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LOYOLA
CONSUMER
PROTECTION
JOURNAL

Volume I — 1972



Special Features —

FOREWORD

by Virginia Knauer

COLLOQUY: *Consumerism, Lawyers and the
Legal System*

Articles —

THE CONSUMER EDUCATION ACT —

An "Ounce of Prevention"

by Senator Alan Cranston

HOW TO PROTECT CONSUMERS THROUGH
LOCAL REGULATION AND ARBITRATION:

*A Cooperative Venture with County
Government*

by Donald P. Rothschild and

Philip J. Davis

HOME SAFETY AND BUILDING CODES:

A Hidden Consumer Issue

by Samuel A. Simon

Comment —

HUMPTY DUMPTY IN THE SUPERMARKET:

*A Report on How All the King's Men
Might Repair Those Fractured Pounds*

and Pints with Unit Pricing

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LOYOLA CONSUMER PROTECTION JOURNAL

VOLUME I — 1972

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THE EDITORS

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* Leave of Absence 1971-72

FOREWORD

A NEED FULFILLED

Virginia H. Knauer*

The Loyola Consumer Protection Journal is proud to include Mrs. Knauer as one of the contributors to its first edition. In her introductory remarks, Mrs. Knauer outlines the function which the Journal can perform, and how the private bar can help improve the plight of the American Consumer.

The editors and publishers of the *Loyola Consumer Protection Journal* are to be congratulated for realizing the serious lack of consumer-oriented publications directed to the legal community and for taking the initiative to fill this gap.

In addition to contributing to the creation of a much-needed source of centralized information for use by practicing attorneys, lawmakers, educators and others, this publication will perform an essential role in the solution of two critical problems which currently beset the consumer movement.

One is the acute need for more and better research, both legal and factual. Research, if undertaken, can often overwhelmingly prove the consumer's case. Its absence, on the other hand, has materially slowed progress in securing remedies for abuses known to exist. This lack of adequate research has too often led to the charge that consumer advocates are merely "bleeding hearts." Actually — and this is a rather sad commentary — the consumer has been researched from head to toe by those engaged in marketing to determine what he will *buy*, how he will be induced to buy, where he will buy, and so on, *ad infinitum*. However, research into what his *problems* are, the scope and scale of these problems, and how they can be resolved is still in its infancy.

The other critical problem is the lack of good consumer law courses in law schools. This situation has been perpetuated by two factors. First, there has long been an absence of adequate text and reference material for use in such courses. Second, law in the main has primarily been approached and learned from a strictly commercial point of view. As a result, few lawyers have developed an

* Virginia Knauer is President Nixon's Special Assistant for Consumer Affairs.

awareness of consumer problems and even fewer have directed their careers toward consumer law. Admittedly, the development of additional consumer law courses is a long-range project. But it is essential to initiate such programs *now*. Besides being reflected in the private bar within a few years, the impact of such courses would certainly be felt in executive, legislative and judicial bodies throughout the country.

The *Loyola Consumer Protection Journal* can help ameliorate these inadequacies. Perhaps its greatest service over the long run will be its assistance in enlisting the whole legal profession (in addition to that minority of attorneys already practicing consumer law) in the consumer cause. Beyond materials to be presented in the *Journal*, which will be of invaluable aid to this group in representing the consumer's interest, general exposure to such a publication can be expected to raise the level of consciousness of the entire private bar in the area of consumer affairs.

I believe it may be reasonably stated that the private bar is the sleeping giant of consumer protection. For obvious reasons (not the least being a lack of pertinent law school courses and resource materials for professional use) the organized bar has, for years, avoided handling disputes arising from consumer transactions. Various obstacles, such as the small amounts generally in controversy, the difficulties of proof, and the lack of adequate compensation for professional services have helped create a situation in which a relatively small group of practicing lawyers handles the bulk of consumer litigation. Still, no greater protection for consumers could be provided than by an aroused and properly motivated bar. Not only would consumers receive greatly enhanced measures of protection, but the cost of such a program to government at all levels would be slight.

Our needs are extensive. We need test cases brought before the courts so that in time we will have established a broadly expanded body of enlightened precedent. We need more aggressive prosecution and enforcement of existing consumer laws, in addition to the passage of new laws each year by the Congress and the state legislatures. We need lawyers with the expertise to define existing problems and suggest workable solutions. We need the increased involvement of the private bar at every level.

Let us look at some of the major problems which the legal profession can play a role in resolving. One certainly is the improvement of the grievance and redress machinery available to the con-

sumer. Small claims court procedures must be improved so as to provide the consumer with more adequate legal remedies. We must explore the potential of consumer class suits. Given the crowded condition of court dockets and the realities of the present-day marketplace, perhaps courts of law cannot handle all controversies. Other possibilities should be explored.

We must also review the whole range of federal and state laws which, in effect, give the seller an unfair advantage over the consumer. The holder-in-due-course doctrine in consumer transactions should be modified. The risk of dealer fraud now rests squarely on the consumer under a system in which a financing agency can purchase installment notes free of consumer defenses. The fact that some states have removed holder-in-due-course protection from all installment sales raises a strong question as to the need for any jurisdiction to apply this doctrine. Not only are financing agencies quite able to protect themselves, but also the policing of installment sales which they would initiate would rebound to the benefit of consumers and ethical businessmen alike.

Essential to the improved consumer protection framework which must be developed is the establishment of strong consumer affairs offices in every state. Such offices should be adequately financed and armed with basic consumer protection laws. They should have the power to conduct investigations, hold hearings, issue subpoenas, and enforce the laws effectively. These offices should have branches throughout the state, especially in the urban and rural ghetto areas, so that they are easily accessible to the poor.

In short, the opportunities for lawyers to improve the consumer protection system in this country are enormous.

Furthermore, even in representing producers of consumer goods and services, attorneys can serve the consumer's interests. I would like to offer four suggestions as guidelines for such attorneys and the production interests which they represent.

First, hesitate before concluding that opposition to proposed government standards or regulations is inevitably in the industry's long-term interests. As a case in point, for years the citrus industry resisted regulations for improved juice standards, including ingredient labeling of juice content. Recently, however, it has come to accept those measures. By taking such a position the citrus industry has received favorable notice across the country.

Second, undertake the task of discovering and improving means by which the industry can do an efficient job of self-regulation.

Third, support a mechanism for prompt resolution of consumer complaints. The old axiom from the country store days, "a satisfied customer makes a happy merchant," still applies today. Many companies are reaping benefits from their own in-house, voluntary settlement procedures. Another kind of complaint mechanism is the successful Major Appliance Consumer Action Panel. This body was established by the major appliance industry to handle consumer complaints which have not been redressed by dealers and manufacturers.

Fourth, support a permanent, in-house consumer advocate to represent the consumer and to question marketing and environmental decisions of the company.

In summary, there are numerous ways in which the *Loyola Consumer Protection Journal* can be expected to advance consumer interests. The Journal stands to serve as an important resource and stimulus to the members of the private bar. I wish to extend my best wishes to the *Loyola Consumer Protection Journal* and to all those connected with the publication.

COLLOQUY:

Consumerism, Lawyers and the Legal System

The following is an excerpt of a discussion between four law professors who are concerned with consumer protection. The discussion raises the dilemma which confronts those who work in the law and see in it the potential to alter the human condition: can law have a control impact on modern bureaucratic institutions? The importance of this conversation, however, is not dependent upon the conclusions which it draws in relation to consumer protection. What is exciting about this dialogue is that it: (1) transcends its own example of consumerism; and (2) illustrates the prerequisite process of definition which must be undertaken prior to any consideration of law reform.

Law reform is discussed here in terms of consumer protection. The arguments are based on the assumption that there exists a class of consumers and a class of manufacturers, and that the manufacturers have the capacity to exploit the consumers. However, what is being considered is not just the plight of the modern day consumer, but the plight of modern day man. The implication which arises is that, in a sense, modern man is the ultimate consumer. He consumes goods and services. He is always in the position of being exploited by the variety of social and political institutions with which he must deal on a day-to-day basis if he is to survive in an institutionalized society. Thus, the question of how to aid and protect the consumer in his relationships with manufacturing institutions has a universality about it: Man is not viewed solely in relation to manufacturing institutions, but in relation to all institutions which have the capacity to exploit him because of the posture of the particular relationship.

In order to discuss possible ways of protecting consumers, the participants in the dialogue engage in a process of defining what they mean by "consumer protection." What is it that consumers need protection from? What role does the institution play? This interchange of ideas is exemplary of the thought process which one must go through prior to engaging in any kind of law reform activity. Consideration must be given to the nature of the relationships between the various components of the problem; in this case,

the components are consumers, manufacturing institutions and lawyers.

THE PARTICIPANTS

NEIL O. LITTLEFIELD,¹ JOHN E. MOYE,² HOWARD I. ROSENBERG,³ and ROBERT H. SULNICK.⁴

THE DISCUSSION

MOYE: To begin with, the judicial system is a poor system for protection. That includes the lawyer as well as the courts and the judges. The time element involved and the cost of litigation do much to make it a very poor system for protecting the consumer. Crowded court calendars often force the consumer to wait a year and a half or two years to get into court, and during this time he is usually suffering with the defective goods.

SULNICK: I think it is very important to make a public-private distinction in talking about the kind of things we have in mind. And then I think we must speak of compensation and control. Compensation refers to the private remedy, while control is the public remedy. On a private level of analysis, I believe you are absolutely right when you indicate that the present system is a poor one. When a client has to wait three years to get to court to seek compensation for his defective automobile, he is clearly being denied "justice." There is just no way around it.

ROSENBERG: Well, I would say so, even if he must wait three months.

SULNICK: Yes, I agree. As for compensation, you really cannot fully compensate him; the delay has been too great. But the question I would ask is this, "If there is a class of consumers and

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a class of manufacturers, should the assumption not be that strict liability enforced on a class action basis, will control behavior?" That is a big assumption, but it has historically been that way. The next question I have to ask is, "Can this historical assumption be justified in the twentieth century?" Then one must determine what the essential value of a lawsuit happens to be. Will the purse-string approach be sufficient? Would the implementation of complete strict liability make it cost more to produce safer products? In other words, "What is the possibility that the class action lawsuit will have some deterrent effect?"

MOYE: But you still come back to the same problem that Howard brought up before. Whether compensation or control is the goal, it must still be pursued on a case by case basis, requiring a great deal of time.

LITTLEFIELD: Since Bob has posed so many questions, let's take them one at a time. I think what he is suggesting to us is that if we think in terms of a public-private dichotomy, then maybe we can still use the court system, but employ a different group of plaintiffs or recognize consumer vs. the industry as opposed to John Jones vs. the manufacturer.

SULNICK: I agree, but I would add that tort actions for compensation on a private level are basically useless. On a *public* level, the common law may have a function to play which I think it has always played historically. The common law is certainly not ineffective; it depends upon what you think you want to do with it.

JOURNAL: There seems to be an underlying problem. Could it be that the principal cause of consumer problems is not the remedies, but the legal system itself? Isn't it a question of the legal system itself? Isn't it a question of the legal system not being accessible to potential plaintiffs?

SULNICK: As I see it, the real problem is the lawyer — what he is willing to do, how he sees his role in society and how he is willing to respond.

LITTLEFIELD: Well this is true only if you think of the lawyer as something more than a businessman. A new aspect of the legal profession would have to be created, something like Nader's suggested public service law firm, rather than blame the present system.

SULNICK: Well, I am not sure. The thing that I always get hung-up on is that I think before this nineteenth century boom of

private law, lawyers were basically public servants. I mean, they were not businessmen. Today the legal profession is another road to business. It's very nearly impossible to go out and set up a business from scratch, but far less difficult to become a lawyer. It's a business.

LITTLEFIELD: Well, it might be interesting to discuss to what extent it was true in the seventeenth century that lawyers were a different breed of cat; but that's not too relevant. Let us take what we've got today.

MOYE: I do think lawyers will respond if they have the means with which to respond. The problem does not lie with the lawyer so much as with the remedies available — what he can do with what he's got, and do it profitably.

SULNICK: Well, even if you take away that profit, he still has a lot to work with: a whole history of common law and writs.

MOYE: But how does he eat?

SULNICK: I think a more realistic question would be, "How *much* does he have to eat?" I don't know of many starving attorneys.

ROSENBERG: Hypothetically, if we took all lawyers and divided them into those who would represent commercial interests and those who would represent clients unable to afford an attorney, we would not see that much change. Dividing manpower up equally, the institution is still there. Again, all we would be doing would be winning more cases, thus making a little more law on a case by case basis. Still the lawyer is stuck with the present structure of the institution.

In other words, it seems to me that the basic problem is *power*. You have here two groups, one with power and one without it. The legislation and case law is the result of that situation. Legislation and case law do not grow in a vacuum; they are the result of a power balance which, in this case, is totally unequal. Lawyers work within that power balance and they aren't really doing much to change it.

SULNICK: I have no problems with that, except that I would say that lawyers on the consumer side today have more power than they recognize — which is actually part of the problem. In other words, I would say that there is a definite relationship between how effective a lawyer can be and the kind of problem he has to work with.

The lawyer is a vital part of consumerism. He can translate consumer power into action through the courts. That is what an attorney's skill is all about — taking a problem, translating it into power, feeding it into the courts and getting a result. The same thing happened in the nineteenth century. Lawyers for industry used negligence law to obtain results for their clients. At the present time we are witnessing a similar development in the area of consumer protection.

LITTLEFIELD: You have been talking about *the* lawyer in the references you have just made. I think there is a slight ambiguity in talking about *the* lawyer as an individual attorney, and *the* lawyer as a group of lawyers. I still do not see how you get over the basic hurdle; lawyers in the nineteenth century and the early part of the twentieth century had *a* case and *a* plaintiff for whom it was worth going to court because a death or injury was at issue. Now, I want to know how you get that ball rolling with respect to consumerism. It is true that some O.E.O. attorneys are doing it with test cases, but it is a small start.

SULNICK: But that is just it. You used the word "worth." "Worth" is a value judgment. It was worth going to court because the client had some kind of compensable injury that the attorney could get a third of. Again, I would suggest that the problem is really one of lawyers in the twentieth century: how they view their job, their profession and how they are trained in law school. If they are educated solely in terms of making money, then you are right . . . this whole idea is washed up. On the other hand, if lawyers value the prevention of institutional malfeasance so that manufacturing institutions do not act negligently, then I think the common law will work.

And I think lawyers do work together. If one lawyer tries a case and wins, other lawyers will use similar techniques so they can win. Again, it all goes back to a question of values and what attorneys think is worth while — what motivates a lawyer to respond.

LITTLEFIELD: Well, I am not sure they ever operated in any environment other than a certain bureaucracy with court fees and varied costs to pay and the economics of a law suit. I am a little puzzled as to how all of a sudden you think that if lawyers are trained differently we can restructure the way the legal profession operates for valid consumer ends.

MOYE: Maybe we are looking at the wrong cause. Maybe the

problem is not the lawyer, but the remedies. It would be nice if he had strictly social ideas at hand and was pursuing all our present remedies to redress all of our consumer grievances. Maybe the problem would be better resolved if we could devise a method to restructure our remedies so that lawyers would be more eager to pursue them.

SULNICK: In a sense, I think that is correct. But the reality of our current political and economic situation is such that this restructuring will not come about, and therefore the burden is on the lawyer. For example, if the Attorney General were to bring a public nuisance action against a particular company for pollution of the air, then nobody else would have to worry about it. The Attorney General has the facilities, the power and the remedy. I guess that is what you were talking about before.

ROSENBERG: For what reason would the Attorney General fail to bring the action?

SULNICK: For a variety of political and economic reasons. And because of this failure, the burden does fall on the individual attorney, whether he wants it or not.

MOYE: Well, it will be the responsibility of the entire legal system to eventually fashion remedies which work better for the consumer.

ROSENBERG: Let's say that you have attorney-generals one and two. Each operates a little differently in the area of consumer protection. The reasons are simply the political and economic factors you have mentioned. Now, if these factors are sufficiently compelling, the attorney-general will really be a consumer advocate; in effect, consumers will have developed consumer power. It seems to me that's where the source of power lies. The primary question is not one of cases and remedies, because the cases and remedies will be shaped by whoever has the power. We have a whole system of mercantile law because a certain group of people gained power some several hundred years ago and have developed it. The crucial question is how consumers will develop their own power.

JOURNAL: In other words, a more significant question would be, "How can consumers act as a group rather than as individuals?" Much of this discussion about remedies assumes that the consumer is acting as an individual. If consumers can gain power by acting as a group, then will not the remedies follow?

MOYE: Yes, definitely. I speak of remedies as an end. When

you get more political and economic power on the side of consumers, the rest will follow.

JOURNAL: But how do consumers as a group get power to act, and once they have it, how do they act as a group?

LITTLEFIELD: This is an organizational question — How do they organize and get power?

I tend to feel that perhaps for the purpose of this discussion we could more profitably assume that right now consumers have more power than they are using. This may be seen either in the legislative halls, though they do not know what to ask for in these halls; in the attorney-generals' offices, though they do not know what to ask for in those offices; or in the courts, though they do not know how to frame the causes of action. What should be aimed at goes beyond getting immediate results, but toward restructuring some of the ways in which consumer remedies are effected.

Let's take a short-range approach to the question of consumer power. What are some of the various ways we can utilize the power that is presently there?

SULNICK: You and Howard both said that consumers have power and we all agree. But I think we should articulate what the basis of that power is. Is it that we have a critical consumer problem and that we have defects in consumer goods? Is it not enough to simply state that consumers have power?

LITTLEFIELD: Well, I think the power is based upon an awareness of certain public officials — courts, senators and representatives and attorney-generals — that there are a lot of consumers out there who will react. I think this is really the function of the ballot box, at least in part. Consumers are beginning to get a feeling that they have common problems with respect to the sale, distribution and financing of consumer goods. These people will vote for public officials in either of these three categories who do something about what is bothering them.

MOYE: It works another way, too. Courts and public officials are becoming increasingly aware that manufacturers are selling inferior goods — more than in the past — and are at the same time exacting higher financing charges.

SULNICK: The basis of their power is that the consumers are being injured, they feel the injury, and therefore respond. They feel the injury of purchasing inferior products: cars that will not

start, dresses that burn up, things that wear out in three months, and so on.

MOYE: But are you not actually saying that because the consumer is feeling this injury, public officials understand that he is being exploited? That is the kind of power that does presently exist, although it is not being used effectively.

ROSENBERG: I suppose that what you are talking about is that consumer awareness is growing. And with such growing awareness, the courts and the legislatures are responding. You know, again, I go back to my original point that consumers do have more power than they believe they have. But awareness itself is a form of power. I think that much of the response by public officials is the result of this awareness.

SULNICK: I agree that awareness is power. I have to ask another question because I do not think we can pass over the distinction between compensation for injury and control of the seller. If we assume that consumers have power predicated upon an awareness, then we say that the thing to do is to utilize that power. But, as to what end? If for compensation, then the courts may be a very good vehicle as the remedy. I think you were right, John, in distinguishing between remedies and other things. There are, of course, legislative and administrative remedies, as well as a host of informal ones, such as organization, demonstration, the use of media and even civil disobedience. All of these remedies are available to consumers, but so much depends on why they are using a particular remedy. Is it to get dollars and cents compensation? Or, possibly to assure control, so that consumers will have better products which do not fall apart in three months? The effectiveness of a particular remedy depends on the remedial goal which is sought.

MOYE: Well, we are looking at both theories, are we not, both compensation and control? Consumer power which exists right now must be developed and put to good use. What we are saying is, "Let's see what we have and let's see how best to use it for both purposes?" The objective, of course, being to get the consumer his \$75.00 back for the couch or get the couch back to the manufacturer; ultimately, to force the manufacturer to make better products.

LITTLEFIELD: Yes, but I think the two concepts apply in different situations. If you talk about the environment, there is only one thing you are interested in: control. We do not want a polluted environment, right? When you have injury-producing products, you want control. I can agree with that easily. But when it

comes to how the ordinary John Q. Public enjoys his television set, his stereo, sofa, food and whatever, I am not sure you need to worry about anything more than getting his money's worth.

SULNICK: I think it *is* a question of control. Maybe consumerism is not the best way to make the point, but I think you should be worried about the next generation and whether it will have to deal with the same problems using the same remedies. Possibly the best analogy is to education. If you have a poor curriculum today, do you not want to change it so future generations do not have to suffer with it?

LITTLEFIELD: No, I presume that if you get the right kind of remedies and the correct way of getting at the problems we are talking about, what is going to happen is that merchandising will operate upon a theory that somebody does not have to pay for something unless it comes up to snuff. I do not care whether industry produces ten percent defective goods and therefore must take them back; nor do I care whether they produce one hundred percent good ones. I take it your control remark is aimed at doing away with shoddy products *per se*. In the area that I am talking about — basic satisfaction of human wants — this can be cured in a number of ways. Some people may be willing to pay fifty dollars for a T.V. set that does not work very well. Howard's problem is that most people in the ghetto are paying three hundred dollars for a fifty dollar television set.

SULNICK: I am not sure that we are talking about the same things.

MOYE: I think we are.

LITTLEFIELD: There is a difference, because on the one hand we are speaking about adequate compensation which in the consumer area would have to be penalties or fines so as to control behavior, whereas on the other our conversation is directed toward compensation for compensation's sake.

JOURNAL: Is control the same thing as eradication, Bob? Or is it possible to ever eliminate the problem? Professor Littlefield's point seems to be that you can still control it, but I think he is worried about controlling it to the extent that you suggest. That is one-hundred percent control as opposed to eighty percent control and compensation for the other twenty percent.

SULNICK: I would much rather have one-hundred percent. We should have one-hundred percent good products.

LITTLEFIELD: What is the social value to be gained by having one-hundred percent good sofas, televisions and radios, other than having an ideal society which produces goods?

SULNICK: Well, just that, you admit consumers are no longer being exploited; they will be getting what they pay for.

LITTLEFIELD: But can't we cure exploitation by simply requiring merchants to take the bad ones back or sell them at a lower price, or do something else with them?

ROSENBERG: Neil, aren't we hindered by the kinds of controls that are built into our system now? If you have a plant that is a nuisance, you can go on maintaining it; but you must pay compensation to some people for the privilege of doing so.

LITTLEFIELD: No, because then I think the negative social value in the nuisance is also desirable as a social value to do something about. We ought to have smog-free air, a noise-free environment and a meaningful society; these are social values. To achieve such a state demands that we eradicate the nuisance.

ROSENBERG: Alright, but are you willing to go that far in terms of a total eradication of consumer abuses?

LITTLEFIELD: I see a difference between controlling injury and death-causing consumer goods and producing goods that work perfectly all the time. I see a utility and a need for shoddily-built, honestly-priced and honestly-sold goods.

SULNICK: What is the use?

LITTLEFIELD: Well, for example — and this is a little personal — I never pay more than \$150.00 for a television set. It is a good set, but doesn't perform as well as one selling for \$300.00. Bob, you will agree with my basic assumption that it will cost more to build a *very* good television set than just a *good* television set?

SULNICK: I am not necessarily sure it does. I think the advertising may cost more and the cabinets might be a bit more attractive. But, I am not really sure in my own mind that actual tubes that go into the sets are any different. That's what bothers me.

JOURNAL: I think what Howard was saying earlier is that, particularly with low income people, consumers may be paying substantially more than the set is actually worth as far as quality is concerned.

SULNICK: Hypothetically, Company X manufactures an

equally good color television set to the one produced by Company Z, but Z's sells for twice as much. Now why should this be? The answer is summed up in one word: advertising. Also, a few other problems enter the picture: labor costs, the cabinet is a bit more attractive and so on. However, I think the actual working abilities of the color sets are quite comparable.

MOYE: Neil's solution, or premise, would be that no matter what Z puts into the television set, it has to be worth what consumers pay for it, or else we have a consumer abuse which should be controlled. Aren't you merely saying that you should have the quality of the goods for the price that is paid?

LITTLEFIELD: I think our society is sufficiently affluent to allow us to be less concerned with the fact that some people like to keep up with the Joneses by paying \$200.00 more for their television set than they need to.

SULNICK: But not only do the Joneses want to buy that, but everybody wants to. That was what Marshall McLuhan's book was all about. We are totally conditioned to buy things, whether we need them or not. At this point I feel it is beyond our control. Huge institutions use their power to *make us* buy things. Pretty soon everybody wants the \$6,000.00 car, which probably is not any safer than the \$2,000.00 car. It is truly a question of control.

LITTLEFIELD: My basic problem with control is, whether the car sells for \$6,000.00 or \$2,000.00, will it be safe?

SULNICK: Well, what I want to have is a safe vehicle that *will* sell for \$2,000.00 — that is where we differ.

LITTLEFIELD: Why do you want it to sell for \$2,000.00?

SULNICK: Because that is a more equalitarian way of distributing money in this economy. Why should an automobile manufacturer make \$5,000.00 profit on a car just because of advertising, and in the process, give you an inferior product? Why not give you a safe car at a more reasonable price of \$2,000.00 which could likely be done?

MOYE: Bob, you raised two issues. One was the eradication of injury and environmental problems. Then there is the second problem of getting goods inferior in quality to the price paid for them.

SULNICK: There is still a control problem to resolve.

MOYE: So let's try to get the consumers to eliminate these abuses by a means of control. We should try to give them what-

ever rights and remedies they need in order to obtain goods of equivalent quality to the price paid.

JOURNAL: What we see emerging from what you just said is that, whereas there is a control function as far as injury is concerned, there is another control function in the question of how we can get manufacturers to produce good quality goods.

MOYE: Manufacturers are going to operate on a cost basis. They are going to decide whether it is going to cost them more to put out ten percent defective goods and take them back, or put out ninety-five percent good products with no returns. Now, you have to develop a system so that whatever they decide, you have the available remedies — the power to force them to do the best they can. That is what we need. In a way, that puts us back where we are. If we have the power, how can we use it now? If we do not have it now, how can we develop it?

