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Foreword

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Kansas Law Review

FOREWORD

*Arthur H. Travers, Jr.**

The function of a symposium is to bring together, in print, a group of experts to examine a problem of current significance. The function of a foreword to such a symposium is to summarize what is said in the articles to follow, thus enabling the writer of the foreword to add a title to his publications list (a result not to be lightly dismissed in a profession which often equates talent and title-count in the same fashion that some military men equate victory and body-count) and enabling the less-than-avid reader to acquire enough information about the symposium to chatter about it at cocktail parties without the necessity of actually reading it. It gives me great pleasure to do the conventional. But the subject of this symposium is so important and timely that I would be greatly disappointed if I discouraged the reader from tackling the articles themselves.

This symposium deals with federal regulation of advertising; necessarily it focuses upon that agency assigned the major portion of that regulatory task: the Federal Trade Commission. Of late, the Commission has been under attack from groups who claim that the Commission's consumer protection record is rather poor. I do not propose to enter the debate about the FTC's performance here, beyond venturing the pedestrian comment that undoubtedly the FTC could do better—as could law professors and every one else. Those interested in the debate should read the recent, scathing report by "Nader's Raiders," Chairman Dixon's statement in reply,[1] and the articles in this symposium, several of which are critical of certain existing practices and policies and offer constructive suggestions for change.[2]

Being attacked is nothing new to the Commission. It was severely criticized in Gerard Henderson's study in 1924;[3] it was one of many regulatory agencies scored in Professor Bernstein's important study in 1955;[4] it received some demerits in the Civil Service Commission Report in 1965;[5] and there have been other negative judgments. But certain aspects of the criticism by Professor Schulz and his associates indicate that their dissatisfaction with the FTC's

* Associate Professor of Law, The University of Kansas. B.A. 1957, Grinnell College; LL.B. 1962, Harvard.

[1] Senator Nelson had both the report and reply printed in the Congressional Record of January 22, 1969, Extension of Remarks.

[2] Whether the move resulted from the recent criticism of the FTC is a matter for speculation, but President Nixon recently asked the American Bar Association to study the Commission and make recommendations for its "future activities and organization." Wall Street Journal, April 21, 1969, p. 3, col. 1.

[3] G. Henderson, The Federal Trade Commission (1924).

[4] M. Bernstein, Regulating Business by Independent Commission 108, 222, 225 and *passim* (1955).

[5] Civil Serv. Comm'n Report 26 (1965).

performance is related to what has been called "the consumer revolution"[6] and to the generalized questioning of the status quo by a variety of groups within our society. I have in mind the criticism that the FTC has failed to establish appropriate priorities for the use of its limited resources, particularly the charges that (1) the FTC has not devoted enough attention to deceptive practices directed toward low-income and other disadvantaged groups; (2) the FTC has not given sufficient effort to eliminating from the markets goods creating a health hazard; and (3) the FTC has left the corporate giants pretty much alone.

It may facilitate the understanding of the significance of these charges if a few pages are devoted to the status of the consumer and his "revolution." It cannot now be predicted what direction it will take; it may not be amiss, however, to note that similar "revolutions" have occurred in the past, and they led, not to Thermidor, but to the belated understanding that somehow the ancien regime had not been deposed after all. In other words, from time to time the feeling becomes widespread once again that, for all the rhetoric, the consumer is less in control of the market than he had thought.[7]

In the nature of things the private consumer—as distinct from the industrial user—of goods is at a disadvantage vis-a-vis a dealer in those goods. The typical private consumer rarely engages in transactions involving substantial amounts of money; repeated transactions tend to involve relatively trivial amounts. Thus, the consumer may purchase a can of peas every week, but the amount involved in such a purchase ordinarily does not warrant the expenditure of much effort in learning about peas. The opportunity cost of such an inquiry would exceed the value of any increased satisfaction that might result from it. On the other hand, the purchase of an automobile or some other consumer durable is a transaction of sufficient magnitude for the consumer to lavish more attention on learning about the available options. But the time lag between purchases often means that information acquired for one purchase has only slight relevance to the next purchase of the same commodity and the complexity of the product often means that a great deal of data must be obtained and assimilated. Thus, while the stakes are higher so too are the costs of information acquisition. Consumers are thus often poorly informed, and their "rationality" and ability to control the market is restricted accordingly.

By contrast, the canner of peas and the dealer in automobiles are well informed. Because the same basic transaction is repeated many times over, the information acquired can be used again and again. The opportunity cost of acquiring the information is low in relation to the amount involved in the transactions to which the information will be relevant. There is thus a disparity in information between consumer and merchant. This seems to be a

[6] *E.g.*, J. BISHOP & H. HUBBARD, LET THE SELLER BEWARE: THE CONSUMER REVOLUTION (1969).

