DELAWARE LAWYER

A PUBLICATION OF DELAWARE BAR FOUNDATION

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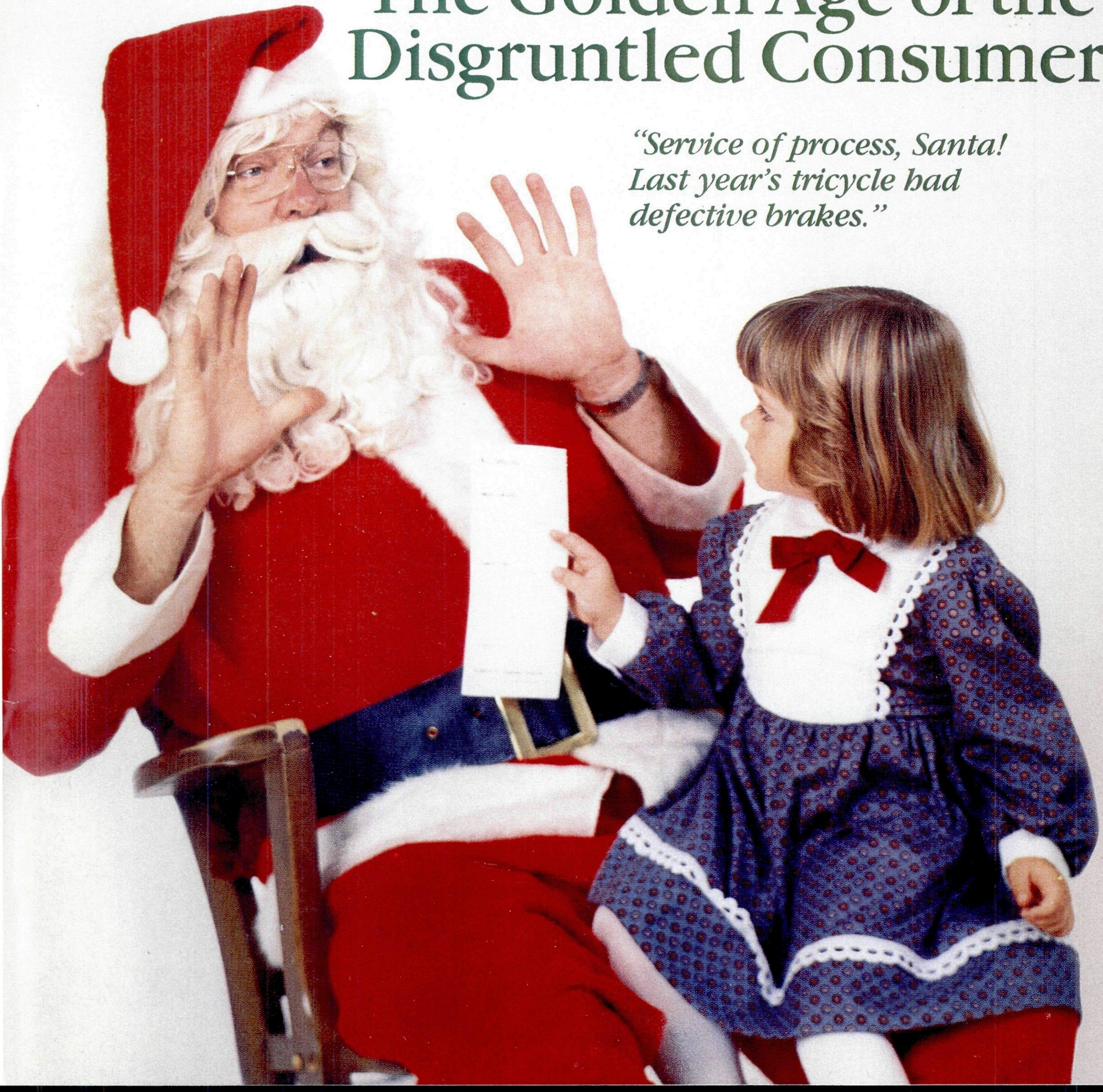
The Golden Age of the Disgruntled Consumer

"Service of process, Santa! Last year's tricycle had defective brakes."



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Contents

COVER: Is *nothing* sacred? Thanks to The Honorable William C. Bradley of the Court of Common Pleas for submitting to this Yuletide indignity and equal thanks to Miss Cynthia Carmine for delivering it. The theme of this issue is consumerism, which we think fitting at the most frenetically consumerist time of the year. Merry Christmas and Happy New Year to our readers. May visions of successful lawsuits dance in their heads!

Photography: Eric Crossan.

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EDITORS' PAGE

Many thanks to the formidably gifted Frances West, Secretary, Department of Community Affairs, who somehow found time to design this issue, to corral the writers, and to wheedle them into some semblance of obedience to our necessarily elastic deadlines.

This is the age of the consumer, who knows at long last that the wheel that squeaks is the wheel that gets the grease.

Back in the consumerist dark ages thirty years ago or more, a Marine corporal named Frank Farkas bought an automobile that turned out to be a treacherous mechanical mess. Getting no satisfaction from the seller, he emblazoned it with painted lemons and drove it (when it functioned) provocatively past the place of purchase. (How's that for gaudy alliteration?) Farkas was arrested and charged under some antediluvian city ordinance with commercial slander. He stood firm, asserted his constitutional right of free speech, and emerged victorious.

What a turnabout! Today the consumer is the suer, not the sued. (See Richard Herrmann's article, *Cave Emptorem*).

The surge in consumer awareness of rights and pitfalls has enveloped all segments of the populace. After the publication of the Summer 1985 issue of this magazine, which was devoted to the rights of the elderly, I began to receive samples of literature useful to those whom we so patronizingly call "senior citizens".

One in particular, a consumer-oriented comic strip, arrested my attention. (Yes, a geriatric comic strip! What next? A shriveled, graying Superman, who leaps tall dog houses in a single bound?) The heroine of this piece is a lady of sunset years, expert at defanging consumer frauds. She is called "Thelma Thwartem" in the give-away name style of Restoration comedy. To put not too fine a point upon it, Thelma is a smug sanctimonious old broad. She chortles at the stupidities of her cronies, who fail to deter burglars by turning on lights when they leave home to visit the free blood pressure clinic or who naively disclose their Mastercard numbers to the slick types who offer bargains over the telephone. Words of insufferable consumerist wisdom balloon from Thelma's withered lips in the best tradition of didactic funny papers. (Why Thelma has any friends left to hector is puzzling, but perhaps the dwindling social circle of the aged explains her otherwise impausible popularity.) The point of all this is that people from every walk of life and every segment of the population are wising up to their rights.

But the consumer is not wholly the pampered darling of the courts. He is expected to exercise some rudimentary common sense when offered shares in the Brooklyn Bridge. And this is why the Division of Consumer Affairs, over which Secretary West presides so ably, maintains a definitive library of consumer literature. It is the sensible philosophy of the Division that it best performs its role when it educates and liberates a collective public intelligence befuddled by junk food and greedy daydreams. May this issue of *DELAWARE LAWYER* do the same.

WEW

LETTER TO THE EDITORS

Dear Sirs:

In their Fall 1985 article "Uncivil Disobedience" Mmes. Jayne, Rosenthal, and Sloan conclude that when citizens protesting abortion "attempt to shut down family planning and reproductive health clinics . . . they go beyond their constitutional rights of free expression." This is precisely the kind of result-oriented, anti-democratic thinking that led the Supreme Court to invent, out of thin air, a constitutional "right" to abortion in *Roe v. Wade*, 410 U.S. 113 (1973). This abuse of judicial power ought to make every citizen uneasy, regardless of his or her views on abortion.

Even Mmes. Jayne, Rosenthal and Sloan do not attempt "to debate . . . the pros and cons" of *Roe v. Wade*. The decision lacks any basis in constitutional precedent and the Supreme Court no longer attempts to defend it either. Paradoxically, however, the Court now adheres to *Roe v. Wade* as a matter of "stare decisis." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 516, 103 S.Ct. 2481, 2487 (1983). And so we are stuck with a "constitutional" regime of abortion on demand that is virtually immune from democratic change. No wonder that a few frustrated extremists blow up abortion mills. With less provocation, other protestors once dumped tea into the Boston Harbor.

Our revolution was not fought to establish government by judges, law professors or social scientists.* However enlightened, the Supreme Court's belief that abortion should be permitted was no basis to strike down state laws to the contrary. As Justice O'Connor stated in her dissenting opinion in *City of Akron*, "the Constitution does not constitute us as "Platonic Guardians", nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy . . .'" 103 S.Ct. at 2505, *quoting Plyer v. Doe*, 457 U.S. 202, 242 (1982). (Burger, C.J., dissenting).

If a citizen views abortion as morally equivalent to murder, why should he not resist it by any means, even violent means if necessary? The answer, of course, is that citizens should respect the institutions, procedures and laws established under the Constitution. But what Constitution should citizens be faithful to when judges (and right-thinking persons like Mmes. Jayne, Rosenthal and Sloan) hold that constitutional rights may be created or abolished to fit the social agenda of the day?

Sincerely,
Gregory A. Inskip

* *It is just as well. Consider the fruits of previous liberal social policy initiatives: the poverty of women cut adrift by no-fault divorce laws; the destruction of poor families and proliferation of poor unwed mothers following welfare subsidization of unwed motherhood; and the misery of homeless people freezing and starving after court-ordered deinstitutionalization of the mentally ill. GAI*

Caveat Emptor 1776-1986

Frances M. West

Frances West, architect of this issue of DELAWARE LAWYER, *is the Secretary of the Department of Community Affairs. She served in that capacity under former Governor duPont and, reappointed by Governor Castle, serves today. Her experience in consumer matters goes back to the early 1970's when former Governor Peterson named her the first Director of the Division of Consumer Affairs. That interest led her to become a founding member and Vice President of the National Association of Consumer Agency Administrators. She is also Vice Chair of the National Council on Patient Information and Education.*

Frances's experience in government is not confined to consumer matters: she was the first female Highway Commissioner in Delaware. She brings to her role in government a varied experience as educator and lawyer. She once chaired a New Jersey high school science department and is today a member of both the Delaware and Pennsylvania Bars.

Millions, perhaps trillions, of words have been written during the last thirty years for and about the modern consumer—how he/she thinks, behaves, and is influenced; what rights and responsibilities exist for both consumer and seller in the market-place; which risks should be contemplated before venturing into the retail "jungle" to avoid getting ripped off; which remedies, legal and administrative, are available to seek redress for injured parties; which political leaders, agencies, and causes support "consumer protection"; all of which has raised to a new consciousness and identity the common understanding of today's American consumer.

In the 1950s, Gailbraith's *The Affuent Society,* Vance Packard's *The Status Seekers* and *The Waste Makers* began the proliferation of media outpourings, attempting to analyze the American consumer who emerged from decades of deprivation imposed by the economic harshness of the Great Depression, followed by the rationing of household commodities During World War II. The "consumer" issues of the 1940's were inflation, price stabilization, housing shortages, rent control, and proposed social security legislation. During the late 1940's and through the 1950's, *Consumer Reports,* published by Consumers Union, began to feature articles on chemicals in foods, meat inspection, and finance schemes. It was largely a voice crying in the wilderness. The relatively stable consumer economy of the 50's did not galvanize consumers to riot or to seek redress of grievances as they pursued the trappings of the good American life. The settlement of surburbia required one or more new cars for the commuting spouse and the suburban mother, new appliances for the new tract house, and a variety of household goods that were new to the market. (Many of the mechanical, electrical, and thermal gadgets were products of a wartime technology converted to the production of peacetime goods.) Because of the emerging consumer economy, the availability of credit to "buy now and pay later", and the daily exposure to the media advertising through a new form, television, the "middle-class" American became the target of industry and finance interests to help expand our economy. When my own children were in high school in the late 70's, I restricted their TV viewing, admonishing them to study instead. Their occasional retort would query, "Mom, didn't you watch TV when you were a teenager?" My response, of course, as a child born between the Depression and World War II, was that "When I was a child, TV wasn't invented yet!" In final retort, my kids would cajole, "Mom, you're not *that* old."

In fact, the TV set entered the family living room just before 1950 (remember the 7" sets with magnifying lenses attached) so the whole family and neighborhood could watch. By that time my generation had managed to survive infancy and our formative years without Saturday morning cartoons telling us what cereal to eat or which toys to hound our parents for at Christmastime. A daily presence in the American home gave the advertising industry a whole new field for pitching products and services to new target groups. Saturday morning cartoons with slick, exaggerated claims and promises made instant consumers out of two- and three-year olds whose whines could be heard in supermarkets and toy stores as they demanded the latest advertised sugar--coated cereal or road-racing toy. Even though these children couldn't read, they indeed influenced the spending of millions of dollars on products advertised to them as consumers. These same infants grew up to be teenagers who spend billions of dollars of their own and influence the spending of billions more on their march to independence, which now occurs legally at eighteen.

The American housewife wasn't ignored either. Marvelous miracle cleaning aids were offered, usually by some sweet and young thing with nary a hair out-of-place as she waltzed through her house work accompanied only by her "White Knight".

The upshot of the 50's advertising blitz created a consumer mentality that by the 60's began to recoil from the deceptive advertising, false claims, poorly designed or manufactured products, and high-pressure sales and financing pitch.

Although consumer protection hit the headlines as a "new" public policy issue in the 1960's, it had, in fact, been around as a governmental responsibility and a subject of intermittent public concern since the beginning of our Nation.

As consumer protection can be defined as government regulation of some marketplace economic activity, the history can be traced to very real events that shaped the quality of life for every American as a consumer. Early government functions provided for a money system, uniform weights and measures, regulation of home markets and foreign trade, and other aids to commerce. Regulation of economic activity was provided for in the Constitution, empowering Congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes," and to "fix the Standard of Weights and Measures". States were active in the regulation and promotion of commerce from the Revolution to the Civil War. During the nineteenth century Pennsylvania legislated inspection of foodstuffs, leather, tobacco, lumber, liquor, and gunpowder. The primary purpose, however, was to further the development of commerce. Consumer benefit was incidental.

Post Civil War state regulatory activity was aimed at curbing abuses of railroad companies, against discriminatory pricing practices and exhorbitant rates. Passage of the "Grange laws" in midwestern farm states in the 1870's and 1880's were the result of Grange organized activity.

In the Wabash case in 1886 the Supreme Court held that states could not regulate railroad traffic within their own borders, even in the absence of congressional regulation. The result was the Interstate Commerce Act of 1887, which was significant in the development of consumer protection. It was the first comprehensive federal regulation of a particular industry and it established the precedent of the independent regulatory commission. (Later congressional action established the Federal Trade Commission, and the Consumer Product Safety Commission.)

The twentieth century brought many changes in the consumer marketplace. The European immigrations after the Civil War provided a large, cheap labor force to fuel the Northeast and Central urban industries. Citizens in urban communities no longer raised their own foodstuffs. The manufactured clothing industry in the East produced apparel for everyone, and large residential buildings were constructed in cities (later urban slums) to house the un-landed worker. The emerging modern packaged goods economy of an increasingly specialized, nonagrarian society brought new problems of safety and wholesomeness in foods and medicines produced in bulk.

The Pure Food and Drug Act of 1906 came after a twenty year piecemeal approach by the federal government to respond to adulterated and synthetic food products. The impetus for these regulations came not from the consumer, but from farmers whose markets were being invaded by cheaper substitutes. (Restrictions on margarine still exist in major dairy states.)

The second issue was inspection, principally of meat, which, with banking and railroad regulation, is the oldest of American regulatory systems. Since 1865, laws had been passed dealing with importing of diseased cattle and swine, health of cattle exports, inspection of live animals, and meat inspection. Again, the impetus for standards came from meat packers to maintain their competitive advantage in a world market, and the resulting protection for consumers was incidental.

New technology such as refrigeration, centralization of the industry, and use of preservatives led to national distribution of products by individual firms. The use of chemicals to disguise stale or rancid foods led to state regulations, later struck down by a Supreme Court holding that goods shipped in original packages in interstate commerce were exempt from state interference. Farm organizations brought about the creation of state departments of agriculture with power to take action against sellers of adulterated farm products. State agricultural chemists organized themselves as the National Association of State Dairy and Food Departments and proceeded to lobby for a national law. Dr. Harvey W. Wiley, a USDA chief chemist, was the nation's leading crusader for a pure food and drug law. He carried his appeal to Congress and to the public, as would Ralph Nader sixty years later. Citizen groups, The Federated Women's Clubs of American and Consumers League of America, were instrumental in applying public pressure.

Then Upton Sinclair's expose of the meat packing industry, *The Jungle*, horrified the nation and led subsequently to the passage of the Pure Food and Drug Act in 1906. A compelling parallel can be made to Ralph Nader's *Unsafe at Any Speed* and the subsequent passage of automobile safety legislation in 1966. The real forces behind both pieces of legislation were public opinion aroused by media sensationalism and progressive politics. (President Theodore Roosevelt and Presidents Kennedy and

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Johnson) One should also note that muckraking in 1906 succeeded in arousing public opinion because of the rise of cheap mass market magazines made possible by new technologies in printing and paper production. The magazines continued to campaign against patent medicine fraud. There is general agreement that the crusade for clean meat and pure food and drugs was an integral part of American Progressivism, which was part of a general reform movement. Reformers began increasingly to talk about the "common man", the "taxpayer", and the "consumer", helping to create consumer awareness.

Before 1918 major campaigns launched by advocates of consumer protection included standardization of containers, quality grading of food, and labeling. World War I and the 1920's saw no major new issues. After World War I, however, the exodus from rural America to the cities continued increasing the number of urban consumers.

Consumer interest emerged during the Depression and New Deal, again focusing on food and drugs.

The Federal Food, Drug and Cosmetic Act was signed into law on June 25, 1938 after several years of administration, public, and congressional wrangling over how much authority the FDA would have. The elixir sulfanilamide tragedy, in which 107 persons died after taking an untested drug made with a toxic solvent, provided final impetus to passage. The new Act was tougher than the original Act of 1906 and included cosmetics and medical devices. Misbranding, warnings, labels, drug testing, therapeutic claims, dyes, adulteration were all addressed in the regulations. However, Rexford G. Tugwell, Assistant Secretary of Agriculture, who had campaigned for a tougher bill, accused Congress of selling out to every shabby interest. The weaknesses in the 1938 legislation became the subject of controversy in the early 1960's when the safety of drugs again became a congressional issue.

There were attempts during President Roosevelt's terms to involve consumers in representing their interests in various councils of government, but with little power or say in matters of importance, they were largely ineffective. Rather, the record would show that consumers were unable to prevent lenient enforcement, regulatory weakness, and the shift by agencies with consumer protection responsibilities from regulator to partner of the regulated. Voluntary compliance, a doctrine by which regulatory agencies should not act to police or enforce, but rather to cooperate, compromise, obtain compliance, persuade, has been and still is the tactic of choice for most regulatory agencies. (Later FTC and CPSC.)