THE CONSUMER EDUCATION ACT — An “Ounce of Prevention”

Senator Alan Cranston*

In the market place, the consumer's lack of knowledge is often his own worst enemy. Despite a constant public interest in bettering the American school system, there has been relatively little effort made to broaden curricula to include consumer education. Thus, members of the buying public are frequently ill-equipped to protect themselves in the world of caveat emptor. In this article, Mr. Cranston discusses the Consumer Education Act, which is designed to remedy this situation. The text of the proposed legislation is reproduced at the end of Mr. Cranston's article.

On June 2, 1971, I introduced a bill entitled the *Consumer Education Act*.¹ This legislation proposes to create a new Office of Consumer Education with authority to allocate up to \$85,000,000 in grants over the next three years to help schools teach young people how to spend their money more wisely. In addition, it could save consumers and the Federal Government millions of dollars each year.

Prevention counts for a lot more than cure in the consumer field. Once the buyer has wasted his money it is generally too late for him to do anything about it. In most cases he does not even realize that he has wasted his money. The function of consumer education is to make the consumer more aware of the value he receives in exchange for the money he spends.

The complexity and size of the market place today make it imperative that the consumer become better informed so as better to protect himself. The government cannot do the whole job; the consumer must have the information he needs to make wise decisions on his own.

Legal redress can only do so much to protect him. Law suits are expensive, time consuming, and come into play only after the damage has already been done.

* Alan Cranston is the senior Democratic Senator from California. He is chairman of the Senate Subcommittee on Production and Stabilization, as well as a member of the committees on Banking, Housing, and Urban Affairs.

¹ S. 1981, 92d Cong., 1st Sess. (1971).

The extent to which our society is consumption-oriented clearly illustrates the significance of this problem. Each year the American people spend in excess of \$600,000,000,000 on goods and services. For example, in 1970, expenditures included \$85,300,000,000 on durable goods, \$150,000,000 on new household appliances, \$271,500,000,000 on perishable goods, and \$270,200,000,000 for various services.

This high level of consumption is encouraged by the advertising efforts of American business. In 1970 alone, advertisers spent \$18,000,000,000 to encourage consumers to buy their products. According to a Columbia University School of Journalism study, the average person spends nineteen hours per week watching television. Another study, by the Carnegie and Ford Foundations in cooperation with the Office of Education, found that pre-schoolers spend an average of 54.1 hours per week before the television. The Columbia University study also estimated that the average American is exposed to 1,516 commercial messages every twenty-four hours; this estimate arrived at by counting all the major media — television, radio, newspapers, and magazines. This is a mind-boggling statistic.

In view of the amount of money spent by the American Consumer each year and the intense pressures exerted on him by the advertising industry, the need for improved consumer education becomes clear. The Consumer Education Act is intended to fulfill this need.

The Federal Government now spends more than \$200,000,000 each year for consumer protection, including at least \$25,000,000 annually in law suits alone. Hardly any of these expenditures are applied to consumer education.

In most states, home economics courses represent the only form of consumer education. However, a mere 35% of all high school girls, and less than one percent of all high school boys, are enrolled in such programs. Moreover, the consumer education aspect of home economics is narrowly limited to such topics as nutrition and home budgeting.

We desperately need specialized courses dealing extensively with the following: consumer purchasing of food, clothing, furniture and appliances; the environmental effects of consumer decisions; purchasing and maintaining an automobile; apartment rental and home buying; short-term consumer credit; budgetary and money management; fraud, quackery and deception; banking and savings; investments; life and health insurance; consumer law, Social Secur-

ity, Medicare and Medicaid. Illinois and Hawaii are, at present, the only states where such courses are required. New York, New Jersey, Massachusetts and Wisconsin are the only states where more than five percent of the high schools offer these courses on an elective basis.

The Consumer Education Bill would establish a separate Office of Consumer Education within the Department of Health, Education and Welfare's Office of Education. It would have a director who would be chosen by the Secretary of Health, Education and Welfare in consultation with a newly-created Council on Consumer Education.

The twenty-one member Council would be the only one of several within the Office of Education to have an independent budget.² It would consist of state and local consumer protection officials, along with representatives from the Justice Department, the Food and Drug Administration, the Federal Trade Commission, the Department of Health, Education and Welfare, and private consumer groups such as the Consumer's Federation of America.

The Council would be responsible for co-ordinating all federal consumer education programs and would evaluate local school and adult education programs seeking grants. Grant money would be used to develop consumer education courses and to encourage their integration into elementary and high school curricula.

The bill authorizes grants totalling \$25,000,000 yearly in fiscal 1972 and 1973, and \$35,000,000 in 1974. It provides for one hundred percent federal grants with no matching funds required from local school districts. Omitting the requirement of matching funds is a departure from the traditional practice by the Office of Education. But in view of the fiscal crisis confronting most states and school districts, it is apparent that the Federal Government must give the local taxpayer comprehensive assistance.

Minigrants of up to \$10,000 would also be available for innovative community consumer education programs. In addition, larger grants for qualified adult projects would be awarded, especially to those grants aimed at people with little formal education.

In view of the amounts expended by the Federal Government in the area of consumer protection, these grants are appropriate. Federal aid to high school home economics courses has amounted to \$20,000,000 annually for the past three years. That same amount

² \$250,000 per year.

is budgeted for fiscal 1972. Last year California schools alone received \$1,650,000 of these funds to support home economics classes in 274 of California's 365 secondary school districts.

In addition, the Food and Drug Administration spent \$83,000,000 on consumer protection in 1971; the Agriculture Department spent \$78,000,000;³ the Federal Trade Commission spent \$11,000,000;⁴ and \$10,000,000 was expended by the Legal Services Program of the Office of Economic Opportunity.⁵ The budget for the President's Advisor on Consumer Affairs is \$810,000. Furthermore, the Justice Department spends millions more each year on civil suits and anti-trust actions in the consumer's interest.

All of this adds up to well over \$200,000,000 annually. By educating the American Consumer, the grant program embodied in the Consumer Education Act will have the long-run effect of reducing the level of Federal Government spending in the area of consumer protection.

There is no question that we need additional protection and assistance for consumers. This assistance is available through the legislative process. Much has been done, but much more needs to be accomplished if we are to improve the position of the consuming public. However, we cannot and should not attempt to legislate everything. Along with the legislative effort we must have — and I personally believe that this is most critical — education of the individual consumer. Educated consumers will be less likely to make the errors which have led to the abundance of consumer disputes in our courts. The Consumer Education Act will provide an important ounce of prevention to replace the more expensive pound of cure.

92D CONGRESS
1ST SESSION

S. 1981

IN THE SENATE OF THE UNITED STATES

JUNE 2, 1971

MR. CRANSTON introduced the following bill; which was read twice and referred to the Committee on Labor and Public Welfare

A BILL

To authorize the United States Commissioner of Education to establish consumer education programs.

³ Including \$4,000,000 for law suits.

⁴ The entire amount was spent on legal action.

⁵ Nearly twenty percent of its \$53,000,000 total budget.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Consumer Education Act".

STATEMENT OF FINDINGS AND PURPOSE

SEC. 2. (a) The Congress of the United States finds that presently there do not exist adequate resources for educating and informing consumers about their role as participants in the marketplace.

(b) It is the purpose of this Act to encourage and support the development of new and improved curricula to prepare consumers for participation in the marketplace to demonstrate the use of such curricula in model educational programs and to evaluate the effectiveness thereof; to provide support for the initiation and maintenance of programs in consumer education at the elementary and secondary and higher education levels; to disseminate curricular materials and other information for use in educational programs throughout the Nation; to provide training programs for teachers, other educational personnel, public service personnel, and community and labor leaders and employees, and government employees at State, Federal and local levels; to provide for community consumer education programs; and to provide for the preparation and distribution of materials by mass media in dealing with consumer education.

CONSUMER EDUCATION

SEC. 3. (a) (1) There is established, within the Office of Education, an Office of Consumer Education (referred to in this section as the "office") which, under the supervision of the Commissioner of Education (hereinafter referred to as the "Commissioner"), Secretary of Health, Education, and Welfare (hereinafter referred to as the "Secretary"), and Council on Consumer Education, shall be responsible for (A) the administration of the program authorized by subsection (b) and (B) the coordination of activities of the Office of Education which are related to consumer education. The Office shall be headed by a Director, with an established reputation in consumer education and the fields covered therein, who shall be compensated at a rate not to exceed that prescribed for Grade GS-17 in section 5332 of title 5, United States Code.

(2) For the purposes of this Act, the term "consumer education" means preparation with skills, concepts, and understanding required for everyday life to achieve within a framework of his own values maximum satisfaction and utilization of resources.

(b) (1) The Director shall carry out a program of making grants to, and contracts with, institutions of higher education, State and local educational agencies, and other public and private agencies, organizations, and institutions (including libraries) to support research, demonstration, and pilot projects designed to provide consumer education to the public except that no grant may be made other than to a nonprofit agency, organization, or institution.

(2) Funds appropriated for grants and contracts under this section shall be available for such activities as—

(A) the development of curricula (including inter-disciplinary curricula) in consumer education;

(B) dissemination of information relating to such curricula;

(C) in the case of grants to State and local educational agencies and institutions of higher education, for the support of education programs at the elementary and secondary and higher education levels;

(D) preservice and inservice training programs and projects (including fellowship programs, institutes, workshops, symposiums, and seminars) for educational personnel to prepare them to teach in subject matter areas associated with consumer education, and for public service personnel (such as, but not limited to, social workers and poverty workers) government employees, and labor leaders and employees;

(E) community education programs on consumer education, including special programs for adults; and

(F) preparation and distribution of materials suitable for use by the mass media in dealing with consumer education.

In addition to the activities specified in the first sentence of this paragraph, such funds may be used for projects designed to demonstrate, test, and evaluate the effectiveness of any such activities, whether or not assisted under this section. Activities pursuant to this Act shall provide bilingual assistance when appropriate.

(3) (A) Financial assistance under this subsection may be made available only upon application to the Director. Applications under this subsection shall be submitted at such time, in such form, and containing such information as the Council on Consumer Education shall prescribe by regulation and shall be approved only if it —

(i) provides that the activities and services for which assistance is sought will be administered by, or under the supervision of, the applicant;

(ii) describes a program for carrying out one or more of the purposes set forth in the first sentence of paragraph (2) which holds promise of making a substantial contribution toward attaining the purposes of this section;

(iii) sets forth such policies and procedures as will insure adequate evaluation of the activities intended to be carried out under the application;

(iv) sets forth policies and procedures which assure that Federal funds made available under this Act for any fiscal year will be so used as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available by the applicant for the purposes described in this section, and in no case supplant such funds;

(v) provides for such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of and accounting for Federal funds paid to the applicant under this Act; and

(vi) provides for making an annual report and such other reports, in such form and containing such information, as the Commissioner may reasonably require and for keeping such records, and for affording such access

thereto as the Commissioner may find necessary to assure the correctness and verification of such reports.

(B) Applications from local educational agencies for financial assistance under this Act may be approved by the Director only if the State educational agency has been notified of the application and has been given the opportunity to offer recommendations.

(C) Amendments of applications shall, except as the Council on Consumer Education may otherwise provide by or pursuant to regulation, be subject to approval in the same manner as original applications.

(4) Federal assistance to any program or project under this section, other than those involving curriculum development, dissemination of curricular materials, and evaluation, shall support up to 100 per centum of the cost of such program including costs of administration; contributions in kind are acceptable as local contributions to program costs.

(c) (1) There is hereby established a Council on Consumer Education consisting of twenty-one members appointed by the Secretary. The Secretary shall appoint one member as Chairman. The Council shall consist of persons appointed from the public and private sector with due regard to their fitness, knowledge, and experience in matters of, but not limited to business, academic, scientific, legal, and information media activities as they relate to the problems of the consumer and consumer education, and shall give due consideration to geographical representation in the appointment of such members: *Provided*, That the Council shall include representatives from State and local agencies responsible for enforcing consumer protection laws and shall include a representative each from the Department of Justice, the Food and Drug Administration of the Department of Health, Education, and Welfare, and the Federal Trade Commission.

(A) Each member of the Council shall be appointed for a term of three years: *Provided, however*, That eleven of the original Council appointees shall serve an initial term of two years. No Council member shall serve more than two consecutive terms.

(B) The Council shall select a chairman from among its members.

(C) Each member of the Council shall receive travel expenses to and from Council meetings together with compensation at the per diem rate of a Government employee with the rank of GS-18 for each day they attend Council meetings.

(2) The Council shall —

(A) advise the Commissioner and the Office concerning the administration of, preparation of general regulations for, and operations of programs assisted under this section;

(B) make recommendations to the Director with respect to the allocation of funds appropriated pursuant to subsection (d) among the purposes set forth in paragraph (2) of subsection (b) and the criteria to be used in approving applications, which criteria shall insure an appropriate geo-

graphical distribution of approved programs and projects throughout the Nation;

(C) develop criteria for the review of applications and their disposition;

(D) evaluate programs and projects assisted under this section and disseminate the results thereof;

(E) develop an overall organizational plan outlining the objectives of the consumer education program;

(F) make a biannual report to the Congress evaluating;

(G) coordinate all Federal consumer education programs; and

(H) hire a staff of up to five persons to help it carry out its functions pursuant to this Act.

(3) The Secretary shall obtain the advice of the Council prior to appointing the Director.

TECHNICAL ASSISTANCE

SEC. 4. The Secretary, in cooperation with the heads of other agencies with relevant jurisdiction, shall, insofar as practicable upon request, render technical assistance to local educational agencies, public and private nonprofit organizations, institutions of higher education, Federal, State, and local government agencies, and other agencies deemed by the Secretary to play a role in consumer education. The technical assistance shall be designed to enable the recipient agency to carry on consumer education programs.

SMALL GRANTS

SEC. 5 (a) In addition to the grants authorized under section 3, the Commissioner, from the sums appropriated pursuant to this Act, shall have the authority to make grants, in sums not to exceed \$10,000 annually, to nonprofit organizations such as citizens groups and volunteer organizations working in consumer education, and other public and private nonprofit agencies, institutions, or organizations for conducting courses, workshops, seminars, symposiums, institutes, and conferences, especially for adults and community groups (other than the group funded) in consumer education.

(b) Priority shall be given to those proposals demonstrating innovative approaches to consumer education.

(c) For the purposes of this section, the Commissioner shall require evidence that the interested organization or group shall have been in existence one year prior to the submission of a proposal for Federal funds and that it shall submit an annual report on Federal funds expended.

(d) Proposals submitted by organizations and groups under this section shall be limited to the essential information required to evaluate them, unless the organization or group shall volunteer additional information.

ADMINISTRATION

SEC. 6. In administering the provisions of this Act, the Director is authorized to utilize the services and facilities of any agency of the Federal Government and of any other public or private agency or institution in accordance with appropriate agreements, and to pay for such services either in advance or by way of reimbursement, as may be agreed upon. The Director shall publish annually a list and description of projects supported under this Act and shall distribute such list and description to interested educational institutions, citizens' groups, consumer organizations, and other organizations and individuals involved in consumer education.

AUTHORIZATION

There is authorized to be appropriated \$20,000,000 for the fiscal year ending June 30, 1972; \$25,000,000 for the fiscal year ending June 30, 1973; and \$35,000,000 for the year ending June 30, 1974, for carrying out the purposes of this Act: *Provided, however,* That during each of those three fiscal years, \$250,000 shall be used for the support of the Council on Consumer Education.

HOW TO PROTECT CONSUMERS THROUGH LOCAL REGULATION AND ARBITRATION:

A Cooperative Venture with County Government

DONALD P. ROTHSCHILD†

and

PHILIP J. DAVIS*

In the following article the authors discuss what they feel to be the most important element of effective consumer protection: organization at the local level. Drawing from their personal experience, Donald Rothschild and Philip Davis present an outline of factors which should be considered wherever consumer protection at the local level is contemplated. This approach is based on the belief that there is no universal formula which can be applied to protect the interests of the consumer. Rather, specific mechanisms must be fashioned according to the particular characteristics of the municipality in question. This article is intended to provide guidelines for such efforts.

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I. INTRODUCTION

This article will propose a methodology for the establishment of local, municipal and county control of consumer protection.¹ The basis for this recommendation is a case study of the development of a consumer protection commission in Arlington County, Virginia, which evolved this past year under ideal circumstances for purposes of analysis. The County Board had determined that the County needed such an agency and enlisted Consumer HELP of the George Washington University Law School² as consultant "to investigate all aspects of the venture."³ This investigation included "a study of the legal aspects and range of consumer protection available for Arlington County citizens."⁴ The contract permitted the Center to work with the Board Commission from the research stage to the formal opening of the Arlington Consumer Protection Commission offices.⁵ The chance to work on this project from its inception presented a unique opportunity to examine the advantages and problems of local control under "laboratory conditions."

Although the genesis of Arlington County's agency was atypical, its use as an example of local control serves more than academic purposes. The Commonwealth of Virginia delegates less power to its municipal and county subdivisions than many other states. Thus, anything that Arlington County has the power to do, the subdivisions of many other states should be able to match and go beyond!⁶

¹ Research by the authors indicates that at least eighteen counties and fifty-three municipal subdivisions have consumer protection agencies. See, e.g., Appendix at the end of this article.

² Consumer HELP is an outgrowth of a clinical course, supervised by Professor Rothschild, which is offered to second and third year law students at the National Law Center, George Washington University. The program operates three complaint centers (including two storefronts) which have received over 14,000 consumer complaints in two years of operation, and a research center which utilizes computers to analyze complaints, referrals, and solutions. Consumer HELP is staffed by over 100 law students, undergraduates, and volunteers each semester, working on over 10 projects in addition to the Arlington County program. See generally Consumer Help (brochure published by Consumer HELP Center, 714 Twenty-first Street, N.W., Washington, D.C. 20006).

³ Letter from Belt W. Johnson, County Manager, Arlington County, Virginia, to Donald P. Rothschild, July 15, 1971.

⁴ *Id.*

⁵ Consumer HELP was hired by the Arlington County Board on July 10, 1971. The resolution establishing the Arlington Consumer Protection Commission was passed on September 11, 1971, and the Commission office was officially opened on February 5, 1972. Consumer HELP personnel have continued assisting the Commission as informal advisors on a volunteer basis since the opening of the office.

⁶ The police power frequently conferred on municipalities and counties is usually sufficient authority for the enactment of local consumer protection programs. See text §IV C, I, d, *infra*.

II. LOCAL CONTROL OF CONSUMER PROTECTION

A. THE NEED

Prior to examining the Arlington experience, it is desirable to consider the need for expanding what may seem to be an already overpopulated consumer movement.⁷

The principal justification for local control of consumer protection is to enable assistance to be given in direct response to individual needs. Existing empirical evidence demonstrates the necessity of tailoring governmental consumer protection activities to the unique problems that arise within limited geographic, socioeconomic and political subdivisions. This evidence supports the proposition that consumer problems and cures vary in type and in kind according to the demographic characteristics of the local units.⁸ Housing problems present an oversimplified, but illustrative, example of such variation. A large number of complaints from consumers living in the inner city will likely be concerned with rental property, while complaints originating from suburbanites will probably deal with the sale of property. This is obviously due to the fact that there are proportionately more lessees in urban areas than are found in suburban areas. However, the more significant variables are far more subtle and arise from the dysfunctional marketplaces which exist in urban areas.⁹ As Professor David Caplovitz' recent study *Debtors in Default* indicates, these urban marketplaces tend to work to the detriment of poorly-educated, low-income consumers from minority groups. The consumers who are forced to shop in such marketplaces are particularly susceptible to and least able to deal with predatory sales and credit practices.¹⁰

The press for consumer protection in Congress and in state legislatures thus far has concerned itself with consumer problems more common to suburban than urban marketplaces. State legislatures particularly address themselves to problems found statewide

⁷ See text §IV, H *infra*.

⁸ Consumer HELP has provided such data as evidence of the need for local protection agencies to government councils in the District of Columbia, Montgomery County, Maryland, and Arlington County, Virginia.

⁹ See Rothschild, *Consumer Protection at Last Through Local Control of Retail Installment Sales Contracts*, 37 GEO. WASH. L. REV. 1067 (1969). See also FEDERAL TRADE COMMISSION, REPORT ON DISTRICT OF COLUMBIA CONSUMER PROTECTION PROGRAM, 1-2 (1968).

¹⁰ See 2 D. CAPLOVITZ, *DEBTORS IN DEFAULT* (1971). See also D. CAPLOVITZ, *THE POOR PAY MORE* (1963). S. MARGOLIUS, *THE INNOCENT CONSUMER VS. THE EXPLOITERS* (1967).

and tend to overlook problems endemic to particular locales. This is not to say that suburban consumers are free from serious problems or that all consumers do not have some problems in common. The point is that there is a substantial need to focus sharply on specific consumer problems arising in distinct marketplaces in order to afford complete protection. In other words, the need for local control is emphasized by the necessity of varying responses to specific individual consumer problems arising because of the variation in marketplaces.

B. ADVANTAGES

Consumer protection afforded a specific group of consumers brings the control aspect close to the source of the problem. If consumer regulation is to be tailored to the consumer, write-in, phone-in and walk-in consumer input is desirable. This can best be accomplished by local agencies. The "mailbag approach" of the Federal Trade Commission has been criticized because it subordinates individual consumer problems. However, this approach has worked more effectively at the Commission's regional offices because they are closer to the source of the complaints.¹¹ The advantage is proximity. The disadvantage is that resources are greater at the federal level. In addition, immediate and direct access to consumers has collateral advantages.

One reason why the Federal Trade Commission or any national consumer-oriented¹² group is unable to deal directly with individual consumer problems is the necessity of a massive staff which is required to resolve individual disputes. Volunteers afford an excellent source of manpower. Consumer HELP has utilized its close contact with consumers to enlist volunteers as one method of satisfying its manpower needs.¹³ The Consumer Education and Protection Association (CEPA), a successful consumer action group headquartered in Philadelphia, has also built upon its success by enlist-

¹¹ Compare ABA, REPORT OF THE COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969), with E. COX, R. FELLMETH, & J. SCHULTZ, THE CONSUMER AND THE FEDERAL TRADE COMMISSION (1969), and F T C ANN. REP. 39-42 (1971) (indicating that the regional offices of the FTC are increasing their dealings with consumer complaints). See also Comment, *Deceptive Advertising*, 80 HARV. L. REV. 1005, 1064 (1967).

¹² An example is the Center for Auto Safety — a group established by Ralph Nader to deal specifically with problems of "lemons," warranty service, and automobile safety, which works to strengthen federal regulation and enforcement efforts.

¹³ Consumer HELP's staff has numbered as many as 140 students and volunteers. Many consumers who have received aid have, in turn, volunteered several hours of service each week. See Consumer Help brochure, *supra* note 2.

ing as members those consumers it assists.¹⁴ Local government units can achieve similar results. They have an advantage over private groups in that they provide stability and prestige which consumer protection groups may lack. Moreover, municipal and county involvement enables private consumer groups to develop a significant paraprofessional staff to provide further services that would otherwise require additional civil servants which many local governments cannot afford to supply. In reality, this means that volunteer help is a prerequisite to providing adequate consumer protection.

Another advantage of local consumer activity arises from the involvement of business groups. The further removed consumer activity is from individual problems and specific marketplaces, the greater is the level of abstraction in dealing with consumer problems. This, in turn, causes the line demarcating consumer from business interests to grow sharper. The allegation that "we are all consumers" may ring true in a city council meeting, but it becomes suspect when stated before a congressional investigating committee by an automobile executive in response to an allegation of corporate irresponsibility. Business support and participation is far easier to obtain at the community level than at the national or state level. Appealing to one's sense of community loyalty is a successful way of recruiting business cooperation in resolving consumer disputes. There is no longer any doubt that a large proportion of consumer problems can be resolved by voluntary methods when dealing with business at the local government level.¹⁵

It is the widely held opinion of consumer advocates that the most important element of consumer protection is "preventive" activity, *i.e.*, consumer education. Consumers must be made aware of the abusive business practices to which they may be subjected and of how to recognize and to overcome them. Certainly, if consumer problems are to be attacked on a permanent basis, the present level of consumer awareness must be greatly enhanced many times. The mass media undoubtedly has a role to play in this educative process. Thus far, however, efforts by public broadcast-

¹⁴ CEPA is a nonprofit, unincorporated association of low-income consumers which was organized in 1966. The Association negotiates consumer disputes and, failing resolution of the conflict, will picket the merchant to encourage satisfaction while enlisting the aid of clients in consumer boycotts.

¹⁵ From their experience with the Consumer HELP Center, the authors estimate that the use of voluntary mechanisms by private consumer protection agencies in the Washington, D. C. Metropolitan area has resulted in the resolution of well over 70% of the cases handled by such agencies. Moreover, the figure in Prince Georges County, Maryland has been found to exceed 80%.

ing and by commercial public service programs, although commendable have fallen far short of this goal and their "Nielsen ratings" have been appalling.¹⁶ "Action lines" found in several urban newspapers help solve individual problems and dispense information and may assist consumers who find themselves with simple complaints or requests. However, this approach is piecemeal and does not provide the depth of information to deal with the more complex consumer problems. This is not to say that media efforts should be discontinued. However, it should be recognized that protection of the consumer will be significantly advanced if consumer education programs are created. Several consumer awareness programs being developed by school systems have been enormously successful.¹⁷ The development of these programs in public schools will have long range effects. The traditional home economics type courses, under a new format of "human ecology," are the most effective vehicles for developing awareness and preventive consumer protection. Entrance to the public school system by local government agencies is relatively easy consequently, local consumer protection and school officials may work together to develop strong and innovative programs.

