problem is in marked contrast to the Senate bill. As introduced, S. 985 simply contained authorization for the agencies to establish the weights and quantities in which consumer commodities were to be sold.[49] As passed by the Senate, S. 985 was drafted to require the Secretary of Health, Education, and Welfare and the FTC, as a preliminary step, to publish their determination that size proliferation existed.[50] Any producer or distributor affected could, within sixty days after the determination of proliferation was published, request the Secretary of Commerce to participate in the development of a voluntary product standard for that commodity.[51] If no such request were made, the agency would promulgate a regulation setting the sizes in which the commodity could be sold. If there were a request for a standard, then the regulation eventually promulgated could not vary from the standard.[52] In effect,

[49] S. 985, 89th Cong., 1st Sess. § 3(c)(1) (1965).
[50] S. Rep. No. 1186, at 35.
[51] Ibid.
[52] Ibid.

under the Senate-passed version, industry had the power to substitute its own standard for the agency's once the determination of size proliferation had been made.

The House amended this section so that instead of having sole or qualified authority to regulate sizes, the FTC and the Secretary of Health, Education, and Welfare are not permitted to regulate the size-proliferation problem at all. Only the Secretary of Commerce has the power to ascertain the problem and to request the development of a voluntary product standard. The standard developed will not have the effect of law or regulation,[53] and the only enforcement available is an appeal to Congress for legislation.[54]

Nothing seems to have been gained by the adoption of the House amendment in the act. The built-in delay of at least one year and the lack of enforcement provisions apparently evidence Congress' concessions to the pressure exerted by industry.[55] No other provision of the FPLA received more criticism from industry spokesmen testifying at the House hearings. They asserted that the powers proposed to be given to the FTC and the Secretary of Health, Education, and Welfare under the Senate-passed bill would increase manufacturers' (and ultimately consumers') costs as well as stifle packaging innovation.[56] They based their arguments on the fact that the varying densities of different kinds of a commodity require the use of many different size containers to accommodate a standard quantity of the commodity. For example, the president of the Kellogg Company (breakfast cereals) testified that Kellogg uses one size container for 6½ ounces of "Special K," 10 ounces of "Sugar Frosted Flakes," 10 ounces of "Pep Wheat Flakes," and 14 ounces of "Raisin Bran." He contended that it would cost three to six million dollars to market these cereals in equal quantities because different size boxes would have to be used to hold the same net weight.[57]

The Senate version, however, had specifically provided for such situations in two ways. First, the agencies had to consider the probable effect of their regulations on manufacturers' costs and the desirability of a reasonable variety of package sizes.[58] Second, the agencies could not prohibit "any package . . . customarily used for the distribution of related commodities of

---

[53] See 15 C.F.R. § 10.7(a) (1966) (procedures for development of voluntary product standards).

[54] FPLA § 5(e)(2).

[55] "The special interests fighting Truth-in-Packaging . . . put on an awesome campaign, particularly after the Senate passed its version of the bill in June by a commanding 72 to 9 vote." 32 Consumer Reports 113 (1967). See 1966 House Hearings, pt. 1, at 607-23 (statement of Mr. Max Benzhaf, Vice President of the Armstrong Cork Company and representing the Chamber of Commerce of the United States); 1966 House Hearings, pt. 2, at 811-25 (statement of Mr. D. Beryl Manischewitz, representing the National Association of Manufacturers).

[56] 1966 House Hearings, pt. 1, at 525-27 (statement of Mr. Lyle C. Roll, President of the Kellogg Company); 1966 House Hearings, pt. 2, at 813 (statement of Mr. D. Beryl Manischewitz).

[57] 1965 Senate Hearings 335 (statement of Mr. Lyle C. Roll); id. at 98; 1966 House Hearings, pt. 1, at 580.

[58] S. Rep. No. 1186, at 35.

varying densities" unless the use would be deceptive.[59] Thus, there is no justification to industry's claims that the Senate version of 5(d) would have been costly or ruinous to innovation. Modification of the Senate-passed version occurred because of the pressure exerted by the powerful companies whose products come under the jurisdiction of the FPLA.[60] The House amendment will not do more to solve the problem of size proliferation than the Senate provisions would have. It will probably even do less, and at a greater cost of time and money.[61]

E. *"Consumer Commodities"*

The FPLA was drafted to regulate the packaging and labeling of "consumer commodities," which are defined in section 10(a) as

> any food, drug, device, or cosmetic (as those terms are defined by the Federal Food, Drug, and Cosmetic Act), and any other article, product, or commodity of any kind or class which is customarily produced or distributed for sale through retail sales agencies or instrumentalities for consumption by individuals, or use by individuals for the purposes of personal care in the performance of services ordinarily rendered within the household, and which usually is consumed or expended in the course of such consumption or use.