One reason given has been inadequate resources to do the job, what with inflation and the expansion of the regulated industries.

The Federal Trade Commission, the granddaddy of state and local consumer protection agencies was formed in 1914 "to prevent the free enterprise system from being stifled or fettered by monopoly or corrupted by unfair or deceptive trade practices." Originally concerned with antitrust, the FTC has now tackled false advertising.

Auto Safety emerged in 1965 and was in the opinion of many activists, the "break through" issue. Auto safety bills were passed piecemeal by Congress from 1962 to 1964, the most important of which required the General Services Administration to set safety standards for cars purchased by the government. Ralph Nader's *Unsafe at Any Speed* heralded a new era of consumer protection as did the hearings on the prescription drug industry held by Senator Estes Kefauver's Anti-trust and Monopoly Subcommittee, which investigated drug prices and safety after the Thalidomide tragedy. As in two previous eras of consumer protection activism, drug safety was a central issue creating a public demand for action.

One issue of the 60's that began to be identified with consumer activisim was Truth-in-Lending. Originally championed by Senator Paul Douglas in the early 60's, Truth-in-Lending (which required full disclosure of interest costs) did not become law until 1968, after years of congressional wrangling.

In the two major issues of the past, Presidents Theodore Roosevelt and Franklin Roosevelt publicly supported food and drug regulations. Presidents John Kennedy and Lyndon Johnson made consumer protection proposals a major part of their legislative programs unlike the presidential administration of the 1950's. President Kennedy's 1962 consumer message to Congress proclaimed four "rights of consumers" and pledged his support for consumer rights to safety, to be informed, the right to choose, and the right to be heard.

Consumer Protection had come of age as a generalized category of issues, not just drug or auto safety. Ralph Nader was proclaimed "Consumer Crusader" on a *Newsweek* cover story. Government intervention and regulation in the consumer marketplace was conceived as necessary by the public and policy makers alike.

The marketplace of the 70's had become more complex, more technological, full of new household products never before made. Problems with can openers, color television sets, etc. all created new awareness of consumer rights to service, repair, replacement, and refund. The government was implicated as the ultimate guarantor of consumer rights.

Consumer protection as a State government responsibility began in the late 1960's. Delaware's Division of Consumer Affairs was started in November, 1970, after Governor Russell Peterson supported a reorganization of 150 plus agencies, boards and commissions of State government into ten cabinet departments. Consumer Affairs was the only brand new agency created. An ex-New York/New Jerseyite was appointed Director in Delaware. Delaware's consumer problems were similar to those in surrounding states. Mom and Pop stores were disappearing, replaced by franchises, not always owned by local business men. Business crossed the borders from Pennsylvania, New Jersey, and Maryland to sell products and services to Delawareans, often leaving the consumer "unsatisfied". The use of credit by more and more households created much misunderstanding and opportunity for fraud and misrepresentation, as consumers were unaware of their contract rights as well as of the intricacies of the credit industry. The "buy from your neighbor" and a local economy governed by a handshake to seal the bargain were gone.

Media continued to hype new products. One by one, states, some counties, and even cities started local consumer protection offices legislated by state or local political jurisdictions. Most states adopted some form of the Consumer Fraud Act patterned after the FTC Act. Enforcement in some states was and still is solely in the Attorney General's office. Some states like Delaware created agencies to provide enforcement, consumer information, mediation, and counseling.

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The Editors.

Consumer officials banded together. Two national presidential consumer advisors, Esther Petersen and Virginia Knauer, lent support to the formation of a national professional organization. (Betty Furness was also a presidential advisor.) The National Association of Consumer Agency Administrators formed in 1976 continues to provide a network for sharing enforcement techniques, information, and issue development. Industry, which had been perceived in the 50's as hostile to consumer interests, formed arbitration panels to mediate consumer complaints about advertising practices and such big ticket items as major appliances, furniture, home warranties, and automobiles.

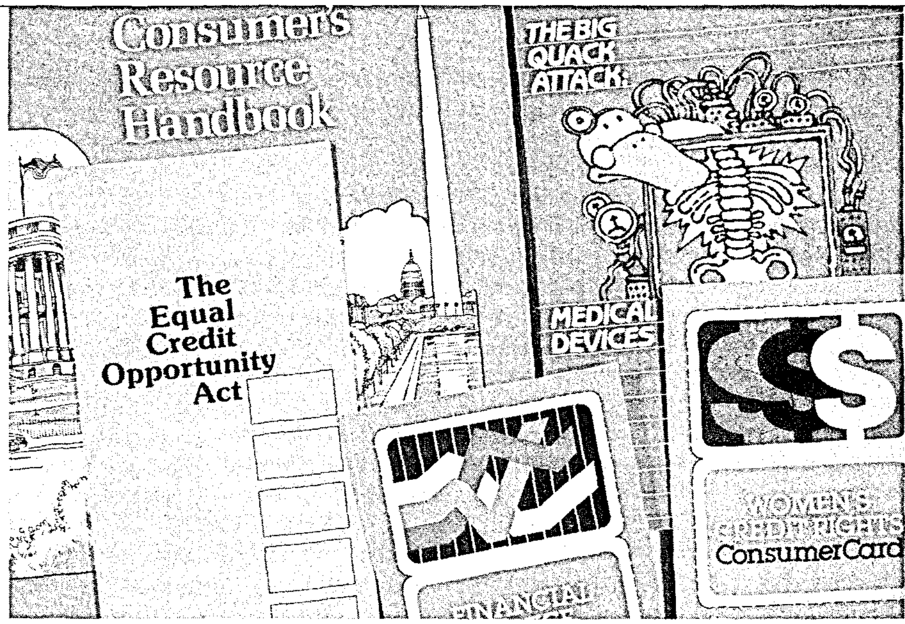
The Chrysler Arbitration Board was the first in Delaware to mediate new car warranty problems. The Society for Consumer Affairs Professionals was the corporations' answer to NACAA. It institutionalized the corporate consumer affairs professional to develop educational, promotional, and community materials to inform the consuming public about the corporations' concern for consumer interests.

State consumer issues during the 70's saw the development of rules, regulations, laws, information and advocacy positions concerning door to door sales, tenant-landlord issues, condominium regulation, food and ingredient labeling, supermarket pricing, land sales, health fraud, professional and occupational licensing, home improvement regulations, "lemon" laws for new automobile purchases, securities regulation, pyramid schemes, "Blue sky" laws, antitrust cases in the sale of consumer goods such as mobile homes, metric conversion, drug prescription labeling and information, future service contracts, and — most important — product safety. Prohibitions of deceptive trade practices were liberally construed to find violations in the sales, service, and advertising of goods to consumers that caused confusion, misunderstanding, and resulted in misrepresentation or actual fraud as a result of some intended or actual sale. 6 *DEL CODE:* 2511-2532.

Meanwhile, back in the nation's capital, Congress created the Consumer Product Safety Commission (CPSC) in 1972 to "protect the public against the unreasonable risks of injuries and deaths associated with consumer products". The CPSC appointed consumer agencies in every state to act as liaisons. The Commission enforces laws, bans products, orders recalls, conducts research on potential hazards, and works with industry to develop voluntary safety standards. This approach is somewhat softer than the standard approach of the 1970's, when standards for such products as bicycles were mandated. Since May, 1973 CPSC has been involved in 102 voluntary standards projects, resulting in 62 new voluntary standards and revisions of 29 existing ones. Examples include infant furniture, (play pens, strollers, and cribs) ladders, electric blankets, extension cords, toy chests, and upholstered furniture. Quality Control has reached the home product industry as well as the major chemical and industrial manufacturers.

During the 70's the FTC strengthened its warranty laws, developed some rules, but did not aggressively enforce its own act. New credit laws defining fair billing

A representative nosegay of consumer literature available from the Division of Consumer Affairs. ▶



practices, equal credit opportunity, and Truth-in-Lending revisions continued what had started in 1968 as the use of credit soared. During the 1970's, a bill to create a federal consumer protection agency different from the FTC or FDA was introduced, debated, and allowed to die for lack of congressional or administrative support.

As we approach the next decade, the future of consumer protection as a government responsibility is unclear. Certain federal protections involving auto safety, food and drug enforcement, and credit regulation will likely continue. Budget cutbacks have severely hampered many consumer offices and activities in other regulatory agencies. The deregulation started in the late 70's continues. Some state and local offices have merged or closed. The response of industry and such related business groups as the Better Business Bureaus and the Chambers of Commerce continue to espouse voluntary compliance and consumer education and information programs and materials as the best way for an informed consumer to achieve equity in the marketplace. Indeed, the plethora of consumer handbooks, guides, and information materials has furnished source materials for high school and college classes in marketing, advertising, and business subjects. Magazines, newspapers, and other media still include "helping hands", "consumer's corners" and other "how-to" columns. However, just as the muckraking of the early 1900's, and the media sensationalism of the 1960's created the appetite for consumer protection and regulation, so may the decline of media attention to consumer abuses and the shift of attention to other public issues, such as nuclear disarmament, budget deficits, space exploration, bring about a period of dormancy for consumer protection and awareness as we approach the twenty-first century. If so, then the battle cry of Caveat Emptor sounded by the Ralph Naders of the 1960's will become another historical footnote. It will be decided by the public or the politicians.

Vendor Beware; Consumer Be Aware

Christopher J. Curtin

A mechanic walks to the repair shop of a new car dealer in Kent County. Threatened with loss of his job, he is disgusted as he removes the dashboard from a flashy demonstrator. He is careful to write down the mileage of the odometer; 44,000 miles. He removes the odometer from the dashboard and a retaining pin on the odometer. He spins the dials on the odometer before replacing it. Now the car has only 6,000 miles. Another careful note is made. The car is sold for top dollar.

The purchaser's complaints about frequent repairs reaches the State Division of Consumer Affairs. A pattern is noted. An investigation is undertaken using the resources of the State Police and the Attorney General. Subpoenas issued. Search warrants are executed and evidence is seized. The disgusted mechanic is glad to unburden himself to state investigators.

The State Police obtain arrest warrants for odometer tampering. The Division of Consumer Affairs issues a cease and desist order for consumer fraud. The Attorney General seeks and obtains grand jury indictments for 12 counts of theft (by deception) of the purchase price of the cars. After the first day of a planned three week trial, the dealer and his corporation plead guilty to felony charges and face penalties of seven years in jail and restitution to the victims.

This case, which is a real one, illustrates many of the tools used in consumer protection in Delaware.

Responsibility for consumer protection by the state government is shared by two agencies whose joint philosophy is "vendor beware; consumer be aware." These agencies, the Office of the Attorney General and the Division of Consumer Affairs, apply a central core of consumer protection statutes and reach out in many directions to combat fraud.

The Consumer Fraud Act

The Delaware Consumer Fraud Act* is the fundamental statute defining consumer fraud and providing the remedies to combat it. The Act, like most addressing fraud, is simple and all encompassing. The statute declares any "deception, fraud, false pretense, false promise, misrepresentation, or the concealment or suppression or omission of any material fact with intent" upon which a consumer relies to be an unlawful practice when made in connection with the sale or advertisement of merchandise. The core of the prohibition is the making of a false or misleading statement or by the concealment of material information, creating a "condition of falseness."**

Courts generally interpret consumer fraud statutes more expansively and less formalistically than fraud at common law. As a result, many technical requirements of the common law need not be proved to win a case of consumer fraud. For example, at common law, a consumer had to plead and prove a number of different "intents" on the part of the defendant. Consumers were required to prove that a defendant *knew* the offensive representative was false; that the defendant *intended* to induce the consumer to act or refrain from acting; that the plaintiff's action or inaction was in "justifiable reliance" upon the misrepresentation; and, of course, the consumer had to prove his monetary damages. Courts of equity modified this strict rule only by permitting a victim to recover where the defendant's misrepresentation or omission was negligent or "innocent," that is to say, where the defendant did not know or believe that his statement was false.

As the Delaware Supreme Court has recently held, the Consumer Fraud Act differs from the traditional common law action for fraud and is even more liberal than the equity definition of fraud.* The Consumer Fraud Act requires no proof that the defendant "intended" to make a misrepresentation or an untrue statement. *Reliance* on the misrepresentation need not be proved at all, let alone whether reliance was *reasonable.* Moreover, there is no need to prove the defendant's intention to induce the action of the consumer. Proof of intention is required by the act *only* when a consumer relies on the failure of the

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* *Six Del. C. §2511, et seq.*

** In re: Brandywine Volkswagon, Ltd., *Del. Super., 306 A.2d 24, aff'd, Sub. Nom.* Brandywine Volkswagon, Ltd. v. State, Del. Supr., 312 A.2d 632 (1973).

* Stephenson V. Capano Development, Inc., Del. Supr. 462 A.2d 1069 (1983).

defendant to provide information about a transaction "with intent that others rely upon such concealment."

The definition section of the Act further broadens its applicability. Although misrepresentations are prohibited "in connection with the sale or advertisement of any merchandise," merchandise includes "objects, wares, goods, commodities, *intangibles, real estate* or *services*." The last three items are particularly important in expanding the breadth of the Act. In many states, real estate is not covered by the Consumer Fraud Act. However, in Delaware real estate cases have been particularly important in defining the scope of the Act. Moreover, "services" encompass what might otherwise be questionable, such as home improvements.

Courts have also given the Consumer Fraud Act a broad reading in light of its stated purpose:

> "The purpose of this subchapter shall be to *protect consumers and legitimate business enterprises* from *unfair* or *deceptive* merchandising practices *in the conduct of any trade or commerce* in part or wholly within this state. It is the intent of the General Assembly that such practices be swiftly stopped and that the subchapter shall be liberally construed and applied to promote its underlying purposes and policies." 6 Del. C., 62511 (Emphasis added.)

The overall theme of protection contained in this statement is both expansive and limiting. For example, it has been held that the statute does *not* extend to the actions of an individual who is not engaged in business other than the single transaction that causes the dispute, for example, where a person sells his own home. However, the "Purpose" injects the notion of "unfairness" into the interpretation of the Act, an idea not mentioned in the prohibitions. Further, it permits enforcement on behalf of businesses as well as consumers. Finally, this section has been read by Delaware courts to permit private law suits under the Act. Private litigation under this Act is likely to grow following a recent opinion authorizing the recovery of punitive as well as compensatory damages.

While the Consumer Fraud Act is the cornerstone, it is supplemented by a host of other consumer protection statutes. The "Home Solicitation Sales Act" provides a three day "cooling-off" period for contracts over $25.00 transacted away from the seller's principal place of business. The "Pyramid or Chain Distribution Schemes" act outlaws "Endless Chain" schemes. The "Lemon Law" requires a new car manufacturer to buy back a car with a serious problem that can't be repaired in four attempts. The "Landlord-Tenant Code" and "Mobile Home Lots and Leases Act" defines the rights and obligations of landlords and tenants. Violation of any of these statues *also* violates the Consumer Fraud Act.

The Attorney General's Office

The Consumer Fraud Act expressly provides that the Attorney General of the State of Delaware enforce this statute on behalf of the public. There are a number of enforcement tools.

The Attorney General is permitted to issue "civil investigative demands" which are, in effect, pre-complaint investigatory subpoenas. Through these "demands" the Attorney General can seek production of books and records, take depositions, and compel answers to written interrogatories. Unlike procedure in civil litigation, however, there *is no reciprocal right to discovery* when the Attorney General issues a civil investigative demand prior to filing suit. Since the penalty for failure to answer the Attorney General's demand is an injunction against further business in the state until there has been compliance, investigative demands have been an effective way to quickly stop certain types of business operators. For example, in one case, a pyramid scheme advertising on cable television was stopped simply by the issuance of the investigative demand. After issuance, the advertisements stopped and the violator apparently ceased doing business in the state. Because he did not respond to the demand, default judgment was entered in the Court of Chancery, enjoining further business or advertising in the State of Delaware until the demand was answered.

Another enforcement tool provided the Attorney General by the Consumer Fraud Act is the authority to enter "cease and assist agreements." The Attorney General is authorized to enter an agreement with a violator who voluntarily agrees to cease the unlawful conduct and take any other action deemed necessary to correct the result of his practices.

Of course, the Attorney General is authorized to sue in Chancery for an injunction against the unlawful practices and to seek restitution for injured consumers as well as the costs of litigation. The statute also authorizes the Court of Chancery to appoint a receiver to operate the defendant's business subject to the control of the Court. Recent legislation authorizes the Attorney General to deposit costs recovered on behalf of the state in consumer protection and anti-trust cases in a "Consumer Protection Fund" and to spend those funds for nearly any purpose that will further consumer protection and anti-trust litigation.

Of these powerful tools, by far the most important by frequency of use and power, is that entrusted to the Division of Consumer Affairs.

The Division of Consumer Affairs

By its enabling legislation the Division of Consumer Affairs of the Department of Community Affairs, enjoys enforcement authority under the Consumer Fraud Act. The Division may issue "cease and desist *orders*" against any person or business where there has been or will be any violation of the Consumer Fraud Act.

Cease and desist *orders* are in essence, administrative injunctions against violations of the Act. They are written orders, which describe the alleged violation. They must state as well the basis for the issuance of the order. They must be served upon the violator and a copy must be filed with the Prothonotary. Cease and desist orders are unavailable where the Attorney General's Office has either filed suit or entered a cease and desist agreement in a case. However, because the Division of Consumer Affairs is represented by the Attorney General's Office, no conflict has ever arisen.

Cease and desist orders are issued after notice to the violator and an informal opportunity to explain his conduct. Once issued, they may be appealed on an expedited schedule to the Consumer Affairs Board, which may uphold, alter, amend or vacate the Division's order. Either the State or the violator may then appeal the Board's decision to the Superior Court.

A violator cited in an order must immediately cease the practices described in the order. Failure to cease the activity is considered "contempt" of the Consumer Affairs Board and is punishable "in the same manner and to the same extent as for a contempt committed before the Superior Court." The State has taken the position, and recently obtained a confirming opinion from Superior Court, that violation of a cease and desist order is punishable as criminal contempt.* The criminal code provides penalties of up to two years incarceration and a fine of up to $2,000 for a criminal contempt. Several convictions have resulted in incarceration for violations of cease and desist orders since the *McFarland* opinion.