There are other reasons why local governmental bodies are the most appropriate agencies for controlling consumer protection. In home rule jurisdictions, the police and licensing power of the state is usually delegated to municipalities.¹⁸ In non-home rule jurisdictions, the extent of such powers varies with the jurisdictions. Many local governmental units have enacted consumer protection agencies based on their police powers. Yet even without such powers, an effective local consumer protection agency may be established. In Virginia, where local powers are limited and municipalities must petition the state legislature for meaningful police powers, the Arlington County Board was able to move quickly and without substantial opposition to create the Consumer Protection Commission. The explanation for this is the political responsive-

¹⁶ Occasionally, however, prime time programming has met with a measure of success, as has been the case with WTTG-TV, Metromedia, Washington, D. C., Consumer Help brochure, *supra* note 2. See note 28 *infra* and accompanying text.

¹⁷ In Washington, D. C., no less than three groups are teaching consumer protection in the public schools. The Arlington Consumer Protection Commission has also begun speaking engagements at schools and before various civic organizations.

¹⁸ The power of home rule would be a nullity if the police power were not conferred upon home rule jurisdictions. "Public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs." *Berman v. Parker*, 348 U.S. 26, 32 (1954).

ness of local government to local consumer groups. An anti-consumer stance is a luxury not available to local politicians. Business groups and trade associations are less able to "lobby" effectively against creation of consumer protection agencies at the municipal level because representatives of consumer groups can easily obtain access to local officials. A final advantage of local control of consumer protection rests with the flexible nature of local government. For example, it is far easier to establish a consumer protection agency in such consumer-related municipal offices as Weights and Measures or Licenses than to establish a similar office in the Agriculture or Commerce Departments of the state or federal governments. There are fewer papers to push and less bureaucratic red tape to cut. Moreover, consumer protection is one of the least expensive regulatory activities that a local government can establish.¹⁹

III. THE IMPETUS TO LOCAL CONSUMER PROTECTION ENACTMENTS.

A. POLITICAL ACTION

It is not uncommon to find instances in which politicians provide the original impetus to local consumer protection. This occurs as the popularity of consumerism prompts increasing endorsement of these laws. Thus, relying heavily on his consumer record, the individual who originally submitted the consumer protection resolution in Arlington County, successfully campaigned as an independent challenger later that year for a seat on the County Board.²⁰

As indicated in the introduction, anti-consumerism is a politically impractical position. The political feasibility of enacting local consumer protection measures often prevails over the traditional opposition of local commercial interests to such enactments. In fact, the Arlington resolution establishing the Consumer Protection Commission forewarned business interests of the futility of attempting to dissuade Board members from enacting the resolution.²¹ Hence,

¹⁹ For example, the Consumer Protection Commission of Prince Georges County, Maryland operated on a \$5,000 budget during its first year of operation.

²⁰ In Virginia, the 1971 campaign for the office of Lieutenant Governor was a tough three-way battle, eventually won by Independent Harry Howell, who based much of his campaign on his own consumer program.

²¹ The resolution contained such clauses as: "Whereas, many Arlington residents have grievances arising from advertisements or sales of merchandise, repair and other services . . ."; and "Whereas, consumers aggrieved by sharp practice lack an adequate means of obtaining aid and redress . . ." Arlington County, Va., Resolution on Consumer Protection, Sept. 11, 1971.

populist pressures to enact consumer protection regulations may prompt local politicians, regardless of party affiliation, to provide the impetus for such action.

B. CONSUMER GROUPS

In many cases, failure of municipal governments to act on consumer protection is directly attributable to a lack of consumer inertia. Local consumer organizations should develop into special interest pressure groups. Since interest groups exist in most counties and municipalities and as public officials are subject to, and respond to, their pressures, consumer organizations should make their pressure felt by demanding of these officials governmental action on consumer problems. There are many channels through which consumer advocates may present their views and arguments, thereby providing an original or added impetus for local consumer protection. Consumer groups can propose original resolutions to local governing bodies or submit amendments and modifications to programs already in operation. In communities where consumer associations are active and well-known, they are usually solicited for their views.²²

Where open hearings take place to measure public sentiment on proposed consumer ordinances and resolutions, consumer organizations should be mobilized to testify. Marshalling consumer forces may seem an overkill, but it is necessary. Business groups like the Chamber of Commerce, Better Business Bureau and numerous trade associations, are already mobilized, and, until recently, have successfully neutralized most efforts at local control.²³ Consumer groups from beyond the local jurisdiction can be enlisted to aid in this effort. At the Arlington hearings, for example, local groups were assisted by consumer organizations headquartered in the District of Columbia, as well as the Virginia Citizens Consumer Council, a private body active statewide. Consumer HELP was even able to enlist support for the resolution from the National Council of Better Business Bureaus, Inc., which was further interested in cooperating with a consumer arbitration project in Arlington.²⁴

²² The Consumer HELP Center has been in operation since March, 1970. In addition to advising the Arlington County Board, the Center has provided testimony on consumer regulations and codes in the District of Columbia, and in Montgomery and Prince Georges Counties, Maryland. See generally Consumer Help brochure, *supra* note 2.

²³ See, e.g., Schoenfeld, *Consumer Report: Bill to Create Advocacy Unit Will be Revived in New Congress*, 2 NAT'L J. 2771 (Dec. 1970).

²⁴ See § V, *infra*.

Local consumer ordinances and regulations are novel developments. Cooperation and pressure from all consumer groups are necessary to secure passage of even voluntary mechanisms.

Such broad-based support is further necessary to supply empirical data on consumer problems in the area and the need for regulation. If local control of consumer protection is to be effective, empirical data is required to point out the problems to be met, the type of response that has been effective elsewhere to meet such problems, and a flexible program to deal with situations that may prove peculiar to the locality.²⁵ Local programs must recognize the variation in consumer problems resulting from qualitative differences in marketplaces, such as the differences between inner city and suburban marketplaces.²⁶ This requires using all the available consumer data, and most importantly, suggestions on mechanisms to gather new data. Thus, local consumer groups can serve as important sources of up to date statistics and research.

In some locales, officials may maintain private or general advisory boards to aid them in determining policy and in formulating programs. For example, one of the authors has served as a special consultant on consumer affairs to the District of Columbia City Council Chairman, and has frequently been called upon to participate in Washington metropolitan consumer activities. Where such avenues of decision-making are open to consumer representatives, they should be utilized to maintain a link between government and private consumer groups.

In addition to providing testimony and advice, consumer groups can enlist the local media to perform independent investigation of local consumer problems. Consumer HELP, for example, has a unique relationship with Metromedia News in the District of Columbia whereby law students and newsroom personnel investigate consumer problems and develop television documentaries, based on their research which are telecast during prime time newscasts.²⁷

²⁵ On research to be performed, see §§ IV, F, G, *infra*.

²⁶ The experience of the Consumer HELP Center's storefront operation in the heart of Washington's black community demonstrates that the following problems are rampant in the ghetto: fraud by merchants, credit, disclaimers of warranties, assignment of contracts and high-pressure sales tactics (especially those of door-to-door salesmen). See generally St. Thomas More Institute for Legal Research, *Law and the Ghetto Consumer*, 14 CATHOLIC LAW. 214 (1968); *Symposium — Consumer Protection and the Urban Poor*, 37 GEO. WASH. L. REV. 1013 (1969). On the other hand, the consumer protection commissions in Prince Georges County, Maryland and Arlington, Virginia have found that the problems of suburban areas concern, generally, the sale of goods and services.

²⁷ Consumer HELP's programs have dealt with a variety of topics; retail install-

Consumer groups can also publish pamphlets and newsletters drawing attention to offensive business practices.²⁸ State level consumer agencies, such as those in the attorneys' general offices of New York and Illinois, publish pamphlets alerting consumers to unfair business practices. Local consumer groups can aid in the distribution of these materials in their communities.²⁹

A further strategy through which consumer groups can effect needed legislation is political action; that is, to support candidates, regardless of party, whose past record has been responsive to consumer goals. Implicit in this support is the requirement that such consistency and responsiveness be maintained after election to guarantee continued electoral support.³⁰

C. BUSINESS GROUPS

Business and financial interests have traditionally maintained powerful positions at the local governmental level. Indeed, it is the business-financial-economic sector which often provides the political leadership in most communities. If not candidates themselves, members of such groups as the Chamber of Commerce, Better Business Bureau, and numerous trade associations provide a financial base for candidates to local office. Business interests, thus, are in a position both to exert considerable influence over the form and strength of local consumer protection ordinances and to block their enactments. Consequently, they are a force to be respected and dealt with in any contemplated legislative proposal. It should be assumed that these interests desire to retain their comfortable position and that they will view most consumer protection proposals as challenges to their hegemony. For example, in discussions with the authors, the Executive Vice President of the Arlington Chamber

ment contracts, employment agencies, car warranties, automobile and television repairs, record clubs and computer dating, as well as appliance, grocery and land purchases.

²⁸ A noteworthy example is the Virginia Citizens Consumer Council, a private consumer advocate group, which regularly publishes newsletters on statewide consumer matters, consumer proposals before the state legislature, and specific consumer problems. Consumer groups, however, should be mindful of the legal limits to such activities. See Comment, *Extrajudicial Consumer Pressure: An Effective Impediment to Unethical Business Practices*, 1969 DUKE L. J. 1011 (1969).

²⁹ For instance, an effortless yet frequently overlooked method of public consumer education is to place these materials in municipal and public service offices, waiting rooms of professional persons, banks, credit unions, labor union offices, public libraries, etc.

³⁰ H. KAUFMAN, *POLITICS AND POLICIES IN STATE AND LOCAL GOVERNMENTS* 99 (1963).

of Commerce expressed his opinion that no further laws with sanctions were necessary. It is not likely that business groups will provide an impetus to local action. Therefore, proponents of local consumer regulations have a very real responsibility of persuasion, diplomacy, and mobilization of resources.

Consumer advocates should not, however, view all local business groups in a negative light. Most businessmen conduct their enterprises with high standards of honesty and due regard for the consumer, since such conduct promotes good will and confidence in the commercial community. As a result, such prestigious groups as the Chambers of Commerce and Better Business Bureaus have not been deaf to consumer outcries against sharp businessmen who are motivated more by quick profit potential than by fair dealing. These people compromise the standing of business in the community as a whole and threaten the success of their more reputable competitors. Therefore, it is in the interest of honest and responsible business associations to combat these abusive practices, and to eliminate those firms which operate on the fringe of legality. A significant number of local businessmen realize this and may provide an impetus for local governmental action. Nevertheless, it is more likely that these businesses will prefer the self-policing approach of their local Chamber or Better Business Bureau.

D. CONSULTANTS

Once a local governing body decides to study the consumer problem, all aspects of consumer protection should be thoroughly investigated, including need, local powers, alternative proposals, and recommendations. In this regard, the retaining of consultants is advisable. The report of a consultant may serve as a persuasive demonstration of the need for local action.

Research into local consumer affairs and possible governmental response is a sophisticated undertaking. Such a study will take researchers into the fields of municipal corporation or county law, commercial law and practices, administrative law and technique, local and state politics, sociology, human relations, and protocol. Prior experience of the consultants in consumer affairs is highly recommended, as they will inevitably have access to a wide variety of information through their contacts, thus eliminating, perhaps, the need for a significant amount of original research. Where consumer consultants have kept up-to-date with consumer legislation in other jurisdictions, they will be better able to analyze alternative

proposals by comparing provisions of enactments which have been in existence elsewhere. In situations where the community is fortunate to have consultants from the immediate vicinity, their statistics will be all the more meaningful as the figures will likely involve relevant marketplaces.

These observations suggest the use of two possible sources of consultants: the county or city attorney's office and law student research groups.³¹ Although the city attorney's office may have more training in analysis³² and have greater experience in dealing with illegalities, the staff may be hampered in its endeavor to produce a comprehensive report due to manpower and budgeting limitations. For example, in Arlington, one of the reasons for the commonwealth (county) attorney's initial negativism toward a local consumer protection resolution was the fear that his office might have been charged with responsibilities under the measures without adequate funding and personnel.

A law student research team with experience in the consumer complaint field, bringing to bear upon the project the information gleaned from the experience, would also have analytical and objective talents and the availability of extensive research tools. This is not to suggest that the student group should not consult with the city or county legal department. On the contrary, the Consumer HELP Center periodically contacted the commonwealth attorney's office with regard to the legal research and tentative legal conclusions.

Once selected, the consultants should begin preparation of a comprehensive report addressing consumer problems in the community. Such a report would outline the legal basis for a local consumer protection agency, local business abuses and complaint volume, and a range of alternatives suitable to accomplish the goal of consumer protection. These efforts can prove to be a persuasive impetus to local action.³³

E. EXISTING STATE AND LOCAL AGENCIES

1. State Agencies

The remoteness and inadequate performance of state consumer

³¹ The authors are aware that only urbanized areas will have access to both of these resources. But it should be noted that these areas are the ones which have the greatest need for consumer programs. See note 25, *supra*.

³² The objectivity of such offices may, however, be compromised by political considerations. See §§III A, C *supra*.

³³ See §IV, *infra*.

protection offices may stimulate local initiative. It is possible to predict the relative success of state consumer protection offices by studying the legislature's placement of the agency within the state administrative structure. For example, an office of consumer affairs located in the attorney general's office and under the supervision of a young assistant attorney general is likely to be a more potent force in the business community than a similar office, directed by a bureaucrat with 40 years experience in state affairs, located in an obscure department of weights and measures. In this regard, it should be recalled that business, finance and industry are omnipresent at and highly influential with state legislatures. Community loyalty arguments are not persuasive in enlisting business support for governmental intrusions into their sphere of operation. Such state departments as Agriculture and Commerce often become puppets of the enterprises they are to regulate; producing a situation where the regulated control the regulators.

It is frequently a period of years between the introduction of a piece of legislation creating a new state governmental body and the initiation of that agency's operations. This lag may create expectations that go unrealized, thereby producing demands by residents for local action. At the local level, however, the time lag is commonly a matter of a few months. For example, in Virginia, the State Office of Consumer Affairs was established in April, 1970. Yet, a plan to open field offices throughout the state was not fully implemented until February, 1972. In Arlington County, however, the Consumer Protection Commission members were appointed on the same day as the passage of the resolution establishing the Commission. Within five months, the Commission had achieved impressive results. It held five full meetings; hired two full time staff members; developed complaint and other forms; mailed form letters to business and other community groups announcing its existence, aims and soliciting cooperation; adopted landmark arbitration rules and procedures; held an official opening; and had been receiving consumer information requests and complaints for six weeks!

State consumer protection statutes may expressly or impliedly anticipate local programs as supplements to state action. State personnel must realize that a comprehensive state-wide consumer protection scheme can best be achieved only by cooperation with local bodies.³⁴

³⁴ See §IV, E, *infra*.

2. Local Agencies

In the absence of a specific consumer protection agency, consumers may address their complaints to such other local government departments as Weights and Measures, Public Utilities, Landlord and Tenant, Business Licensing, Human Relations, Public Health and Safety, and Police. To the degree that these bodies are not specifically charged with responsibility for complaint-handling or that procedures and manpower limitations militate against the effective handling of this additional activity, complaint reception is likely to hinder such departments in the efficient pursuit of their proper responsibilities and objectives. This dysfunction may further create demand for a local consumer office.

IV. THE PROCESS OF ENACTMENT

A. INTRODUCTION

If the authors are tempted to expound on an "in my experience . . ." thesis it is at this point. For there are two ways to embark on the process of enactment — and, yes, one is right and the other is wrong. Before drafting proposed regulations it is absolutely necessary to proceed with *detailed* research into the doctrine of local government power as it relates to (1) local regulation, (2) the state in question, and (3) a specific municipal subdivision. Conversely, it is wrong to "cut and paste" regulations that are in force in other jurisdictions. Therefore, the first step in regulating is research into specific local government powers.

B. LOCAL GOVERNMENT POWERS

Local governments obtain their powers from the state. Virtually all forms of government within a state are considered in law as "creatures of the state," subject entirely to the will of state legislatures within limitations that may be imposed on the legislatures by the people through the state constitution.³⁵ That is, in the absence of state constitutional restrictions, the legislature possesses plenary power over the number, nature, extent, and duration of the powers conferred on local governing units.³⁶ Thus, it is commonly recognized that counties and municipalities have only those powers

³⁵ 1 C. ANTIEAU MUNICIPAL CORPORATION LAW, §1.00, at 3 (1968) [hereinafter cited as 1 ANTIEAU].

³⁶ Hunter v. Pittsburgh, 207 U.S. 161, 178 (1907).

which the state constitution, general laws, or its charter from the legislature³⁷ have bestowed upon it. The powers of a county or municipality are conferred upon and exercised by the local governing body.³⁸ The issue of whether a county or municipality may enact consumer protection regulations or ordinances³⁹ essentially reduces to a determination of the powers possessed by the local governing body. These are numerous powers which, if granted to local government units, may be exercised to enact consumer protection measures. Such powers are the same whether given to a home rule or non-home rule municipality or county. There are certain distinctions that must initially be made between the concepts of home rule, non-home rule and county enactments before these powers are explored, as the differences affect the interpretations given to the powers conferred.

1. Home Rule Municipalities⁴⁰

The powers of home rule municipalities may emanate from two sources: state constitutional provisions which directly confer powers on municipal corporations; or home rule laws which the legislature must or may pass in compliance with constitutional directive. The former states are labelled "constitutional home rule" or "self-executing" states; the latter are "legislative home rule" states. The scope of the power granted is frequently found in the municipal

³⁷ 1 ANTIEAU, *supra* note 35, §1.00; C. ANTIEAU, COUNTY LAW §31.06-24 (1966) [hereinafter cited as COUNTY LAW]; 2 E. McQUILLIN, MUNICIPAL CORPORATIONS, §10.03, at 793-40 (3d ed. 1966), [hereinafter cited as McQUILLIN].

³⁸ See 1 ANTIEAU, *supra* note 35, § 4.00; COUNTY LAW, *supra* note 37, § 32.03; 4 McQUILLIN, MUNICIPAL CORPORATIONS, § 13.01 (1968 rev. vol.). See e.g., VA. CODE ANN. §§15.1-7, 15.1-837 to -838 (1969).

³⁹ "Although an 'ordinance' is not a law in every sense of the term as used in constitutions and statutes, it is nevertheless a local law of the municipality, emanating from its legislative authority, and operative within its restricted sphere as effectively as a general law of the sovereignty." *Maynard v. Layne*, 140 W. Va. 819, 825, 86 S.E. 2d 733, 737 (1955), citing 2 McQUILLIN, *supra* note 37, § 662. See also *State ex rel Leach v. Redick*, 168 Ohio St. 543, 550, 157 N.E.2d 106, 111 (1959); *S. SATO & A. VAN ALSTYNE*, STATE AND LOCAL GOVERNMENT LAW 419 (1970).

Resolutions are usually ministerial or procedural in nature. They are less "formal" than ordinances and may be used more for ad hoc or interim purposes while ordinances exert a more permanent influence on the locality. See, e.g., *Parr v. Lansing City Clerk*, 9 Mich. App. 719, 158 N.W.2d 35 (1968); *City of Salisbury v. Nagel*, 420 S.W.2d 37, 43 (Mo. App. 1967); *Mitchell v. City of Parshall*, 108 N.W.2d 12 (N.D. 1961). But see *McLaughlin v. City of Millville*, 110 N.J. Super. 200, 264 A.2d 762 (1970).

"Regulation" is frequently held to be synonymous with "ordinance." See, e.g., *City of Clayton v. Nemours*, 237 Mo. App. 167, 164 S.W.2d 935 (1942); *Villines v. Freeman*, 370 P.2d 307 (Okla. 1962), quoting *State ex rel Krebs v. Hocror*, 83 Neb. 690, 120 N.W. 199 (1909).

⁴⁰ Municipalities vested with home rule powers are free from state interference, regulation, and control over matters which concern the relationship between the local

charter⁴¹ which cannot enlarge or contravene the municipal power allowed by the state constitution.⁴² Nor can home rule charter contravene general law, case law, or the public policy of the state.⁴³

government and its constituency. See, e.g., *People ex rel Attorney General v. Johnson*, 34 Colo. 143, 86 P. 233 (1905) (dictum).

The constitutions of the following states contain home rule provisions: ALASKA CONST. art. X, §§ 9-11; ARIZ. CONST. art. XIII, §§ 2-3; CAL. CONST. art. XI, § 6, *et. seq.*; COLO. CONST. art. XX, §§ 1-6; CONN. CONST. art. X, § 1; FLA. CONST. art. 8, §§ 1-2; GA. CONST. art. XV, § 2-8301; HAWAII CONST. art. VII, §§ 1-5; KAN. CONST. art. XII, § 5; LA. CONST. art. XIV §§ 3a, 22, 40; MD. CONST. art. XI-A. -E; MASS. CONST. amend. art. II; MICH. CONST. art. IV, §§ 29, art. VII; MINN. CONST. art. XI, §§ 3-5; MO. CONST. art. VI, §§ 19-20; NEB. CONST. art. XI, §§ 2-5; NEV. CONST. art. VIII, § 8; N. H. CONST. pt. I, art. 39; N. MEX. CONST. art. X, §§ 4-5; N. Y. CONST. art. IX; N.D. CONST. art. VI, §130; OHIO CONST. art. XVIII, §§2-3; OKLA. CONST. art. VIII, §§2-7; ORE. CONST. art. XI, §§2-2a; PA. CONST. art. IX, §2; R. I. CONST. amend. XXVIII; S. DAK. CONST. art. X; TENN. CONST. art. XI, §9; TEX. CONST. art. XI, §5; UTAH CONST. art. XI, § 5; WASH. CONST. art. XI, §§ 10-11; W. VA. CONST. art. VI, §39a; WISC. CONST. art. XI, §3.

For a more extensive treatment of the subject of home rule, see ANTEAU, *supra* note 35, §§ 3,00-36.

CHICAGO HOME RULE COMM'N., MODERNIZING A CITY GOVERNMENT (1954); F. GOODNOW, MUNICIPAL HOME RULE (1897); H. MCBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE (1916); S. MCGOLDRICK, LAW AND PRACTICE OF MUNICIPAL HOME RULE, 1916-1930 (1933); 2 McQUILLIN, *supra* note 37, § 10.13 at 774, § 10.25, at 804; R. MOTT, HOME RULE FOR AMERICA'S CITIES (1949); E. RUSCO, MUNICIPAL HOME RULE: GUIDELINES FOR IDAHO (1960); C. RYNE, MUNICIPAL LAW (1957). For useful law review articles discussing this subject, see Abels, "Home Rule" for Iowa Cities and Towns?, 13 DRAKE L. REV. 53 (1963); Baum, *Scope of Home Rule: The Views of the Con-Con Local Government Committee*, 59 ILL. ST. B. J. 814 (1971); Crummett, *City Home Rule in Kansas*, 9 WASHBURN L. J. 1 (1969); Glauberman, *County Home Rule: An Urban Necessity*, 1 URBAN LAW, 170 (1970); Hagensick, *Wisconsin Home Rule*, 50 NAT'L CIVIL REV. 349 (1961); Janney, *Home Rule Charters in Nebraska*, 5 CREIGHTON L. REV. 98 (1971); Klemme, *The Powers of Home Rule Cities in Colorado*, 36 U. COLO. L. REV. 321 (1964); Martin, *Home Rule for Kansas Cities*, 10 U. KAN. L. REV. 501 (1962); Millenbach, *Municipal Home Rule in New York*, 22 SYRACUSE L. REV. 736 (1971). Sandladow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964); Smalley, *The Municipal Home Rule Act of 1965*, 3 GA. ST. B. J. 333 (1967); Tollenaar, *Home Rule Puzzle: Metropolitan Area Functional Consolidation Calls for Modification of the Theory*, 50 NAT'L CIV. REV. 411 (1961); Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968); Vaubel, *Municipal Corporations and the Police Power in Ohio*, 29 OHIO L. J. 29 (1968); Note, *Municipal Home Rule for Kentucky?*, 54 KY. L. J. 757 (1966); Note, *Home Rule and Special Legislation in Minnesota*, 47 MINN. L. REV. 621 (1963); Note, *Home Rule: A Solution for Municipal Problems*, 16 WYO. L. J. 47 (1961).

⁴¹ Neither legislative action nor a municipal charter is necessary where home rule powers are conferred by constitutional provisions. ANTEAU, *supra* note 35 § 3.02, at 98. Although these are unnecessary as sources of power, a number of home rule municipalities have adopted charters. In most states, constitutional home rule powers "do not come into existence until the performance of some public or official act or action, such as the adoption of a charter . . ." 2 McQUILLIN, *supra* note 37, § 10.13, at 775.

⁴² See, e.g., 2 McQUILLIN, *supra* note 37, § 10.16, at 777-78.

⁴³ See, e.g., COLO. CONST. art. XX, §6; OHIO CONST. art. XIX. See also 2 McQUILLIN, *supra* note 37, § 10.13, at 776.

a. *Constitutional Home Rule*:⁴⁴ A constitutional grant of home rule will likely be quite broad.⁴⁵ The power granted, however, is limited to municipal or local affairs.⁴⁶ Controversy has thus arisen over the determination of what is local, in contrast to a state, affair.⁴⁷ Since consumer problems are matters of both state and local concern, the resolution of this controversy is particularly important to advocates of local government consumer protection.