Excluded are: meats, poultry, tobacco, alcoholic beverages, seeds, economic poisons (insecticides, fungicides, and rodenticides), prescription drugs, and insulin, which are subject to special labeling requirements of other federal statutes.

The intention of the act's sponsors was to limit the application of the FPLA to commodities sold in grocery stores and supermarkets, because it was felt that the most serious impediments to value comparisons are the result of packaging and labeling abuses in the marketing of those commodities.[62] The definition, however, is vague enough so that the FPLA need not be limited only to "kitchen and bathroom" products. An amendment was proposed in the Senate to extend FPLA coverage to all commodities sold in packages.[63] The purpose of the amendment was to resolve doubts

---

[59] Ibid.

[60] Among those appearing at the House Hearings in opposition to the FPLA were representatives of the Kellogg Company, National Biscuit Company, General Foods, Pet Milk Company, Scott Paper Company, Campbell Soup Company, and the Proctor & Gamble Company. In addition, many trade associations sent representatives to voice disapproval: National Association of Manufacturers, Label Manufacturers National Association, Inc., Grocery Manufacturers of America, Soap & Detergent Association, Toilet Goods Association, and the National Canners Association.

[61] H.R. Rep. No. 2076, 89th Cong., 2d Sess. 15 (1966). Each voluntary product standard costs the government $20,000. The Department of Commerce estimated that its administration of the voluntary standard procedures would cost a total of $700,000 to $1,000,000 per year. Ibid. These figures reflect an estimate of thirty-five to fifty standards per year.

[62] 112 Cong. Rec. 12166 (daily ed. June 9, 1966) (remarks of Senator Hart).

[63] Id. at 12165 (amendment no. 575, proposed by Senator Cotten of New Hampshire).

about whether items such as paints, varnishes, nails, and stationery were covered by the act. Although the amendment was defeated, the Senator who proposed it suggested that the definition of "consumer commodity" could be construed so as to include paints and varnishes anyway.[64] This seems entirely possible. Paints and varnishes are commodities customarily distributed for sale through retail sales agencies (hardware stores), for use by individuals in the performance of services ordinarily rendered within the household, and are usually expended in the course of such use. The act does not specifically mention grocery stores or supermarkets.

It is possible, then, that through judicial construction, the FPLA may be more comprehensive than it was intended to be. It would have been wiser if Congress had left no doubt as to which commodities were covered. There is no way to tell whether the agencies will restrict their regulations only to those items sold in grocery stores and supermarkets. In addition, there is no way to tell whether grocery stores and supermarkets will always sell the same kinds of commodities. The twenty thousand items predicted for supermarket shelves by 1975 may include items not now considered kitchen or bathroom products, but which qualify under the definition in section 10(a). Judicial inclusion of such items might lead to an extension of the act to items presently assumed to be exempt.

III. Preemption of State Laws

Congress declared in section 12 that the FPLA preempts all state laws "which are less stringent than or require information different from the requirements of section 4 of this Act or regulations promulgated pursuant thereto." S. 387 also had a preemption clause, but it was worded so that the act would not preempt any state act "unless there is a direct and positive conflict" between the state and federal laws.[65] It is apparent that Congress intended to make the FPLA the minimum standard for the packaging and labeling of consumer commodities. State laws may impose more rigorous standards, but they may not require information on the label different[66] from that required by section 4 regulations.

It does not seem likely that the FPLA will have much effect on state law. The National Bureau of Standards sponsors the National Conference on Weights and Measures, an association of state weights and measures officials. The Conference drafted the Model State Regulation Pertaining to Packages, which is in effect in nineteen states.[67] In addition, other states

---

[64] Id. at 12167 (remarks of Senator Cotten). The following were also mentioned as items to which the definition might apply: stationery, gift wrapping paper, floor waxes, clothespins, string, ribbons, ink, glue, paste, nails, safety pins, and straight pins. Id. at 12165.

[65] S. 387, 88th Cong., 1st Sess. § 2(d) (1963).

[66] "Different" was thought to be synonymous with "inconsistent." H.R. Rep. No. 2286, 89th Cong., 2d Sess. 11 (1966).