[7] It is an interesting fact that a large part of the rhetoric about consumer sovereignty comes from the business community. *See* F. SUTTON, S. HARRIS, C. KAYSEN & J. TOBIN, THE AMERICAN BUSINESS CREED 147-50 (1962).

necessary by-product of the division of labor in a society; the owner of Adam Smith's pin factory undoubtedly knew a great deal more about the pin market than did a seamstress who used the pins.

It is perhaps ironic that the consumer's position should be aggravated by the very success of the American economy in servicing him. It is because the vast majority of goods and services produced are of acceptable quality that the opportunity costs of acquiring information are ordinarily not worth incurring. If one can of peas were delicious but another poisonous, all but those consumers suffering from an excess of nerve or a death wish would deem it worthwhile to learn which was which.

Moreover, the variety of goods and services offered has also complicated matters. Faced with an almost infinite range of choices as to goods and services, his market decisions are correspondingly more difficult, the number of items about which he needs more information is correspondingly greater. Like everyone else limited by his wits, the consumer is forced to engage in "satisficing" as opposed to the traditional "maximizing" behavior; that is, he attempts to select a package of goods and services from the wide variety available that will prove reasonably satisfactory rather than the one best package.[8] Whether the consumer is consciously aware of what he is doing is a debated point, but in any case it would seem that most consumers will find "satisficing" tolerable only if certain conditions are met. First, the consumer must have attained an income level that eliminates or significantly alleviates the compulsion to maximize. Only if relative affluence is fairly well dispersed throughout the populace can the bulk of consumers live with their vulnerability. This may account for the fact that the last great burst of the consumer movement occurred during the Great Depression when large numbers of consumers—many of whom were more highly educated than the average member of a low income group—were reduced to income levels that penalized severely the failure to get the best buy. It may also account for the fact that the current interest in consumer affairs has coincided with the development of a national concern with the persistence of poverty in America despite the general level of wealth, and with the emergence among disadvantaged groups of a significant number of educated and intelligent spokesmen.

Moreover, the facts must warrant the assumption by consumers that no matter what package they choose, things cannot turn out too badly. This means, first of all, that none of the goods he might purchase represents a serious threat to his physical well-being. It means too that, occasional lemons aside, almost all of the goods he might buy will do pretty much what they are bought to do for a reasonable length of time. These assumptions allow the consumer to function in the marketplace without undue anxiety. But in order to make these assumptions the consumer must have enough information to exclude from consideration goods and services which are unsafe or shoddy.

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[8] *See generally* the discussion in J. McGuire, Theories of Business Behavior 182-84 (1964).

He need not have as much information as he would require if he were searching for the optimal package, but he needs something.

It is at this point that advertising enters the picture. Although there are available other sources of information—professional studies like *Consumer Reports* and neighborhood scuttlebutt, for instance—most Americans rely upon advertising for their information about the goods and services available. The costs of acquiring information through advertising seem low to the consumer since the seller is apparently paying to reach him. The Bauer-Greyser study, conducted in the mid-1960's revealed that the majority of those queried had attitudes that were more favorable than unfavorable toward the institution of advertising.[9] Significantly, the major reason given for these approving attitudes was the informational value of advertising.[10]

Critics of advertising are likely to find such attitudes laughable: Recline of an evening before a functioning television set. You will be bombarded with a fearful amount of advertising; in the end you will know little about the products being sold, and most of that will be wrong. The chances are you will not even know one of the facts that economists deem most important: the price.

All of this may be conceded, but the ads did have informational value nonetheless. They informed the consumer what was available, what it looked like, and in general what it would do. The very fact that the maker of the product engaged in extensive advertising on its behalf indicated a substantial company and one willing to risk its reputation by broadcasting its association with the product.[11] So long as the consumer continued to make the assumptions given above, this was about all the information he needed; it told him enough to enable him to decide what to include among his range of potential goods. He was secure.

As a result of the disclosures by Ralph Nader and others, these assumptions have been shaken: If General Motors can make an unsafe automobile, if General Electric can market a television set that leaks radiation, if other reputable firms can produce products that are unsafe or of poor quality, then brand name is no longer an infallible guide to inclusion of the goods for consideration for purchase. The consumer realizes that there are transactions in which it would pay him to acquire more information. But he has no litmus paper test to indicate which transactions these are, and he cannot exhaustively investigate all of them. The recent demise of the Corvair, following a dramatic shrinkage of sales in the wake of charges that it was unsafe, may well illustrate the extent of consumer reaction not only to the threat of harm but to the undermining of an assumption that enabled him to function in the market.