Practical Enforcement

In practice, consumer enforcement in Delaware is a symbiotic blend of resources, jurisdiction, personnel and ultimately, enforcement. The Attorney General's Office represents the Division of Consumer Affairs as a client. This representation is assigned to the civil division of the Attorney General's Office. The Attorney General has traditionally appointed one deputy attorney general to represent the Division of Consumer Affairs and to be the arm of enforcement on behalf of the Attorney General. Together, the Attorney General's Office, the director of the Division, and the investigator working on the individual case discuss investigative steps, and the efficacy of each enforcement tool, regardless of what statute has authorized it. As a result, there has been a tendency to move away from formal civil litigation in favor of more speedy and effective means of enforcement.

Mediation is the front line of enforcement.

Complaints are first handled by Consumer Affairs investigators who attempt direct mediation with a merchant or landlord. More complaints are settled in this fashion than by any other means. Where a pattern of unresolved complaints develops, enforcement escalates.

A hybrid creature, the "consent to cease and desist order" has emerged as a device for resolving significant violations. This tool consists of an order to cease and desist from described practices, enforceable by criminal contempt proceedings. Moreover, corrective measures, restitution for victims, and recovery of costs of the investigation are often negotiated. If a consent order cannot be negotiated, alternatives such as the cease and desist order and formal litigation are available.

Criminal Prosecutions

Frequently, conduct originally reported to the Division of Consumer Affairs as a consumer fraud, turns out upon investigation, to disclose such a pattern of abuse and such high dollar losses, that criminal theft charges are warranted. In these situations, the Division of Consumer Affairs and the Attorney General's Office, frequently call upon police agencies to assist in the investigation and prosecution. Criminal investigations have been coordinated with federal enforcement agencies such as the United States Postal Inspector and the United States Department of Justice. Since the Attorney General is the sole arm of prosecution in the State, it is a simple matter to coordinate prosecutions through the consumer protection deputy.

Criminal charges usually involve theft and contempt for violation of a prior cease and desist order. The typical criminal case involves a home improvement contractor who solicits business door-to-door, takes deposits to "purchase materials" and performs little work for some early victims and no work at all for later victims. A detailed chronological and financial analysis of all transactions

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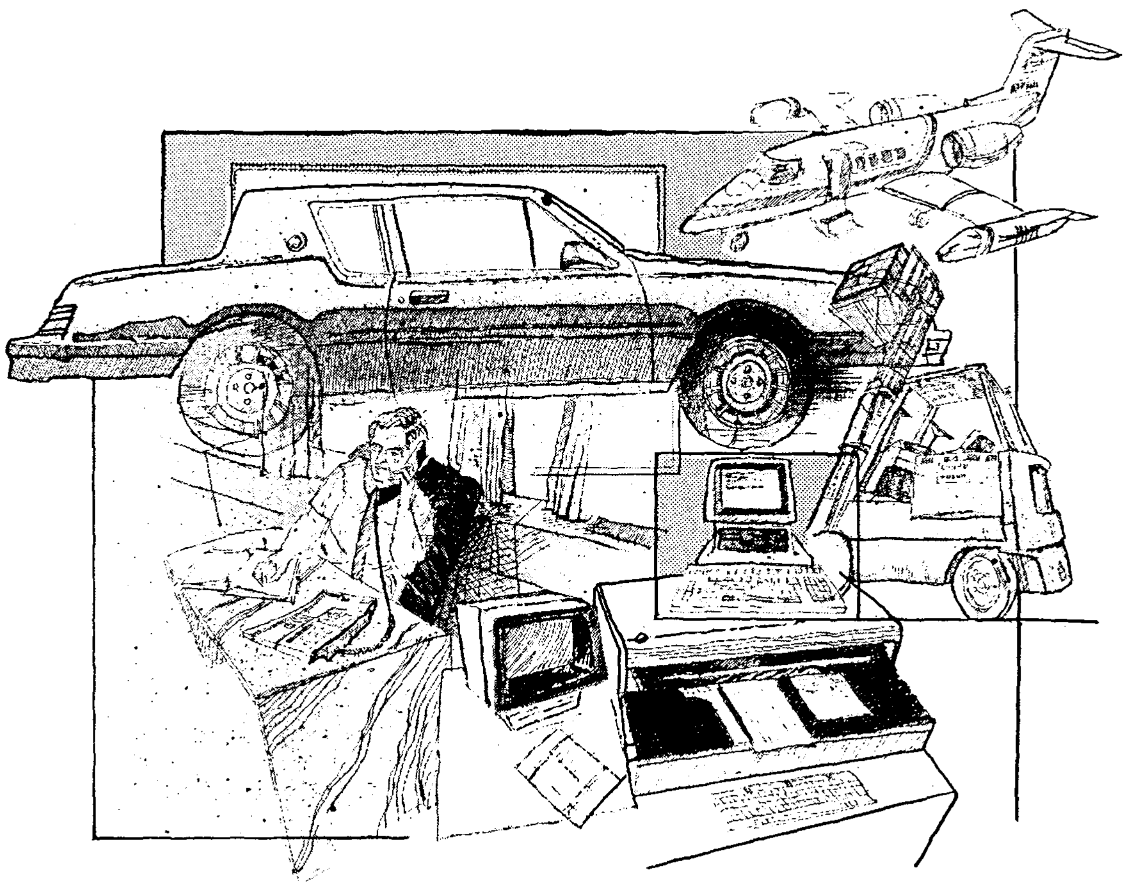
* *State v. McFarland,* Del. Super., IN 83-07-1622 through 1639, (April 9, 1984, Balick, J.).

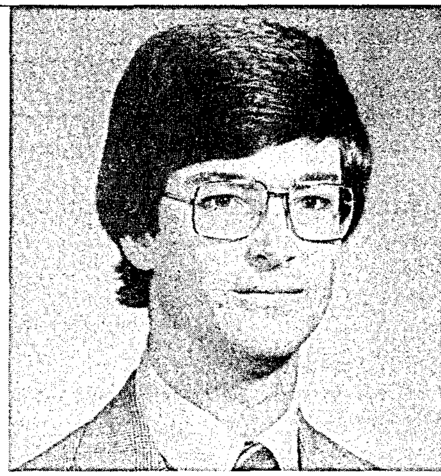


frequently reveals a point beyond which the defendant must have known he had no ability to perform his outstanding contracts or his new contracts. With this evidence of the defendant's intention to steal, theft convictions frequently follow.

The penalties for theft are severe. Theft is a felony punishable by up to seven years incarceration and a fine in the discretion of the court if the theft involves more than $300. Corporations can be fined in an amount equal to two times the amount obtained by the theft. Multiple victim cases are rarely resolved by misdemeanor charges, which are punishable by incarceration for up to two years and fine of up to $1,000. The sentencing judge is required by law to order restitution to injured victims or state publicly why he chooses not to. The courts have responded to this legislation by imposing sentences of incarceration followed by lengthly periods of probation with payment of restitution as an express condition.

Other criminal statutes relied upon in recent consumer enforcement actions include: the Odometer Act; the Pyramid Schemes Act; The Securities Act; Criminal Impersonation and Mail Fraud. A recently introduced State "RICO" (Racketeer Influenced and Corrupt Organizations) statute hold the potential of enhanced criminal penalties and powerful civil remedies against organizations operating through fraud or violence. If criminal prosecution represents the ultimate form of enforcement, RICO holds the potential of being the ultimate ultimate.

Through the combined efforts of the Attorney General's Office, the Division of Consumer Affairs and private litigants, a broad spectrum of enforcement remedies are available to the Delaware consumer. The daily annoyances or gross "rip-off" may be cured by an informal telephone call or the most formal of all enforcement remedies, a criminal jury trial. However, there is plenty of room in between for negotiation.



Christopher Curtin was, for nearly eight years, a Deputy Attorney General with the Delaware Department of Justice. For nearly six of those years he represented the Division of Consumer Affairs, handling civil and criminal, formal and informal investigations. While at the Department of Justice he was cross-designated as a Special Assistant United States Attorney for criminal anti-trust enforcement. Mr. Curtin is now associated with the firm of Sawyer & Akin.

"CAVE EMPTOREM"
Beware of the Buyer

Richard K. Herrmann

There are so many public and private interest groups looking out for the consumer, the old adage "Caveat Emptor" is a phrase which has become part of antiquity. The pendulum has swung, and those in the chain of distribution are now in the pit. The more appropriate buzz words for today are "Cave Emptorem", "Beware of the Buyer" (member of his household, user, consumer, bystander, person in the sphere of danger, or person next to the person in the sphere of danger).

Those of us who practice products liability litigation in Delaware are aware that a problem exists nationally, although we in Delaware have not yet felt the brunt of it. With the exception of our share of the asbestos cases, the products liability claims in this State are, by and large, of the usual mechanical or design defect categories. It could be that the conservative approach our courts have taken is the reason that national plaintiff's bar has not been knocking down the Delaware doors to file products cases. After all, we followed the 1916 landmark decision of *McPherson v. Buick,* until 1976, when privity was finally put to rest in *Martin v. Ryder Truck Rental Co.,* Del. Supr., 353 A.2d 581 (1976) as explained in *Seiler v. Levitz Furniture Co.,* Del. Supr., 367 A.2d 999, 1007 (1976). To this very day, strict liability is not available in actions involving the sale of products [as opposed to bailments, *Martin v. Ryder Truck Rental Co.,* supra]. And it wasn't until the recent decision of *Stagg v. Bendix,* Del. Supr., 486 A.2d 1150 (1984), that the time of discovery rule was applied to products liability cases in Delaware.

Assuming that our Supreme Court sticks to its guns on the strict liability/sale issue, what looms over the horizon in Delaware for future products liability cases? Since our evolution will not be in the strict liability/sale context, we can expect greater consumer protection by two approaches: (1) expansion of strict liability into the service area, and (2) expansion of strict liability in areas that may not be considered sale of "goods" within the Uniform Commercial Code.

Strict Liability and Services

The Supreme Court of our great State has declared that strict liability is not applicable to the sale of services. *Castaldo v. Pittsburgh-Des Moines Steel Co.,* Del. Supr., 376 A.2d 88 (1977). This approach is in conformity with the general rule that has developed nationally. With few exceptions, those in the service industry, as distinguished from product distribution, have been protected from the extension of strict liability. However, the evolution of strict liability is now taking us further. And, of course, New Jersey is out in front. In 1982, the Supreme Court of New Jersey held that strict liability applied to an independent contractor hired to rebuild a piece of equipment. *Michalko v. Cooke Color and Chemical Corp.,* N.J. Supr., 451 A.2d 179 (1982). The strict liability of the "servicer" has now been fully extended to reconditioners of sporting goods equipment. *Gentile v. MacGregor Mfg. Co.,* N.J. Super., 493 A.2d 647 (1985). In *Gentile,* the defendants reconditioned and repaired football helmets for the high school, the plaintiff attended. The plaintiff was injured while using the helmet. The defendants admitted, for purposes of their motion for summary judgment, that the warnings on the helmet were inadequate. However, it was their contention that they were not subject to strict liability, since they merely refurbished the product and did not remanufacture it. It was already in the stream of commerce.

The court found that the defendants were in the best position to control the danger, and represented the reconditioned product as being safe. It also specifically pointed out that the reconditioners dealt with a significant volume, "unlike the supplying of professional services, where because of the individuality of the service rendered . . . strict liability generally is not applied. . ."

If the Delaware Supreme Court wishes to expand strict liability, without overruling the preemption decision of *Cline v. Prowler,* Del. Supr., 418 A.2d 968 (1980), the service area is the most likely angle of approach.

Goods

Presently, strict liability is not applicable to the sale of goods. This is a result of the legislature's preempting the field by the enactment of the Uniform Commercial Code. *Cline v. Prowler,* supra. Of course, if the product were not considered "goods" under the UCC, logically the courts would be free to expand the strict liability enunciated in *Martin v. Ryder Truck Rental Co.,* supra. "To be (goods) or not to be (goods), that is the question." Can an item be considered a product without being considered a "good" under the UCC? With a bit of imagination, such an academic feat is not difficult. For example, in 1967, when our Legislature enacted the UCC, little thought had developed as to whether computer software would be considered "goods" under the UCC. Now that computers have become so ingrained in our economic society, computer law is rapidly becoming a field in and of itself. In any event, a person injured as a result of defective computer software clearly ought to have the same degree of protection afforded a bystander who suffers injury from a leased vehicle.

What about published printed material? If the printing or the binding is sound, it is unlikely that there is a breach of implied warranty. Are the contents, i.e. the printed thoughts, "goods" under the UCC? If not, will the contents be considered a product for purposes of strict liability?

The issue is not such a novel one. For years, publishers have been protected for incorrect information appearing in publications. "If a newspaper prints incorrect information, if a scientist publishes careless statements in a treatise, or if an oil company prints an inaccurate road map, they cannot be 'liable' to those of the general public who read their works, absent some special relationship between writer and reader." *De Bardeleben Marine Corp. v. U.S.*, 5th Cir., 451 F.2d 140 (1971). The rationale for this protection, as explained in *De Bardeleben,* is that publishers and the like lack the resources to "compensate an indeterminate class who might read their work."

For years, then, the courts have generally taken the view that the printed thought is not a product.* *Herteg v. Hustler Magazine, Inc.*, S.D.Tex., 565 F.Supp. 802 (1983); *Walter v. Bauer,* N.Y. Supr., 439 N.Y.S.2d 821 (1981).

However, a new trend is developing that invades even this once protected province. Just ask Jeppesen & Co.

Jeppesen produces a navigational aid for airplanes. Included in its charts is an instrument approach procedure relied upon by pilots who use the charts. The charts or the instrument approach procedure have been held to be *products***, subjecting the manufacturer to strict liability. As with "tract-housing" the issue seems to rest on mass production. "Though a 'product' may not include mere provision of architectural design plans or any similar form of data supplied under individually-tailored service arrangements, the mass production and marketing of these charts requires Jeppesen to bear the cost of accidents that are proximately caused by defects in the charts." *Saloomey v. Jeppesen & Co., 2d Cir., 707 F.2d 671, 677 (1983). See also, Fluor Corp. v. Jeppesen & Co.,* Cal. App., 216 Cal. Rptr. 68 (1985); *Brocklesby v. U.S.,* 9th Cir., 753 F.2d 794 (1985); *Aetna Casualty & Surety Co. v. Jeppesen & Co.,* 9th Cir., 642 F.2d 339 (1981).

Only time will tell whether our Courts in Delaware will use either of these approaches to expand strict liability. However it is more likely than not that further evolution will be seen. Until that time comes, each merchant, supplier, and manufacturer transacting business in Delaware, sells a product at its own risk. Cave Emptorem, beware of the buyer.

**The Editors of this magazine nervously adhere to their view.*

***Ouch!*

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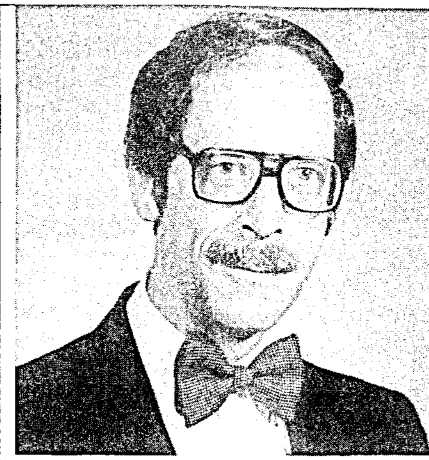


Astute Legislative Approaches in Health Care: The Law of the Well-Run Jungle

William E. Kirk, III

Delaware has gained a great deal of national attention in the 1980's as the home of a number of new banks. The state's success in attracting those banks has been due to the Financial Center Development Act of 1981 and subsequent legislation. One vital ingredient in that legislation has been deregulation—specifically, the removal of interest ceilings on certain consumer loans. There have been some critics who have said that the state has traded consumer protection for economic development, at least in the consumer loan field, but the consensus seems to be that the overall impact of the new banking laws has been favorable.

This article will describe two other relatively recent (but much less well-known) legislative initiatives of Delaware's General Assembly, which have highlighted the interplay between consumer protection and deregulation, this time in the field of health care financing. *The financing and delivery of health care in the United States is undergoing a fundamental restructuring, featuring many new players and new types of organizational structures.* By opting for a partially deregulated approach for health maintenance organizations (HMO's) and health insurance rates, Delaware has aligned itself in a forward-looking, pro-competitive posture, which will help to assure a wide range of choices for its citizens in the years ahead.

The protection of its citizens from various evils is a function the state has performed since the earliest times. But in the United States, with its strong tradition of individualism and free enterprise, the financial perils associated with commerce have often been left to the inherent regulation of a free marketplace. (Physical threats to health and safety have been an entirely different matter; for example, selling tainted food was a common law crime, and many states passed pure food laws even before Congress.) Early court cases generally applied the common law rule of *caveat emptor*, and judges and others commented favorably in comparing that rule with its civil law opposite, which "looks upon man as incapable of judging for himself, assumes the guardianship over him, and interpolates into a contract that which the parties never agreed to."[1]

It would be tempting but inaccurate to say that this early laissez-faire attitude simply gave way to a more "progressive" stance as time passed. At least three important industries, banking, insurance and public utilities, were the subjects of early regulatory legislation at state level. Moreover, there was sometimes an ebb and flow between the laissez-faire and paternalistic approaches.