[67] 1966 House Hearings, pt. 2, at 914. Those states are: Arkansas, California, Delaware, Hawaii, Illinois, Kansas, Kentucky, Michigan, Mississippi, Missouri, Montana, New York, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, and West Virginia.

use the Model Regulation as an unofficial guide in regulating packaging and labeling of commodities manufactured within the state.[68] Because many of these commodities are shipped interstate, they would have to comply with the regulations promulgated under section 4 of the FPLA. Although it is not possible to say exactly what the FPLA regulations will be, it is clear that at least one provision of the Model Regulation will be preempted. Section 3.5 of the Model Regulation contains rules for declaring the net contents on a package. Instead of requiring a statement of both the total number of smallest units of weight or measure and the larger units, the Model Regulation requires only that the *largest* whole unit of weight or measure be stated on the label. Under the Model Regulation, a 33-ounce liquid commodity would be labeled "one quart, one ounce," whereas under section 4(a)(3)(A)(ii) of the FPLA, it would be labeled "33 liquid ounces—one quart, one liquid ounce."

Where section 4 of the FPLA does not authorize regulations comparable to those in the Model Regulation, there will be no preemption. For example, the Model Regulation contains a provision in section 3.7.1 requiring that any supplemental quantity declarations, such as "6 muffins," may appear, as long as the type size is no larger than that of the net quantity statement, and as long as the supplemental quantity declaration does not detract from the required quantity statement in any way. Since there is no authority for such a regulation in section 4 of the FPLA, and since the provision of the Model Regulation does not require information different from any other section of the FPLA, there would be no preemption.

In addition to the Model State Regulation Pertaining to Packages, the National Conference has also drafted the Model State Law on Weights and Measures which has been adopted by twenty states.[69] Only Section 26 of the Model Law substantially corresponds to the provisions of section 4 of the FPLA. It contains a general requirement that the net quantity of commodities (in terms of weight, measure, or count) be stated conspicuously on the outside of the package. It also forbids the use of qualifying terms (such as "jumbo," "giant," or "full") in conjunction with the net quantity statement if they tend to exaggerate the quantity. Section 26 of the Model Law does not appear to require any information different from that required

---

[68] Id. at 920.

[69] Ala. Code tit. 2, §§ 587-633 (1958); Alaska Stat. §§ 45.75.010-.400 (1962); Ark. Stat. Ann. §§ 79-201 to -234 (Supp. 1965); Colo. Rev. Stat. Ann. §§ 152-1-1 to -35 (1963); Del. Code Ann. tit. 6, §§ 5101-45 (Supp. 1964); Fla. Stat. Ann. §§ 531.01-.53 (1962); Hawaii Rev. Laws §§ 22B-1 to -23 (Supp. 1965); Ill. Ann. Stat. ch. 147, §§ 1-51 (Smith-Hurd 1936); Me. Rev. Stat. Ann. tit. 10, §§ 2301-751 (1964); Md. Ann. Code art. 97, §§ 1-83 (1957); Mich. Stat. Ann. §§ 12.1081(1)-(34) (Supp. 1965); Miss. Code Ann. §§ 5132-01 to -37 (Supp. 1964); Mo. Ann. Stat. §§ 413.220-.430 (Supp. 1966); Mont. Rev. Codes Ann. §§ 90-601 to -621 (Supp. 1965); N.M. Stat. Ann. §§ 76-1-28 to -55 (Supp. 1965); Pa. Stat. Ann. tit. 76, §§ 100-1 to -42 (Supp. 1966); Tenn. Code Ann. §§ 71-201 to -246 (Supp. 1966); Va. Code Ann. §§ 3.1-919 to -969 (1966); Wash. Rev. Code Ann. §§ 19.93.010-.900 (1961); Wis. Stat. Ann. §§ 98.01-.26 (Supp. 1967). Twelve states have both the Model Regulation and the Model Law: Arkansas, Delaware, Hawaii, Illinois, Michigan, Mississippi, Missouri, Montana, Pennsylvania, Tennessee, Virginia, and Washington.

by section 4 of the FPLA. Section 4, however, is much more precise than section 26 because it specifically states what must be printed in the net quantity statement, where it will be placed, the type size, and the color background. Section 26, then, is arguably less stringent than section 4 and will be superseded.