The judiciary has taken two approaches to the validity of the exercise of power by a municipality on a subject arguably of state concern. First, the problem may be considered a dual state and local concern in which case the acts of the municipality, if consistent with its charter, will be upheld until the state preempts the area.⁴⁸ Second, the municipal act can be invalidated in the absence of a specific constitutional or legislative grant.⁴⁹ Of course, in either case, the state legislature may end the controversy by defining as exclusively a state concern an area that could arguably be either local or state. A constitutional grant to "frame a charter" in these self-executing states is sweeping and should be interpreted to grant a municipal corporation all power over local affairs. In today's increasingly urbanized society with the movement to decentralize government services it should be recognized that "local affairs" is a term without a precise definition which fluctuates with every change in local conditions.⁵⁰ No objective tests have evolved to distinguish local from state concerns.⁵¹ As Professor Rhyne has asserted,

In the process of inclusion and exclusion of matters relating to municipal affairs, the courts will respect the desire to safeguard the health, safety, welfare and property rights of the inhabitants of home rule cities, but are likely to reject exclusive local control . . . if there is a need or desire to effect uniformity in regulation throughout the state.⁵²

⁴⁴ See note 40, *supra*.

⁴⁵ 1 ANTIEAU, *supra* note 35, § 3.03, at 99.

⁴⁶ *Id.*, § 3.06, at 107.

⁴⁷ See generally *id.*, § 3.17; 2 McQUILLIN, *supra* note 37, § 4.78, at 140.

⁴⁸ 2 McQUILLIN, *supra* note 37, § 4.87; see note 127, *infra*, and accompanying text.

⁴⁹ *In re Lane*, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962). See generally Feiler, *Conflict Between State and Local Enactments — The Doctrine of Implied Preemption*, 2 URBAN LAW 398, 404 (1970).

⁵⁰ See, e.g., *Los Angeles Brewing Co. v. Los Angeles*, 8 Cal. App.3d 391, 48 P.2d 71 (1935); *Holmer v. Superior Court*, 48 Cal. App. 140, 191 P.1000 (1920); *People ex rel Public Utilities Comm'n. v. Mountain States Tel. & Tel.*, 125 Colo. 167, 243 P.2d 397 (1952); *State ex rel McElroy v. City of Akron*, 173 Ohio St. 189, 181 N.E.2d 26 (1962). See generally S. SATO & A. VAN ALSTYNE, *STATE AND LOCAL GOVERNMENT LAW* 236-38 (1970).

⁵¹ 1 ANTIEAU, *supra* note 35, § 3.17, at 142.

⁵² C. RYNE, *MUNICIPAL LAW* 65 (1957).

Although states cannot legitimately be denied power over state commercial practices, it is submitted that consumer protection is predominantly a matter of local concern.⁵³ The fact that business practices are likely to differ in areas which are themselves different in socio-economic, cultural, and population traits demands that municipalities have the ability to respond adequately, imaginatively, and independently. Thus, uniform consumer protection is not necessarily desirable throughout a state. The Colorado Supreme Court approximated this argument when, in upholding a weights and measures ordinance passed by Denver, it stated that,

[t]here can be no doubt that the regulation of standard weights and measures . . . is a matter of concern wherever commerce is carried on, without regard to local governmental boundaries. Such is of state wide concern, but more so of local concern . . . is the regulation of weights and measures to prevent misrepresentations and fraud in commercial transactions . . . and such may be regulated under police power . . . at the municipal level, [absent conflict with state enactments].⁵⁴

A further problem arises in self-executing states in situations where localities adopt charters. These charters may be viewed or interpreted as "limitations upon particular municipal authorities and as "distributors" of municipal power.⁵⁵ Because such charters may be unnecessary and are not legislative grants, the powers they provide should be liberally construed, regardless of clauses providing that local officials "consider themselves empowered to perform indicated functions."⁵⁶

b. *Legislative Home Rule States:* In states where home rule laws are passed by the legislature pursuant to state constitutional mandate, such statutes are the principal sources of muni-

⁵³ See §II, A *supra*.

⁵⁴ *Blackman v. County Court*, 160 Colo. 345, 351, 455 P.2d 885, 888 (1969). The result in this case may have been different if the controversy had arisen in a "state supremacy home rule state" where municipalities have all power over local affairs, subject to general state law covering the particular subject matter. In local supremacy home rule states, such as Colorado, the municipality has exclusive power over local affairs and the state may not impinge thereon. However, the state, in either case, can define as exclusively a state concern what was once a local concern and the locality would be without power to enter the area. In *Blackman* prevention of misrepresentation and fraud in commercial transactions was found to be a dual state and local concern and thus the court held the ordinance in question not to be in conflict with state laws. *Id.*

⁵⁵ 1 ANTIEAU, *supra* note 35, § 3.05, at 104. For an in-depth study of the enactment process of constitutional home rule charters, see Freilich, Robards & Wilson, *Home Rule for the Urban County: Observation on the New Jackson County Constitutional Charter*, 39 U. M. K. C. L. REV. 297 (1971).

⁵⁶ *Id.*, § 3.09, at 125.

cipal power.⁵⁷ Generally, the home rule law will confer powers upon municipalities in a two-part format.⁵⁸ First, the act will expressly confer certain powers; secondly, it will contain a broad grant of power to cover situations not addressed in the explicit grants. These latter clauses may be phrased for example, as the power "... [to pass] any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants . . . ;⁵⁹ or, . . . to enforce all ordinances necessary to protect the health, life and prosperity . . . and to preserve and enforce the general government, order and security of the city and its inhabitants."⁶⁰

Clearly, these powers of general management should be construed liberally⁶¹ to encompass proposed consumer protection ordinances. Unfortunately, there are courts which adhere to strict interpretations of both the specific grants of powers and the customary broadly-worded catch-all grants, and thus deny reasonable exercise of power based on these provisions.⁶² Or, courts may fail to make the essential distinctions necessary to uphold the validity of home rule power.⁶³ Certainly consumer protection laws, which aim toward detection and correction of improper business practices and the strengthening of consumer confidence in commercial transactions, may reasonably be thought to address themselves to the "prosperity," "order," and general welfare of the community. The powers conferred by these home rule acts should be liberally construed, unless a contrary legislative intent is apparent. Proper construction of broadly stated grants of power, such as those above, should allow home rule municipalities to exercise plenary power over municipal affairs unless such exercise is specifically limited or withheld by the state legislature.⁶⁴

It is submitted that narrow interpretations are also contrary to the purpose of home rule laws. Under restricted construction, home rule laws cannot allow municipalities to adapt to changing

⁵⁷ *Id.*, § 3.08, at 115. It should be noted that "[o]ccasionally courts in the non-self-executing or 'legislative' home rule states will admit that the constitutional home rule clause *itself* confers some power upon municipalities. However, when such an admission is made . . . it is always expressed cautiously and limited to things absolutely essential to local self-government." *Id.* (emphasis added), citing *Clements v. McCabe*, 210 Mich. 207, 177 N.W. 722 (1920).

⁵⁸ 1 ANTIEAU, *supra* note 35, § 3.08, at 115-18.

⁵⁹ MICH. COMP. LAWS § 117, 4j (1948).

⁶⁰ TEX. CIV. STATS. art. 1175, § 34 (1963).

⁶¹ 1 ANTIEAU, *supra* note 35, § 3.08, at 118.

⁶² *Id.*, § 3.08, at 119-22. See also *People v. Delgado*, 146 N.Y.S.2d 350 (1955).

⁶³ *Corpus Christi v. Unitarian Church*, 436 S.W.2d 923, 929-30 (Tex. Civ. App. 1968).

⁶⁴ 1 ANTIEAU, *supra* note 35, § 3.08, at 118-19.

conditions and exigencies. Municipalities must, under these interpretations, engage in the lengthy, often frustrating, procedure of petitioning the state legislature for the necessary powers. Further exacerbating this situation is the likelihood that state legislators will be unacquainted with, and perhaps uninterested in, the peculiar problems of a specific locale. For example, an urban municipality's request for additional power may be given a particularly hostile reception by legislators in those states where the legislature is composed predominantly of non-urban delegates, or where a tradition of urban-rural animosity exists within the legislature. Where the legislature is dominated by rural interests, local control over consumer protection is even more critical since it is unlikely that the legislature will pass meaningful legislation in this area.

2. *Non-Home Rule Municipalities:*

As already mentioned, the state legislature, in the absence of state constitutional restrictions, possesses plenary power over those powers the local governing units may employ in effectuating local consumer protection.⁶⁵

3. *Counties:*

Consumer protection measures have been enacted at the county level. Where counties are accorded home rule, the preceding sections concerning home rule municipalities do not apply; where counties are not granted home rule, the comment on non-home rule municipalities is likely to be relevant. Yet there may be a fundamental distinction between county organizations and municipal corporations.

Municipal corporations proper are called into existence, either at direct solicitation or by free consent of the people who compose them. Counties are local subdivisions of the State, created by the sovereign power of the State, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to by the people it embraces; the latter is superimposed by a sovereign and paramount authority. A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the State at large. . . . With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the State . . .⁶⁶

⁶⁵ See §IV, B. *supra*.

⁶⁶ *Smith v. Kelly*, 162 Va. 645, 174 S.E. 842 (1934).

This is not say that counties are unable to provide for particular needs of their inhabitants or that municipal corporations are not also agents of the state. For example, "[b]oth count[ies] and cit[ies] [municipal corporations] in Virginia serve a dual role as agents of the state and as local law-making bodies with the power to provide, within the limits of the grants of authority from the state, for the particular needs of the individual city or county."⁶⁷ Therefore, the fundamental distinction between municipal corporations and counties in Virginia is the method by which they come into existence. Where consumer protection at the county level is desired, it should be determined whether such a dual role has been created.⁶⁸

C. POWERS WHICH SERVE AS A BASIS FOR THE ENACTMENT OF MEASURES.

It is the general rule that non-home rule municipalities, legislative home rule municipalities, and counties, possess and can exercise a tripartite series of powers:

1. those powers granted expressly;
2. those powers necessarily or fairly implied in or incident to, the express powers; and
3. those powers essential and indispensable to the existence and functioning of the particular kind of municipal corporation.⁶⁹

1. *Express Powers:*

The express power of legislative home rule and non-home rule municipalities and counties is found in the state constitution, legislative acts, or municipal charter.⁷⁰ Thus, it is necessary to consult these sources to determine the specifically enumerated powers. Clearly, if a local governing body is expressly granted the power to enact consumer protection ordinances, this body should be able

⁶⁷ McSweeney, *Local Government Law in Virginia, 1870-1970*, 4 U. RICH. L. REV. 176, 177 (1970). See generally COUNTY LAW, *supra* note 37, §§ 31.00, 31.06.

⁶⁸ 1 ANTIEAU, *supra* note 35, § 5.01, at 215; COUNTY LAW, *supra* note 37, § 31.06; 2 McQUILLIN, *supra* note 37, § 10.9, at 755; C. RYNE, MUNICIPAL LAW 70 (1957).

⁶⁹ 1 ANTIEAU, *supra* note 35, § 5.02, at 219; 2 McQUILLIN, *supra* note 37, § 10.10, at 761.

⁷⁰ See, e.g., VA. CODE ANN. §§ 15.1-909 to 919 (1964). On its face, this article of the Virginia Code refers only to "municipal corporations." However, discussions with Virginia officials and consideration of VA. CODE ANN. § 15.1-689 indicate that counties may obtain such powers upon request to the state legislature.

to exercise that power. Yet express grants of power over consumer protection need not be phrased in terms of "consumer protection." There are many powers directly relevant to consumer protection. In Virginia, a particularly potent series of power may be conferred on municipal corporations or counties, upon their petition to the state legislature. Included in this series is the power to regulate and inspect the production, preparation, storage, distribution and sale of food and food products,⁷¹ and the conduct of dealers in second hand stores.⁷² In addition, a Virginia municipal corporation "may prevent fraud or deceit in the sale of property; may require weighing, measuring, gauging and inspection of goods, wares and merchandise offered for sale; and may provide for the sealing of weights and measures and the inspection and testing thereof."⁷³ Moreover, the police power is broadly delineated as the power "to secure, preserve, and promote health, safety, welfare, comfort, convenience, trade, commerce and industry in the municipality and among the inhabitants thereof . . ."⁷⁴

a. *The Express Power to Regulate and Inspect:* Local powers, as they relate to the marketplace, may be defined in terms of the power to regulate and inspect.⁷⁵ For example, Virginia provides that

. . . a municipal corporation may regulate and inspect the production . . . distribution and sale of . . . food and food products . . .⁷⁶

Likewise, in California, the appropriate local inspectors may enter any building used in the various processes, including production, distribution, and sale, of food products to inspect all machinery used in these steps, and to report for prosecution any violation discovered.⁷⁷

Laws relating to regulation and inspection have a dual objective: the improvement, through observation of the quality of pro-

⁷¹ VA. CODE ANN. § 15.1-866 (1964).

⁷² *Id.*, VA. CODE ANN. § 15.1-866 (1964).

⁷³ *Id.*

⁷⁴ VA. CODE ANN. § 15.1-852 (1964).

⁷⁵ See generally *Southern Ry. Co. v. Russell*, 133 Va. 292, 112 S.E. 700 (1922) (defining the power to regulate); *O'Hare v. Peacock Dairies*, 26 Cal. App. 2d, 345, 79 P.2d 433 (1938) (defining the power to inspect).

⁷⁶ VA. CODE ANN. § 15.1-853 (1964). In other states the power to inspect may be limited to specifically enumerated foodstuffs. See, e.g., OHIO REV. CODE ANN. § 71.5.46 (1954).

⁷⁷ CAL. HEALTH & SAFETY CODE ANN. §§ 28296-97 (West Supp. 1972). In South Dakota, "[e]very municipality shall have the . . . power to provide for the inspection . . . of articles of merchandise. . ." S. DAK. COMP. LAWS § 9-34-4 (1967).

duct-handling at various stages of preparation for delivery to the ultimate consumers and the protection of consumers against fraud involving these goods.⁷⁸ The power to regulate and to inspect is a broad power, "comprehensive enough to cover the exercise of authority over the whole subject to be regulated."⁷⁹ It provides express authority for local government officials to enter markets in order to examine those businesses or articles of merchandise over which it has this power and to correct abuses discovered.

b. *The Power to Prevent Fraud and Deceit:* The power to prevent fraud and deceit is a particularly potent authority for local governments to enact consumer protection regulations. Montana gives every city the power "to suppress, prohibit, and punish all fraudulent devices and practices for the purpose of obtaining property."⁸⁰ In Virginia the legislature may confer the power to "prevent fraud or deceit in the sale of property."⁸¹ Fraud and deceit are generic terms with no fixed definitions. Courts have thus found it necessary to reserve to themselves the liberty to deal with fraud in whatever form it may present itself. "Every case involving allegations of fraud must be adjudged upon its own facts, and the circumstances which warrant or forbid relief cannot be scheduled by any fixed rule."⁸²

Likewise, local government power to prevent fraud and deceit must be broad and flexible. Municipalities and counties which are given the power to prevent fraud and deceit must be recognized to have power equal to the ingenuity which individuals employ to devise fraudulent and deceptive schemes. Certainly, the fact that the judicial definitions of these terms is flexible does not diminish the power of a municipality to regulate transactions in order to prevent fraud and deceit in sales. The essence of the word "prevent" is anticipation. Clearly, the power to prevent fraud and deceit contemplates an administrative scheme which will complement the courts' role in giving remedies after the fraudulent transaction has occurred.⁸³

c. *The Power Over Weights and Measures:* "Weights and measures" provisions are a third category of statutory and char-

⁷⁸ See note 74, *supra*.

⁷⁹ See *Blackman v. County Court*, 169 Colo. 345, 487 P.2d 377 (1969); *Southern Ry. v. Russell*, 133 Va. 292, 112 S.E. 700 (1922).

⁸⁰ MONT. REV. CODE ANN. § 11-922 (1947).

⁸¹ VA. CODE ANN. § 15.1-866 (1964).

⁸² *Murphy v. McIntosh*, 199 Va. 254, 99 S.E. 2d 585 (1957).

⁸³ See § IV, D, *infra*, (exercise of powers),

ter provisions which can reasonably be asserted to support consumer protection ordinances and regulations.⁸⁴ For example, in Virginia,

. . . a municipal corporation may require weighing, measuring, gauging and inspection of goods . . . offered for sale; and may provide for the sealing of weights and measures and the inspection and testing thereof.⁸⁵

Similarly, in California each county is required to establish an office of county sealer of weights and measures for the purpose of testing all devices used to gauge "quantities, things, produce, articles for distribution or consumption purchased or offered . . . for sale, hire or reward and ascertain if the same are correct."⁸⁶

Municipalities have used this power to enact consumer regulations and to establish consumer protection commissions. For example, Dade County, Florida, used an expanded version of the City of Miami's Division of Weights and Measures as the cornerstone for its Trade Standards Division, popularly known as the Consumer Protection Department. This agency has regulated such diverse items as meat, milk, bread, taxi meters, bottled gas cylinders, odometers on rental cars, and gasoline pumps have been regulated under weight and measure statutes.⁸⁷ Thus, the power over weights and measures is another vehicle with which local governments can protect their consumers.

d. *Police and General Welfare Power.*⁸⁸ Although the foregoing powers are all in a sense police powers since their exercise promotes public interest,⁸⁹ municipalities and counties are also often granted broad inchoate police powers through a general welfare clause.⁹⁰ Various statutory phrases are used to indicate this

⁸⁴ See generally 7 McQUILLIN, MUNICIPAL CORPORATIONS, § 24.399 (1968 rev. vol.).

⁸⁵ VA. CODE ANN. § 15.1-866 (1964). South Dakota provides the "[e]very municipality shall have the power to provide for the weighing, and measuring of articles of merchandise . . ." S. DAK. COMP. LAWS 9-34-4 (1967).

⁸⁶ CAL. BUS. & PROF. CODE ANN. §§ 12200-06 (West Supp. 1972).

⁸⁷ TRADE STANDARDS DIVISION, FIRST ANNUAL REPORT 1968-1869, 10-11 (no official pagination). The Director of the Trade Standards Division has stated that "[m]ost of the complaints are about false or misleading advertising, *weights and measures*, and general merchandising . . ." Miami Herald, Oct. 25, 1968, at B-2 (emphasis added).

⁸⁸ See 1 ANTIEAU, *supra* note 35, § 6.00, *et seq.*; 6 McQUILLIN, MUNICIPAL CORPORATIONS, § 24.01, *et seq.* (1969).

⁸⁹ "The fundamental basis for the existence of a police power is the inherent right and duty of a government to provide for the general welfare of its citizens." Rothschild, *Consumer Protection At Last Through Local Control of Retail Installment Sales Contracts*, 37 GEO. WASH. L. REV. 1067, 1070 (1969).

⁹⁰ General welfare clauses confer on counties and municipalities the power "to protect the health, morals, peace and good order of the community, to promote its

power, from the traditional grant to promote the life, health, and general welfare of inhabitants to Virginia's more specific grant of the power "to secure, preserve, and promote health, safety, welfare, comfort, convenience, *trade, commerce, and industry* in the municipality and among the inhabitants thereof . . ." ⁹¹ Since the police power is co-extensive with the necessity to promote the public interest, ⁹² *a fortiori*, it must and does embrace the enactment of consumer protection regulations. ⁹³ The police power is "one of the powers which may be given the broadest application, and it is common knowledge that this power has been increasingly exercised to keep abreast of advances" made in our society. ⁹⁴

The police power due to its nature and historical evolution, has not been precisely defined. The power to promote general welfare, much like that to prevent fraud and deceit in sales of property, takes on new substance as new conditions arise. Flexibility within certain limits is required

. . . in order to meet the changing and shifting conditions which from time to time arise through the increase and shift of population and the flux and complexity of commercial and social relations. ⁹⁵

As local economic conditions change, local governments need the power to meet these changes. The police power is sufficiently comprehensive to meet this need and to provide municipalities with

welfare in trade, commerce, industry, and manufacture . . ." 6 McQUILLIN, *supra* note 88, § 24.44, at 565. See generally COUNTY LAW, *supra* note 37, § 35.06; 6 McQUILLIN, *supra* note 88, §§ 24.43-45. Such a broad general welfare clause is liberally construed. 6 McQUILLIN, *supra* note 88, § 24.44, at 565; but see *id.*, at 567. Such clauses have been construed as granting the locality power as broad as the police power of the state. *Id.*, at 566. General welfare and police powers are closely related in that a general welfare clause vests police power in the county or city "to promote the order, safety, health, morals, and general welfare of society." State *ex rel* Carpenter v. City of St. Louis, 318 Mo. 870, 882-2 S.W.2d 713, 722 (1928), quoting 12 C. J. CONST. L. § 412, at 904 (1917); see 6 McQUILLIN, *supra* note 88, § 24.44, at 565, § 24.45, at 567.

⁹¹ VA. CODE ANN. § 15.1-852 (1964).

⁹² 6 McQUILLIN, *supra* note 88, § 24.09, at 485. See also note 88, *supra*.

⁹³ The following cities and counties, among others have based consumer protection ordinances on the police power: Prince Georges County, Maryland; Camden and Burlington Counties, New Jersey; San Bernardino, Santa Clara and Ventura Counties, California; and Chicago, Illinois. See Appendix. The Prince Georges County Commissioners stated that their authority to enact a county consumer protection ordinance was provided by its power to ". . . enact 'any other ordinance for the safeguard of life, health and property and the promotion of public safety, and moral welfare' and which further authorize[s] it to '[P]rescribe the duties, powers and functions of any officer, employee, or board appointed by it.'" Prince Georges County, Md., Gen. Res. 3-1970 § 1, Jan. 30, 1970, quoting PRINCE GEORGES COUNTY, MD., CODE OF PUB. LOCAL LAWS art. 17, §§ 18-1(b)(3), (33) (1963).

⁹⁴ Weber City Sanitation Comm'n. v. Craft, 196 Va. 1140, 1148, 87 S.E. 2d 153, 158 (1955).

⁹⁵ 6 McQUILLIN, *supra* note 88, § 24.03, at 472.

the basis for passage of new and/or revised measures to deal with the immediate demands of the general welfare,⁹⁶ including consumer protection measures.

Further, municipal corporations are generally recognized as the sole judges of the necessity and reasonableness of their police and general welfare ordinances. Every presumption is "in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety, and it is not the province of the courts, except in clear cases, to interfere with the exercise of powers vested in municipalities for the promotion of the public safety."⁹⁷

e. *Special Enabling Legislation:* Two situations may occur in which effective local consumer protection enactments can be realized only after the passage of special legislation by the state legislature. First, the local governing body may be without the necessary powers to adequately address the business abuses in its marketplaces. Such a municipality or county should petition the state legislature for the appropriate grant of powers.

In the second situation, although the powers of a locality may be sufficient to enact consumer ordinances, the appropriate commercial community may be more expansive than the jurisdiction of a single local government unit. In such cases, the action of a municipality would be only partially remedial. The only appropriate and effective consumer program would require either concerted local governmental action or the conferral of requisite powers upon a larger local unit.⁹⁸ Special petition to the state legislature may result in unique and highly responsive legislation being adopted for those troublesome commercial communities greater than the jurisdiction of a single local governmental body.⁹⁹

⁹⁶ *Block v. Hirsh*, 256 U. S. 135 (1921).

⁹⁷ *Repass v. Town of Richlands*, 163 Va. 1112, 1115, 178 S.E. 3, 5 (1935); see also *Wood v. City of Richmond*, 143 Va. 400, 405, 138 S.E. 560, 562 (1927); *Hopkins v. City of Richmond*, 117 Va. 692, 710, 86 S.E. 139, 144 (1915).

⁹⁸ The general rule is that the powers of a municipal corporation cannot be exercised beyond the corporate boundaries. See 2 McQUILLIN, *supra* note 37, § 10.07, at 751-52; COUNTY LAW, *supra* note 37, § 31.06, at 23-4.

⁹⁹ Dade County, Florida, is a case in point. The city and county commissions of Miami and Dade Counties met in special joint session in May, 1967, and resolved that the "[c]ounty assume from the City of Miami the regulation of Trade Standards, which are then to be enforced on a county-wide basis, providing that the State passes legislation authorizing the county to participate in this activity." TRADE STANDARDS DIVISION, FIRST ANNUAL REPORT, at 4 (1968-69). This meeting was held in response to increased community concern that consumer protection could be better achieved through a county-level approach. The resulting special enabling legislation and county law passed in pursuance thereof gave broad policing power to the Trade Standards Division, Dade County. See Appendix.

2. Implied Powers:

Local governments also derive powers by implication; that is, their governing bodies can exercise powers which are implied from express grants of authority.¹⁰⁰ Unfortunately, the implied powers of municipal corporations and counties are narrowly construed.¹⁰¹ Courts limit implied powers to "those powers necessary or essential to carry out the express powers"¹⁰² or "those powers indispensable to local civil government."¹⁰³ The application of this basic and narrow rule has not resulted in uniform decisions as to what powers are necessary, essential, or indispensable, as courts differ widely on the powers that may be implied from a given express grant. Some states, through their constitution, statutes or case law, have adopted a more liberal rule of construction and thus allow local governments greater latitude in determining powers which may properly be implied. This more liberal rule may be in the form of "reasonable necessity,"¹⁰⁴ "appropriateness,"¹⁰⁵ "reasonable implication,"¹⁰⁶ or "fair implication."¹⁰⁷

Contrary to this liberal construction is the so-called "Dillon Rule" which addresses itself to ambiguities and doubts arising out of the grants of power, and which states that "[a]ny fair, reasonable, substantial doubts concerning the existence of power is resolved against the corporation and the power is denied."¹⁰⁸ There are, however, certain limitations to this rule. Powers are not to be so strictly construed as to defeat legislative intent, to destroy the purpose for which the grant was intended, or to hamper the reasonable exercise of express powers.¹⁰⁹ Rather construction should be consistent with state legislative policy on local affairs.¹¹⁰ Thus, the power to change an inspection fee for regulatory purposes

¹⁰⁰ 1 ANTIEAU, *supra* note 35, § 5.03, at 220; 2 McQUILLIN, *supra* note 37, § 10.12, at 765-67; COUNTY LAW, *supra* note 37, § 31.06, at 20-24.