One example of this fluctuation is found in the usury laws governing interest rates. These "were of medieval origin, and fraught with moral and religious overtones."[2] But by the late 18th and early 19th centuries, American legislatures considered repealing them, and by 1860 at least four states had done so. These actions were largely in response to the need for cash with which farmers and others could buy newly-available government land at favorable prices—the opportunities were such that the cost of borrowing became relatively insignificant. But when hard times returned later, "the same people who had begged for money at any price denounced those who had come in with satchels of money, as evil usurers; and the legislatures thundered forth new, stringent usury laws."[3]

The business of insurance was also an early subject of regulation, much of which attempted to ensure that the carriers had sufficient reserves to pay claims. Other laws and regulations dealt with the insurance policy itself, and attempted to prevent misleading language and unfair claims practices. Some courts and legislatures found ways around the plain language of insurance policies, as they attempted to redress a perceived imbalance of power between insurer and insured. As a result, by the twentieth century the insurance industry was hemmed in by a net of regulation, but *it had a large say in the actual* administration of that regulation, and even in its design. The resulting standardization of policies and rates effectively eliminated the need for carriers to compete in many respects, and on balance their loss of freedom could be characterized as a form of protective custody.[4]

Similar arrangements developed with public utilities and even licensed occupations: they gladly accepted heavy regulation in exchange for a market free from worrisome competition. "This is the key to understanding why some forms of government intervention, chiefly on the state level, grew so phenomenally during the last half of the 19th century. The statute books swelled like balloons, despite ideological sound and fury about individualism, social Darwinism, free enterprise, Horatio Alger, and the like, from pulpit, press, and bench."[5]

The preceding only hints at the extensive tradition of government involvement in the financial well-being of its citizens as their lives are touched by commerce. It is difficult to make generalizations about the trend of this involvement, since there were both early and late instances of decisions to deregulate. Delaware's reputation as a leading banking state is far antedated by its reputation as a leading corporate domicile, and much of that reputation is due to the "liberality" of its corporate laws—specifically, the state's willingness to permit (i.e. deregulate) certain conduct and arrangements which other states forbade under a more paternalistic view of the world.[6]

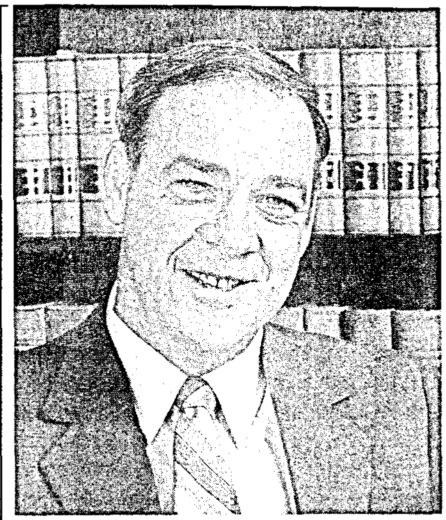
The financing of health care is a relatively recent concern of government, but it has made up for lost time in a hurry. As a major buyer of health care services itself, the government has had a profound impact on the way those services are financed and delivered. Upwards of forty percent of this country's health care costs are paid for by the government, some directly and some through private contractors in competitively bid or negotiated arrangements. In just two years, the Federal government has established a new "prospective payment system" of reimbursing hospitals for Medicare patients. Under this system, hospitals get paid according to a patient's diagnosis, rather than hospital costs, the basis for the previous reimbursement system. If the hospital's cost of treating the patient is less than the allowance for the particular diagnosis, the hospital makes a "profit". This new system reverses the old, which had the perverse effect of rewarding hospitals that operated at higher costs. As hospitals scramble to cut expenses to take advantage of the new system, and to attract patients in the wake of reduced occupancy, they are experiencing an almost unprecedented degree of marketplace competition.

The influence of government as a buyer has been very strong, but there have been other important varieties of direct regulation in the health care field, most of which have come in this century, indeed within the last ten to fifteen years. To describe or even list them all would be impossible in an article such as this. Two examples must suffice, each of which will illustrate a variety of the paternalistic approach, at odds with the laissez-faire spirit of American enterprise.

At the Federal government's prodding, most states have passed "certificate of need" laws, which require government approval before medical providers may enlarge their operations or make significant capital outlays. As a result, hospitals, clinics, and sometimes even private physicians find themselves seeking government permission to spend their own money to add a building wing or to buy a diagnostic machine.[7] These laws are designed to allow the community to contain health care costs by preventing an "oversupply" of expensive services. There is no doubt that such oversupplies have existed (and continue), and that they contribute greatly to rising costs. But the prevention of oversupply is an unusual function for governments at work in a free market economy, notwithstanding such occasional efforts as agricultural production quotas. Classical free market theory would likely deny that any oversupply could remain a problem for long; it would surely deny that an oversupply would keep prices too high. But the classic laws of supply and demand seem to have largely stopped working in today's health care market.

Another example of government paternalism in health care is found in laws and court rulings against the so-called "corporate practice of medicine". For much of this century and even earlier, state and national medical societies have urged government to restrict efforts to deliver physicians' services in nontraditional forms sponsored by consumers, farmers, workers, entrepreneurs, disgruntled physicians, reformers, and others. Early in the century, several state courts ruled that corporations could not run a medical practice open to the public, on the theory that such activity violated public policy. One early form of HMO was the so-called "lodge practice", whereby a fraternal society sponsored pre-paid medical care for its members. A 1907 American Medical Association Journal article criticized such plans, pointing out that "ruinous competition"invariably followed from giving unlimited medical service for a fixed fee. Later efforts were made to form medical cooperatives in areas which suffered from drought or unemployment, and these were usually resisted—opponents cited the customary provision in professional ethics codes that no third party should be permitted to interfere in the near-sacred relationship between doctor and patient. Between 1939 and 1949, twenty-six states had passed laws which effectively prevented the operation of consumer-controlled medical cooperatives. Sometimes the resistance went too far: in the 1943 Supreme Court case of *United States v. American Medical Association*, the association was held to have restrained trade in its efforts to stifle a fledgling group medical practice in Washington, D.C. But the chilling effect of organized medicine's hostility, coupled with barriers sometimes put up by governments ready to accommodate the professional mainstream, effectively delayed for many years the development of what are now called "alternative delivery systems".[8]

At first glance, Delaware's HMO Act of 1982 would appear to be in the mold of heavy government regulation, since it calls for licensing and ongoing supervision of HMOs. But this important law, whose prime sponsor was Senator Thomas B. Sharp, may be even more significant in its deregulatory aspects.[9]



Senator Thomas B. Sharp, Majority Leader in the Delaware Senate, was the prime sponsor of the two bills described in this article.

By its explicit authorization for corporations (as well as trusts, associations, and partnerships) to operate HMOs, the Act wipes out any problems arising from the "corporate practice of medicine" theory. The law stipulates that HMOs must use licensed professionals to perform tasks that otherwise require licenses, and in so doing recognizes the traditional concern for public health and safety. But the absence of any restriction as to the type of entity that may employ those professionals opens the way to HMO operations run by corporations (both for-profit and not-for-profit), associations, partnerships, and insurers.[10]

In order to encourage competition on price, the Act wisely leaves that matter to the market; other states have done the opposite by requiring prior regulatory approval for HMO rates, or even by specifying that charges will be set community-wide, with no variations reflecting individual group experience. The Delaware Act does require both initial and ongoing regulatory oversight to ensure that HMOs have sufficient financial strength to meet their commitments to their members: there is a certain risk in unlimited service for a set monthly fee. But the oversight is general and result-oriented, rather than the potentially stifling variety that other states have chosen.

As of October, 1985, Delaware had already licensed four HMOs, and more are in the wings. They can be expected to compete fiercely—with each other and with traditional health insurers—in the arenas of price, service, quality, and convenience, and in so doing they will give Delawareans a range of choices for their health care coverage never before available.

In 1984 the General Assembly took another pro-competitive step in the field of health care finance, this time involving traditional health insurance. Before this action, health insurance premiums were subject to a statutory scheme which allowed for their disapproval by the Insurance Commissioner on the grounds, among others, that they were "excessive." Because there were no objective standards to define this term, regulated and regulator alike lacked guidelines for their respective jobs of setting and reviewing rates.

Again under the leadership of Senator Sharp, the General Assembly improved the situation by creating a new framework for the setting, filing and review of health insurance premium rates. Under the new rules, rates are presumed lawful if they meet predetermined standards; the result is that insurers can now choose to avoid the expense of administrative hearings and litigation by setting their rates so as to meet those benchmarks.

The central principles underlying the new framework are those of price regulation through competition, and a fair return on the premium payer's dollar. The legislation recognizes the reality of competition in the group health insurance marketplace, where the purchasing decision-maker (such as an employer, union trust fund or business association) usually has the sophistication to assemble and compare a number of alternatives. The legislation presumes that the market for group health insurance is competitive, and leaves it largely deregulated in the absence of a specific finding by the Insurance Commissioner to the contrary. If that finding is made, the statute imposes mandatory percentages of premium which must be paid out as benefits. In similar fashion, the law requires specific payout percentages for products sold to individuals outside the group market.[11]

By spelling out the percentages of payout (called "loss ratio" in the industry), the legislation focuses on what is probably the best measure of the fairness of a premium rate. Some insurance buyers want "Chevettes", others want "Cadillacs", and the law now takes the regulator out of the business of making that basic decision. In such matters, the customer is not "incapable of judging for himself"; if protection is needed, assuring fair value for the money ought to suffice. In time, Delaware's health insurance consumers will have the opportunity to shop for coverage using payout percentages as a guide, much as some consumers now use EPA mileage estimates or EER figures for appliances. The same principle could logically be extended to other insurance lines, where differing policy provisions and deductible amounts can make price comparisons difficult.

Under the new legislation, the Commissioner may still disapprove rates if they are inadequate to assure that the carrier will be able to meet its obligations. By retaining this feature of rate review, which traces back to the earliest days of insurance regulation, the General Assembly recognized that market competition can tempt carriers to cut prices to an irresponsible level, thus imperiling the policy holders who depend on insurers' ability to honor their contracts in the future. Delaware's new Insurance Commissioner, David N. Levinson, has said repeatedly that he is more concerned about insurance rates being too low than too high, and his concern is amply justified in light of insolvencies preceding his term which involved Delaware-chartered carriers.

Consumer protection need not always take the activist form of product recalls or reformed contracts. Free market competition should usually result in meaningful alternatives for consumers, and on occasion the best thing the lawmakers can do is to further that competition through deregulation. Delaware's most famous deregulatory efforts have been made primarily to encourage economic growth, but at least the two laws described in this article can best be seen as a new approach to consumer protection.

The opinions I express in this article are not necessarily those of my employer, Blue Cross & Blue Shield of Delaware, Inc.; specifically, the reader should not infer any criticism by that organization of the medical profession, or certificate of need laws. My views coincide with the company's on the two statutes which are my main subjects, and which I supported in the General Assembly both as a drafter and as a lobbyist.

[1] Lawrence M. Friedman, *A History of American Law*, p. 233.

[2] *Id.*, p. 475. See also *The Merchant of Venice.*

[3] Friedman, *History*, pp. 475-476.

[4] Id., pp. 476-480.

[5] Id., p. 397.

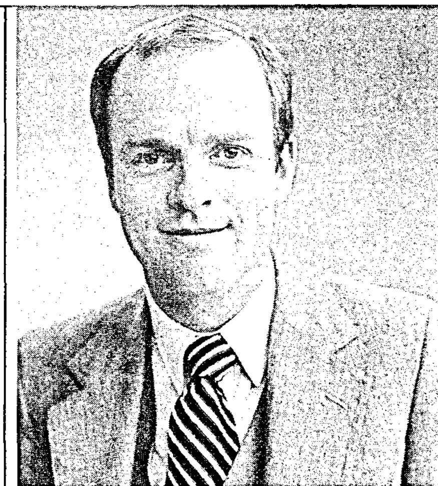
[6] William E. Kirk, III, "A Case Study in Legislative Opportunism: How Delaware Used the Federal-State System to Attain Corporate Pre-Eminence", 10 *Journal of Corporation Law* 233, 258-260.

[7] Delaware's certificate of need law is found in 16 *Del. Code* ch. 93.

[8] Paul Starr, *The Social Transformation of American Medicine*, pp. 204-209, 215-218, 299-306.

[9] The Delaware HMO Act is found in 16 *Del. Code* ch. 91. Co-Sponsors included Rep. Jane Maroney, who floor-managed the bill in the House.

[10] The older theory is alive with respect to optometrists: 24*Del. Code* §2113(a) still prohibits them from working for corporations other than statutory professional corporations—and those must be controlled by members of the profession. That code section, which is the subject of legislation pending in the 133rd General Assembly, also forbids carrying on practice "in a store or office which does not conform to that used by the majority of professional *men* in the area". (Italics supplied)



The youthful and talented Bill Kirk, admitted to our Bar in 1975, serves today as General Counsel to Blue Cross/Blue Shield of Delaware. We are pleased to welcome to our pages an accomplished writer whose work has already appeared in the Delaware Journal of Corporation Law and in the Journal of Corporate Law. Bill has been closely and usefully involved in the work of the Bar. He served as a law clerk in the Court of Chancery and as a Deputy Attorney General. For two years he chaired the Governor's Magistrates Screening Committee. He is active in the Delaware State and American Bar Associations, the National Health Lawyers Association, and the American Judicature Society.

Last December, Bill, his sister Susan, and his brother Dick were admitted to practice before the United States Supreme Court on motion by their father, William E. Kirk, Jr., which according to veteran court observers, was an unprecedented family event in that august forum - and a very nice precedent for this legally gifted family.

[11] The standard-setting legislation has been incorporated in 18 *Del. Code* §2506.

Health Fraud —
The Problem and Solutions

Alexander Grant

The Problem

Health fraud, the promotion of false or unproven products or therapies for profit, has not only been with us for centuries, but is becoming increasingly more subtle and sophisticated. Its impact has expanded as the use of all types of advertising has expanded.

According to a congressional subcommittee, health fraud is big business costing consumers more than $10 billion a year. Health fraud promoters prey on the hopes of consumers for miracle cures for their illnesses and other problems. While some consumers may lose only money, health fraud can also lead to tragic consequences.

All of us are potential victims since we all have "blind spots" and unfulfilled needs. Some of the reasons for this vulnerability to particular treatments or products were discussed by speakers at the recent National Health Fraud Conference:

- the feeling of "helplessness" — that we cannot control our own health. There may be insufficient communication between health professionals and patients leading patients to be vulnerable to fraudulent products or procedures;
- the beliefs that anything that appears in the media must be true, and that fraudulent products are not allowed to be sold;
- the desire for the "easy way out", such as taking a pill to lose weight rather than adjusting the diet and exercising;
- the need for less expensive treatment for health problems. Patients may believe that a fraudulent treatment will cost much less than conventional therapy; and
- the ingenuity of health fraud promoters. Those who practice health fraud are astute observers of human nature. They exploit the lack of public consensus about the value of certain products. Promoters of fraudulent products also learn quickly the limitations of the law, and how to avoid regulatory action. They change the names of their companies, move, sell different products, modify their labels, and alter their marketing techniques in order to avoid being caught.

Solutions

The mission of the Food and Drug Administration (FDA) is to ensure that foods are safe and wholesome; that drugs and medical devices are safe and effective; that cosmetics are safe; that use of radiological products does not result in unnecessary exposure to radiation; and all these products are honestly and informatively labeled. Specifically, FDA is approaching health fraud on three levels: (1) enforcement; (2) public education; and (3) coalition building.

Enforcement. When the Agency finds a violation of the law, enforcement decisions are based on the health hazard potential of the violative product, the extent of the product's distribution, the nature of any mislabeling, the jurisdiction of other agencies, and available resources. FDA has developed a priority system of regulatory action based on three general categories of health fraud: direct health hazards, indirect hazards, and economic frauds.

Products in the direct health hazard category are given the highest priority. Such products include those that have been documented to cause injury or death or have a reasonable potential for causing direct serious adverse effects. When these products are found, the Agency uses all available civil and administrative sanctions to ensure that they are removed from the market, and publicity is used to warn consumers. Examples of direct hazards are artificial hair implants, which have caused serious infections, and the Relaxacizor, an electric device that was sold for exercising and waist line reducing, but was found to have serious potential for damage to the heart and other vital organs.

Indirect health hazards include products that do not pose a health hazard themselves, but which may adversely affect a patient's health by causing delay or denial of proper medical treatment, or by being put to an inappropriate use. The so-called "sobriety aids" are examples. Products in the third category, economic frauds, pose no health threat to the user, only economic loss. The baldness remedies fall into this category.

Public Education. FDA's consumer education initiatives complement the regulatory activity; currently available material on health fraud includes 14 publications, 2 slide presentations, 2 exhibits, and a videotape. News media interest has helped to inform consumers how to recognize quackery in general, and when and how to protect themselves against specific fraudulent products and promotions.

The Agency is also working with private groups to combat health fraud. Two current projects involve the Council of Better Business Bureaus and the Pharmaceutical Advertising Council. FDA and the Council of Better Business Bureaus mailed a joint letter to advertising managers of 9,500 newspapers and magazines, and 10,000 radio and TV stations. Important information was provided for reviewing ads, and checking with local FDA and Better Business Bureau offices when advertising sales personnel have questions about the validity of claims made in proposed advertising for health products or medical services. A similar mailing went to the producers of every radio talk show in the country with respect to guest selection and health product promotion.

FDA and the Pharmaceutical Advertising Council (PAC) have developed a new public service campaign that uses all media to provide the public with information about how to recognize, avoid, and help stop health frauds. The materials include TV and radio public service announcements, brochures, and print advertisements.

Coalition Building. FDA is also working closely with many other groups to build national and local coalitions to help combat health fraud. Three regional conferences have been conducted through the joint efforts of FDA, the National Association of Consumer Agency Administrators, the Federal Trade Commission, the Council of Better Business Bureaus, the U.S. Postal Service, the Arthritis Foundation, and the American Cancer Society.

On September 11, 1985, FDA, the Federal Trade Commission, and the U.S. Postal Service cosponsored a National Health Fraud Conference in Washington, D.C. This was the first national conference on health fraud since 1966, and was attended by approximately 250 representatives of federal, state, and local agencies, independent public interest groups, and industry associations. The goal of the conference was to heighten the awareness of health fraud in America, and to facilitate the cooperation of the various concerned agencies in addressing the problem at the highest policy-making levels in the public and private sectors.

Future Initiatives

FDA and other public and private sector organizations have a number of plans for future health fraud initiatives. Some of them are:

- Regional health fraud conferences conducted by FDA in cities all across the country. These local conferences will serve as an impetus to develop new, and expand ongoing, health fraud activities and form coalitions with state and local officials, community groups, and professional organizations. Public and private sector organizations at the local level will be encouraged to work together to develop strategies to combat health fraud and to educate the public. FDA and the National Coalition of Hispanic Mental Health and Human Services Organizations (COSSMHO) also plan to conduct a regional health fraud conference for hispanic leaders early next year in San Antonio, Texas.
- A national health fraud survey planned by the Food and Drug Administration and the Department of Health and Human Services. The survey, when approved by the Office of Management and Budget, will provide reliable information on the reasons consumers have used various fraudulent products. It will also explore attitudes and beliefs with regard to these products. The survey will be conducted under contract with Louis Harris and Associates.
- A demonstration Health Fraud Information Exchange Network planned by FDA and the National Association of Consumer Agency Administrators. The Network will share information from federal, state, and local offices on consumer inquiries about fraudulent products, responses to consumer inquiries, names of contact people in each organization, education materials, and announced regulatory actions.
- A program to examine unproven cancer remedies by the U.S. Pharmacopeia (USP). USP plans to develop information on unproven remedies similar to what they now have for recognized medications. Unproven remedies for other diseases will also be considered. The USP has an internationally accepted system for developing information for health professionals and consumers on the indications for use, precautions, and adverse reactions of prescription and over-the-counter medications.
- A health fraud model plan passed by the Association of Food and Drug Officials proposing that each state form a Health Fraud Surveillance and Action Team (HFSAT). The HFSATs would provide a mechanism for state, local, federal, and private agencies to coordinate and consolidate their surveillance and action efforts to reduce the distribution and promotion of health fraud products.