The twenty-three states which have not adopted either the Model Law or the Model Regulation have a variety of laws relating to packaging and labeling. Eight resemble section 26 of the Model Act,[70] and to that extent would be preempted by the FPLA. The other fifteen states have laws that are even less specific than the FPLA or are limited to food packages and resemble the quantity provisions of Section 403(c) of the Federal Food, Drug and Cosmetic Act.[71]

For some reason, Congress did not declare that the discretionary regulations under section 5 would preempt state laws as will those under section 4. Nevertheless, the section 5 regulations, if promulgated, will set the minimum standards for all consumer commodities sold in interstate commerce, thereby including the majority of brands manufactured. There are no state laws which are similar to the characterization-of-size provision of section 5(c)(1) or the proliferation-of-sizes procedure in section 5(d). No state has a packaging or labeling law which authorizes regulation of price-reduction programs as does section 5(c)(2). The only provision where there is some duplication in state law is the slack-filling prohibition in section 5(c)(4), and none of the state laws is as specific as the FPLA. Section 28 of the Model Law simply contains a prohibition against packages wrapped or filled "so as to mislead the purchaser as to the contents of the package." Section 9(1) of the Model Law does allow the state Director of Weights and Measures to prescribe a reasonable standard of fill for individual commodities. However, if a state authority set a level of fill lower than that set by a section 5(c)(4) regulation, the 5(c)(4) level would prevail.

IV. Division of Regulatory Authority

The authority to promulgate regulations under sections 4 and 5 of the FPLA was given to the Secretary of Health, Education, and Welfare and to the Federal Trade Commission.[72] The Secretary's authority extends to all foods, drugs, devices, and cosmetics, while the FTC's authority covers all other consumer commodities as defined in section 10(a) of the FPLA. The bulk of the regulations promulgated will emanate from the Secretary, because the majority of commodities described in section 10(a) are foods. The FTC will regulate detergents, paper towels, aluminum foil, tissues, cleaning powders, and other nonfood items. The question raised by this allocation of authority is whether the FPLA would be more effectively implemented if the authority had been given to only one of these agencies.

[70] Idaho Code Ann. § 71-228 (Supp. 1965); Iowa Code Ann. § 189.9 (1946); Mass. Gen. Laws Ann. ch. 94, § 181 (Supp. 1966); Nev. Rev. Stat. § 581.300 (1961); N.C. Gen. Stat. § 81-15 (1965); Ohio Rev. Code Ann. § 1327.44 (Baldwin Supp. 1966); Okla. Stat. Ann. tit. 2, § 5-43 (1964); Ore. Rev. Stat. § 618.160 (1965).

[71] 52 Stat. 1040 (1938), as amended, 21 U.S.C. § 343(e) (1964).

[72] FPLA § 5(a).

Mr. Paul Rand Dixon, Chairman of the FTC, testified that the role of the FTC would be minor under the FPLA because of the relatively few products covered by the act which are not foods, drugs, devices, or cosmetics.[73] He recommended that the FTC be given exclusive authority to promulgate regulations under the FPLA, because he felt that the nature of the act and the nature of FTC procedures and experience made it the logical administrative choice.[74] He noted that the act is not designed to inform consumers in order to protect their health as is the Federal Food, Drug and Cosmetic Act, but is aimed at deceptive practices in labeling and packaging which involve "economics, competition, and promotional practices."[75] Chairman Dixon also stated that the nature of the FTC's enforcement procedures lend themselves more easily to the practices attacked by the FPLA. This is important because the FPLA adopted the enforcement procedures which each agency is accustomed to using. The FTC issues cease-and-desist orders under Section 5(b) of the Federal Trade Commission Act[76] when it finds, after a hearing, that an unfair method of competition or a deceptive trade practice is being used. The FTC does not have to sue in court for enforcement, although its cease-and-desist orders may be appealed to a United States Court of Appeals. This is in contrast to the seizure and condemnation procedure of the Food and Drug Administration, which requires a court determination that the item seized is misbranded under the Federal Food, Drug and Cosmetic Act.[77] The experience of the FTC in regulating selling practices is more extensive than that of the Department of Health, Education, and Welfare, and could be used effectively in administrative proceedings.

Chairman Dixon's suggestions reflect a more logical approach to the administration of the FPLA than the one taken in the final act.[78] The thrust of the FPLA is toward the prevention of certain practices which limit the information available to consumers and make value comparisons difficult. Basic to the thinking behind the FPLA is the fact that the objectionable practices are a form of "nonprice competition" which is not adequately

---

[73] 1965 Senate Hearings 81. The FTC estimated that it would require only $250,000 per year to administer its segment of the FPLA as compared with $1,500,000 estimated by the Secretary for HEW's segment. H.R. Rep. No. 1186, at 9. Assuming their costs of performing like activities are equal, the figures indicate that HEW will have six times as much to do under the FPLA as the FTC.

[74] 1965 Senate Hearings 81.

[75] Ibid.