¹⁰¹ See generally, 2 McQUILLIN, *supra* note 37, § 10.18a, at 787-90. "The rule of strict construction flows . . . from the judicial viewpoint that charters are regarded as special grants of power, and hence the conclusion is that whatever is not given expressly, or as a necessary means to the execution of expressly given powers, is withheld." *Id.*, at 788.

¹⁰² 2 McQUILLIN, *supra* note 37, § 10.12, at 767. ..See also 1 ANTIEAU, *supra* note 35, § 5.03, at 220-22.

¹⁰³ 2 McQUILLIN, *supra* note 37, § 10.12, at 770.

¹⁰⁴ 1 ANTIEAU, *supra* note 35, § 5.05, at 226.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ DILLON, MUNICIPAL CORPORATIONS, § 430.14 (3d ed. 1949); See 2 E. McQUILLIN, *supra* note 37, § 10.19, at 790-91.

¹⁰⁹ 2 McQUILLIN, *supra* note 37, § 10.21, at 794.

¹¹⁰ *Id.*

is a proper incident of the authority of a city to regulate milk sold and the power to license certain businesses is often inferred from the power to regulate those enterprises.¹¹¹

It is clear, therefore, that advocates of local power to enact consumer regulations will have to consider the state constitution, statutes and case law in deciding to which of these possible positions their respective states adhere. Arguments anticipating challenges to authority will have to be formulated. No apparent problem should be encountered in those states which adhere in practice to the more liberal construction.

3. *Powers Essential and Inherent to the Existence and Functioning of Municipal Corporations:*

There are three judicial approaches to this category of powers. The general rule of interpretation denies the existence of essential or inherent powers.¹¹² Other jurisdictions, apparently confused about the distinction between implied and essential powers, treat essential powers as implied.¹¹³ Still others recognize essential and inherent powers as a distinct category. Reliance upon these powers as authority for the enactment of consumer protection regulations is not recommended, however, because these powers are limited in number.¹¹⁴ The apparent reluctance of courts to recognize essential powers as an independent repository of significant authority cuts against the trend of expanding local government powers. As long as the judiciary retains this rigid posture, essential powers will not be supportive of the ability of localities to enact consumer ordinances and regulations. However, this is not a significant impediment because the power of a municipal corporation to enact such consumer protection schemes is usually adequately supported by express and implied powers.

4. *Voluntary Mechanisms:*

It may be determined that a local governing body has few or narrow powers on which to base its authority to pass consumer pro-

¹¹¹ See *City of Des Moines v. Fowler*, 218 Iowa 504, 509, 255 N.W. 880, 882 (1934); *Prudential Co-op Realty Co., Inc. v. City of Youngstown*, 118 Ohio St. 204, 214, 160 N.E. 695, 698 (1928). See generally 1 ANTIEAU, *supra* note 35, § 5.08, at 237.

¹¹² 1 ANTIEAU, *supra* note 35, § 5.01, at 217-218. See also 2 McQUILLIN, *supra* note 37, § 10.11, at 763.

¹¹³ 1 ANTIEAU, *supra* note 35, § 5.01, at 217-18.

¹¹⁴ The right to sue and be sued is probably the most widely recognized essential power of a municipal corporation. See 1 ANTIEAU, *supra* note 35, § 5.08, at 236. See generally 2 McQUILLIN, *supra* note 37, § 10.11, at 762-65.

tection laws: In such situations, the wisest course is to establish a "voluntary" mechanism; that is, one not founded upon sanctions or penalties but upon conciliation and negotiation. The Arlington County Board passed such a consumer protection resolution. This resolution established a nine-member Consumer Protection Commission and conferred upon it responsibilities and duties in four general areas:

1. Complaint-handling; the Commission is to receive, to record, to investigate, and to conciliate complaints which allege improper practices and conduct in the sale of goods or services and the lending of money or the extension of credit. These conciliation efforts may include persuasion, conferences, public hearings, and arbitration.

2. Consumer education; a program of consumer education and information is to be developed and disseminated through publicity and printed material.

3. Recommendations; the Commission is to keep the County Board up-to-date by recommending improvements in local and state legislation and administrative procedures and by reporting annually on the Commission's activities, and present and future needs for consumer protection.

4. Referral; the appropriate law enforcement bodies are to be referred information regarding potential violations of law.

Thus, the Commission must work in a cooperative, non adversarial tone, relying on persuasive rather than police powers. This is not fatal to consumer protection. The Consumer HELP Center, which does not have governmental power or backing, has successfully resolved 70% of the complaints handled by it through negotiation, conciliation, and mediation. The Arlington Consumer Protection office has also been successfully resolving complaints at a 70% rate during its first few months of existence.¹¹⁵

D. THE EXERCISE OF POWER

The legislative grant may be silent regarding the manner in which the power is to be exercised by the municipality.¹¹⁶ In these

¹¹⁵ See e.g., ARLINGTON CONSUMER PROTECTION COMMISSION, MONTHLY REPORT, January, 1972.

¹¹⁶ It is generally within a legislature's power "to direct in what way, through what board of municipal offices or agents, or by what municipal officers the powers given shall be exercised." 2 McQUILLIN, *supra* note 37, § 10.27, at 809. Where this is done, substantial compliance is required. *Id.*

Therefore, the major difficulty in the preemption area is determining whether a conflict exists. Researchers should scrutinize consumer-related state laws dealing with matters upon which a local governing body might legislate. They should further investigate those areas covered in proposed resolution. These statutes may encourage the argument that the state scheme contemplates the existence of local consumer regulations in significant areas. In Virginia, for example, the state legislature established an Administrator of Consumer Affairs in the Department of Agriculture and Commerce.¹³⁷ The administrator was, *inter alia*,

*[t]o serve as a central coordinating agency and clearinghouse for receiving complaints . . . of [improper] practices and referring such complaints to the State and local departments or agencies charged with enforcement of consumer laws.*¹³⁸

The statute further states that “[t]he responsibility of the Administrator . . . shall embrace the consumer programs and responsibilities of all the departments and agencies of the state.”¹³⁹ Thus, the statute expressly provides that this official is to coordinate and to refer complaints to local agencies responsible for enforcing consumer laws. Moreover, the Administrator’s responsibilities extend beyond the local level to encompass consumer programs of state agencies.¹⁴⁰

These provisions reasonably can be interpreted as contemplating a comprehensive consumer protection scheme. A state Administrator charged with responsibility “to embrace” and to coordinate consumer programs throughout the state, may be the cornerstone of such a plan, and vesting such an official with these powers indicates a rejection of a “piecemeal” approach to consumer problems. The essence of a state office with such responsibilities is state and local coordination and cooperation. It can be argued that the state legislature contemplated that local governments would: take steps to enact local consumer protection programs where they had the

less the statute limits the requirements for all cases to its own prescriptions. *Id.* at 755-56, 61 N.W.2d at 706-07 (emphasis added). See also *Pipoly v. Benson*, 20 Cal. 2d 366, 125 P.2d 482 (1942); *United Tavern Own. of Phila. v. Philadelphia School Dis.*, 441 Pa. 274, 272 A.2d 868 (1971); *Western Pa. Rest. Ass’n v. City of Pittsburgh*, 336 Pa. 374, 77 A.2d 616 (1951); *King v. County of Arlington*, 195 Va. 1084, 81 S.E. 2d 587 (1954).

¹³⁷ VA. CODE ANN. § 3.1-18.1 (Cum. Supp. 1971).

¹³⁸ VA. CODE ANN. § 3.1-18.2 (Cum. Supp. 1971).

¹³⁹ *Id.*

¹⁴⁰ In this regard, it should be noted that counties serve as agencies of the state and are charged with enforcement of state law. See, e.g., *Mann v. County Bd. of Arlington Cnty.*, 199 Va. 169, 173, 98 S.E. 2d 515, 518 (1957) (dictum).

cases, the local governing body must exercise its discretion in selecting the proper procedural course. The rule of strict construction, which frequently burdens municipalities in determining whether a power exists,¹¹⁷ is not a factor in evaluating various modes of exercising determined powers.¹¹⁸

It is important, therefore, to distinguish between the power to enact consumer protection regulations and the extent of authority available to exercise that power.

Assuming that the mode of exercise does not conflict with constitutional requirements, the rule of reason predominates. The presumption is in favor of the validity and reasonableness of the means selected; doubts are resolved in favor of the municipality. As the Virginia Court stated in reference to the police power, every presumption is

... in favor of the lawfulness of the exercise of the municipal power making regulations to promote the public health and safety, and it is not the province of the courts, except in clear cases, to interfere with the exercise of the powers vested in municipalities for the promotion of the public safety.¹¹⁹

Therefore, where the consumer advocates ascertain that the power to promulgate consumer protection regulations exists in a locality, the validity of a consumer protection commission or department is clear.¹²⁰ The governing body will undoubtedly need an administrative staff to supervise the ordinance and to exercise governmental functions.¹²¹ In addition, it will need advice and evidence on the need for enacting new or revised regulations. If further support is needed for the creation of a commission or department, it exists in the fact that every local governmental unit which has enacted consumer regulations has simultaneously either constituted a commission to act thereunder, charged an existing department, such as weights and measures or law, with responsibility thereunder,¹²² or created a separate staff in the executive offices.¹²³

¹¹⁷ See section IV, C, 2 (implied power).

¹¹⁸ 1 ANTEAU, *supra* note 35, § 5.13, at 248. See 2 McQUILLIN, *supra* note 37, § 10.29, at 815.

¹¹⁹ Repass v. Town of Richlands, 163 Va. 1112, 1115, 178 S.E. 3, 5 (1935).

¹²⁰ See § IV, C, *supra*

¹²¹ See text accompanying notes 159-63.

¹²² See Appendix

¹²³ *Id.*

power; or initiate demands for the conferral of the necessary power from the state legislature.¹⁴¹

In situations where consumer offices exist or are foreseen at both levels of government, the use of similar or identical forms of regulation should be considered. Such a policy promotes the easy exchange of information and complaints and helps to present an accurate picture of consumer problems and business practices throughout the state to the legislature. The trend toward computerization of state and local operations reinforces the wisdom behind this policy. The state can also contribute immeasurably to the development of a consumer education and information program through distribution of pamphlets, newsletters, posters, newspaper advertisements, and radio and television announcements. States should share their publicity materials and documents with local governments; indeed, state consumer departments are not, by definition, doing their job if they do not act as a central clearing house to distribute this information statewide.

State enactment of the Uniform Commercial Code might be asserted as evidence of legislative intent to occupy the commercial field and thus preclude local regulation in that area. The UCC is a pervasive scheme,¹⁴² but the draftsmen "decided early against any comprehensive attempt to control predatory sales and credit practices."¹⁴³ Consequently, specific provisions intended to protect consumers are rare.¹⁴⁴ The UCC defers to other statutes and regulations for the purposes of consumer protection.¹⁴⁵

Thus, by scrutinizing existing statutes and determining their relationship with proposed local regulations, state laws may be found not to preempt but to *support* and to anticipate the enactment of local consumer protection plans.

F. RECOMMENDATIONS FOR ENACTMENT

1. *Comparative Analysis:*

Once the power enabling local consumer protection action is determined, it is advisable to examine how similar powers are exercised by other governmental bodies. This phase may require

¹⁴¹ See VA. CODE ANN. § 15.1-909 to -915 (1964).

¹⁴² See UNIFORM COMMERCIAL CODE § 1-104.

¹⁴³ Rothschild, *supra* note 9, at 1077.

¹⁴⁴ See 1 GILMORE, SECURITY INTEREST IN PERSONAL PROPERTY, 293-94 (1965); cf. King, *The New Conceptualism of the Uniform Commercial Code*, 10 ST. LOUIS L. J. 30 (1965).

¹⁴⁵ See generally, Rothschild, *supra* note 9, at 1077-81.

E. STATE PREEMPTION¹²⁴

Since commerce, trade, and industry are matters of concurrent state and local concern, any assertion of local control over these affairs raises the question of municipal versus state jurisdiction: the question of state preemption.

In the case of non-home rule municipalities, a statute always prevails over a conflicting ordinance.¹²⁵ Where a constitutional home rule amendment varies this basic common law rule of state supremacy, ordinances dealing with exclusively local matters may supersede state statutes; but there is no converse rule of municipal supremacy. Courts have narrowly construed the phrase "exclusively local," seldom holding in favor of conflicting ordinances.¹²⁶ Therefore, it is probably accurate to characterize the general rule as one of state supremacy.

Nevertheless, there is a vast area of concurrent state and municipal legislative authority especially in consumer affairs. The problem arises in determining whether a conflict exists, and if so, the extent to which the local enactment is invalid.¹²⁷ Of course, if an ordinance expressly permits that which a statute expressly prohibits, and *vice versa*, the conflict is clear and the ordinance will fall.

Three relationships may exist between concurrent but non-conflicting statutes and ordinances: (1) the ordinance may address itself to conduct not explicitly covered by the statute, although within the same general area; (2) the ordinance may duplicate the statute; or (3) the ordinance may establish a less rigorous or more rigorous standard with respect to conduct covered by the statute.¹²⁸

In the first situation, invalidation of the ordinance is "always based on the theory that the state legislation was intended to preempt the field."¹²⁹ The weakness of this theory can be easily demonstrated. It is unlikely that a state legislature will enact statutes in the consumer field which are suitable for the entire state or, more specifically, which cover a subject to the extent necessary to provide adequate protection against egregious practices that are limited

¹²⁴ See Note, *Conflicts Between State Statutes and Municipal Ordinances*, 72 HARV. L. REV. 737 (1959).

¹²⁵ See, e.g., *Hemphill v. Wabash R. Co.*, 209 F.2d 768 (7th Cir. 1954), *cert denied*, 347 U. S. 954 (1954).

¹²⁶ Note, *supra* note 124, at 740-42.

¹²⁷ That part of the ordinance which is not inconsistent with state law may be severable from those portions which are invalid.

¹²⁸ Note, *supra* 124, at 744.

¹²⁹ *Id.*, at 744-45.

research solely into localities with similar population, governmental structure, and geographic, socio-economic, and historical traits, or it may entail comprehensive analysis of all municipalities and counties with consumer programs. The latter research is not as overwhelming as it may sound because there are relatively few local governments with consumer programs.¹⁴⁶ However, comparative analysis is meaningful because the cities and counties which do control consumer protection exhibit wide differentials of governmental structure, geography, population and socio-economic characteristics.¹⁴⁷ This information can be gleaned from a study of the language of ordinances and resolutions and the research does not usually require an analysis of enactments in actual operation. Although an ordinance in actual operation may not reflect its written provisions, such comparisons are useful in that they suggest the various provisions that consumer enactments might contain.

To facilitate relevant comparison, an analysis should be made of; power basis, governmental structures, and the position within local government of the body charged with responsibility under the consumer enactments.¹⁴⁸

G. INFORMATION PACKET AND PUBLIC HEARINGS:

Research into the state constitution, general statutes, case law, and local powers, and a comparative analysis of other consumer regulations should provide an arsenal for consumer advocates that must be presented to the local decision-making body.

The governing body will undoubtedly hold public hearings or meetings to discuss the proposed resolution. Prior to these meetings, a report should be sent to this body from the consultant or research group outlining the research, conclusions, and proposals.¹⁴⁹ The contents should comprise persuasive factual and argumentative material pointing to the need for and legality of a local consumer ordinance or resolution, or a voluntary mechanism, which can also be presented at the public hearings. A breakdown of the contents should reveal:

1. *Statistics:*

The governing body must be shown that there is a problem

¹⁴⁶ See note 1 *supra*.

¹⁴⁷ See Appendix.

¹⁴⁸ *Id.*

¹⁴⁹ Where consultants are retained, the local government should require this report. See notes 3-4 *supra* and accompanying text.

to a specific commercial center. Determining the intent of a state legislature is a difficult task since these bodies seldom express their intentions. ". . . [u]sually there are no written committee reports, published hearings or debate on state legislation."¹³⁰ The argument favoring local control in consumer protection cuts against preemption especially where the state legislature has not acted on the exact subject sought to be regulated locally.¹³¹ Preemption should not be applied automatically to preclude local attention to matters of local concern.

In situations involving duplication between statute and ordinance, redundancy is not a sufficient reason to invalidate an ordinance. Thus, ordinances "regulating the same conduct as a statute and doing so in substantially the same manner [are] usually held valid."¹³² Since local regulations seldom merely duplicate state enactments, this occurrence warrants little further attention.¹³³

The third possibility is significant. Ordinances infrequently promulgate *less rigorous* standards than statutes, but when they do, they are usually held invalid on the ground that the ordinances impliedly allow violation of the state laws.¹³⁴ Ordinances do, however, frequently contain *stricter* standards than their statutory counterparts. This fact raises interesting questions regarding consumer regulations. Local enactments can regularly be expected to establish stricter standards because local markets, especially in large urban commercial centers, require more comprehensive, and perhaps different, treatment than that appropriate for the entire state. Yet, stricter local licensing laws are frequently declared invalid on the theory that the state licenses are intended to grant recipients the right to operate statewide without further interference.¹³⁵ Recognizing this problem, courts have adopted a standard of reasonableness and thus uphold a stricter local regulation unless the statute directs otherwise.¹³⁶

¹³⁰ Finley, Book Review, 24 IND. L. J. 328, 330 (1949).

¹³¹ See Fordham, *Decision-Making in Expanding American Urban Life*, 21 OHIO ST. L. J. 274, 275-76 (1960), which represents a strong policy argument in favor of local control.

¹³² Note, *supra* note 124, at 747.

¹³³ *Id.*

¹³⁴ *Id.*, at 748.

¹³⁵ *Id.*, at 748-49.

¹³⁶ See *Gannett v. Cook*, 245 Iowa 750, 61 N.W.2d 703 (1954). Where the legislature has assumed to regulate a given course of conduct by prohibiting enactments, a municipal corporation may make such additional *reasonable* regulations in aid and furtherance of the purpose of the general law as may seem *appropriate* to the necessities of the particular locality. The fact that an ordinance enlarges on the provisions of a statute by requiring more than the statute requires creates no conflict therewith un-

requiring attention. Figures showing complaint volume easily overcome the obstructive pleadings of opponents. Where consumer groups are active in handling complaints, they should divulge their statistics for this cause. Where such a source is unavailable, other local government departments,¹⁵⁰ including those of neighboring localities that receive consumer complaints should be solicited for similar statistical information.

2. *Legal Memorandum on Local Power:*

This memorandum should state the power of the locality to enact a consumer protection program and should cover the areas of express, implied, and inherent powers; voluntary mechanisms; state preemption; and special enabling legislation. Reasonable arguments should be fashioned for each of these categories as support for local consumer protection. Thus, the memorandum should comprise a comprehensive analysis of the legal base for local regulations.

3. *Comparative Chart:*

The comparative analysis undertaken by the local governmental consumer protection programs elsewhere is best condensed into a chart format. This facilitates visual comparison and lends itself to oral presentations at public hearings.¹⁵¹

4. *Substantive Provisions:*

The legal and comparative research should result in conclusions regarding the provisions that can lawfully and practically¹⁵² be included in a local enactment and also the methods of administration which can best be integrated into the overall administrative machinery of the municipality or county.¹⁵³ Therefore, a spectrum of alternative provisions should be presented. There are, however, minimum provisions which any municipality or county may enact regardless of its legal impotence or the political infeasibility of undertaking consumer protection in the face of strong business opposition. These minimum provisions were the basis for the Arlington County consumer protection resolution and are found in many other local consumer ordinances. Such clauses should provide for:

1. The receipt, recording, investigation and conciliation of com-

¹⁵⁰ See §III, E, 2, *supra*. (local agencies).

¹⁵¹ See Appendix.

¹⁵² See § 3, C *supra* (business groups).

¹⁵³ See § IV, I, *infra* (administration).

plaints from people alleging improper business conduct in connection with commercial transactions.

2. The reporting to an appropriate city law, county, state or federal agents of information regarding violations of law.

3. The development of consumer education and information programs and the dissemination of such materials through the news media, displays, pamphlets, and speaking programs.

4. Recommendations to the local governing body on changes on local and state legislation and administrative regulations required to provide adequate consumer protection.

5. A voluntary arbitration process for the settlement of complaints where prior conciliation attempts prove futile.

The above provisions contain no sanctions or penalties which would require a statutory power base. Although it is a voluntary mechanism, it should not be thought of as mere window-dressing because the majority of complaints can be satisfactorily resolved through conciliation and mediation and need not result in a lawsuit.¹⁵⁴ As local powers are determined to be more extensive and as practical impediments are neutralized, more powerful provisions can be added.

At the public hearing, consumer advocates or researchers should marshal the support of other consumer groups, state consumer protection personnel, and interested associations.

H. THE APPROACH TO BUSINESS

The authors believe that the best approach is direct communication with the business community. For those who disavow the politics of persuasion, it should be kept in mind that the alternative to voluntary local consumer protection is the expense and delay of litigation. Conferences with business leaders should 1) explain the proposal and its purpose, 2) explain how business groups can play a role, for example by suggesting people to serve on a commission or advisory body or by offering its expertise in certain areas, and 3) request their suggestions and support.¹⁵⁵ Further, it should be emphasized to the business community that the consumer movement, generally, expects and aims to benefit businessmen as well as their

¹⁵⁴ See note 115 *supra* and accompanying text.

¹⁵⁵ In Arlington County, the authors met with the Executive Director of the Arlington Chamber of Commerce to explain the proposal, to hear his suggestions and to suggest ways in which the Chamber and the proposed office could work together, especially on referral and the possibility of the Chamber supplying arbitrators where special expertise is required.

customers. The improper practices of many businessmen have derogated the confidence of local consumers in the overall commercial community.¹⁵⁶ Honest businessmen should welcome efforts to improve or to remove those operators whose business practices are fraught with impropriety.

If these conferences are properly conducted their success may be evidenced by the absence of business representatives at the public hearings at which the consumer protection proposals are discussed and implemented. As previously indicated, the Consumer HELP Center was able to persuade a powerful national business organization to co-sponsor an amendment to the original resolution whereby the two groups would work in tandem on a consumer arbitration experiment.¹⁵⁷ No other business groups appeared at the public meeting at which the resolution was adopted.¹⁵⁸

Businessmen are often concerned with the possibility, posed by the existence of numerous private and public consumer groups, that they will be pressured or "harassed" by these various groups regarding a single complaint. That is,

[s]ome consumers [may] reason that by reporting a single complaint to three or four consumer agencies more pressure can be brought on the businessman concerned. Most local consumer complaints are settled by conciliation. And what businessman is in the mood to conciliate after he has been clobbered by several consumer groups?¹⁵⁹

Although the argument reveals its own weakness in that consumer advocates seek to conciliate rather than "to clobber," this concern does have validity.

One measure to protect against harassment is the inclusion on the complaint form of space for the listing of other assistance that the complainant has sought in resolving his problem. Where no other assistance has been sought, the complainant should be asked not to go beyond the immediate body, at least until that body has exhausted the possibilities for settlement. In cases where the complainant has contacted other agencies with little or no success, doubts may reasonably be entertained regarding the good faith of

¹⁵⁶ See § III, C *supra* (business groups).

¹⁵⁷ See § V *supra* (arbitration).

¹⁵⁸ In a panel discussion held after the passage of the resolution, the Executive Vice President of the Arlington Chamber of Commerce stated that his organization would evaluate the operation of the Arlington Consumer Protection Commission for a few months and then decide whether to cease or to continue its own complaint-handling activities.

¹⁵⁹ The Arlington News, Dec. 1, 1971, at 4, col. 3.

both parties, the consumer in respect of the validity of his complaint and/or the merchant as to his sincerity in seeking a resolution of the matter. Where the consumer is found to be lacking good faith, further efforts are inappropriate. On the other hand, where it is the businessman who does not evidence sincerity, his charges of harassment should not discourage action by other agencies.

It is unnecessary to defend these sentiments as an apology for business. The argument is that voluntary cooperation is a key element to successful local control; but if business withholds its support, local regulation can and should proceed without it. In fact, this realization on the part of businessmen often enhances cooperation!

I. ADMINISTRATION

The positions within local governmental structure of administrative bodies charged with responsibilities for local consumer protection have differed greatly. The choices are:

1. To create a new office in the executive branch of the government.
2. To create a new division within an existing department such as weights and measures, corporation counsel or public safety.
3. To create a new office under the city or county council.
4. To create a citizen commission which is assisted by a full-time office staff.

One administrative apparatus that has proven functional in Arlington County is the commission form. This mechanism consists of a citizen group, appointed by the governing body, which directs and is assisted by a full-time office staff. The likelihood that a local consumer body will initially be a controversial center of attention makes it imperative that it not appear subject to the undue influences of a particular segment of the business or consumer community. Such a commission should clearly appear interested in accomplishing the goals of the legislative act creating it. Local governing bodies must be careful to appoint a nonpartisan, or at least a bipartisan, body containing representatives of a broad spectrum of interests. In this regard, the Arlington County Board solicited recommendations for commission membership from a wide range of community organizations. The commission members represent a

broad spectrum of experience in law, business, education, and consumer affairs. In addition there should be a provision for staggered terms among the members which can serve the dual purpose of enhancing the possibility for new members and new ideas, while assuring a degree of continuity and knowledge of operations.¹⁶⁰

Local government consumer offices should not attempt, nor should other consumer groups allow it, to preempt any pre-existing bodies concerned with consumer affairs. On the contrary, an inter-agency cooperation effort should be established.¹⁶¹ Joint meetings should be held to create working relations and referral policies among local consumer groups. In this regard, an extensive referral index should be maintained so that duplication of effort can be minimized. Such an index can provide access to the total local consumer information resources available. This file should include names of public and private bodies active in consumer affairs, as well as contacts within various business establishments who will facilitate the handling of complaints and inquiries concerning particular establishments.¹⁶² In those situations where a consumer organization is retained by the governing body to undertake the studies previously suggested,¹⁶³ this group, especially if experienced in local consumer problems, can assist the commission in establishing an office and to forward working papers and other research as requested. As an outgrowth of its consulting contract with the County Board, the Consumer HELP Center has regularly provided assistance to the Consumer Protection Commission during the first year of its operation. This assistance has been in the form of participation by law students enrolled in one author's "Problems of the Consumer" clinical law course at George Washington Law School. The consulting team regularly attends commission and sub-committee meetings and has provided working papers and suggestions on complaint referral policy, complaint handling and conciliation procedures, state legislation, reading material, standard forms, publicity and education, and arbitration rules and procedures.