Alexander Grant is the Associate Commissioner for Consumer Affairs of the Food and Drug Administration. He entered the federal service in 1966 and currently serves as a member of FDA's Policy Board and as a member of the Health and Human Services Executive Development Board. Mr. Grant is a past president of the Washington, D.C. Chapter of the Society of Consumer Affairs Professionals in Business and is a member of the National Academy of Public Administration.

FDA Commissioner Dr. Frank E. Young has compared health fraud to a disease in that it can be a deliberate, devouring, destroying entity if left unchecked. It can also be contagious. It is extremely important that all organizations interested in combating health fraud form coalitions and work together to enhance the cures for health fraud —education and enforcement.

Additional information on health fraud may be obtained from the FDA District Office at 2nd and Chestnut Streets, Room 900, U.S. Customhouse, Philadelphia, PA 19106.

ALEXIS I DUPONT BAYARD 1918-1985

When a man is so accomplished and versatile that nearly everything he undertakes is exceptional, it is difficult to highlight some particular facet of his life. The entire fabric is a masterpiece, indescribable and never to be duplicated.

Cale Boggs and I came to that conclusion immediately when *DELAWARE LAWYER* asked us to write a tribute to our friend Lex Bayard, who died September 4.

I guess we've all heard "He puts his pants on one leg at a time" whenever anyone wants to reduce some towering figure to human terms, but all of us know it is undeniably true that some human beings are indeed larger than life. Lex was such a man.

One thing we quickly learned was that a man as cosmopolitan and involved as Lex cannot be categorized by occupation or profession, even one as far-reaching as law. We found that when we sought out anecdotal information about him, those who shared in his remarkable life were much more eager to reminisce about the whole man—his zest for living, his natural wit, his passion for justice, and his loyalty to commitments and friends.

Each of us knew him in different ways, because the passions of his years were many. Our contacts were accordingly as diverse as we are from one another. There was Christ Church and Delaware Law School, to both of which he was devoted, and there were scores of other interests.

Cale and I knew him best through politics and hunting, which we pursued with him, though in Governer Boggs's (or is it Senator or Congressman — who knows exactly what to call Cale?) case their political goals were far apart at first blush, but perhaps not so much so when you take a closer look.

Lex was generous to a fault with both his resources and himself. I know that many a Democratic Party chieftain from Jack Kennedy and Bob Strauss to Charlie Terry and Henry Topel called him for help and advice when the party faced a crunch.

And it was always forthcoming. He loved the Democratic Party, but he held an even deeper belief in the two-party system. He believed that our government serves the people well if both parties have good men and women pursuing the goals of our democratic republic.

Here are some recollections from Cale about Lex and politics and lawyering:

"Lex and I knew each other from the late 1940's when he was Lieutenant Governor and I was in Congress. We used to have coffee together several mornings a week at the old meeting place at 10th and Market, which had about three tables and was frequented by young men in the town, especially the legal community.

"Even in those days he had a great affinity for young lawyers and a keen interest in their welfare. He wanted to see them develop a sense of community and civic and political involvement and, even though hardly more than a kid himself, he took a paternal interest in their progress.

"Of course I've known him ever since and not once in all those years can I recall his saying a single word in anger. Though he was a staunch Democrat and I was as Republican as anyone can be, we never argued, although we spoke about politics a lot in an observational sense, I wound up learning a great deal from him."

Gentility was sort of the by-word of his life as he carried on a family tradition of illustrious achievement and civic devotion (such as his heroism under enemy fire in World War II and his years of public service). His colleague, Richard Herrmann, captured some of his essence in the following rhymed remembrance:

The common word is "gentle",
If a description of Lex is sought.
And when upset, he was gently mad
While other men were not.
He even hunted gently and with accuracy renowned.
His shot would gently hit its mark
And the drake float to the ground.

Anyone who ever saw Lex in the company of his five sons and daughters knows full well the enormous impact he had on young people. Their admiration and respect for their father was evident in their every gesture, yet the banter and confidence-sharing and conversation all made it seem like equals enjoying each other's company.

Lex was a complex and urbane man and, as I said in a piece written for another publication... he had traveled the far corners of the world in pursuit of his great passions: learning, first of all, and then hunting and fishing. And yet, though he had seen the challenge of big game and big fish and the wide world, it was home he loved above all and in Delaware he knew every creek with a deep hole where a nice bass could laze in the sun and every body of water where a man could conceal himself and make pass shots at teal.

People sought his companionship because he could relate well to everyone in the most natural and intimate way without ever straining to keep a conversation going. And always his remarks were punctuated with that, self deprecating rapier wit that kept people chuckling with pleasure.

Leon Pleasanton is a Kent County farmer who operates a game preserve and has been a national trap shooting champion. He rarely misses what he shoots at. "You know," Lex told Cale one day grinning impishly as only he could do, "I've noticed that when I shoot with Leon I nearly always get my limit."

Can we doubt that there is a very big gap in our lives where this man used to be?

Ned Davis, in collaboration
with the Honorable J. Caleb Boggs

Drug Information and Education: Growth and Results for the Voluntary Approach

Paul G. Rogers

The consumer movement of the 1960's and the self-care movement of the 1970's have caused Americans in ever greater numbers to seek more information about all aspects of their health care. They feel they have a need to know and a right to know about decisions being made for them.

One of the most frequent decisions is the prescribing of medicines. On average, each patient visit to the physician results in the writing of at least one prescription.

So it is not surprising that demands for prescription drug information has grown over the years. The Food and Drug Administration (FDA) responded in 1970 with patient prescription drug labeling requirements for oral contraceptives. Patients received information with which to decide whether to take or to continue to use these drug products.

Later in the mid-1970's, FDA received petitions from a number of groups asking for more prescription medicine information. FDA, responding as it must to public concerns, began to consider alternative approaches. In September 1980, the agency proposed for public comment a plan to require pharmacists to dispense prescription medicine information in "patient package inserts" (PPI's) with ten prescription drugs to be tested over a three year period.

Groups representing the health care professions, consumers, voluntary health organizations, and pharmaceutical manufacturers recognized that most patients do not get the information they need to use prescriptions safely and effectively. They agreed that a nationwide problem existed. But the proposed solution, requiring Federal regulation, did not attract the broad-based support from the interested parties needed to address the problem comprehensively.

FDA, still committed to the belief that patients must actively participate in decisions about the best therapeutic approach to treating illness, proposed to withdraw the PPI program, if there could be voluntary approaches in place of the mandatory system for getting information to patients.

In 1981, government, pharmaceutical manufacturing, health care, and consumer groups began working together to develop a voluntary program to improve patient drug information and education.

In October, 1982 twenty-three organizations and agencies representing health professionals, consumers, voluntary health organizations, pharmaceutical manufacturers and others including the Food and Drug Administration (FDA), formed the National Council on Patient Information and Education (NCPIE).

The Council began with a three-year start-up grant from CIBA-GEIGY Corporation. With the help of the organization's founders, the Council recruited member organizations, an enthusiastic Board of Directors representing member groups, four voluntary Task Forces, (Public Communications, Professional Communications, Patient Education and Responsibility, and Planning and Evaluation), a permanent staff, and a National Advisory Board with leaders in health and industry to guide fund-raising efforts. Today, NCPIE has 236 member organizations to support an expanding agenda of medication information initiatives.

Catalyzing Nationwide Communication

In response to studies conducted by the FDA and others, which showed that patients do not receive adequate drug information from their health professionals, NCPIE fostered an on-going dialogue about medication use. We have developed and sponsored a wide variety of national activities. Some of them raise public awareness of medication information issues. Others promote communication among Council members or behavior change among health professionals.

NCPIE's role has remained the same in all of its initiatives. The Council is a catalyst, stimulating broader understanding of the involvement in medication information activities than any single organization could create.

Patient Awareness

To bring the need for accurate drug information to immediate public attention, the Council used the television and print media to communicate its message.

For television, NCPIE distributed a series of three public service announcements (PSA's). The 30-second spots encouraged consumers to ask their health professionals about how and when to use their medicines, reminding them that "the more you know about the medicines you take, the better they'll help take care of you."

In July, 1983, the Council sponsored the "Get the Answers" campaign, which encourages consumers to ask five basic questions about their prescription medicines. Wallet cards, brochures, posters, print-ads, carrying an FDA health message in Social Security checks, and other approaches to consumers has enabled the Council to reach an estimated 50 million Americans directly. Now with a recent grant from Exxon Corporation, the "Get the Answers" campaign will be revised for corporations so they can reach employees, their dependents, retirees, and customers with this important health message.

Professional Awareness

At NCPIE's October 1984 annual meeting we introduced the Council's new professional education campaign. The "Give the Answers" campaign, is designed to help all health professionals, and especially physicians, pharmacists, nurses, and physician assistants, to educate their patients about prescription medicines. The campaign informs these health professionals that 96% of their patients will not ask questions about their medicines but the majority do want more information. It urges health professionals to take the initiative in counseling patients for informed drug use and offers programs and materials to support their efforts.

We have prepared a sourcebook for professionals that describes patient drug information resources they can use to enhance their interactions with patients about medications. The council is distributing these sourcebooks in registration kits at major health professional meetings and through individual mail orders, together with a lapel badge that health professionals can wear that says, "I GIVE THE ANSWERS."

This latest campaign is designed to complement the Council's "Get the Answers" public information initiative. The two campaigns are intended to work together to help patients and professionals speak the same language.

Initial response shows that "GIVE ANSWERS" is being well received. Profession specific sourcebooks have been distributed to more than 30,000 health professionals at professional meetings and by direct mail.

Coordinating Widespread Voluntary Action

In addition to catalyzing and providing resources for national activities, NCPIE has an equally important role: serving as a clearinghouse and coordination point for the hundreds of national, state, and local level medication information programs NCPIE member organizations sponsor. Many of these programs represent member affiliate groups participation in campaigns such as "Get the Answers," which NCPIE has generated. Others are independent efforts by members to meet prescription drug communication needs that the Council has identified.

One local example of these independent efforts comes to mind. The Happy Harry Discount Drug Chain in Delaware sponsored a full-page tabloid news campaign, carrying the logo "Ask Me" and the five NCPIE consumer drug questions. Pharmacists are wearing "Ask Me" buttons to encourage consumer questions, and each prescription department has a drug information booklet produced by the U.S. Pharmacopeial Convention for consultation. There are thousands of similar examples in states and communities across the country. There are hundreds of examples in every state.

The Future: Expanding the Agenda

With broader membership involvement and new sources of funding, NCPIE will take new approaches to promoting the prescription drug dialogue. The Board of Directors has approved an ambitious program that provides new directions for NCPIEs voluntary cooperative network. Highlights:

- Expanding the "Get the Answers" consumer education campaign to reach the employee populations of major American corporations and to urge them to ask questions about their prescription medicines.

Paul Rogers, Chairman of the National Council on Patient Information and Education, is a member of the Washington, D.C. firm, Hogan & Hartson.

- Publishing a Directory of Patient Drug Information Resources Research and Programs that reports how consumer, health professional, government, pharmaceutical manufacturing, health care organizations, and others are promoting safe and effective use of prescription medicines.
- Plannings for the first National Medication Awareness Week to be held next Fall.
- Printing and development of a media campaign that promotes the safe and effective use of medicines among older people. Action on this initiative, funded by a grant from The Commonwealth Fund has already included planning meetings of the Campaign Steering Committee, National Advisory Board and Campaign Task Force and the development of a priority-setting document. The development and testing of the media materials will occur in the Fall and Winter of '85 with the announcement of the campaign scheduled for Spring, 1986.

These activities and others will further extend the Council's outreach to those who want and need to know about drug information issues. With the continued support of its member groups and funding sources, NCPIE will continue to expand the dialogue about prescription medicines and demonstrate that the voluntary approach to solving national problems can work.

Will Delaware Join Growing List of States Banning Credit Card Surcharges?

Jacob Clayman

Early in 1984, Congress allowed a decade-long federal ban against credit card surcharges to lapse. Suddenly, it became legal for merchants to impose extra charges when consumers use their credit cards.

Congress also left a lot of big questions unanswered. Such as:

- How will consumers be able to trust advertised prices and claims if credit card surcharges become common?
- Will consumers be enticed by advertisements of a lower cash price, and then socked with credit card surcharges at the cash register?
- Will Americans tolerate a two-tiered pricing system for literally every purchase (one price for cash and a higher one for credit)?
- Do we really want to deliver this body blow to Truth in Lending?

And those are only some of the *big* questions! There are lots more small ones.

Recently, state legislatures have been working to straighten things out. A few states already had regulations prohibiting surcharges under state usury or other credit-related laws. These included Maine, Oklahoma and Massachusetts. New York voted for a ban in 1984, enacting an excellent law that is still a model piece of legislation.

The fight soon spread across the country. Texas and Colorado passed surcharge bans during this year and, as I prepared this article, I learned that legislation passed in California. If California did it, can Delaware be far behind? I hope not!

Congress's inaction has ignited a legislative prairie fire spreading all across the country. What does it all mean to Delaware? What's all the fuss?

First of all, *any* change in credit card policy is big news because so many people use credit cards. Millions of Americans use them everyday. We at the National Council of Senior Citizens are very much concerned, because studies show that 42% of people over 65 use credit cards.

Overall statistics are even more compelling. There are an estimated 600 million credit cards in the United States today. That's roughly four for every adult! Seven out of ten adults carry one or more for the safety and convenience they provide. Yearly credit card purchases total over 60 billion dollars.

If merchants offer discounts when people pay cash, that's one thing. But why punish customers for using credit cards? After all, cash discounts *reduce* the price. Surcharges *increase* it.

According to Mary Heslin, Commissioner, Connecticut Department of Consumer Protection, providing cash discounts to consumers serves the interests, of both consumer and merchant, but opening the door to credit card surcharges "endorses a system of double-charging and massive confusion in the marketplace."

Sounds like an open-and-shut case, right? But when we try to have the surcharge ban passed at the state level, it isn't easy. The outcome usually depends on how well we communicate.

In Texas, the ban passed with only one dissenting vote. The Colorado vote was overwhelming. California support was also strong. Obviously, we did something right. If people understand what is at stake, they make sure that their representatives know about it.

But, strange as it may seem, there *are* people who support surcharges. They argue that cash customers subsidize credit card users. After all, don't merchants have to pay a handling fee to credit card companies each time a card is used? Isn't this an extra cost that supposedly results in higher prices?

Well, it doesn't work that way. Credit cards may be a lot of things, but they certainly are *not* a drain on merchant profits. Rather, they spur sales and allow merchants to offer lower per-unit prices.

Opponents don't recognize the fact that cash purchases have their own transaction costs, including insurance, check processing, bad check charges, and bonding of employees. Besides, adding a surcharge to credit card customers will not lead a merchant to lower prices to cash customers unless a discount for cash is offered.

But the worst problem is that credit card surcharges make advertised prices and claims undependable. Talk about misrepresentation in the marketplace! Unless a surcharge ban is enacted, full disclosure will be needed for all advertised prices and claims. Two-tiered pricing will be required (cash and credit) with all the resulting paperwork. Store displays, credit contracts, monthly billing, and even advertising will have to be jammed with complicated disclaimers.

It will be a mess. The National Association of Consumer Agency Administrators knows it, and so does the Minnesota AFL-CIO. Both groups have adopted resolutions in support of legislation banning credit card surcharges.

Now as the consequences become known, shouldn't Congress get back to this important issue?

Let me caution you. I've fought this fight for quite a while. It's been almost two years since the federal ban expired and there is still no action in Congress.

So let's all get started now to at least protect ourselves in the states where we live. There's a lot at stake! Start working now to reestablish this vital consumer protection in Delaware. Join the states of Arizona, Florida, Iowa, Kansas, Maryland, New Jersey, Pennsylvania, and Utah by convincing the state legislature to introduce a surcharge ban bill in 1986.

How about it, Delaware?

For more information about Consumers Against Penalty Surcharges, you can call or write to Monica Dignam, CAPS Coordinator, at CAPS, 733 North Van Buren Street, 4th Floor, Milwaukee, WI 53202 (414) 271-1398.

Jacob Clayman, lawyer, editor, and administrator, has had a long and distinguished career devoted to protecting the rights of others. He was one of the founders of the Consumer Federation of America and became its first president in 1968. He retired in 1979 as president of the Industrial Union Department of the AFL-CIO to conduct a vigorous retirement, currently as president of the National Council of Senior Citizens. His views are informed by wide experience, including work for the Federal Government, and service as an elected representative to the Ohio Legislature.

The 1985 Revisions to the Delaware Inheritance Tax Statute

Peter S. Gordon and
Richard J.A. Popper

The consumer, initially preoccupied with getting his honest money's worth, becomes upon reflection ever more concerned about hanging on to the money he would wisely spend. Enter the estate-planning tax lawyer, whose literally death-defying acrobatics sustain our dreams of durable greed.

Estate planning has never been an easy task. But under Delaware law as it existed before the 1985 revisions to the Delaware Inheritance Tax Statute, estate planning was far more difficult than it is today.

The revisions that made estate planning easier were contained in S.B. 270. This Bill was carefully prepared by members of the Estates and Trusts Section and the Tax Section of the Delaware State Bar Association and was introduced in the State Legislature by Senator Richard Cordrey. Signed into law by Governor Castle on July 12, 1985, it is effective for the estates of those who die on or after July 1, 1985.

The highlight of the new legislation is certainly the creation of the Delaware Unlimited Marital Deduction. This provision permits an unlimited amount of property to pass from a decedent to his or her surviving spouse free of Delaware inheritance tax. But the statute did more than just create an unlimited marital deduction. It contains other significant provisions, which are important to estate planners and to their clients.

Retirement Benefits

Almost every major employer sponsors qualified retirement plans for its employees. These plans include thrift plans, savings and investments plans, pension plans, ESOPs, TRASOPs, and others; all commonly referred to as pension plans. Most provide death benefits for beneficiaries designated by participants.

Prior Delaware law assessed an inheritance tax on the value of the decedent's interest in the plans at the time of his death. The old law provided that the amount of the decedent's interest subject to inheritance tax was the same amount included in the decedent's estate for federal estate tax purposes. In effect, the state "piggy-backed" on the federal law, relying on the Internal Revenue Code to establish the amount of death benefits subject to state tax.

The system worked well until January 1, 1983. Generally, death benefits were not subject to inheritance tax if they were paid to a beneficiary in the form of an annuity, since federal law excluded installment payments from the gross estate. Only lump sum distributions were subject to tax, but then the beneficiary had the cash with which to pay the tax and received certain favorable income tax treatment to mitigate the death tax costs of the distribution.

The federal rule changed for estates of decedents dying on or after January 1, 1983. The exclusion for retirement plan death benefits became limited to $100,000 regardless of whether benefits were paid in lump sums or in installments. Before the State of Delaware could react, the federal law changed again. This time the $100,000 exclusion was eliminated for the estates of those who died on or after January 1, 1985, and the full value of the retirement plan death benefits became includible.