[76] 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(b) (1964).

[77] 52 Stat. 1044 (1938), as amended, 21 U.S.C. § 334 (1964).

[78] One writer has suggested that because of the possibility that "the FTC could . . . issue trade practice and trade regulation rules which conflict with the regulations issued by the FDA under . . ." the FPLA, the division of authority established by the act could lead to a "jurisdictional quagmire." Forte, The Food and Drug Administration, the Federal Trade Commission and the Deceptive Packaging of Foods, 40 N.Y.U.L. Rev. 860-61 n.5 (1965). The possibility of a jurisdictional conflict will, in all likelihood, remain remote due to the history of cooperation between the FDA and the FTC. See 3 Trade Reg. Rep. ¶ 9850, at 16482-83 (1954). Still, even this possibility could have been eliminated by granting exclusive authority under the FPLA to the FTC.

regulated by existing trade-regulation law.[79] Adding this fact to Chairman Rand's assertions that the FDA is better equipped to deal with practices that affect health and safety rather than competition, it seems that the FTC should have been given exclusive regulatory authority under the FPLA.[80]

V. Conclusions

Any evaluation of the FPLA at this time is necessarily incomplete, because the regulations authorized to treat packaging and labeling practices have not been promulgated, and thus their actual effect cannot be measured. Several observations, however, can be made.

First, the problem of size proliferation was not treated as effectively as it could have been. If the more efficient Senate procedure had been adopted so that the agencies could regulate the sizes in which commodities are sold, consumers who now try to make value comparisons would have an easier task. In addition, those who do not now make their shopping decisions as carefully as they might, will not be encouraged to scrutinize and compare brands and sizes, because there will still be too many different sizes to allow reasonably quick price-per-unit computations.

Second, nothing was done to regulate misleading shapes and sizes. Hopefully, the clearer quantity statement provided by section 4 will mitigate some of the deceptive or confusing effects of shape and size, but too much buying will probably still be made on the basis of package appearance.

Third, nothing was done to regulate the use of misleading pictures on the labels of consumer commodities[81]—a practice that was treated in S. 3745 and S. 387. Perhaps the FTC will do more in this area on the theory that the use of misleading pictures constitutes an unfair or deceptive trade practice subject to appropriate action under Section 5(b) of the Federal Trade Commission Act.

Fourth, the act does not regulate the combination practice of reducing the quantity or size of the contents while simultaneously changing the package size or shape to obscure the change.[82] Manufacturers could have been required to announce on the label any changes in size or quantity by stating both the old and new quantity specifications. The only way consumers will be more aware of changes is if they are already accustomed to reading and remembering the quantity statement on the packages they purchase. Surely a clearer quantity statement will make reading and re-

[79] S. 3745 and S. 387 were proposed as amendments to § 3 of the Clayton Act, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 14 (1964).

[80] This exclusive authority should include the authority given the Secretary of Commerce under § 5(d) of the FPLA. See pp. 635-37 supra.

[81] An example of this practice submitted during the House hearings was that of a frozen cherry pie. Pictured on the label was a slice representing one-fourth of the pie. Forty cherries were counted in that slice, yet only seventy cherries were actually contained in the *entire* pie. 1966 House Hearings, pt. 1, at 271. Other examples of this practice which were given included: frozen dinner packages, ibid.; pork and beans cans and chocolate chip cookies, 1966 House Hearings, pt. 2, at 773.

[82] One instant mashed potato package and its contents were manipulated over a four-year period, achieving a 36% price increase. 1966 House Hearings, pt. 1, at 237.

membering easier, but the practice of adjusting package sizes to obscure quantity changes will still exist and will probably continue to take its toll of the unwary.

Overall, the FPLA should achieve a fair degree of success in carrying out the first element of the policy declaration in section 2—providing more information, clearly stated, on the labels of consumer commodities. It is doubtful, however, that a significant improvement in the facilitation of value comparisons will be made except for those who are willing, using the information guaranteed by the FPLA, to continue to match wits with manufacturers and take the time that will still be necessary to make intelligent buying decisions in the supermarket.[83]

WALTER ANGOFF

[83] "Business is probably not delighted to have a bill but is probably delighted with the one they have." 32 Consumer Reports 113 (1967) (statement of advertising executive William J. Colihan, Jr.). "I would call it the housewives' bill or a bill for housewives because it was made for them. If they had controlled the fate of this bill, I am sure it would be about 10 times as strong as it is." 112 Cong. Rec. 23858 (daily ed. Oct. 3, 1966) (remarks of Congressman Harley O. Staggers).