To facilitate its efficient overall operation and to focus the attention of members on specific issues, the commission should ser-

¹⁶⁰ The nine member Arlington Consumer Protection Commission has three groups of 8 members with each group having 6 one, two and three year terms.

¹⁶¹ See § IV, E *supra* (state preemption).

¹⁶² To the extent that coordination and referral are successful and efficient, the business complaints similar to those at note 158 and accompanying text will be reduced.

¹⁶³ See § III *supra*.

iously consider the establishment of a sub-committee system. The Arlington Consumer Protection Commission presently consists of sub-committees on education, complaints, legislation, procedures, and arbitration. It initially had a law student aide working with each committee. These groups held meetings independent of the commission proper in order to deal with their area of concentration, and regularly report their decisions and actions to the whole commission at the regular meetings.

Although the commission should determine basic policy of the consumer office, the daily office work of complaint-handling, initial contact, referral and record-keeping requires a regular staff. The staff members should also participate in the aforementioned visits, discussions, and meetings. The Arlington consumer program capitalized on the experience of county employees in representing the interests of county residents in public utility matters by appointing as Executive Director of the Consumer Protection Commission¹⁶⁴ the individual who had served in a similar position under the Public Utilities Commission. He now serves in both capacities with an expanded but distinctly dual staff. In complaint-handling, the staff undertakes the initial investigation and recording of information and upon a determination of the validity of the complaint, instigates conciliation conferences. When the staff's conciliatory efforts prove unsuccessful, a report is forwarded to the Commission which embarks on further individual or collective action or determines whether the dispute is ripe for arbitration, which is the final step in the County's grievance procedure.

V. ARBITRATION

A. THE CONCEPT OF CONSUMER ARBITRATION

Traditionally, consumers have sought relief from business abuses through the court system or administrative agencies. The failure of these approaches in resolving disputes between businessmen and consumers is well-documented.¹⁶⁵ Further, resort to ju-

¹⁶⁴ The Executive Director supervises the daily work of the office staff, presents reports to the Commission and serves as secretary at the regular meetings.

¹⁶⁵ See, *eg.*, H. BANFIELD, *THE UNHEAVENLY CITY*, 158-84 (1970); D. CAPLOVITZ *THE POOR PAY MORE* (1967); Cox, Fellmeth & Schulz, *The Consumer and the Federal Trade Commission — A Critique of the Consumer Protection Record of the FTC* (1969); FTC, *REPORT OF DISTRICT OF COLUMBIA CONSUMER PROTECTION PROGRAM*, 4, 17-18 (1968); FTC, *DEPT OF COMM., DEPT OF LABOR & SPECIAL ASS'T TO THE PRESIDENT ON CONSUMER AFFAIRS, REPORT OF THE TASK FORCE ON WARRANTIES AND SERVICE*, 67-68 (1969); *NAT'L COMMISSION ON PRODUCT SAFETY, FINAL REPORT* 2, 13, 78 (1970); *COM-*

dicial procedures does not serve the interests of either consumers or the allegedly offending businessmen. The amount of money at stake in the usual case does not warrant, indeed, it militates against, court action by either party. Litigation is adverse to the interests of businessmen in retaining the good will of their customers. "Consequently, where differences arise out of day-to-day commercial affairs parties often prefer to settle them privately and informally, in the kind of businesslike way that encourages continued relationships."¹⁶⁶

Yet, in the modern commercial world, disputes are inevitable. Unintended defects are necessary concomitants of mass production and mass marketing systems. Moreover, there will always be those fringe businesses which operate with deliberate, unscrupulous practices and which intentionally exploit the carelessness, ignorance and various hardships of consumers.

The authors feel that procedure whereby consumer disputes are ultimately submitted to arbitration is both a viable substitute for the inadequacies and inappropriateness of litigation, and a mechanism that can serve the interests of the consumer and businessman. Furthermore, it is submitted that the presence of an arbitration alternative will put a "cap" on conciliation; the threat of arbitration will facilitate settlement. This inducement may even exceed the pressure involved in a "threat" of litigation because arbitration is easier, quicker and cheaper to employ.

In general, arbitration is an arrangement whereby controversies are submitted to an impartial third party for final and binding settlement.¹⁶⁷ Such mechanisms are designed to avoid the court system and are intended to avoid the formalities, delay, expense, and adversarial atmosphere of ordinary litigation. Arbitration was recognized at early common law as a method of adjusting disputed matters, but the frequent court practice of construing arbitration proceedings and awards so as to defeat them demonstrates that it

MUNICIPAL ACTION PROGRAM, OEO, GREEN POWER: CONSUMER ACTION FOR THE POOR 4-5 (1969); Address by Mary Gardiner Jones, Carnegie-Mellon University Program for Executives, Feb. 27, 1970; Meserve, *The Proposed Federal Door-to-Door Sales Act: An Examination of Its Effectiveness as a Consumer Remedy and the Constitutional Validity of Its Enforcement Provisions*, 37 GEO. WASH. L. REV. 1171, 1191-92 (1969); Taylor, *A Private for Consumer Problems*, 42 OHIO BAR 437, 442 (1969); Note, *Developments in the Law — Deceptive Advertising*, 80 HARV. L. REV. 1005, 1123, 1126-27, 1132-33, 1064, 1082-83 (1967).

¹⁶⁶ AMERICAN ARBITRATION ASSOCIATION, *A BUSINESSMAN'S GUIDE TO COMMERCIAL ARBITRATION*, at 3 (19....).

¹⁶⁷ See, e.g., SMITH, MERRIFIELD & ROTHSCHILD, *COLLECTIVE BARGAINING AND LABOR ARBITRATION* 103-17 (1970).

was a procedure not originally favored by the courts.¹⁶⁸ Due to the characteristics of arbitration as an inexpensive, informal yet businesslike proceedings chosen by the parties, it is now favored by the courts as a method of resolving disputes.¹⁶⁹

Although such mechanisms have been used with marked success in the fields of labor relations and commercial transactions,¹⁷⁰ and less extensively in the international claim area, their use in the consumer field has only recently been seriously considered. Under the auspices of local Better Business Bureaus, arbitration panels have been established in the metropolitan areas of, *inter alia*, Los Angeles, Atlanta, San Diego, San Joaquin County, and Long Island. Unfortunately, the majority of these panels limit the subject matter of arbitrable disputes.¹⁷¹ In addition, these panels often have a greater proportion of business representatives than consumer representatives; the result being that the consumer often lacks confidence that an impartial judgment will be rendered.¹⁷²

B. THE ARBITRATION MECHANISM IN ARLINGTON COUNTY

The determination of the Arlington County Board to appoint a consumer protection commission and to study all aspects of consumer affairs and the consulting contract which resulted therefrom provided the authors with an opportunity to act upon their preference for consumer arbitration. The Council of Better Business, Inc., has recently been under pressure from members "to do something about consumerism" before "mad dog" consumer advocates steal the initiative by prompting the local government to enact restrictive or burdensome consumer programs. Therefore, Consumer HELP Center approached the Council with the consumer arbitration idea and proposed joint sponsorship. The outlines of a concrete plan were eventually agreed upon. Voluntary arbitration was

¹⁶⁸ *Id.* at 119-20.

¹⁶⁹ *See, e.g.*, *Wauregan Mills, Inc. v. Textile Workers Union of America*, 21 Conn. Supp. 134, 146 A.2d 592 (1958); *Knickerbocker Textile Corp. v. Sheila-Lynn, Inc.*, 172 Misc. 1015, 16 N.Y.S. 2d 435 (1939); *Eastern Engineering Co. v. Ocean City*, 11 N.J. Misc. 508, 167 A. 522 (1933).

¹⁷⁰ The importance of arbitration in the labor field was recently indicated by the NLRB in *Collyer Insulated Wire*, 77 L.R.R.M. 1931, 1937 (1971).

¹⁷¹ For example, the Los Angeles, San Joaquin, Atlanta, and San Diego area panels deal with textile complaints, *i.e.*, those involving dry cleaning and laundry firms. Memorandum from David J. Kingsley of the Council of Better Business Bureaus, Inc., August 12, 1971.

¹⁷² For example, the Los Angeles Panel is comprised of representatives of a) five cleaners, b) one launderer who is not involved in a cleaning establishment, c) one dryery-retailer-cleaner, d) one carpet retailer and cleaner, e) one furrier, f) one leather goods expert, g) one men's shop retailer, h) two home economists, i) two women's club representatives, and j) a writer for *Apparel Weekly*. *Id.*

adopted by the County Board as an addition to the settlement procedures of the proposed resolution. The Center and the Council have been primarily responsible for the initial establishment and operation of the program. The Council will cover the costs of the arbitration for one year, thus relieving the County of initial expenses. The contacts of the Center and Better Business Bureau with experienced arbitrators in the Washington community will ensure an impartial operation. The availability of experienced arbitrators and the joint sponsorship of the plan by a consumer and business group enhance the possibility of consumer arbitration gaining the respect of potential users and being an ultimate success.

These peculiarities of the Arlington experience should not deter arbitration proposals in locales without these characteristics. In fact, the plan, if successful, could be a model for use elsewhere and could dramatically influence local consumer-business conciliation procedures throughout the country. Thus, at little or no cost, the County gained two distinct benefits: the arbitration expertise of consumer and business personnel and the likelihood of substantial publicity for the use of arbitration in local consumer affairs. In addition to consumers and businessmen, Arlington County and the Council of Better Business Bureaus will gain from this experiment.

C. ARLINGTON ARBITRATION PROCEDURES

The Arlington County consumer arbitration program is an amalgam of rules and procedures similar to those used by the American Arbitration Association, the National Center for Dispute Settlement, and Better Business Bureaus. It is impractical to give a complete account of the intricate and detailed arbitration procedure which resulted from this study, but the highlights of the plan can be delineated.¹⁷³

Consistent with the subcommittee format of the Commission,¹⁷⁴ a Subcommittee on Arbitration was created to work with the Center and the Council in the administration of the plan. The duties of this subcommittee will vary as the mechanism becomes operational and modifications are required. Initially the subcommittee was charged, *inter alia*, with ascertaining whether the parties request-

¹⁷³ Copies of the Arlington Consumer Protection Commission's Arbitration Rules may be obtained by writing the Commission at Room 206, 2049 15th Street North, Arlington, Va. 22201.

¹⁷⁴ See § IV, I *supra* (administration).

ing arbitration¹⁷⁵ had exhausted self-help grievance procedures, such as the internal complaint-handling mechanisms of the business establishment involved, and whether conciliation efforts had also been undertaken by the Commission and its staff. Such a requirement for "exhaustion of remedies" is consistent with the preference of businessmen to attempt to settle customer complaints in a private and informal manner without outside help, thus promoting settlement. The Subcommittee is further charged with the responsibility to determine whether the character of a dispute submitted for arbitration requires an expert in the field and to administer the selection process when such a determination is made. Consumer disputes differ in their degree of complexity; some require more expertise and knowledge to understand and to resolve than others.

Further, parties may justifiably hesitate to submit technical disputes to an arbitrator unlearned or inexperienced in the area.¹⁷⁶ Therefore, two arbitration panels were established. A General Panel arbitrates cases which involve less than \$50.00 and for which no particular expertise is deemed necessary. To promote impartiality and to discourage the use of lawyers, the General Panel has a tripartite membership, one representative each from the business and consumer communities and one neutral arbitrator. The General Panel has a revolving membership and sits at regular intervals to prevent a backlog of arbitrable disputes from accumulating. All decisions, awards, and other rulings of the General Panel are by majority vote. However, a Special Panel of one arbitrator is convened to hear disputes involving more than \$50.00 and in which the Subcommittee has determined that a high degree of knowledge or expertise is advisable to promote the rendering of a fully-informed and equitable award. Included are such areas as home improvement and automobile and electric appliance repair.

It is imperative to the integrity of the arbitration process that the panels remain free from any apparent control or undue influence from business or consumer groups. The multiple views represented on the General Panel should assure the parties of the overall impartiality of that Panel. Since the Special Panel is composed of a sole arbitrator, the selection process was designed to attract similar confidence from prospective users. In cases where the sub-

¹⁷⁵ To initiate the arbitration process, the parties to a dispute must sign a contract agreeing to arbitrate according to the Arlington Consumer Protection Commission rules, and to be bound by the decision.

¹⁷⁶ For example, one businessman with an arbitrable dispute immediately backed away from arbitration when he was informed, incorrectly, that law students would be panelists.

committee determines that an expert is required, it submits to each party an identical list of nominees which it feels are technically qualified to arbitrate the matter. Each party has seven days from the date of mailing, in which to eliminate any nominee to which he objects, to number the remainder in the order of preference and to return the list to the subcommittee. The list contains identifying explanations of each nominee. The explanatory material is not lengthy; it merely identifies employment and membership in clubs and organizations. This data promotes the informed choice of an arbitrator. These arbitrators will come from the Washington metropolitan area, but particularly from George Washington University Law School. If a party does not return the list within the time specified all persons named therein are deemed acceptable. From the list of mutual preferences, the Subcommittee appoints an arbitrator. If the parties fail to agree upon any of the persons submitted or if for any other reason the appointment cannot be made from the submitted list, the Subcommittee makes an administrative appointment. But in no case will an arbitrator whose name has been eliminated by either party be assigned to arbitrate a case.

In his acceptance of appointment, the special arbitrator is required to disclose any financial, professional, social or other relationships, past or present, direct or indirect, with either party to the dispute which he is assigned to arbitrate. Where the Subcommittee deems such disclosures relevant to the controversy before it, it is required to provide this information to the parties. The parties then have the option to waive any conflict of interest objections and to proceed, or ask for a different appointee. Where another appointee is requested, the Subcommittee will dismiss the arbitrator and fill the position from other preferences or will make an administrative appointment.

D. BUSINESS PARTICIPATION

As arbitration in general and consumer arbitration in particular will likely be unfamiliar to many businessmen and consumers, it was deemed unreasonable to expect all enterprises to subscribe irrevocably to arbitration without reservation.¹⁷⁷ Therefore, three alternative degrees of participation were provided, ranging from total commitment in proper cases, to total abstinence in others. A businessman may agree that all complaints involving his store and

¹⁷⁷ In fact, requiring an irrevocable commitment to binding arbitration has been the major impediment to the establishment of consumer arbitration mechanisms.

within the Commission's subject matter jurisdiction¹⁷⁸ will be settled by arbitration after all other administrative remedies have been exhausted. On the other hand, a merchant may agree that only certain types of complaints involving his business will be settled by arbitration. Finally, the enterprise may agree to judge on a case-by-case basis whether a dispute will be submitted to arbitration. Of course, to the extent that the arbitration process is perceived to operate with no apparent bias, additional and stronger commitments by business to the process are expected. As an incentive for businessmen to select one of the first two plans, it is made clear that those participants may advertise their participation in their store windows, circulars, and public newspapers.

E. JURISDICTION

Consumer complaints stem from all areas of business impropriety including fraud, breaches of contract, misleading advertising, breaches of etiquette, *ad infinitum*, *ad nauseum*.

The Arlington Arbitration Rules initially limit the subject matter of arbitrable disputes to breaches of oral or written contracts including breach of warranties. There are at least three arguments to support this limitation. First, limiting arbitrable disputes to breaches of contract will leave a sufficient number of complaints available for arbitration. Secondly, as previously mentioned, it is unreasonable to expect that businessmen will immediately agree to arbitrate all future disputes in all potential complaint areas. Satisfactory experience in this area is expected to lead to a wider acceptance of this mode of dispute settlement and a widening of the field of arbitrable disputes. Thirdly, arbitration may not be the most appropriate settlement procedure for certain types of complaints. Fraud, for example is probably more effectively dealt with by the appropriate law enforcement agencies. Further, other problems such as breaches of etiquette, are not susceptible to resolution by arbitration proceedings.

F. PUBLICITY

Because the arbitration program is voluntary, businesses do not have to submit any complaints to the process. A major obstacle to the success of such voluntary mechanisms is the reluctance of businessmen to accept arbitration as a business practice. A vicious

¹⁷⁸ See § V, E, *infra*.

circle will be encountered because merchants will understandably not want to submit to a procedure which they have not seen in operation. Yet the system will not operate unless businesses join. The American Arbitration Association's consumer arbitration experiment in the District of Columbia failed because of such business resistance. Although unfortunate, this hesitation will be understandable due to the unfamiliarity of consumer arbitration to business. There are various avenues that can be taken to solicit businessmen's cooperation in the project.

Familiar figures in the Arlington business community are members of the Commission. The acceptance of arbitration procedures by their own stores may act as a catalyst to cooperation from other commercial enterprises. Selling efforts will be particularly aimed at the acknowledged "leading" businesses in Arlington with the hope that a "coattail" result will occur upon the acceptance by the leaders of arbitration. In this regard, conferences will be held with the executive officers of the Arlington Chamber of Commerce to seek their official support. The endorsement of the Chamber separate from that of its individual members would be meaningless. Thus, separate meetings, chaired by the businessmen members of the Commission, will be held with department store managers, chain store officials, small business proprietors, service personnel, etc.

In selling arbitration to businessmen, advocates will use the "business interests" argument, *i.e.*, it is good business to submit otherwise unresolvable complaints to an arbitration panel as a regular business practice. Such a habit is strong evidence of a responsible commercial enterprise and promotes the confidence of consumers in receiving a "fair deal."¹⁷⁹

VI. SUMMARY

Hopefully, the Arlington project—which provides the empirical basis for this article—will continue for a long time and will be a success. Whatever happens to the County's program, more local entries into the consumer protection field are necessary. The purpose of this report has been to stimulate additional projects and to develop a literature of local control of consumer protection. The record to date in Arlington County has been encouraging although

¹⁷⁹ Statement by Samuel C. Jackson, Vice President-Director of the Center for Dispute Settlement of the American Arbitration Association, before the Federal Trade Commission, Nov. 21, 1968.

conclusions at this time would be premature. Regardless of the ultimate degree of success in Arlington, several generalizations can be made which may aid future local endeavors.

The first factor which favors local control of consumer protection is political in nature. Municipal government is the closest governmental contact with consumers. Conversely, business is least able to lobby against consumer regulation at the local level because of community loyalty and effective lobbying consumer advocates. Governmental consumer commissions can be nurtured out of this political environment quickly and with surprising ease.

Secondly, although municipal government law has failed to keep pace with urban needs, there is enough flexibility to create consumer protection agencies without the necessity of long legislative and judicial battles. The powers of local governments should increase in direct proportion to the emphasis upon decentralization of government.

Thirdly, the contest between state and local agencies for control of consumer protection must of necessity reach an early accommodation. The problem is too large for state agencies to handle. State mechanisms and priorities cut across municipal boundaries, and efforts to deal with demographic problems require state governments to enlist local support. In short, consumer protection requires local action because of the specific nature of consumer problems.

Fourthly, traditional legal institutions have failed to protect consumers. New alternative agencies and mechanisms to protect consumers are needed. There are voluntary methods, such as arbitration, which can be experimented with at the local level without substantial commitments of money. Alternative dispute settlement mechanisms are easiest to develop, institute and staff at the local level.

Lastly, real progress toward consumer protection in a society characterized by affluence comingled with poverty, a free but controlled economy and a business-oriented marketplace, requires a consumer awareness which simply does not exist today. Consumer education involves contact with people at the lowest common denominator — local government. In this area of consumer protection, at the very least, the results have been encouraging.

Appendix
COMPARATIVE CHART

	Burlington County, New Jersey ¹	Camden County, New Jersey ²	Chicago, Illinois ³	Dade County, Florida ⁴	Jacksonville, Florida ⁵	Monroe County, New York ⁶	Nassau County, New York ⁷	New York City, New York ⁸	Orange County, New York ⁹	Prince George's County, Maryland ¹⁰	Rockland County, New York ¹¹	San Bernardino County, California ¹²	Santa Clara County, California ¹³	Ventura County, California ¹⁴	Yonkers, New York ¹⁵
Governmental Structure	Board of Chosen Freeholders	Board of Chosen Freeholders	Mayor-City Council	County Manager	Mayor-City Council	Board of Supervisors	County Executive Board of Supervisors	Mayor-City Council	County Executive Board of Supervisors	Board of County Commissioners	Board of Supervisors	Board of Supervisors	County Executive Board of Supervisors	Board of Supervisors	City-Manager
Position in local government	Department of County Gov't	Office under Commissioner of Public Affairs	Dept. within Executive Branch	Office under County Manager	Division within Department of Public Safety	Joint City-County Advisory Commission	Office under County Executive	Department of City Government	Office under County Executive	Unpaid Board	Office in Dept. of Weights and Measures	Department of County Gov't	Department of County Gov't	Div. within Dept. of Weights and Measures	Dept. under City Manager
Authority	Police and Reg. Power	Police and Reg. Power	Police License & Reg. Power	Special Enabling Legislation	Municipal Home Rule	Municipal Home Rule	Municipal Home Rule	Municipal Home Rule	Municipal Home Rule	Police Power	Municipal Home Rule	Police Power	Police Power	Police Power	Municipal Home Rule
Powers Granted															
To receive complaints	X	X	X	X	X		X	X	X	X	X	X	X	X	X
To investigate complaints	X	X	X	X	X		X	X	X	X	X	X	X	X	X
To conciliate disputes		X								X					
To initiate its own investigation, research and studies	X	X	X	X	X		X	X	X	X	X		X		X
To hold hearings															
Public					X		X	X	X	X					X
Private					X		X	X	X	X					X
To administer oaths					X		X	X	X	X					X
To compel attendance of witnesses (subpoena)			X				X	X	X	X					X
To interrogate witnesses			X				X	X	X	X					X
To compel production of papers, documents, records, and other evidence			X				X	X	X	X					X
To inspect premises			X	X	***X				X	X	X	***X	***X		***X
To seize and impound evidence			X	X	***X							***X	***X		
To issue cease and desist orders					***X					X					
To propose consumer protection legislation															
Local	X	X		X	X	X	X		X		X				X
State	X	X		X	X	X	X		X		X				X
To initiate criminal or equitable court proceedings				X	X		*X		**X	*X	**X				
to make arrests			X	X	***X								X		
To revoke licenses					X			X		X					X
To develop or assist consumer education programs		X			X	X	X	X	X	X	X		X	X	X
To make rules				X	X			X							

¹ Burlington County, N.J., Consumer Protection Resolution, Nov. 12, 1969.
² Camden County, N.J., Resolution Creating Office of Director of Camden County Consumer Affairs, Oct. 6, 1970; Memorandum from Carol J. Brooks, Director, Camden County Office of Consumer Affairs.
³ CHICAGO DEPARTMENT OF CONSUMER SALES, WEIGHTS AND MEASURES, ANNUAL REPORT (1970).
⁴ METROPOLITAN DADE COUNTY, FLA., CODE §§ 8A-65 to -124 (1968).
⁵ JACKSONVILLE, FLA., CODE §§ 16.301 to -302, 400.101-406.504 (1969).
⁶ Monroe County, N.Y., Res. No. 218 (1971).
⁷ NASSAU COUNTY, N.Y., AD. CODE §§ 21-10.1 to -10.2 (1970), GOV'T CODE § 2102 (1967).
⁸ NEW YORK CITY, N.Y., CHART. § 2203 (1969), NEW YORK CITY AD. CODE §§ 773-1.0 to -14.0 (1971 N.Y., DEPT. CONS. AFFAIRS. CONS. PROT. L. REGS. 6-7, 9 (1971)).
⁹ ORANGE COUNTY, N.Y., CHART. § 18.6A (1970).

¹⁰ Prince Georges County, Md., Gen. Res. 3-1970, Jan. 30, 1970.
¹¹ Rockland County, N.Y., Local Law 5, Oct. 19, 1970.
¹² SAN BERNARDINO COUNTY, CALIF. CODE §§ 12.220 to -225 (1971)
¹³ Santa Clara County, Calif., Ordinance NS - 300.141 (1970).
¹⁴ Ventura County, Calif., Ordinance Creating Consumer Affairs Division in the Department of Weights and Measures, June 21, 1971.
¹⁵ Yonkers, N.Y., Local Law 2 (1971). See also Nat'l League of Cities, United States Conf. of Mayors, Consumer Affairs Agencies Survey (1971). Copies of above statutory materials may be obtained by writing to the respective agencies.

Key to Asterisks:
 *Through County Attorney
 **Cause Prosecution
 ***Derivative from the weights and measures power

HOME SAFETY AND BUILDING CODES:

A Hidden Consumer Issue

Samuel A. Simon*

Consumer protection is not limited to the purchaser of chattel . . . it applies to the purchaser of real property as well. In this article the author discusses the failure of modern building codes to make the American Home a safe place to live. He argues that even remedial legislation presently before Congress does not adequately address this problem.