The changes at the federal levels seemed harsh at first. But, they were added to a system that exempts the first $400,000 of a decedent's estate from federal estate tax (It will rise to $500,000 in 1986 and $600,000 in 1987.) and allows unlimited amounts of property to pass to a surviving spouse without estate tax. The net result was that most death benefit distributions remained federal estate tax free.

The federal changes were "piggy-backed" into Delaware law. Unfortunately, Delaware's old inheritance tax statute contained no unlimited marital deduction and nothing even close to the exemption equivalent allowed by federal law. Suddenly, widows and widowers found the death benefits payable to them from their deceased spouse's retirement plan subject to Delaware inheritance tax. What is worse, the death benefits were usually payable over the lifetime of the surviving spouse *but the Delaware inheritance tax had to be paid at one time, in cash, nine months after the date of the plan participant's death.* There was a strong belief that the old Delaware statute would cause retirees to move out of state to avoid the tax on the death benefits payable to their surviving spouses.

The new Delaware law solved the problem by completely exempting death benefits under qualified retirement plans from Delaware inheritance tax. Section 1309(c) of the act insures that death benefits will be non-taxable whether paid in lump sum or in installments and regardless of whether they are paid to a decedent's surviving spouse or other beneficiaries of the decedent such as a minor children. Resident retirees can rest easier now that the new law is in place. In addition, estate planners and tax practitioners need not worry about how an estate will find the cash to pay inheritance tax on funds not distributable until some time in the future.

Life Insurance

Mr. Roberts owns a $100,000 life insurance policy insuring his life. He names his wife as his primary beneficiary but fails to name a contingent beneficiary. At the time of Mr. Roberts' death, his wife has predeceased him. The life insurance proceeds are paid to his estate, under the terms of the life insurance policy, and are distributed to his daughter with the residue of his estate under the terms of Mr. Roberts' will.

Mr. Robert's failure to name his daughter as the contingent beneficiary of his life insurance policy cost his daughter at least $2,470 under the old Delaware Inheritance Tax Law. This is because the old law only excluded life insurance proceeds from inheritance tax if the proceeds were "payable otherwise than to the estate of the insured." Had Mr. Roberts, or his estate planner, made certain that the beneficiary designation form named his daughter as the contingent beneficiary, no Delaware inheritance tax would have been due.

The requirement that insurance proceeds be paid to a beneficiary designated other than by the decedent's Will to avoid Delaware inheritance tax created many problems. The inadvertent inheritance tax on Mr. Roberts' estate illustrated above is only one. Often, where an insured had a number of beneficiaries whom he wished to benefit, insurance companies would refuse to accept the lengthy beneficiary designation form necessitated by the insured's estate plan. The result was complicated drafting to establish a trust as a beneficiary of the life insurance proceeds so that the insured could select those whom he wished to benefit.

Section 1310 of the new law makes it clear that life insurance proceeds are exempt from Delaware inheritance tax even if paid to the decedent's estate. The failure to name a contingent beneficiary, while not encouraged, will not result in a hidden tax. Moreover, where the insured has a detailed plan in mind for the distribution of his estate, including his insurance proceeds, it is possible to name his estate as the primary beneficiary of the policy and still avoid the Delaware inheritance tax. Additional probate fees should be considered before taking this approach.

Gifts Near The Time Of Death

Prior Delaware law presumed that gifts made within six months before a decedent's death were made "in contemplation of death". The law included the full value of the gift in the taxable estate of the decedent unless the estate could prove that the gift was not death tax motivated.

Federal law, on the other hand, generally permitted a tax payer to transfer $10,000 to each donee each year without federal-estate tax consequences. Only the excess value of the gift (over $10,000) affected the decedent's estate tax liability. The conflict was apparent. Tax advisors had to explain to elderly and ill clients that the $10,000 gifts they planned to make to their children and grandchildren would be exempt from federal estate tax but could be subject to Delaware inheritance tax if death occurred within six months after the date of the gifts.

Section 1306 of the new statute does

away with the distinction between the estate and federal "gift in contemplation of death" rules with respect to the first $10,000 in transfers. Now, the $10,000 excludible portion of each transfer is exempt from Delaware inheritance tax regardless of the proximity of the gift to the date of the decedent's death. The value of the gift in excess of $10,000 continues to be taxed under the old rule and will be subject to Delaware inheritance tax unless the estate can prove that the transfer was not death tax motivated.

Jointly Held Property

The old Delaware law applied two principles to determine the value of jointly held property to be included in the taxable estate. These were: the rule of contribution and the presumptive share rules. The rule of contribution provided that a decedent's taxable estate would include the date of death value of jointly held property to the extent of the decedent's contribution to the acquisition of the property. If jointly held property was purchased for $40,000, $20,000 of which was paid by the decedent, and the property was worth $100,000 on the date of the decedent's death, the rule of contribution resulted in the inclusion of $50,000 in the taxable estate, since the decedent contributed one-half of the original acquisition cost.

The presumptive share rules distinguish between joint tenants who were husband and wife and non-spousal joint tenants. If a husband and wife own property as joint tenants with right of survivorship or as tenants by the entirety, the estate could elect the presumptive share, which presumed that one-half of the first $200,000 in jointly held property was contributed by the surviving spouse rather than the decedent. This presumptive share was therefore excluded from the inheritance tax base. The presumptive rule that applied to non-spousal joint tenants presumed that the entire value of the property was contributed by the decedent, unless the surviving tenant could prove the actual contribution made by him or her to the acquisition of the property. Only the share for which the surviving joint tenant proved contribution was excluded from the decedent's taxable estate.

The rule of contribution and the presumption that the entire value of jointly held property is includible in the decedent's gross estate still apply to nonspousal joint tenants. However, there has been a significant change in the rule as it applies to joint tenancies between husband and wife.

Section 1305 of the new statute now conclusively presumes that one-half of the value of all property jointly held by a husband and wife was contributed by the surviving spouse. The result is that only one-half is includible in the taxable estate. This rule, taken into account with the new unlimited marital deduction, will generally result in no inheritance tax on property jointly held between husband and wife.

The Unlimited Marital Deduction

The widely perceived most significant change in the Inheritance Tax Law is the unlimited marital deduction, which has been added to Section 1323(b). Any property that qualifies for the federal estate tax marital deduction will qualify for the marital deduction in Delaware. With respect to property that qualifies or could qualify as qualified terminable interest property ("QTIP") under Internal Revenue code ("IRC") §2056(b)(7), a separate Delaware election is provided. The election may be made to obtain a marital deduction for QTIP property regardless of whether a federal estate tax return is required and regardless of whether an election is made for federal estate tax purposes.

Generally, items that qualify for the Delaware marital deduction at the first spouse's death will be included in the taxable estate of the surviving spouse and items that do not qualify for the Delaware marital deduction will *not* be so included.

This general principle is important in estate planning, since Delaware inheritance tax will have to be paid at one death or the other, if the inherited assets in question have not been consumed before the survivor's death. In general, property qualifies for the marital deduction for federal estate tax purposes if it passes to the surviving spouse and is not an interest that will terminate on the lapse of time, or on the occurrence or failure to occur of an event or contingency ("terminable interest"). However, a terminable interest can qualify for the federal estate tax marital deduction under IRC Section 2056(b)(7) if the surviving spouse is entitled to all of the income from the property payable no less frequently than annually, and no person has a power to appoint any part of the property to a person other than the surviving spouse, provided the executor elects to qualify it for the marital deduction on the federal estate tax return. Such property is commonly referred to as QTIP property. The price of this election is inclusion of the property in the surviving spouse's estate. It is beyond the scope of this article to fully describe the rules concerning the federal estate tax marital deduction.

12 *Del.C.* Section 1304(d) taxes Delaware QTIP property in the survivor's estate. It taxes property for which a federal gift tax marital deduction was allowed under IRC Section 2523(f) or, more important, for which a deduction was allowed in the estate of the first spouse to die for Delaware inheritance tax purposes as Delaware QTIP property. If a person creates an inter vivos QTIP trust and makes an election under IRC Section 2523(f) to qualify it for the marital deduction, he will not pay any federal gift tax. An example of an inter vivos QTIP trust is a trust created and funded by a husband during his lifetime providing income to his wife for her lifetime, and providing for disposition of the corpus of the trust to his children at the death of the wife. Since the Delaware gift tax piggy-backs the federal gift tax in this respect, if a person creates an inter vivos QTIP trust, he will obtain a Delaware gift tax deduction for the value of the gift. In order to prevent such a person from escaping both Delaware gift and inheritance taxes on the corpus of such a trust, Section 1304(d)(2) includes the corpus in the surviving spouse's estate for Delaware inheritance tax purposes.

Under IRC Section 2519 and for purposes of the Delaware gift tax, if a spouse disposes of all or any part of federal QTIP property, the entire property subject to the QTIP election will be deemed to have been transferred by the spouse. Therefore, §1304(d) exempts such property from the inheritance tax since there is no policy reason to tax such property twice. QTIP trusts created before August 1, 1985 are not included in the surviving spouse's estate.

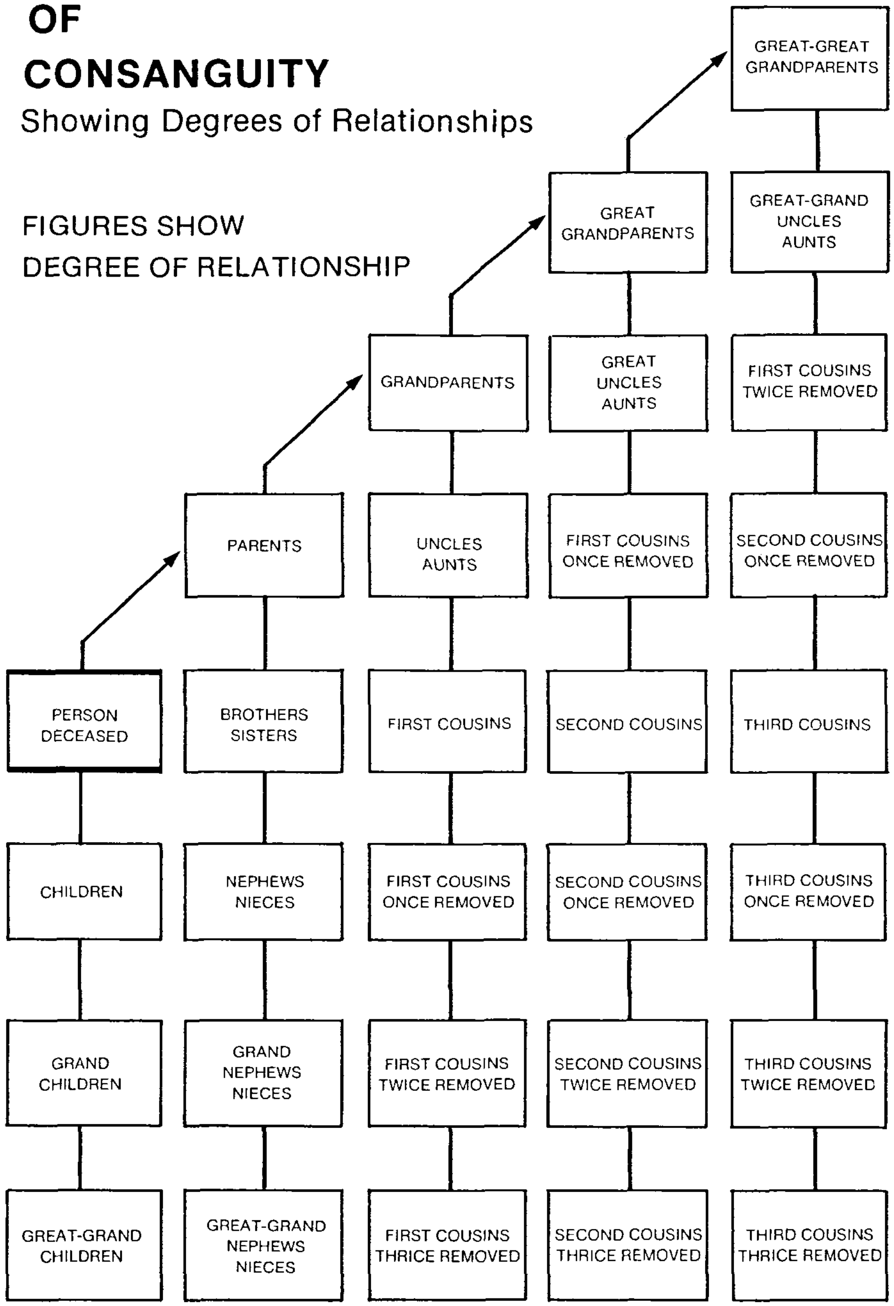
The operation of the QTIP marital deduction provisions can be illustrated by a simple case. Assume that a decedent dies leaving his entire estate, with a total value of $400,000, to a trust that provides a life income interest to his wife and equal remainder interest to his two children. Assume that the widow is 72 years old. Under the 10% tables contained in Treas. Reg. §20.2031-7(f), the life income interest of the widow is worth .57261 of the corpus. For Delaware inheritance tax purposes, this means that $229,044 is taxed to the wife at Class A rates for a tax of $4,762. The remainder is divided between the two children who are taxed on $85,478 each. The tax for each is $1,819 resulting in a total tax of $8,400 assuming no Delaware QTIP election is made.

If the QTIP election is made, the corpus of the trust is sheltered by the marital deduction. Thus , there is no Delaware inheritance tax due.

However, Section 1304(d) imposes a price for making the QTIP election. At the death of the widow, her taxable estate will include the entire value of the trust. If the trust remains at $400,000, each child will be taxed on $200,000 at Class B rates. If the trust is the only property includible in the widow's estate, the tax will be $12,800 which is $4,400 more than the tax which would have resulted if no Delaware QTIP election had been made at the first death. The savings would be even greater if the spouse has other property.

TABLE OF CONSANGUINITY

Showing Degrees of Relationships



The foregoing example demonstrates that, except when the surviving spouse is absolutely insistent on paying zero tax at the first spouse's death, it is wise to combine the Delaware QTIP election with $70,000 Class A exemption. Thus, one would make an election as to all but that portion of the trust in which the surviving spouse's interest is $70,000. The correct fractional portion is determined by working backwards using the 10% tables. In our example, dividing $70,000 by .57261 results in an amount of $122,247. The desired result is to make a Delaware QTIP election, the effect of which is to have all but that fractional portion of the trust with the value of $122,247 qualify for the marital deduction. This can be expressed as "that fractional portion of trust X, the numerator of which fraction is the total value of the assets in trust X less the value of assets in which the interest of the surviving spouse is equal to $70,000 using appropriate valuation tables for Delaware inheritance tax purposes, and the denominator of which fraction is that total value of the assets in trust X." In this example, the fractional election will result in a tax of $345 at the first death because of the $52,247 taxed at Class B rates. However, this is a small price compared to the potential 6% tax on $122,247, or $7,335 at the surviving spouse's death if the entire trust were qualified for QTIP treatment.

Attention must be paid in planning QTIP elections to the age and health of the surviving spouse and who the surviving beneficiaries are. If the surviving spouse has a short remaining life expectancy, it will often be unwise to make a QTIP election because of the increased tax which it will cause at the second death. If the remaining beneficiaries of the trust fall into Class C or Class D as related to the *surviving spouse*, the maximum 10% and 16% rates may make the QTIP election a very expensive proposition.

Another important change in the marital deduction area involves powers of appointment. Prior to the amendment of the Delaware Inheritance Tax, 12 *Del. C.* §1304 taxed property subject to a general power of appointment. A general power of appointment allows a person to appoint principal to himself, his creditors, his estate, or the creditors of his estate. Section 1304(a) has been amended to include the value of property with respect to which the decedent possessed a general power of appointment created after July 31, 1985 conferred upon the decedent by the decedent's spouse. Usually, the first spouse's estate would have been entitled to a marital deduction for such property, so the appropriate price is a tax at the survivor's death. General power of appointment marital deduction trusts will be included in the taxable estates of surviving spouses when the first spouse dies after July 31, 1985. General power of appointment marital deduction trusts created by decedents in favor of their spouses when the decedent died before August 1, 1985 will continue to be exempt from inheritance tax to the extent that the surviving spouse does not exercise or release the power of appointment.

Tax Rates and Classification of Beneficiaries

Important changes have been made to the tax rate structure of the Delaware inheritance tax as set forth in 30 *Del. C.* §1322. Prior law taxed property passing to beneficiaries at different rates depending on the relationship of the beneficiary to the decedent. The four class structure of prior law has been retained but the definition of the relationships to the decedent which fall

under each class and the level of exemptions have been altered.

Class A, the lowest taxed classification, for property passing to a spouse, remains unchanged. In spite of the unlimited marital deduction, Class A will continue to have application where property passes to a spouse in a trust or another form, which either does not qualify for the Delaware unlimited marital deduction or which the executor does not elect to qualify for QTIP treatment.

A significant addition has been made to those persons who fall into Class B, the second lowest tax group. Formerly, Class B included the decedent's parents and grandparents, children, sons and daughters-in-law, and legally adopted children. Now, Class B also includes stepchildern. Stepchild means a child of the spouse of the decedent to whom the decedent stood in the mutually acknowledged relationship of a parent for not less than ten years before death, if the relationship began at or before such person's 15th birthday and was continuous for ten years thereafter.

As a result of the prior exclusion of stepchildren from Class B, it was often advisable from an inheritance tax viewpoint to suggest to testators that they legally adopt their adult stepchildren in order to reduce the tax rate. The effect of such an adoption in some states was to eliminate the child's right to inherit from his natural parent. Also, many people do not wish to adopt stepchildren merely to save inheritance tax.

The new law eliminates the need for adoptions in some cases, but unfortunately, because of the narrow definition of stepchildren, adult adoptions are likely to continue to occur frequently.

The exemption in Class B has been increased from $3,000 to $10,000.

Class C has been amended. Formerly, Class C included brothers and sisters either of the whole or half blood of the decedent or any of their lineal descendants and brothers or sisters of the decedent's parents and their children. This left the anomalous result that cousins would be included in Class C, but descendants of cousins would be in Class D, the most expensive rate bracket. On the other hand, nephews and nieces and their descendants would be included in Class C and not Class D, no matter how many generations removed. Class C now includes any person whose relationship to the decedent is within five degrees of consanguinity and is not included in Class B. Thus, Class C includes brothers and sisters (two degrees), and their children, grandchildren and great-grandchildren. It also includes cousins (four degrees) and their children (five degrees) but not anyone more distantly related to the decedent than that. See illustration to determine what classes of relatives of the decedent would be included in Class C.

The Class C exemption has been increased from $1,000 to $3,000.