At the same time consumers are becoming more aware of the unwholesome amount of advertising that is simply untrue. If FTC actions are any guide,

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[9] R. BAUER & S. GREYSER, ADVERTISING IN AMERICA: THE CONSUMER VIEW 331 (1968).
[10] *Id.* at 333.
[11] *See* F. SUTTON, *et al.*, *supra* note 7, at 148-49.

whole sections of certain industries seem to be engaged in fraud.[12] Recent studies have shown that a disproportionate number of the victims of these frauds have been the sick, and the old, and the poor. Not only are these groups in economic circumstances that require them to get the best buy, but they are often peculiarly susceptible to fraudulent schemes.[13] Spokesmen for such disadvantaged groups have objected to the paltry amount of information contained in advertising relative to their need, and the number of misstatements.

With rare exceptions, the larger national corporations have not been engaged in the grosser sorts of frauds.[14] But many of them spend great quantities of money attempting to convince the consumer that its product—functionally identical with countless others—is somehow different.[15] According to the report by Professor Schulz *et al.*, during the first quarter of 1968, $4,618,500 was spent on television advertising for Anacin, $3,110,500 was spent for Bayer Aspirin, and $2,929,500 was spent for Bufferin.[16] In one way or another these advertisements suggested the superiority of the particular product being sold, despite the fact that repeated tests by some of the best laboratories in the country have been unable to discern any differences among these products, or between these products and lower priced aspirin.[17] Whether this should be classified as "fraud" depends upon your point of view, but it is undoubtedly "well-considered" mendacity, to quote Professor Galbraith. And since the consumer ends up paying for it in higher prices for these products, it is expensive.[18]

Although proprietary analgesics represent the classic case, the use of advertising to create in the consumer's mind imaginary differences among identical products is a widespread phenomenon. Professor Galbraith has put it with characteristic pungency:

> . . . Most goods perform commonplace functions—they suppress hunger, serve alcohol or nicotine addiction, move people gradually through heavy traffic, move waste products more rapidly through the intestinal tract or assist in removing filth. Little or nothing of importance can truthfully be said about the way a product performs these routine functions. Flat lies as to their performance are

[12] Sellers of chinchillas for home breeding and sellers of aluminum siding for the home seem to make up a disproportionate number of respondents in FTC actions.

[13] *See generally* D. CAPLOVITZ, THE POOR PAY MORE (1963).

[14] A notable exception was the Holland Furnace Company, which led the FTC on a merry chase through the litigative process for over thirty years. *See* W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKETPLACE 22-23 (1968).

[15] The classic theoretical discussion of this phenomenon is E. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION 56-116 (7th ed. 1956). *See also* R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE 18-22 (2d ed. 1967).

[16] J. COX, E. FELLMUTH & J. SCHULZ, THE CONSUMER AND THE FEDERAL TRADE COMMISSION App. 3 (1969). It may also be worth noting that during the same period $3,552,700 was spent to advertise Salems, $3,321,600 was spent on Winstons, and $2,103,000 on Kools. So far as I am aware no study has shown that these brands differ significantly in the amount of tar and nicotine they contain.

[17] *Id.* App. 9.

[18] The exact cost is hard to calculate. *See* J. BAIN, INDUSTRIAL ORGANIZATION 417-18, 426-27 (1959). It has recently been estimated that monopoly costs the American economy 45 billion dollars annually in lost output. *See* 2 ANTITRUST L. & ECON. REV. 2 (Fall 1968). I have no way of verifying this figure, and in any case advertising is not the whole story of monopoly. But if the figure is anywhere near correct, the loss is enormous.

generally impermissible. But a surrogate for the truth, in which minor or even imaginary qualities confer great benefits, is essential.[19]

In the best of all possible worlds, these three basic problems would probably still exist. Given the limits of human foresight goods will always get on to the market that create unforeseeable hazards. Given the limits of human decency, other goods—dangerous or worthless—will always be produced and people will be found to foist them on the defenseless. Given the limits of human candor, merchants will always seek to differentiate their products. But the real question posed by the charges is whether these tendencies are not intensified by our practice of relying on advertising to supply consumers with information.

The cost to the consumer of information acquisition through advertising is not as low as many consumers may think. Indeed, it may be one of the most costly ways in which the job can be done. Even the bare information contained in an advertisement is distributed not only to the persons interested in receiving it, but countless thousands who have no interest in the product whatever. But the buyers must pay for all of the information disseminated. Moreover, if consumers are going to rely upon sellers to supply them with information, they must expect that the sellers will present it in a manner best calculated to increase their revenues; it is naive to expect a disinterested presentation of the facts and nothing but. Hence, advertising will continue its persuasive function as well, even if this means magnifying trivial differences or inventing imaginary ones. To the extent that advertising costs reflect efforts at persuasion, they represent little of value to the consumer, who must pay them as well. And it should not be forgotten that extensive outlays for advertising in an industry often increase entry barriers and contribute to less competitive performance.