I. INTRODUCTION

A thirteen-year-old girl was scalded to death last year while showering after she accidentally turned on the hot water and was unable to extricate herself because of her unfamiliarity with a latch on the shower door.¹ At about the same time, a mere three months after occupying their new home a couple was killed in a fire stemming from a defective heating system.² Not long before these incidents an infant was scalded badly enough to require hospitalization for seventy-two days and three skin graft operations.³ The family had just moved into a home when it was noticed that the hot water came out at an extremely high temperature; so high, in fact, that a sign was posted in the bathroom to warn guests. These incidents are examples of over twenty million injuries of all types that occur in the home every year. In 1969, there were over four million "disabling" injuries and thirty thousand deaths from accidents within the home.⁴

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¹ DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, SUMMARY REPORT, HOME ACCIDENT CAUSES AND RECOMMENDED REMEDIAL MEASURES, PHASE I, (1970) [hereinafter cited as HOME ACCIDENT STUDY]. The study was prepared for the Department of Housing and Urban Development [hereinafter referred to as HUD] by Information and Electronics Systems Division of Brown Engineering Company, Huntsville, Alabama, under HUD contract number H 113.

² *Youngstrom v. Dunn*, 447 F.2d 948 (8th Cir. 1971).

³ *Schipper v. Levitt & Sons*, 44 N.J. 70, 207 A.2d 314 (1965).

⁴ NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 80 (1970 ed.).

Many of these injuries could have been prevented most simply by safer home design and construction. Two recent studies, one by the National Commission on Product Safety⁵ and the other by the Department of Housing and Urban Development,⁶ disclose a lack of adequate safety standards governing home construction, products, and fixtures. In fact, there is a virtual absence of any rational system for the regulation and control of home safety requirements.

The system ought to be different.

The purchase of a new home is the most important single purchase, in terms of expense and use, made by the consumer in his lifetime. The average purchaser of a new home today obligates himself to pay in excess of \$24,000 in monthly installments, which constitute approximately twenty percent of his income.⁷ In terms of use, the home serves as the center of family life; the entire quality of the family existence is affected by the physical home environment.⁸ Yet, the purchaser of a new home today has less assurance of the quality, workmanship and safety of the product he receives than when he purchases an automobile. The home buyer also has fewer remedies than does the automobile owner when he discovers a defect or is injured because of an improperly designed vehicle.

Traditionally, a new house has not been looked upon as a single consumer product. This attitude stems from the continuation of feudal legal property concepts, such as *caveat emptor*⁹ and the doctrine of merger,¹⁰ which have long been discarded in other areas of product liability.¹¹ It makes as much sense today to continue

⁵ NATIONAL COMMISSION ON PRODUCT SAFETY, FINAL REPORT 2 (June, 1970). [Hereinafter cited as PRODUCT SAFETY REPORT.]

⁶ HOME ACCIDENT STUDY, *supra* note 1.

⁷ HUD CHALLENGE, Nov., 1971, at 9. In 1969 the average price of a new home was \$27,900 and in 1970 it was \$26,600. *Id.*

⁸ See generally, 47 TEXAS L. REV. 1160, 1172 n.61 (1969).

⁹ See generally, *Druid Homes, Inc. v. Cooper*, 272 Ala. App. 415, 131 So.2d 884 (1961); *Mitchem v. Johnson*, 7 Ohio St. 66, 36 Ohio Ops.2d 52, 218 N.E.2d 594 (1966); *Allen v. Wilkinson*, 250 Md. 395, 243 A.2d 515 (1968). But see cases cited note 11 *infra*.

¹⁰ See *Cox v. Wilson*, 109 Ga. App. 652, 137 N.E.2d 47 (1964); *Coutrakon v. Adams*, 39 Ill. App.2d 290, 188 N.E.2d 780 (1963), *aff'd on other grounds*, 31 Ill. 2d 189, 201 N.E.2d 100 (1964).

¹¹ See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916). Only recently have product liability concepts been applied in the area of housing. In a 1968 Texas decision, for example, the doctrine of *caveat emptor* was abandoned and the rule that there is an implied warranty of habitability when a new home is purchased was adopted. *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968). See also Berman, *Caveat Emptor in Sales of Realty — Recent Assaults Upon the Rule*, 14 VANDERBILT L. REV. 541 (1961); Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L. Q. 835 (1967). A number of states have adopted an exception to the merger rule when a residential dwelling is involved. See *Lippon v. Southgate Park Corp.*, 345 Mass. 621, 189 N.E. 2d 191 (1963); *Capawelli v. Rolling Greens, Inc.*, 39 N.J. 585, 190 A.2d 369 (1963).

these concepts and to consider the home as something other than a single integrated consumer product as it would be to consider the purchase of an automobile as individual purchases of its constituent parts.

The time when the purchase of a new home was a highly personal matter with work done by a true artisan is, unfortunately but perhaps necessarily, long past. Today the average home buyer gets what amounts to a mass-produced product. He has little or no control over the quality of the building materials, the quality of the workmanship, or the basic safety of the design involved in the product he buys.

The purpose of this article, then, is to look at the basic tool that historically has been utilized to insure home safety — local building codes — and to evaluate suggested alternatives with some recommendations.

II. BUILDING CODE STANDARDS

The main tools for insuring home safety are the local building codes.¹² These codes normally consist of

. . . a series of standards and specifications designed to establish minimum safeguards in . . . the construction of buildings, to protect the human beings who live and work in them from fire and other hazards, and to establish regulations to further protect the health and safety of the public.¹³

In actuality, these codes have little, if any, relevancy to building soundness and safety in the residential building category. In the words of a Department of Housing and Urban Development study of building codes:

¹² Although building codes have been the subject of substantial study in recent years, this interest has been concentrated on the relationship between building codes and the need for new building techniques to increase housing products. See ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, BUILDING CODES: A PROGRAM FOR INTERGOVERNMENTAL REFORM (Jan. 1966) [hereinafter cited as BUILDING CODES]; MANVEL, LOCAL LAND AND BUILDING REGULATION (1968); PRESIDENT'S COMMITTEE ON URBAN HOUSING, A DECENT HOME 198-205 (1968) [hereinafter cited as A DECENT HOME].

¹³ NATIONAL COMMISSION ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY at 254 (1968) [hereinafter cited as BUILDING THE AMERICAN CITY]. The President's Committee on Urban Housing listed three goals that a "quality control" system for urban housing should meet: The system should be designed

1. to protect consumer lacking the sophistication to judge the quality of the housing product;
2. to protect residents, neighbors and passersby from hazardous conditions in a housing structure, for example, structural instability or risk of fire; and
3. to establish standards sufficiently uniform to promote free transferrability of mortgages and easy insurance of properties against hazards.

A DECENT HOME, *supra* note 12, at 199.

The bulk of information in building codes emphasize engineering knowledge of building materials, methods of construction, fire safety, and performance requirements for essential equipment and facilities in *commercial type structures*.¹⁴

The HUD study disclosed just how disastrous the overall picture of home safety is. The study analyzed the five major "model" or national building codes, including the Federal Housing Administration's Minimum Property Standards,¹⁵ in terms of clearly identifiable safety hazards within the home. The four private national codes considered were (1) the Code of the Building Officials of America,¹⁶ (2) the National Building Code,¹⁷ (3) the Southern Standard Building Code,¹⁸ and (4) the Uniform Building Code.¹⁹ The FHA MPS fared best when compared to the other four codes, but it also was found to be inadequate.

The study compared major accident-producing safety hazards identified from a survey of major cities throughout the country. Five major accident categories and forty-seven separate safety hazards were used in the comparison, although the report mentioned many others. Each code was first examined to determine whether there was a standard designed to protect against the identified accident-producing safety hazards. If there was, the standard was then examined to determine whether it was, in fact, adequate protection against the particular hazard. The categories considered were accidents involving stairways, glass doors, windows, doors other than glass, and hot water systems. Each category contained an average of eight separate safety hazards. For example, the category of accidents involving glass doors included seven accident-producing safety hazards, including the type of glass used, the existence of marking devices, and the thickness of the glass.

The results of the comparison raise a substantial doubt concerning the usefulness of present-day building codes as a means of assuring the home buyer that the product he receives is functionally

¹⁴ HOME ACCIDENT STUDY, *supra* note 1 at 8 (emphasis added).

¹⁵ UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, MINIMUM PROPERTY STANDARDS FOR ONE AND TWO LEVEL UNITS (1968); UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, MINIMUM PROPERTY STANDARDS FOR MULTI-FAMILY HOUSING (1968); [both of the above hereinafter cited as the FHA MPS].

¹⁶ The study included four codes developed by the Building Officials Conference of America, Inc.: HOUSING CODE (2d ed. 1970); PLUMBING CODE (1st ed. 1968); BUILDING CODE (Cum. Supp. 1968); and the BASIC BUILDING CODE (4th ed. 1965).

¹⁷ AMERICAN INSURANCE ASSOCIATION, NATIONAL BUILDING CODE (1967 ed.).

¹⁸ THE SOUTHERN BUILDING CODE CONGRESS, SOUTHERN STANDARD BUILDING CODE (1969 ed.).

¹⁹ INTERNATIONAL CONFERENCE OF BUILDING OFFICIALS, UNIFORM BUILDING CODE (1967 ed.).

safe and of sound design. There were 179 accident-producing safety hazards for which no standard exists in at least one of the codes. Of those standards that did speak of identified accident-producing safety hazards, forty-nine were found to be inadequate to protect against the hazard, while forty-five were found to be adequate.

Typical of the omissions was the absence from all of the codes of any standard pertaining to bathrooms. Similarly, there were no standards regulating built-in appliances. For example, although sixty-five percent of new homes come with a pre-installed garbage disposal, there were no standards in any of the codes governing their installation or use. Even the most obvious and dangerous hazards to children, such as a lack of protective coverings over electrical outlets, were found not to be covered.²⁰

An example of standards found to be inadequate to protect against hazards were those relating to lighting over stairwells. The four national codes completely omit standards while the FHA MPS were considered adequate in some respects. Only the FHA MPS were considered to adequately cover the hazard of improperly placed lighting switches on stairwells. Similarly, only the FHA MPS had standards regulating the location and useability of faucet and shower controls, and these were considered to be inadequate. Three of the five codes were found to have deficient standards relating to hard-to-open windows, while the other two had none at all. Only three of the five codes had adequate provisions governing the type of glass to be installed in glass doors.

Significantly, the study also found that most of the omitted safety standards can be provided with little or no increase in cost of the home to the consumer, who would probably be willing to pay a premium for these items if given the opportunity. For example, water temperatures can be lowered to reasonable levels by the simple addition of a mixing valve to the outside of the hot water tank. Mixing valves are available at most hardware stores and cost approximately eighteen dollars installed.²¹ Thousands of injuries from falls

²⁰ Other omissions include a failure of any of the codes to provide standards to protect against identified accident-producing hazards in the positioning of windows, the type of glass in windows, low window sills, handles on glass doors, operating pressure for glass doors, swinging doors, garage doors, location of shower heads and many others too numerous to mention here.

²¹ HOME ACCIDENT STUDY, *supra* note 1. The study pointed out that while all household needs would be satisfied if hot water were delivered at 115°F., present hot water systems deliver hot water at temperatures of up to 210°F. If the 115°F. standards had been, in effect, the life of the thirteen-year-old girl mentioned in the Introduction to this article might have been saved. *Id.*

could be prevented by requiring abrasive, non-slip tape on tub or shower floors. Placement of soap dishes at easily accessible points on the wall, automatic shower diverters that insure the shower is cut off when the water is turned off, and the placement of electrical outlets away from water faucets are other examples of inexpensively corrective safety hazards not covered in any of the codes.

Many of the hazardous objects that were either not covered or inadequately governed were found to be purely decorative in nature, designed to increase the aesthetic character of the home. Absence of these hazards would most likely result in a cost saving to the consumer. Decorative handrails, for example, present sharp edges and protruding surfaces. In one case cited in the study, a woman slipped while descending a stairway with a decorative handrail and suffered an amputated finger from a sharp corner of the rail. Another example cited was the glassed areas that are placed in close proximity to stairs or in unsuspected areas to take advantage of panoramic views.

This failure of building codes to accomplish what they were intended to do is best explained by an examination of the process by which code standards are developed and promulgated.

III. PRIVATE BUILDING CODE SYSTEM

The private national codes are based almost exclusively upon industry-developed standards and specifications.²² There is currently no organization that develops building standards or specifications that does not depend on the construction or building products industry for its funding.²³

²² See BUILDING THE AMERICAN CITY, *supra* note 13 at 263. The standards and specifications development process is highly complex, rendering full explanation neither practical nor helpful. A very good summary of the organizations primarily concerned with established product standards and specifications and the methods used by them can be found in PRODUCT SAFETY REPORT, *supra* note 5 at 51-62.

²³ Two prominent organizations concerned with the development of building product specifications and standards are the American National Standards Institute and the American Society for Testing and Materials. BUILDING THE AMERICAN CITY, *supra* note 13 at 263; A DECENT HOME, *supra* note 12 at 200. See also PRODUCT SAFETY REPORT, *supra* note 5 at 51. Other important organizations in this field are the American Fire Protection Association, Underwriters Laboratories, Inc., the National Fire Protection Association, the Association of Home Appliance Manufacturers, the Plastic Pipe Institute and the Construction Standards Institute. *Id.* at 51. Independent laboratories like Underwriters, which are non-profit in nature, rely primarily on the fees of those whose products they test for their funding.

The primary governmental agency concerned with standards is the National Bureau of Standards of the Department of Commerce. Its authority, however, is limited to the establishment of procedures for development of standards in cooperation with private organizations. 19 U.S.C. 272 (1964). In fact, much of this work is done in the Bureau by individuals "lent" to the Bureau by industry. Interviews with National Bureau of Standards Employees, June-Oct. 1971.

The customary procedure for inclusion of a new product or system in one of the private national codes is for the developer or manufacturer to submit the product or system to a special panel along with specifications and standards for its use.²⁴ The product is then evaluated in terms of the information provided and a decision is made on whether the item is suitable for use.²⁵ The code organizations do not test the products submitted, although most of them do require that the product be approved by a testing laboratory.²⁶ After acceptance, the code organizations include the product on their lists of approved products, which are circulated among governmental units utilizing their codes.²⁷

Local governments, such as townships, counties and municipalities are the basic units which adopt building codes.²⁸ These political entities enact codes which establish building standards for the specific geographic areas under their jurisdiction. Although a majority of the local codes are either taken from one of the private national codes or are based on one of them, most are not kept up to date.²⁹ As a result, provisions in local building codes depend largely on the discretion and expertise of local building code officials.³⁰ In addition to the common lack of sophistication of officials responsible for maintaining building code provisions, these officials are too often subject to substantial pressure from local interests to adopt provisions most advantageous to a particular type of product.³¹ The system, then, is one of manufacturer or developer propaganda, aimed at local building code officials, designed to obtain the inclusion of a particular product in the local code. This is accomplished by launching an "educational program" to acquaint the design professions, builders, and building code officials with the virtues of a new product or system.³² While approval by a national code of a

²⁴ BUILDING THE AMERICAN CITY, *supra* note 13 at 263-64.

²⁵ *Id.*

²⁶ *Id.* at 264. See note 23, *supra*. Either the quality of the testing done by independent laboratories is questionable or the laboratories are not very concerned with the safety of the product that bears their seal of approval. For example, the most prestigious of all testing laboratories, Underwriters Laboratories, Inc., approved thousands of television sets which subsequently caught fire, the Hanksraft vaporizer that scalded a large number of children, and the Little Lady toy oven which reached temperatures of 300°F. PRODUCT SAFETY REPORT, *supra*, note 5 at 55. The Product Safety Commission stated that Underwriters had attempted to upgrade a number of their standards but encountered substantial opposition from the manufacturers. *Id.*

²⁷ BUILDING THE AMERICAN CITY, *supra* note 13 at 264.

²⁸ See generally BUILDING CODES, *supra* note 12.

²⁹ BUILDING THE AMERICAN CITY, *supra* note 13 at 254-57. The National Commission on Urban Problems surveyed 18,000 local governments. Of these, less than half actually had building codes. In governmental units with populations over 5,000, 52.5 percent employed one of the model codes. Of these, only 28 percent had adopted as much as

product or technique is advantageous, it is not enough by itself to secure a nationwide market for a product or construction technique. National code approval is no more than an advertising point to be stressed in the "educational program" of the manufacturer. The detrimental consequences for quality and safety of housing under this system are easily foreseeable.

The classic example of how this system operates and the detrimental consequences awaiting the consumer may be seen in the controversy over plastic pipes. Within the last ten years the plastics industry has been developing the technology to enable the application of plastic pipe for commercial and domestic uses.³³ With this development, the Plastic Pipe Institute³⁴ was established to promote plastic pipes by gaining their approval in various building codes. At the same time, entrenched copper and cast iron pipe interests, such as pipe-fitter unions, began to wage a vigorous campaign to keep plastics out of local codes. This campaign met with considerable success. In 1968 one study showed that 68.9 percent of the communities sampled prohibited the use of plastic pipes for *any* purpose.³⁵ This effectiveness in preventing the adoption of plastic pipes in local codes demonstrates the importance of strong local influence which was available to the unions but which was not available to the PPI.³⁶

Although the arguments at first centered around quality com-

90 percent of the recommended changes of the model codes within the three previous years. The Commission concluded:

Only about 15 percent of all the municipalities and townships above 5,000 in population had in effect a national model building code which was reasonably up to date; about 85 percent of the units either had no code, did not use a model code, or had failed to keep the code up to date. *Id.* at 257.

³⁰ *Id.* at 264.

³¹ A DECENT HOME, *supra* note 12 at 199.

³² BUILDING THE AMERICAN CITY, *supra* note 13 at 264. The National Commission on Urban Problems kindly utilizes the term "educational program" to describe the final step in the product approval process as follows:

(5) An educational program is undertaken by the manufacturer to acquaint the design professions, builders, and officials with the value of the new product. *Id.*

³³ See generally The Plastic Pipe Code Battle, Status 1970, speech by Jerome H. Heckman, prepared for the April 2, 1970, meeting of the Plastic Pipe Institute.

³⁴ Hereinafter cited as the PPI. The PPI is a division of a larger plastics trade association that has had the principle responsibility of gaining acceptance of plastic piping in building codes. *Id.*

³⁵ BUILDING THE AMERICAN CITY, *supra* note 13 at 259.

³⁶ The latest chapter in the battle to gain acceptance of plastic piping has been the filing of a \$20,000,000 anti-trust suit by plastic pipe interests against the Southern Building Code Congress. 117 CONG. REC. H 10,060 (daily ed. Oct. 27, 1971) (remarks of Representative Waggoner).

parisons,³⁷ a real safety issue soon emerged.³⁸ When exposed to fire, plastics burn and create toxic fumes.³⁹ Two California fire marshals, members of the House Select Committee on Small Business, and others have taken the position that plastic pipes are unsafe for use in multi-family dwellings because of the increased fire risk. Moreover, the PPI has refused to submit any of its piping to Underwriters Laboratories, Inc., for testing.⁴⁰ Thus, the safety issue has become unduly blurred because of the vested interests of those who raise it. To complicate the issue even further, HUD has *accepted* the use of plastic drain, waste, and vent pipes in housing up to six stories in height which is insured by the Federal Housing Administration.⁴¹

The history demonstrates that within the private sector the entire mechanism for protection of the home buyer is faulty.⁴² Public involvement in this area exists in the form of the Federal Housing Administration⁴³ and its Minimum Property Standards. However, a look at this system will show that once again the consumer is without substantial protection.

IV. FEDERAL HOUSING ADMINISTRATION

A. Standards

In order to qualify for FHA mortgage insurance, a home must meet that agency's Minimum Property Standards.⁴⁴ These standards serve as a model for many local governments that have adopted one

³⁷ See generally Heckman, *supra* note 33.

³⁸ See HOUSE SELECT COMM. ON SMALL BUSINESS, SUBCOMM. ON SMALL BUSINESS PROBLEMS IN SMALL TOWNS AND URBAN AREAS, IMPACT OF CRIME, CRIME INSURANCE, AND SURETY BONDS ON SMALL BUSINESS IN URBAN AREAS, 91st Cong., 2d Sess., 93-1390 (1970).

³⁹ *Id.*

⁴⁰ Hearings, *House Select Comm. on Small Business, Subcomm. on Small Business Problems in Smaller Towns and Urban Areas, Impact of Crime, Crime Insurance, and Surety Bonds on Small Business in Urban Areas*, 91st Cong., 2d Sess. at 306 (1970).

⁴¹ UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, MINIMUM PROPERTY STANDARDS FOR MULTI-FAMILY HOUSING, FHA No. 2600 (1968). A 1971 review draft edition does not contain the six story limitation. Most plastic piping is listed as acceptable for distribution of only cold water, above and below ground drain and vent piping. UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, MINIMUM PROPERTY STANDARDS Vol. 2 at 115 (1971 review draft ed.). The use of plastic piping for distribution of hot and cold water is listed as neither acceptable nor unacceptable. *Id.* Yet, the PPI has published its own standards for the use of CPVC (Chlorinated Polyvinyl Chloride) plastic pipe for use in both hot and cold water distribution systems, which state that the maximum operating temperature for such pipe is 200°F. However, modern home hot water distribution systems develop water temperatures as high as 210°F. PLASTIC PIPE INSTITUTE, MODERN PIPING WITH PLASTICS; HOME ACCIDENT STUDY, *supra* note 1.

⁴² For a discussion of the problems of local enforcement of building codes see G. STERBLIEB, *THE TENEMENT LANDLORD* (1966).

of the private national codes. In addition, since most housing today is completed prior to purchase, builders generally use FHA standards as their basic guide to provide for the possibility that the purchaser will wish to use FHA financing.⁴⁵ The result is that FHA standards have a substantial impact on actual building practices and standards throughout the country.

Like the private code organizations, the FHA relies almost entirely on standards developed by industry or private standards groups.⁴⁶ In fact, the FHA neither develops nor tests standards. Rather, it relies on many of the same sources from which private industry groups obtain information.⁴⁷ The HUD study⁴⁸ and the Report of the National Commission on Product Safety⁴⁹ demonstrated that although better than the private codes, FHA Minimum Property Standards are also seriously deficient in their relevancy to home safety.

Two of the most obvious examples involve glass doors and floor furnaces. In both cases, the FHA standards were found to be inadequate and the safety hazard easily correctable. Prior to the hearings held by the National Commission on Product Safety, FHA MPS did not require safety glass to be used in sliding glass doors.⁵⁰ Although safety glass is now required, the standards still do not require the use of safety glass in windows.⁵¹ Similarly, the standards do not require floor furnace coverings to be designed to minimize heat. Thus, every year a large number of children fall and receive extreme burns from the covers that heat up to approximately 400° F.⁵²

⁴³ Hereinafter referred to as the FHA. Unless otherwise indicated, information in this section is based on R. Jacobs, Federal Housing Administration: Poor Standards Poorly Applied, 1970 (unpublished report prepared for Ralph Nader).

⁴⁴ *Supra* note 15.

⁴⁵ See also PRODUCT SAFETY REPORT, *supra* note 5 at 12.

⁴⁶ See generally BUILDING THE AMERICAN CITY, *supra* note 13 at 263-64.

⁴⁷ For example, many standards utilized are those developed by the American Society for Testing and Materials and the United States of America Standards Institute. See discussion in note 23, *supra*. In addition, FHA MPS often deem private code standards to be acceptable for use as a substitute for the standards of the FHA MPS themselves. FHA MPS, *supra* note 15.

⁴⁸ HOME ACCIDENT STUDY, *supra* note 1.

⁴⁹ See generally PRODUCT SAFETY REPORT, *supra* note 5.

⁵⁰ *Id.* at 12. Yet, over 100,000 people walked through glass doors in 1969. *Id.* The Commission also found that "of 10 such injuries studied," all could have been prevented or limited by the use of safety glass. *Id.*

⁵¹ HOME ACCIDENT STUDY, *supra* note 1.

⁵² PRODUCT SAFETY REPORT, *supra* note 5 at 15. Each year nearly 60,000 children under the age of five sustain burns, requiring medical treatment, as a result of falling on floor furnace covers. *Id.* D. Julian Waller, testifying before the Commission, stated:

The only other heating device . . . so constructed is the barbeque, and this is a device that is deliberately designed to cook flesh. . . . The temperature at the level of the floor furnace grate has been actually recorded at

Yet, the Product Safety Commission was able to obtain three different plans for coverings that would substantially reduce the temperature at floor level, for little or no additional cost.⁵³

One reason for the present situation is the constricted view taken by FHA officials of that agency's role in the housing area. Despite the impact FHA MPS have on housing construction, the view within the agency is that standards are designed only to insure the soundness of the government's insurance investment.⁵⁴ Moreover, both FHA officials and homebuilders agree that a house built only in accordance with FHA standards would not only be unsafe, but would probably be uninhabitable.⁵⁵

B. Enforcement

Despite their deficiencies, in terms of safety, the FHA MPS are superior to those of the private codes. Proper enforcement of the standards could serve the useful purpose of insuring that deficiencies occurring in private national codes, but which do not exist in the FHA MPS, are eliminated from FHA insured housing. A sampling of inspection techniques for compliance with FHA MPS requirements in the Washington, D. C. area, however, indicated that standards are often not met. Moreover, when a home owner attempts to secure compliance, he often is faced with a mountain of red tape and bureaucratic ineptness. A survey of twenty-five builders in the Washington, D.C. area found that the average length of time between receipt of a letter of complaint by the FHA and the repair of the defect was eleven weeks. In one case, the defect existed 150 weeks before it was corrected.

This poor enforcement record is the result of a lack of manpower, normal bureaucratic lethargy, and knowledge by the builder of the reluctance of FHA officials to use the only enforcement tool they have. Any builder who fails to build to standards or refuses to bring his work up to standards may have his work declared ineligible for FHA financing. This sanction, however, is rarely used. In Washington, D. C., a builder will not be subjected to sanctions unless he has not complied with standards in ten percent or more of his homes.

between 300° and 350° F. . . [the usual temperature for cooking] chicken, beef, ham, veal and . . . other meats. *Hearings of the National Commission on Product Safety*, (Feb. 19, 1969).