Class D, as before, includes anyone not includible in Classes A, B, or C. The Class D beneficiaries now have an exemption of $1,000. Formerly, there was no exemption in Class D.

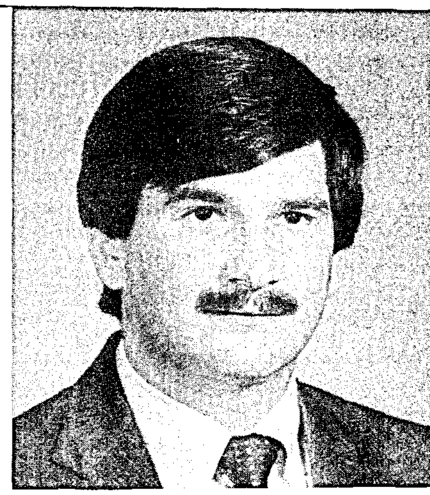
Return Filing Requirements

Section 1341 has been amended to adjust the return filing requirements in accordance with the new exemptions. The $20,000 amount formerly contained in Section 1341 (a), which exempted from the filing requirement estates the value of which exceeded $20,000 if there was no beneficiary other than the surviving spouse, has been changed to $70,000. Even if an estate is entitled to the unlimited marital deduction and all property passes to a surviving spouse, a return must still be filed to claim the marital deduction if the estate exceeds $70,000.

A special provision has been added to Section 1342(a) regarding the timing of filing returns. In general, returns must still be filed within nine months of the date of the decedent's death. However, if before the expiration of that nine month period the estate has become involved in any litigation, the outcome of which may affect the computation of the Delaware inheritance tax, the due date of the return is extended until thirty days after the litigation is concluded.

The 1985 revisions to the Delaware Inheritance Tax Statute make great strides toward simplifying estate planning. Differences between the federal estate tax and the Delaware inheritance tax have been narrowed, and ambiguities in the old statute have been clarified.

For most estates where the decedent leaves all of his property to his surviving spouse, the new law means that no Delaware inheritance tax will be due. Larger estates will continue to require careful planning to minimize tax at the second death. In this regard, the new law offers many opportunities for tax savings.



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The New Laissez Faire: Antitrust and the Consumer

William J. Wier

Typically, antitrust issues do not generate widespread public interest. However, in the last five years there has been such a dramatic swing in antitrust policies that if the law continues on its present course, repercussions will be felt from the corporate boardroom to the corner store.

The impetus of this divergence from prior law no doubt lies with the present administration, particularly the Justice Department's Antitrust Division and the Federal Trade Commission (FTC), and to a lesser degree President Reagan's appointees to the Federal Judiciary. The current antitrust position of the Federal branches and enforcement agencies is generally characterized by relaxed merger guidelines, laissez-faire approach to vertical restraints, a more forgiving view of vertical price-fixing and accommodating interpretations of previous court rulings and legislative histories — all for the limited purpose of achieving economic efficiencies. In short, the current stance towards regulating business is that the antitrust laws were enacted to serve economic efficiency, not notions of consumer welfare. The perceived result has been that business practices previously regarded as pernicious to consumers and small businesses have gone unchallenged, or when challenged, have been permitted.

The current administration has been able to largely succeed in its objectives of reinterpreting the antitrust laws to the limited purpose of achieving economic efficiencies because of the inherent nature of the statutes themselves. The antitrust laws are notoriously imprecise and have been open to wide degrees of interpretation. For example, note the operative language of §1 of the Sherman Act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal." And equally as broad, the Federal Trade Commission Act's Section 5: "Unfair methods of competition in or affecting commerce, and unfair or deceptive trade practices in or affecting commerce are hereby declared unlawful." Traditionally, litigants and courts alike have resorted to legislative history when confronted with vague or ambiguous statutory language. But a review of such history for antitrust statutes indicates that Congress clearly intended to provide only the statutory skeleton, leaving the fashioning of the flesh, heart, and soul of the law to its enforcers. Thus, as one sitting Federal Trade Commissioner commented: ". . . The federal antitrust law is essentially federal common law, and it is appropriate for both the courts and those responsible for antitrust enforcement to consider what should be the appropriate goal of antitrust."[1]

One former Assistant U.S. Attorney General who served in the Antitrust Division, assessing these developments observed that President Reagan's administration is exercising its broad and unfettered discretion in interpreting and enforcing the antitrust laws. This commentator noted that the current Justice Department has openly repudiated enforcement of various aspects of antitrust law and tempered most of the rest of the antitrust law. Further, he observed that this reversal of policy is truly dramatic because antitrust enforcement has been fairly consistent since at least the late 1950's without regard to whether the administration was Republican or Democratic, and that the sudden and sweeping shift in policy recently enacted has created serious problems for both legal advisors and the business community.[2]

This restrictive interpretation of these laws by the current administration has not only been steadfastly maintained in action. It has been enunciated by candid and forthright speech, as exemplified by merger policies. Attorney General Meese reported that the administration is committed to promoting economic growth [through mergers] and strengthening U.S. firms against foreign competition.[3] Under the preeminent standard currently used by the Justice Department, the hallmark of permissible combination is whether or not the merger results in greater economic efficiency. A combination that is more efficient, regardless of size, now goes unchallenged by the Antitrust Division, presumably on the ground that consumers benefit from lower costs for goods and services.

Thus, the mega-mergers of the past several years have passed scrutiny under antitrust laws that would have seemed to prohibit them only several years ago, specifically because of the Justice Department's and the Courts' pre-disposition to eschew any possible adverse non-price related market consequences in deference to formations of more "economically efficient" conglomerations. Thus, combinations between giants such as Texaco and Getty or Chevron and Gulf have been approved with only minor changes even though the merger was not achieved to fend off foreign competition *and has resulted in no apparent consequential price decrease for the consumer.*

The perceived relaxation of antitrust restrictions has been further fostered by the additional development on the part of both the courts and the Department of Justice in increased recourse to a "rule of reason" analysis, as opposed to a "per se" analysis in assessing the legality of given business practices. Traditionally, either one of these two standards has been applied in determining the legality of business activity. They are mutually exclusive. The per se rule is the strictest application of antitrust law and establishes the standard that one violates the antitrust laws upon a finding that a certain business activity "would always or almost always tend to restrict competition . . . "[4] Contrastingly, the rule of reason involves an extensive analysis of the restraint of trade, including the balancing of anticompetitive effects of the restraint against any procompetitive effects of the restraint.[5] Once the per se rule is invoked, the activity in question is "conclusively presumed illegal without further examination under the rule of reason.[6]"

An historical review of the development and relative prominence of the per se rule and rule of reason is beyond the scope of this article. Suffice it to note that application of the rule of reason has become the clear choice of the current administration and most courts, thereby resulting in a certain liberality and a loosening of the antitrust standards in evaluating the legalities of business conduct previously evaluated under the more stringent per se approach.

Indicative of this metamorphosis are the antitrust opinions recently espoused by the Federal Courts and agencies. For example, in 1966 the Federal Trade Commission observed in *Brown Shoe Co.:*

> In assessing the need for Commission action, we must take account of the fact that historically one of the purposes of antitrust law, over and above purely economic considerations, has been to preserve an organization of industry in small units.[7]

More recently, in a stark departure from *Brown Shoe* FTC Commissioner Calvani wrote: "It is important to note that the protection of small businesses may be economically inefficient and comes at significant cost to the consuming public."[8]

The position noted by Calvani is vividly reflected in the FTC cases of recent vintage. The attempts initiated a decade ago to expand and define the contours of Section 5 of the Federal Trade Commission Act's prohibition of unfair methods of competition have been all but aborted by the current Commission. For example, the FTC's attacks on concentrated industry structures like breakfast cereals and oil were dropped by the Commission. The FTC's potent antitrust holdings of yester-year in *Russell Stover*[9], and *Boise Cascade*[10] were recently reversed on appeal, and the *Borden*[11] decision has essentially been rewritten by the incumbent Commission.[12]

The Antitrust Division of the Department of Justice, which is charged with enforcing antitrust law, has not only mirrored the administration's position but has led in fostering its effect. Its prosecution efforts have been drastically reduced and generally limited to price fixing. In fact, in a number of cases last year the Division actually assisted antitrust defendants in the defense of the claims against them. In one such case, the Antitrust Division filed an amicus brief on behalf of General Motors and Toyota arguing that Chrysler *did not* have standing to challenge the joint venture. Interestingly, the Federal Trade Commission also gave its approval to the General Motors and Toyota joint venture, and not surprisingly the three commissioners named by President Reagan provided the bare majority of the five person commission. The dissenters, holdovers from the Carter administration, typified the reaction of the other auto companies when they expressed outrage at the result. FTC Commissioner Patricia Bailey went so far as to complain: "If this joint venture between the world's first and third largest automobile companies does not violate the antitrust laws, what does the commission think will?"

Courts likewise seem to be undergoing the same metamorphosis in the field of antitrust. Thus, the Supreme Court's major antitrust cases of the last term seem to paint a clear picture of the direction in which antitrust law is headed. All four major cases — *Monsanto*,[13] *Hyde*,[14] *NCAA*[15] and *Copperweld*[16] — contributed to weakening and restricting the application of the per se rule. In *Hyde*, the Court went so far as to hold that tying arrangements — a restraint previously held to rarely serve any purpose other than supression of competition — are not illegal without elaborate inquiry and analyses into market conditions and anticompetitive effects.

Most important, as a practical effect, these developments have had far reaching consequences for private parties, particularly small businesses and consumers. Needless to say, the burden of proof now shouldered by the antitrust plaintiff will dramatically increase the need for economic analysis, necessarily involving economic experts, a barrage of graphs, charts, and complicated models. By broadening the antitrust areas now subject to the rule of reason and restricting use of the per se rule, the discovery burden dramatically increases. Furthermore, the most vivid consequences of the new antitrust standards are to subject plaintiffs to increased uncertainty about the merits of their cases in the face of the tremendous costs inherent in developing a case subject to a rule of reason analysis.

These consequences are reflected in the numbers: over the past five years, private enforcement (private antitrust complaints) — are off over 30 percent, from 1,457 new filings in 1980 to an even 1,100 in 1984.[17] Plaintiffs presum-

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ably are discouraged by the restrictive decisions of the Supreme Court and lower courts on standing, causation, proof of injury, and damages, as well as rulings on substantive violations such as those in the field of vertical restraints.

With economic efficiencies the flagstaff of its antitrust policies the government has elected to do little to use the antitrust laws to attack business practices once deemed to be harmful to small businesses or consumers. Seemingly, only restrictive business practices regarded as without any redeeming business justification whatsoever, such as price fixing, or those that create a clearly inordinate degree of economic concentration in a given industry are now the potential targets of the enforcement agencies. Furthermore, given both the government's and the courts' disposition to making liability evaluations by rule of reason analysis, the prospects for private challenge of any non-price related practices under the antitrust statutes appear bleak.

It may well be that the antitrust laws should reflect to the more restrictive interpretation adopted by the present administration. Many commentators have said as much. But should not such a radical shift in key economic policy be the subject of legislative consideration before it is adopted? It is at least questionable whether the laws in their present form were intended to be given such a constrictive interpretation, which certainly runs counter to the recent history of antitrust enforcement. Furthermore, there remains some question of what type of activities fit within the rubric of economic efficiencies (which these laws are perceived to serve) as opposed to fostering anticompetitive practices in the name of efficiency.

As in most cases, the general picture is not one-sided. Some recent developments, which may be harbingers of further change, should be mentioned. First, in its *NCAA* decision, the Supreme Court appeared receptive to a "quick look" or truncated rule of reason evaluation, which could relieve many of the litigation pressures now facing the private litigant. Second, the Courts have demonstrated a willingness to bring new areas of possible violation under antitrust scrutiny. Health care and the professions provide examples of such instances. Third, and potentially most interesting, is the Supreme Court's recent decision in *Sedima/S.P.R.L. v. Imrex Company, Inc.*[18] There the Court adopted the Seventh Circuit's broad interpretation of the application of the Racketeer Influence and Corrupt Organization Act (RICO) to reveal many commercial practices including those previously attacked under the antitrust laws. This decision may foreshadow the use of that statute to reach by expedited litigation many instances of commercial abuses that were difficult to attack even in prior years because of the need for market analysis. If so, the prospect of protecting consumers or small businessmen from commercial practices not subject to antitrust attack may actually turn this entire evaluation on its head. From the plaintiff's perspective, it may fill what some practitioners have believed to be a serious enforcement gap spawned by the present administration's restrictive interpretation.

But one observation seems axiomatic. This area of the law is no longer to be regarded as arcane, remote from the concern of the common practitioner. It portends broad developments, which will have important implications for all commercial endeavors and for society generally.

Post Script

Since the completion of this article, there have been several developments that reflect the sense of tension presently existing in the field of antitrust law suggested in the article. Two related to the tension between Congress and the Reagan Administration, the third to current developments in the Courts to circumvent the restrictive enforcement construction adopted by the Administration and its Courts. First, the issue of antitrust enforcement was addressed in a recent bipartisan resolution introduced in the House of Representatives. The resolution recorded that body's finding that there was no validity to the vertical restraint guidelines issued by the Justice Department. The Resolution suggests the Courts adopt this view. The second development, tangentially related but jurisprudentially juxtaposed to the Resolution, is the publication of a report of the activities of the Economic Policy Council and Domestic Policy Council, which, according to Attorney General Meese (who chairs that cabinet level body), is considering an extensive revision of the antitrust laws. The revisions purportedly will reduce the constraints on business activities in an effort to preserve competition in the domestic economy, while simultaneously permitting U.S. conglomerations to compete more effectively in global markets. Finally, the third development is the Court's recent opinion in the *Genex Corp.* litigation *(Genex Corp. v. G.D. Searle & Company,* 85-4154, District of Maryland, 10/8/85). The case demonstrates the increasing use by antitrust plaintiffs of the RICO statute in combination with allegations of Section 1 and 2 Sherman Act violations. These developments are reported in Vol. 49, No. 1238 of the *BNA Antitrust And Trade Regulation Report* of October 31, 1985.

[1] Calvani, "Analysis and Perspective," Legal Times, Dec. 24, 1984, at 14, col. 1

[2] Litvack, "The Ebb and Flow of Antitrust Enforcement", 1982 B.Y.U. L.Rev., 849, 850, 851 (1982)

[3] "Justice Under Reagan," U.S. News & World Rep., Oct. 14, 1985, p.62.

[4] Broadcast Music Inc. v. Columbia Broadcasting Systems, Inc. 441 U.S. 1, 19-20 (1979)

[5] Chicago Board of Trade v. U.S., 246 U.S. 231, 238 (1978); Graphic Products Distributors v. Itek Corp. 717 F.2d 1560, 1567-68 (11th Cir. 1983).

[6] Catalano Inc. v. Target Sales, Inc., 446 U.S. 643, 650 (1980)

[7] F.T.C. v. Brown Shoe Co, 384 U.S. 316 (1966).

[8] Calvani, *supra,* p. 14

[9] Russell Stover Co. v. F.T.C., 718 F.2d 256 (8th Cir. 1983)

[10] Boise Cascade Corp., 91 F.T.C. (1978), rev'd Boise Cascade Corp. v. F.T.C., 637 F.2d 573 (9th Cir. 1980)

[11] Borden, Inc., 92 F.T.C. 669 (1978), aff'd. 674 F.2d 498 (6th Cir. 1982), vacated, 77 L.Ed. 2d. 1298 (1983), order modified, [1979-83 Transfer Binder] Trade Reg. Rep. (CCH) 121,995 (1983)

[12] Silcox, "Unfair Methods of Competition", 29 Antitrust Bulletin 423, 470 (1984)

[13] Monsanto Co. v. Spray-Rite Serv-Corp, 104 S.Ct. 1464 (1984)

[14] Jefferson Parish Hospital District No. 2 v. Hyde, 104 S.Ct. 1551 (1984)

[15] NCAA v. Board of Regents of U. of Okla., 104 S.Ct. 2948 (1984)

[16] Copperweld Corp. v. Independence Tube Corp., 104 S.Ct. 2731 (1984)

[17] "Antitrust in Transition", 54 Antitrust L.J. 3, (1985).

[18] Sedima/S.P.R.L. v. Imrex Company, Inc., ____ U.S. ____, 105 S.Ct. 3275 (1985)

A Christmas Reminiscence

William Prickett

A catalogue from a tree company in Western Maine has arrived on my desk, as it does each year. As always, it evokes memories of Christmas when I was a boy and a young man. How so?

Well, for as long as I can remember, my father, a strict, hardworking lawyer all year round, would undergo a sort of change of character or metamorphosis in connection with Christmas. In place of his usual combative, assertive approach to life, people, and the law, he would become affable, genial and sentimental at the Christmas season. Having changed his outlook and demeanor to conform with the festive nature of the Christmas season, he expected everyone else to do likewise. In a sense, this little account explains how and why my father's Christmas transformation and his yearly personal delivery of his home grown Christmas trees appeared to fail in the end.

Actually, Christmas for my father would start each year in late January or February. At that time, he would write or call Mr. Tabor, then the Delaware State Forester, to place an order as a landowner for his small allocation of State trees. At that time, Delaware provided landowners with seedling trees, not for ornamental purposes but for reforestation, windbreaks and Christmas tree production. Just how my father learned about this program I do not know. Be that as it may, my father always ordered about a hundred Norway Spruce seedlings. This order would be delivered in late March or early April by the green State Forestry pick-up truck. The order would consist of two dozen bundles of seedlings, 9 to 12 inches long, stoutly bound together by coarse brown bailing twine. At one end of each little tree, there would be the pinkish, naked root system and, at the other end a spritely dark green plume of Norway Spruce pine needles. The bundles of seedlings would be heeled in along the edge of the woods at some shady place at the property in Centerville. Then, on a blusterly Saturday or Sunday in late March or April, my brother, Harry, my father, and I would go out to plant the little trees. First, we would plunge two or three of the tightly bound bundles of seedlings into a pail half full of ice cold water. Then, each of us would take a long-handled shovel in one hand and a bucket in the other. Stepping along, we would thrust the shovel into the moist, frost-free, brown earth, pull the shovel smartly back, insert one of the stripling trees into the hole, and then carefully pull the shovel back out. With a firm stamp or two of one's boot, the new home of the little tree would be sealed up. Then one would pace six feet onward and repeat the process. In a year or two, these small seedlings would begin to peep above the grass and weeds. In five or six years, they would become fair size Norway Spruces, just beginning to be right for Christmas harvesting. Of course, since my father planted a new batch almost every year and only gave out about forty or fifty trees each Christmas, there should have been an ever increasing crop of trees of various sizes. However, some of the little trees died, some were carelessly mowed down and others were choked by woodbine, honeysuckle or just plain weeds. In addition, there were always some few people whose Christmas apparently consisted of coming out to the country to steal a Christmas tree. Indeed, on one occasion, someone even took a whole truckload of our trees.