If the FTC were to operate at peak efficiency, it would probably be unable to do a great deal to correct a condition that seems inherent in the institution of advertising as it now exists. This is dramatized by some statistics: In 1967 the FTC received an appropriation of $14,378,000; of this amount, $6,846,000 was allocated to stopping deceptive practices.[20] This latter figure is less than the combined television advertising budget for Anacin and Bayer during the *first quarter* of 1968. With this kind of a stake in its present type of advertising, it cannot be expected that the makers of analgesics would settle for advertising copy that would please Ralph Nader. Were the FTC to attempt to enforce such a standard of candor, it would quickly become mired in a protracted litigation that might or might not achieve much.

This may be illustrated by the Geritol litigation, of which Professor Schulz and his group make so much. Geritol is an iron tonic, conceded to be safe and an effective treatment for certain forms of iron deficiency anemia. In

[19] J. K. GALBRAITH, THE NEW INDUSTRIAL STATE 325 (1967).
[20] J. COX, *et al., supra* note 16 App. 1.

1962 the FTC issued its complaint against the makers of Geritol;[21] its final order was not entered until 1965,[22] and was not affirmed, with minor changes, by the Sixth Circuit until 1967.[23] In 1968 the FTC decided that Geritol's new commercials were as objectionable as the prior commercials had been;[24] it warned Geritol to stop flouting the order.

Although the Commission's theory altered during the litigation, the ultimate order was predicated on the idea that Geritol's ads implied that if the viewer were tired, it was probably a result of iron deficiency anemia and, hence, treatable with Geritol. In fact, most people who feel tired do not have iron deficiency anemia, and most people with iron deficiency anemia do not feel tried. The first order required the disclosure of the former fact, but this proved unsatisfactory. Further disclosures may yet be compelled. But it would seem that nothing will satisfy the FTC's objections short of the makers of Geritol making it perfectly clear in every advertisement that there is no way for the consumer to judge whether Geritol will help him or not. But if the consumer goes to his doctor, the approved source of the information, the chances seem remote that he will prescribe Geritol even if he finds iron deficiency anemia. To the extent that Geritol is successful in inducing potential customers to get a doctor's opinion, it will cut itself out of the market and pay for the privilege of doing so. This is a zero-sum game. Geritol's chances of survival seem slim if the FTC pushes its objection to the limit; the FTC is likely to find anything less disappointingly ineffective. Given these stakes, Geritol has every incentive to drag out the litigation for as long a time as possible.

Were the FTC to take on similar crusades against the larger corporations, similar results could be expected. It would amount to a frontal assault upon product differentiation by those firms, who have obviously found this a rewarding policy. While each action was wending its tortuous way to a conclusion, other problems would have to be slighted. Pressure to divert resources to them would build up; in many instances it is not unlikely that any victory the FTC might wring from the respondent would prove totally pyrrhic. While additional appropriations would ease the pinch, they are unlikely to be substantial enough to eliminate the dilemma altogether. Judgments on these matters can easily differ, but there is room for a good deal of doubt as to whether this is a sound allocation of resources. Certainly a reasonable man could conclude that the Geritol litigation represented an enormous amount of expended resources to very little purpose.

The preceding outline has suggested that the consumer's position stems ultimately from a pervasive structural condition: He is less well informed than the seller of goods. He has tended to rely upon the seller to supply him with whatever information he requires because it has seemed the least costly

[21] J. B. Willams Co., [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16,213 (FTC Dkt. No. 8547, Dec. 19, 1962).

[22] J. B. Williams Co., [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,339 (FTC Sept. 28, 1965).

[23] J. B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir. 1967).

[24] FTC News Release, Dec. 13, 1968.

way of obtaining it. In fact, it is more expensive than first appears, and the current consumer unrest reflects an enhanced appreciation of the true cost of such an information system in higher consumer prices and, in some instances, personal tragedies. For the foreseeable future, however, it may be expected that consumers will continue to use advertising as their main source of information. There has been some sporadic discussion of ways in which other sources of information might be developed, but these plans are hardly more than fond hopes at the moment. Development of a consumer information market seems a long way off.

While advertising continues to play its present role in our economy, I am dubious that the FTC can do much more than perform a cosmetic operation. This is not to say that it is of no importance how well the FTC performs that task. Anything that would enable the FTC to improve its performance would be helpful, and it is hoped that the articles that follow will contribute to that end. But it is also important not to conjure up too many visions of the promised land while much desert remains to be crossed.