Our problem from year to year was not big trees but to locate enough small trees to service the needs of our list of recipients. About ten days before Christmas, my father would pull out his little appointment book. In the very back of it, he had a penciled list of those who were to get Christmas trees and the size tree they requested. His list was made up of a totally diverse group of people consisting of all sorts of different people whom my father considered as friends in he broadest sense. Thus, there were secretaries and former secretaries, social friends, legal and professional friends, tradesmen, relatives, and others. My father would go carefully over the list to determine whether there were any additions that he should make or whether there were people who had died, moved away or who had told him that they preferred to make other arrangements for their Christmas trees. When he had settled on the definitive list for that year, we three would sally forth on some December afternoon to tag selected trees with the names of the designated recipients.

Then came the prickly task of cutting down the marked trees. In order to do this, my brother and I would have to take on the tough job of burrowing

Bill Prickett is a regular and valued contributor to this magazine. He is an eminent Wilmington lawyer and a very accomplished prose stylist. He needs no other introduction to our readers.

through the lower branches to get into the interior of the tree itself. Once inside, one was in a kind of quiet little cocoon, which had a sweet smell. A small timber saw was used to cut away the dead branches so that the tree itself could be sawed down. Usually, it only took a score of strokes with the timber saw. Then the tree would begin to sway and finally gracefully yield, slowly tipping over. The new cut would give off a distinctive smell, something between turpentine and rosin. A few more strokes with the saw or the double-handed axe and the tree would fall clear, leaving a white naked stump. When all the designated trees were cut, we would drag them (a la Currier & Ives) to a central point.

Originally, I believe that my father had made deliveries himself on Christmas Eve. However, this schedule caused universal dismay. No matter how freshly cut, no one wanted the job of setting up a large, ungainly Norway Spruce on Christmas Eve itself, especially if the hour was late. Thus, by the time my brother and I were old enough to help, deliveries were made on the Saturday or Sunday before Christmas. If it was a Saturday, my father would leave his law office at the usual Saturday 1:00 P.M. closing time. He would pick up my brother and me. In high good spirits, we would then drive out into the country and borrow Levi Hollingsworth's blue stake bed truck and drive it back over to our Centerville property. Once there, the three of us would pile a great load of trees on the truck and rope then down with great gordian knots. That done, we would set out on our first round of deliveries. Typically, we would draw up to a house and stop. We would then clamber all over the load of trees in order to find the tagged tree in question, undo the knots and wiggle the chosen tree out of the pile. The tree would then be dragged up onto the lawn or onto the porch. That done, we would bang on the door. The lucky recipient would come out and dully admire the great bushy tree with a jagged stump that stood on the porch, obscuring the front door. As noted, our basic problem always was that our Norway Spruce would grow so quickly and so sturdily that, all too often, the tree in question was a tad larger, even in our own view, than what might be called for by the fragile living room for which it was destined. Nevertheless, in the spirit of Christmas, these huge green trees appear to have been gratefully received, or at least we thought so. We, of course, were in the roughest of working clothes, since the cutting and delivering of Christmas trees was dirty work at best. We would be welcomed into the house and duly issued Christmas cheer which as we boys got older, got stronger.

Since we had deliveries to make literally all over New Castle County, the task went on well into the evening. Indeed, in the middle of our round of deliveries, we would stop off at our house, ravenously hungry, demanding an immediate supper so that we could get back to our Noel rounds. After a hasty supper, we would pile back aboard the truck for yet another jovial round of deliveries. It was usually well past midnight when our Christmas task was done. We would redeliver the truck to Levi Hollingsworth's shed. Then we would stand for a while in the moonlight or starlight and enjoy the night, the country, and the festive rounds that we had just completed. It was great good fun.

However, my mother, who was gallic by origin, was not amused at all by these annual Christmas tree shenanigans. First, Christmas trees were Germanic in origin. Second, she, for some reason, did not fancy being left all alone, originally on Christmas Eve and later on the Saturday or Sunday before Christmas. Finally, it did not amuse here one bit to have her husband and sons stomp in between rounds, loudly demanding dinner and then coming home at all hours, after roistering all night on Christmas cheer. However, annually, we disallowed these complaints as not being in keeping with our view of Christmas. We were sure that we were performing a service for the community and the lucky recipients of our huge coniferous offerings.

However, I noticed that my father's list did not grow over the years. On the contrary, it got smaller. At times, we three wondered why people kept removing themselves from the list. When we would call to inquire as to what size tree they wanted on this particular year, all too often they replied that they had already committed to this church or that fire company or that they had bought a tree or were going away or simply would not require a tree from us that year. However, as I think back, there are certain incidents now that stand out in my mind that should have warned us that our heroic and jovial efforts were somewhat overdone.

The first of these episodes involved a lady (who shall remain nameless) who had just had her handsome dining room redone with a tray plastered ceiling. The dining room was the place in the house where the Christmas tree had always stood. Thus, when the front door was opened, I manfully dragged a great tree past her, over the hardwood floors and Persian carpets and on into the dining room where a small ladies' lunch to admire the new ceiling was in progress. The lady, looking agitated and apprehensively at her treasured new ceiling, gently suggested that this particular tree might be just a little bit too tall for the handsome new ceiling. I roughly gauged the height of tree and the height of the ceiling and came to a different conclusion. (Perhaps my judgment on the respective heights might have been a mite affected by the Christmas cheer that I had imbibed at previous houses on this particular round.) Be that as it may, I quickly decided to determine the matter by raising the tree. I swung it up: it turned out that the hostess was right and that I was dead wrong, perhaps by 9 to 12 inches. The bristly top of the freshly cut green tree first bent over against the pure white ceiling, leaving a bright green line across it. But, the worst was yet to come: when I had the tree straight up, the stiff top of the new cut tree popped right on through the treasured new ceiling, putting a great ugly hole in it. There was a ghastly silence all the way around for a full thirty seconds. Then, the lady graciously said that it really didn't make any difference: surely no one would notice the huge hole at all. She added wistfully that, after all, the ceiling could be redone after Christmas. My father and brother compounded the damage that I had done by pulling the tree back down, again thus enlarging the ugly hole. Need it be said that the lady made it plain that, on several occasions well before the next December rolled around, she would not be needing a tree from us. In fact, she called us on December 10th to say that she had already purchased a table-sized tree which she had placed in the hall and had already decorated.

Then there was the time that we somehow managed to lose our last small tree. We ended up that particular round with nothing other than a 9-foot tree. We could barely force it up the steps and in the front door of the small apartment of the luckless recipient. She somewhat ruefully said later that she had kept it there all through Christmas though she and her family had not been able to go into the living room at all and that it had cost her a small fortune to have the building superintendent drag this green monster back out again after New Year's. She did add, however, that though the apartment had had a delicious woodsy smell, please to count her out.

Again, I remember that we had been delivering trees for a number of years to an old friend of my father and his wife. They were always very cordial and very effusive in their praise of the freshness and fullness of our trees. Then, for some inexplicable reason, we totally forgot them one year, believing as we stood in the moonlight after our rounds were completed that we had in fact delivered a tree to them. It was only later that we found out that they had waited in vain for their tree only to have to go out the day before Christmas when Christmas tree prices were at their highest and buy a dingy old Vermont tree that had been cut back in October. These people wisely made their own provisions for dependable Christmas trees in the following years. Thus, they dropped themselves off our dwindling list.

One of our oldest "customers" was my father's friend, Judge John Biggs, and his wife, Anna, a courtesy aunt of mine. Though Judge Biggs stoutly protested that putting the tree up was a nuisance that interferred with the real pleasures of Christmas, nevertheless, the Judge and Anna were always affable when we would finally wind our way up their bumpy drive. The late arrival of our truck would rouse their dogs who would bark their heads off. Though they were often in bed or at least ready for bed and reading comfortably, they would put on bathrobes and come down and turn on the outside lights, hush the dogs, and duly admire the large tree that stood propped against their yellow house. Afterwards, we would all troop into the Judge's study. Drinks would be poured and the Judge's precious Cuban cigars would be offered to my brother and me. In an hour or so, we would leave the Judge and Aunty Anna to their Christmas peace. We would bang and rattle our way down their winding graveled drive. On the last occasion of our delivery to them, however, we found that we had again managed to lose a tree. Thus, we had no tree to deliver at our next stop. After a council of war, it was decided that we would go quietly back to the Biggs' and "borrow" the tree that we had given them and give it to the next recipient. Later, we would go back out into our fields and cut another tree, even fresher and bigger, for the Biggs's. Thus all would be well. Indeed, all would have been well, except that the dogs again set up a terrific uproar. The Judge stuck his head out his bedroom window and saw that somebody in the darkness below him was purloining the tree that had just been delivered to him. The Judge summoned the State Police. They stopped us at the covered bridge, demanding to know who these three scruffy people were, why they were driving a truck that didn't belong to them loaded with a Christmas tree that belonged to a United States Circuit Court Judge. In the end, we had to make a third trip back up the hill, arousing the dogs and, of course, again waking the Judge and Aunty Anna. To make a long story short, we eventually did go back in the field and cut another tree. It was delivered at about 3:00 A.M. that morning. Our delivery again roused the dogs and the Judge. That was our "Swan Song" with Judge Biggs and Aunty Anna.

In time, some of my friends had been added to my father's list of those who annually got a Christmas tree. Here again, initially, we were greeted with open arms, but our Noel exuberance and excess brought this gracious custom to an end with my friends. For example, Laird and Peggy Stabler built themselves a handsome house with a magnificent hall and a beautiful curved staircase. It was obvious that the center of the staircase was a place where a tall Christmas tree should go: it would seem to disappear right out of the top of the house. Since, as I say, many of the trees that we had planted over the years had not been cut down and had now grown to truly magnificent height, our efforts for the Stablers became grander and grander. Indeed, Peggy accumulated four closets full of Christmas lights and Christmas ornaments year after year in order to decorate the monsters that we brought her.

The year of our last delivery to the Stablers, there happened to be snow on the ground. Quite apart from our Christmas tree operation, we needed to cut down a huge pine tree that had been there long before my father had started planting Norway Spruce. However, it was overshadowing other trees and Mother had decreed that it must come down. It had grown fully 60 feet high and had a 10-inch base. Therefore, we got out the powersaw and sawed away at the base. With a tremendous crash, this giant pine came down. At the time, we were simply going to chop it up for firewood. Suddenly, we got the idea of delivering it to the Laird Stablers: it would be the granddaddy of all Christmas trees! We therefore got out a large iron chain and fastened it around the butt of this piney Goliath. The other end was hooked to our tractor. We pulled this huge tree on out our drive, down the Kennett Pike through Centerville, over the Center Meeting Road, down Montchanin Road and eventually up the Stablers' drive. The tree was so big that it covered the entire road and no cars could go by. This monster, as it went up the Stablers' drive, knocked down the neat snow stakes on both sides, brushed their own newly planted trees and scattered their white painted rocks. Nevertheless, we persisted on our course of Christmas madness and dragged it right up to the very front door of the house. Fortunately, there was no one at home except a Labrador and a Chesapeake Bay who barked loudly to see "Burnham Wood come to Dunsinane." Delighted with ourselves, we left the tree in front of the house. The branches at the butt end came up to the second story windows. The prone tree stretched the entire length of the house. Neither the

White House, Pennsylvania Station nor Rockefeller Center had a finer, fresher or bigger Christmas tree that year than the Stablers. However, this last effort broke the Christmas camel's back. Peg Stabler put her foot firmly down and decreed that reason must return to Christmas. She would not have a Christmas tree that made herself and all of her family look like Liliputians. Thus, we had outdone ourselves at the Stablers and yet another recipient lopped themselves off our list.

By the end of my father's lifetime, his list had dwindled greatly. In spite of the foregoing incidents and indeed many others, he could not understand why his Christmas largesse was not gladly accepted each year by those lucky persons on his list. Those who would still accept a freshly cut Norway Spruce was just a small group of the fifty or so that we had delivered to in our heyday or heynights. After his death, our custom of delivering home grown trees died out entirely: it is a thing of the past.

Now, Christmas has become far more commercial than it was when I was a boy and young man growing up. Fireproof Christmas trees are made of plastic. They can be taken apart and stored in the attic, to be used year after year. They have no pine smell at all. Christmas doesn't begin on some windblown day in March with the planting of a row of small Norway Spruce along a wood line. Rather, it starts when the Wall Street Journal, around Labor Day, runs a series of articles containing sombre predictions of whether Christmas will be a retail success or not, depending on whether there is a 3% or 4½% increase of sales of Cabbage Patch Dolls over the last year. Christmas Day itself culminates in a deafening cacophony on the radio of Christmas carols. The television screen celebrates the birth of our Savior in a manger in Bethlehem with Christmas specials done by Hollywood celebrities. In retrospect, I fully understand why our customer list fell away. Still, I think that there was something wonderful and special, at least from our point of view, in our quaint custom of growing and delivering our own home grown trees. I miss it every year at Christmas time, especially the time when all the trees had been delivered and we stood in the crisp December coldness looking up at the stars, the smell of the cut trees still on our clothes.

Thus, as I look back at my catalogue of evergreen trees from Western Maine, I fill out an order for two dozen Norway Spruce. This year, they will arrive, as always in March or April. I will plant them as a sentimental gesture and a reminiscence of Christmas long ago. However, perhaps Annie, my daughter, age eight, will join me as she gets a bit older and we will again deliver Christmas trees to friends, relatives, and neighbors.

Watch Your Language!

(The first — and perhaps the last — of a useful DELAWARE LAWYER service)

Legal writing courses are the rage! The word has gone 'round that lawyers can't express themselves clearly enough to get their ideas across. Legislatively mandated contracts in "plain English" are enriching those members of the Bar who can explain to Courts what these wonderful new simplified instruments actually mean. A tasteful T.V. ad for a Philadelphia law firm says we all conduct our business in "mumbo jumbo" — all of us, that is, except that paragon of lucidity who pays for the ad.

Let's hang a few pirates in chains! Here are some horrors to keep you on your toes.

Wilmington lawyer, appearing before the New Castle County Council: "We wish to withdraw this petition because of certain circumstances which has arose." That, believe it or not, is a true quote. Milton, thou shouldst be living at this hour!

The *New Yorker* magazine recently reprinted this headline from the Flagstaff, Arizona *Sun*: BARS LAUNCH PROGRAM TO GIVE POOR LEGAL AID

Or consider this chilling revelation from an obituary in a Cape Cod, Massachusetts weekly: "Death was attributed to drowning by the Medical Examiner."

Then there's that grand old howler: "I have discussed your proposal for filling the drainage ditch with my partners."

And now for a spot quiz, kiddies. Find the errors of grammar and usage (not to mention decorum and common sense) in this sentence: "If I was laying down on my very unique chaise lounge, hopefully I would not become nauseous."

Anyone who doesn't spot half a dozen stinkers in that sentence will be sent back to the third grade to have his mouth washed out with soap.

And so, friends, be on the alert, keeps a civil tongue in your head, or even a criminal one if that's your principal practice.

Consumers and Arbitration

Over a year ago the Superior Court Rules were amended to permit, indeed require, arbitration in civil matters where the amount in issue was $30,000 or less. Seemingly this would present a golden opportunity for resolving swiftly and economically issues of consumer dissatisfaction. We checked with the Court Administrators office and were advised by Samuel R. Russell, Esquire, Assistant Arbitration Coordinator, that despite this useful avenue of prompt relief, only four product liabilities claims have been resolved in the more than one year since the new arbitration system went into effect.

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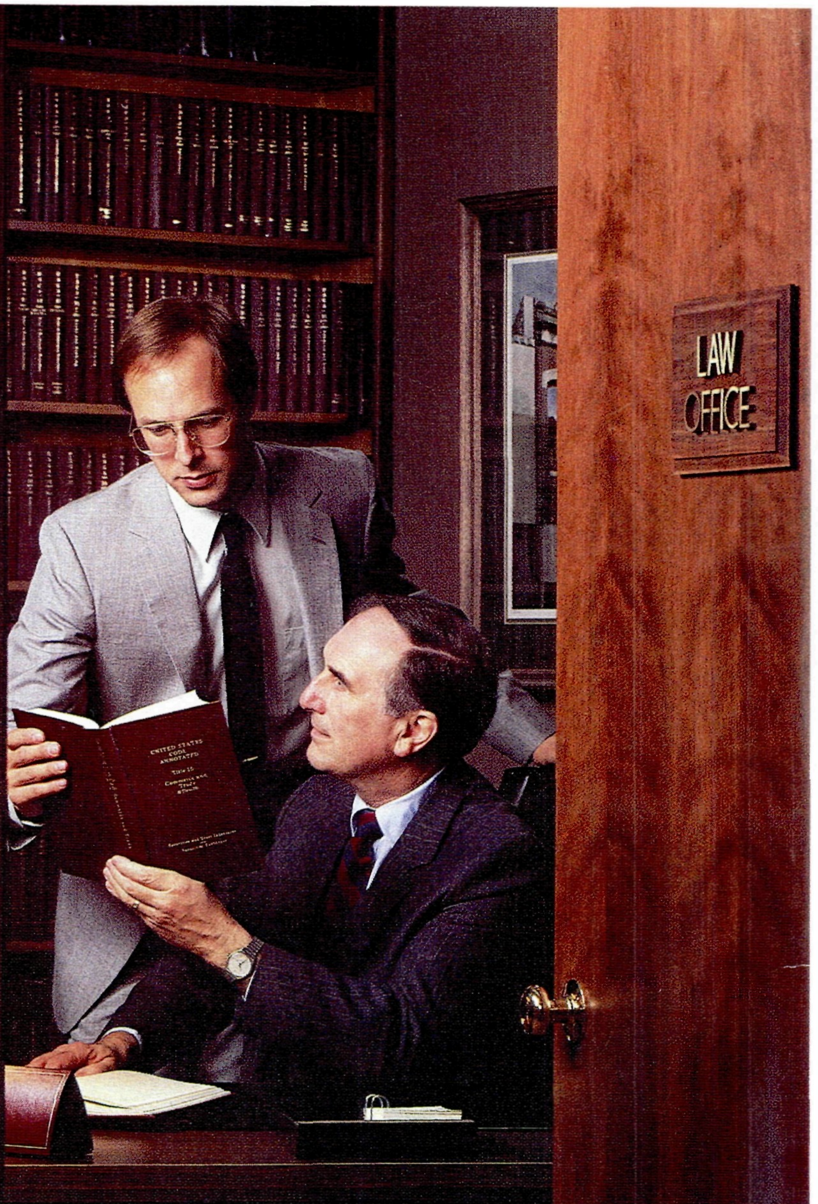

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