⁵³ PRODUCT SAFETY REPORT, *supra* note 5 at 16.

⁵⁴ Jacobs, *supra* note 43.

⁵⁵ *Id.*

V. PROPOSAL FOR CHANGE: THE NIBS BILL

Criticism of codes and code systems has focused more on achieving greater uniformity in code provisions in order to facilitate innovation in the building industry than on the quality of the standards themselves. Very little attention has been given to safety factors, although the emphasis on uniformity may incidentally benefit the cause of safety. The building code study by the Advisory Commission on Intergovernmental Relations in 1966 emphasized the need for building codes of statewide application.⁵⁶ The President's Committee on Urban Housing endorsed the Commission's proposal and urged the creation of a national "Building Standards Institute."⁵⁷ The National Commission on Urban Problems expanded this concept to include the commitment of large sums of money for research and development, and urged an increase in federal involvement in the building standards area.⁵⁸ There is now before Congress a bill which incorporates many of these proposals.⁵⁹

The NIBS Bill is an effort to implement a number of the recommendations made by the National Commission on Urban Problems. The bill creates a National Building Sciences Institute as a public, non-governmental agency, and a non-profit corporation.⁶⁰ In the declaration of findings and policy, the bill justifies itself by stating that (1) there is no authoritative national source to make findings and advise the public and private sectors of the economy on building sciences and technology, (2) a single national building code is unworkable because of variations in local needs, (3) the present lack of uniformity increases the cost of housing and reduces the housing stock, and (4) the creation of the Institute will facilitate development of new technology.⁶¹

The Institute would consist of a Board of Directors appointed by the President⁶² and a Consultative Council to be created by the Institute itself.⁶³ The Council's membership would be composed of trade associations, building code groups, professional associations and consumer groups. The Council would essentially serve as a "line of communication" between the above mentioned groups and the

⁵⁶ BUILDING CODES, *supra* note 12 at 63-73, 87-98.

⁵⁷ A DECENT HOME, *supra* note 12 at 29.

⁵⁸ BUILDING THE AMERICAN CITY, *supra* note 13 at 266-70.

⁵⁹ Building Sciences Act of 1971, S.1859, 92d Cong., 1st Sess. (1971) [hereinafter cited as the NIBS Bill].

⁶⁰ *Id.* §1003(a) [hereinafter cited as the Institute].

⁶¹ *Id.* §1002(a).

⁶² *Id.* §1004(a).

⁶³ *Id.* §1004(h).

Institute.⁶⁴ The function of the Institute would be to develop, promulgate and maintain nationally recognized performance standards, technical provisions and test procedures suitable for adoption in building codes.⁶⁵ This would be accomplished through contracting with existing private organizations such as testing laboratories.⁶⁶ Funding initially is to come from Congress,⁶⁷ but the Institute will be authorized to charge fees for its services.⁶⁸

Inclusion of Institute-created standards within building codes is to be on a voluntary basis. The bill is apparently premised on the theory that code groups and local building officials will recognize the value of a "single authoritative source" and, having participated in the Institute's work, will voluntarily accept Institute standards. However, the Institute's standards will be mandatory for all projects and programs involving federal assistance.⁶⁹ In addition, departments and agencies within the federal government will be required to accept the standards of the Institute.⁷⁰

It is suggested that the concept of the NIBS Bill is to facilitate the development of performance standards which will be generally accepted by both the building industry and building code groups and officials. Institute-developed standards will not, however, be promulgated into a code, and compliance, except in federally-assisted housing, will be voluntary.⁷¹ It attempts to foster technological progress by increasing uniformity in codes, eliminating restrictive provisions by providing an authoritative source for acceptability of new products and systems, and increasing the amount of funds available for research and development in the building sciences. The subject of home safety, however, is not mentioned. Although the provisions of the bill are adequate to achieve its goals, the emphasis is clearly *not* that of home safety. If the NIBS Bill is to be made relevant to home safety, substantial changes in its provisions will have to be made.

The concept of a single national model building code was rejected in the bill

... because of the difficulty at all levels of government in updating

⁶⁴ *Id.*

⁶⁵ NIBS Bill, *supra* note 59, §1006(a) (1).

⁶⁶ *Id.* §1006(b).

⁶⁷ *Id.* §1009.

⁶⁸ *Id.* §1007(b).

⁶⁹ *Id.* §1008(b).

⁷⁰ *Id.* §1008(a).

Federal departments and agencies may also contract with the Institute for specific services. *Id.* §1008(c).

⁷¹ The Institute has the power to develop appropriate methods for "encouraging" the adoption of its standards by "all sectors of the economy." *Id.* §1006(c).

their housing and building regulations to reflect new developments in technology, as well as the irregularities and inconsistencies which arise in applying such requirements to particular localities or special local conditions . . .⁷²

It is not clear why the same difficulties will not arise with voluntary standards, which exist under the present model building code system.⁷³ The bill seems to be based on the theory that the prestige of the Institute will sufficiently motivate local building code officials and organizations to up-date their building regulations. Yet, Underwriters Laboratories, Inc. and other prestigious testing organizations certify many products and product systems that are rejected by code groups and local code officials.

If Institute standards are to serve the purpose of insuring home safety, they must be promulgated into a national building code. The voluntary standards proposed by the present NIBS Bill may be sound for the purpose of increasing uniformity in order to reduce costs and increase technological development. But self-regulation or voluntary standards as a system to insure product safety is unworkable. After an exhaustive study of product safety, the National Commission on Product Safety concluded:

As related to product safety, self-regulation by trade associations and standards groups, drawing upon the resources of professional associations and independent testing laboratories, is legally unenforceable and patently inadequate.⁷⁴

The implementation of a national building code would necessitate the development of effective enforcement machinery. This could be done through regional FHA offices, utilizing personnel already employed in inspecting housing for compliance with FHA MPS. In addition, closer formal ties between the Institute and the Department of Housing and Urban Development should be provided. As the bill is presently written, there is no requirement that the Institute work with HUD.⁷⁵ Yet HUD is the governmental agency whose primary responsibility is housing.⁷⁶ Specifically, the Secretary of

⁷² *Id.* §1002(a) (2).

⁷³ See discussion in Part III, *supra*.

⁷⁴ PRODUCT SAFETY REPORT, *supra* note 5, at 2.

⁷⁵ The Institute is required to "consult with the Department of Justice and other agencies of the government to the extent necessary to insure that the national interest is protected and promoted in the exercise of its functions and responsibilities." No specific mention is made of HUD. NIBS Bill, *supra* note 59, §1006(c) (3).

⁷⁶ The NIBS Bill provides that the Institute will be created with the advice and assistance of the "Academies-Research Council." *Id.* §1002(c). This advice and assistance will continue through the first five years of the Institute's operation. *Id.* §1003(b). It would seem, however, that HUD is the more appropriate governmental agency to assist in the operation of the Institute. At least it should have an equal role with the "Academies-Research Council."

HUD, or his representative, should be made a permanent member of the Institute's Board of Directors to assure coordination between HUD and the Institute.⁷⁷

The problem of varying local conditions cited in the bill⁷⁸ can be easily resolved in a variety of ways. Most obvious would be the fashioning of standards to apply only where relevant. If unique conditions exist, the problem could be brought to the Institute's attention and a provision written into the applicable standard of the national building code. An alternative would be to provide for supplementation of the national code on the state level with approval of the Institute. This would reduce the workload of the Institute, increase the flexibility of the code system and reduce objections to a further federal involvement in what historically has been an area of state and local prerogatives. An additional alternative would be to authorize limited changes by the enforcement officials in regional FHA offices.⁷⁹

If the NIBS Bill is to address itself to home safety and amended to provide for a national building code, provision should be made for increased participation by consumer representatives.⁸⁰ As presently drafted, the only direct participation of consumer groups would be in the Consultative Council.⁸¹ The bill also provides that the Board of Directors should, insofar as practicable, be representative of the consumer as well as industry and regional interests.⁸² However, no mention of consumer interests is made when the bill states that the government should seek the assistance of the "Academies-Research Council" and achieve the "greatest practicable participation" of industry in the creation of the Institute.⁸³ Nor are consumers included in the groups to be consulted by the "Academies-Research Council" when it proposes rules and procedures for the Institute.⁸⁴

A system providing for permanent involvement of consumers should be developed. If the Institute's standards are to be binding,

⁷⁷ The NIBS Bill does not specify the membership of the Board of Directors. Instead, it merely provides guidelines for the selection of Board members. *Id.* §1004(a).

⁷⁸ *Id.* §1002(a) (2).

⁷⁹ It would be necessary to provide the Institute with appeal procedures in order to avoid the present problems of product competition. Also, consumer groups should be given standing to appeal as a further check on undue local influence by a particular interest group.

⁸⁰ Even if the present NIBS Bill is not amended to include a national building code, additional consumer representation should be required at all levels of the Institute's work.

⁸¹ NIBS Bill, *supra* note 59, §1004(h).

⁸² *Id.* §1004(a).

⁸³ *Id.* §1002(c).

⁸⁴ *Id.* §1003(b) (3).

rule-making hearings in accordance with the Administrative Procedures Act⁸⁵ will have to be held. A permanent office should be created within the Institute whose function would be to represent consumer interests at these hearings. Legislation proposed by the National Commission on Product Safety⁸⁶ includes a provision for a "Consumer Safety Advocate" who would be authorized, *inter alia*, to bring safety hazards to the attention of the proposed Consumer Product Safety Commission, comment on proposed and existing safety standards and to appeal decisions of the Commission.⁸⁷

Further, as currently drafted, the NIBS Bill envisions that a substantial portion of the work in developing standards will be done through delegation of the Institute's duties to private organizations.⁸⁸ While this concept is sound, provision must be made for independent development of standards by the Institute when industry either fails to accept contracts or proposes unacceptable standards.⁸⁹

Finally, if it is to be an effective protective mechanism for the consumer, the NIBS Bill should provide a workable enforcement system and remedies for homeowners against builders who know-

⁸⁵ Administrative Procedure Act, 5 U.S.C. §1001 (1967).

⁸⁶ Consumer Product Safety Act of 1971 S.983, 92d Cong., 1st Sess. [hereinafter cited as the Product Safety Bill]. The National Commission on Product Safety proposed the Product Safety Bill to implement the findings of its extensive study of product safety. The stated purposes of the bill are to (1) protect the public from unreasonable product hazards to its health and safety; (2) assist consumers in evaluating the safety of consumer products; (3) to aid manufacturers of consumer products by encouraging industry to develop uniform safety standards . . . and (4) to promote research and investigation into the causes and prevention of product-related deaths and injuries. Product Safety Bill §2(b). This would be accomplished through the creation of a Presidentially-appointed "Consumer Product Safety Commission." *Id.* §3(a). [Hereinafter cited as the Commission]. The Commission would have authority to issue mandatory product safety standards. *Id.* §7; ban unreasonably hazardous products. *Id.* §14(a); require manufacturers to notify the Commission of defects in their products. *Id.* §16(a); require recall and repair of defective products. *Id.* §16 (h); require labeling of the product to indicate its compliance with product safety standards. *Id.* §7(b); hold hearings and issue subpoenas. *Id.* §19; and impose civil penalties for violations of standards. *Id.* §25. The Product Safety Bill also authorizes the imposition of criminal penalties. *Id.* §26; confers a private cause of action for treble damages on persons injured by reason of a "wilful or knowing violation of a consumer product safety standard or regulation. . . ." *Id.* §30; and preserves other common law remedies that might exist. *Id.* §29.

Whenever it is determined that a safety standard is necessary, the Commission would be required to publish a notice in the Federal Register with a request for offers to develop the standard. *Id.* §8(a),(b). The offers would be made by private organizations. *Id.* §8(c). Upon receipt of an offer, any action by the Commission would be suspended for 180 days. *Id.* If no offer is received the Commission itself would develop the standard. Product Safety Bill §8(e). Once developed, the standard would be published in the Federal Register and then promulgated by the Commission. *Id.*

⁸⁷ Product Safety Bill, *supra* note 86, §4.

⁸⁸ NIBS Bill, *supra* note 59, §1006(b).

⁸⁹ The Institute should also be authorized to require labeling and recall or on-site repairs of defective homes, home products, and construction work. This authorization would have to be applied only to large producers of mass housing, industrialized housing, and large developments. Absence of such authorization, however, would make the Institute obsolete as soon as industrialized housing becomes a reality.

ingly fail to comply with building code standards. Civil and criminal sanctions should be included in the bill and, when enacted, be vigorously enforced. Private suits for treble damages against those who knowingly violate national code standards should also be provided.⁹⁰

The need for a building code system that will protect the homeowner against unreasonable safety risks is clear. A national building code with mandatory standards and specifications would accomplish the goals of the present NIBS Bill and also be an effective mechanism for insuring home safety. Actual drafting of an expanded NIBS Bill will have to be a careful and meticulous process to allow for creativity and personal differences in taste. In addition, exceptions will have to be made to either the application of the standards or the enforcement penalties for the rare individual who still constructs his own home. Small contractors, however, should not be exempted. Coverage should extend to anyone who undertakes to provide a home for another. While this may tend to eliminate some of the smaller builders from the market, it will be a recognition that the building of a home for resale is an act with implications for the safety and emotional well-being of the consumer.

VI. CONCLUSIONS

It is clear that a real problem of home safety exists today. Yet, there is little or no recognition of the problem. This is largely the result of the concern for the lack of housing available to large segments of the population. Great efforts and large amounts of money have been devoted to increasing the supply of housing while little or no concern has been expressed over the *quality* of the housing being erected. Building codes have been viewed merely as impediments to technological innovation which must be overcome whenever possible by avoiding the necessity for compliance. With the arrival of industrialized housing on the horizon, the need for an adequate system of consumer protection in the area of home safety increases. The NIBS Bill, as it is now written, is simply another step towards more housing at any cost.

The problem of the lack of sufficient housing is a real one and the above discussion is not intended to belittle efforts aimed at increasing the stock of available housing. On the other hand, to continue de-emphasizing home safety for the sake of developing a greater national supply ignores a legitimate and pressing societal

⁹⁰ The Product Safety Bill has similar provisions. See note 86, *supra*.

interest in home safety. The purchaser of a home is entitled to expect that the product he purchases is of safe and sound construction and design. Solving the housing crisis should not be at the expense of the consumer's safety.

The HUD Study and the Report of the National Commission on Product Safety demonstrated not only that serious safety hazards exist, but that they are easily correctable. It is also clear that industry has taken no meaningful steps to eliminate these safety hazards. It is time that the well-publicized fact that "most accidents occur in the home" is taken seriously and that real action in the form of a national building code be taken.

COMMENT

HUMPTY DUMPTY IN THE SUPERMARKET:

A Report on How All the King's Men Might Repair Those Fractured Pounds and Pints with Unit Pricing

Where consumers were once able to compare the prices of commodities sold by the pound or pint from the crate or barrel in neighborhood grocery stores, the contemporary practice of packaging goods in uneven weights and measures has made it impossible, as a practical matter, for shoppers to do so today. A handful of jurisdictions have enacted unit pricing laws requiring supermarkets to price each commodity per pound or other unit of measurement and to state this price on a label affixed to the commodity or shelf from which the product is offered for sale. This article explores the feasibility of the unit pricing requirement and considers problems inherent in legislation thus far enacted or proposed on the subject.

Today's homemaker would agree that there is something more than a merely casual similarity between Humpty Dumpty's dilemma and the fractured pounds, pints, quarts and ounces which flourish on supermarket shelves. Everyone who patronizes a supermarket has seen them — the box containing one pound *four ounces* of laundry soap, the package holding $7\frac{1}{4}$ ounces of cookies, and so forth. The similarity between the fractured measures and the plight of that droll little nursery rhyme character is made all the more striking when it is discovered that not even all the king's men (the members of the United States Congress) have succeeded in making the pounds and the pints whole again — after twelve years¹ of trying!

Is it so critical that packaged commodities be sold in even measures (pounds, ounces, pints or quarts)? How else can a shopper determine that one product is *really* cheaper than another? Quite obviously, one box of soap selling at 58 cents per pound is a better bargain than another offered for 62 cents; especially when it is the same brand sold in a different size. But if the first box

¹ Congress first began to wrestle with the problem in 1960, after Sen. Philip M. Hart introduced legislation which was popularly identified later as the "Truth-in-Packaging" bill. The bill, as amended, was enacted in 1966 as the Fair Packaging and Labeling Act. 16 U.S.C. §§ 1451-61 (1970).

is offered at 75 cents for one pound four ounces, and the purchase price of the second is \$1.30 for two pounds two ounces, who would know that the better bargain is still the first? To appreciate the utter futility of attempting value comparisons of commodities sold in uneven weights or volumes under actual market conditions, the reader is challenged to determine which was the best bargain among the following products offered for sale by Alpha Beta's East Whittier (California) market on February 27, 1972.²

Brand	Designated Size	Weight ³	Price
1. Alpha Beta	Jumbo	9-13	\$1.41
2. White King D	Giant	3-1	.57
3. Tide	Family	10-11	2.81
4. Bold	Giant	3-1	.87
5. White King	Giant	2-8	.52
6. Miracle White	Giant	3-1	.87
7. Citrus	Giant	3-0	.51
8. Ivory Snow	Giant	2-0	.87
9. Dreft	Giant	2-12	.87
10. Alpha Beta	Home	20-0	2.51
11. Imperial	Giant	3-1	.29
12. Imperial	Home	20-0	2.15
13. White King	King	4-10	.87
14. Drive	Family	10-11	2.81
15. Tide	Regular	1-4	.37
16. Purex	Jumbo	9-13	2.35
17. Ivory Flakes	Giant	2-0	.87
18. Rinso	Giant	3-1	.68
19. All	Jumbo	9-13	2.35
20. Salvo	Giant	2-14	.79
21. Dash	Giant	3-1	.82
22. Imperial	Family	10-0	1.09
23. Alpha Beta	Giant	3-1	.55
24. Drive	King	5-4	1.09
25. Alpha Beta	Giant	3-1	.50
26. All	Home	20-0	4.65
27. Dash	Jumbo	9-13	2.35
28. Un-Polluter	Giant	3-1	.87
29. Punch	King	5-4	1.11
30. All	Giant	3-1	.74
31. Drive	Giant	3-1	.72
32. Tide	King	5-4	1.41
33. Punch	Giant	3-1	.65
34. Cheer	Giant	3-1	.87
35. Cold Power	Giant	3-1	.73
36. Tide	Giant	3-1	.87
37. Ajax	King	5-4	1.33
38. Gain	Giant	3-1	.87
39. Ajax	Giant	3-1	.87
40. Fab	Giant	3-1	.73
41. Cold Power	Giant	3-1	.73

² In order of ascending cost, the five lowest priced commodities listed are: 11-Imperial, 9.6¢ per pound; 12-Imperial, 10.8¢ per pound; 22-Imperial, 10.9¢ per pound; 10-Alpha Beta (private label), 12.6¢ per pound; and 1-Alpha Beta, 14.4¢ per pound.

³ Weight is given in pounds and then ounces.

Of course, one asks if the loss of a few pennies here and there on unwise selections really makes much difference. In 1971, Americans spent an estimated \$80 billion at their grocery stores.⁴ From an experiment conducted by the New York City Commissioner of Consumer Affairs,⁵ and on the basis of observations of at least two leading food retailers,⁶ it is not unreasonable to estimate that from \$8 to 12 billion might have been slashed from the nation's grocery bill last year if shoppers had had the means of distinguishing the relative per pound, per gallon or other unit cost of commodities (and utilized this information to guide their purchases).

To appreciate the present Humpty Dumpty state of affairs on America's grocery shelves, and to gain some understanding of why our national legislators are finding it so difficult to patch the pint and the pound, one only has to search back into the recent history of the grocery industry's growth and development.

GROCERY MERCHANDISING: A TWENTIETH CENTURY REVOLUTION

Sixty years ago, American homemakers were required to do their shopping at a minimum of three outlets. Meat, produce and grocery items were usually sold at different stores.⁷ Thus accustomed to shopping so many places, consumers were probably encouraged to compare the prices of goods sold at neighborhood stores — and to shop elsewhere for better bargains. Price comparison was made easier by the fact that most staples were sold in bulk from the barrel or box.⁸ The shopper could easily discern the fact that the grocer selling brand X soap chips for 7 cents per pound was

⁴ Schwartz, *U. S. Backs U-Price, Sees Brands Still Tops*, Supermarket News, Aug. 30, 1971, at 1. The figure given was a Commerce Department projection.

⁵ Furness, *The Cost of Living — Unit Pricing*, McCALLS, March, 1970, at 151. Two groups of shoppers were sent into supermarkets with instructions to purchase the lowest priced commodities from a list of items normally consumed in the household. As a consequence of being unable to distinguish the relative prices per pound and other standard units of measure, the shoppers spent an average of 10 percent more than was necessary to purchase the articles assigned.

⁶ Charles Fitzmorris, President of Benner Tea Company, estimates that consumers should be able to save 10 percent of their outlay for groceries. *Unit Prices Move Onto the Shelf*, BUS. WEEK, June 6, 1970, at 23. U. S. Mart Stores, a chain of 21 supermarkets operating in Kansas and Missouri, claims that shoppers would be able to reduce their grocery bills by as much as 15 percent if this information were available and utilized. *U. S. Mart Goes U-Price*, Supermarket News, Feb. 22, 1971, at 31.

⁷ R. MARKIN, *THE SUPERMARKET* 7 (1963); J. HANDLER, *YOU AND FOOD MARKETING*, 29 (1968).

⁸ See P. SAYRES, *FOOD MARKETING* 13-14 (1950); J. HANDLER, *supra* note 7, at 28; W. MUELLER & L. GARDIAN, *CHANGES IN THE MARKET STRUCTURE OF GROCERY RETAILING* 11 (1961); M. ZIMMERMAN, *THE SUPER MARKET* 24 (1955).

offering no bargain when his competitor across the street was selling the same goods for 6½ cents. Granted, the product might be tainted and scales tipped in the grocer's favor, but if the manufacturer were careful and the retailer honest, the shopper could depart the marketplace with her purse lightened only to the extent necessary to clean and feed her family.

Beginning in that era, three successive revolutionary developments in grocery merchandising compromised, then finally dispatched, the integrity of the pound and other standard units of measure as aids to comparison shopping. In 1912, an Alpha Beta store introduced "self-service" shopping in Southern California. For the first time, shoppers were free to roam through the store and examine at close range the products available for sale.⁹ Freed from the necessity of asking at the counter for specific goods, shoppers were encouraged — and later, motivated — to vary their purchases, that is, to buy something they might not otherwise have thought of buying.

Less than two decades later, that marketing innovation culminated in the appearance of the supermarket.¹⁰ Self-service stores and supermarkets each represented merchandising developments which resulted in reductions in the prices of food and other commodities.¹¹ Since stores could employ fewer persons to handle goods, labor costs declined. Increased consumer demand for a greater variety of goods, and expansion of shelves to accommodate this demand,¹² resulted in increased opportunities for manufacturers of new products or different brands to display their wares. These events encouraged competition. To illustrate how self-service supermarkets influenced grocery merchandising, King Kullen, the New Jersey outlet generally credited as being this nation's first supermarket, could undersell conventional competitors by as much as fifty percent on many items. A leading brand of soup selling for 7 cents elsewhere could be offered from King Kullen's shelves at 4 cents.¹³

Self-service stores and supermarkets were themselves made possible by a revolution in the production and packing methods of manufacturers. About the time Alpha Beta introduced self-service, certain technological advances in the manufacture of cardboard

9 R. MARKIN, *supra* note 7, at 9; M. ZIMMERMAN, *supra* note 8, at 25.

10 M. ZIMMERMAN, *supra* note 8, at 24, 30-31.

11 R. MARKIN, *supra* note 7, at 10-11; *See* P. SAYRES, *supra* note 8, at 21-22.

12 R. MARKIN, *supra* note 7, at 10.

13 J. HANDLER, *supra* note 7, at 30; R. MARKIN, *supra* note 7, at 11.

packages made it possible to include containerization as the final step in the on-line food production process.¹⁴ And since shoppers were now able to wander freely about their grocery stores, processors soon recognized that the package could itself be used to promote its contents.¹⁵ To the credit of the industry, packaging to individual consumer units advanced the elimination of spoilage and filth, the inevitable by-products of the bulk packing and barrel retailing methods of the 19th century.¹⁶ Unfortunately, if packaging promoted sanitation, and if supermarketing represented efficiency and economies in the movement of goods from the processor to the consumer table, these developments hastened the demise of the pound, pint, ounce and quart as means by which consumers could make value comparisons of the rapidly proliferating lines of goods making their appearance on grocery shelves. The story of the Ritz Cracker is a typical one and will illustrate the truth of the preceding observation.

National Biscuit Company introduced the Ritz cracker in 1935. Then, as now, the Ritz cracker was packaged and sold in half-pound quantities. If the consumer had to choose 37 years ago between a packaged half-pound box of Ritz selling at X cents and a half-pound of crackers selling from the barrel at Y cents per pound, it was not too difficult for her to calculate 2 times X cents in order to compare the prices of the two products. But the barrels of cookies and crackers have disappeared from the market, and in the years intervening between 1935 and the United States Senate hearings in 1965 on the Fair Packaging and Labeling Act, National Biscuit added 15 other cookies and crackers to its product line — all using the Ritz box under their own labels. Only one other cookie weighed eight ounces when packed in this container.¹⁷ Even disregarding the difficulty involved in figuring the cost per pound when fractions of ounces are involved, as was the case with some National Biscuit products, how many supermarket patrons are likely to pause and calculate that a 7-ounce box of crackers costs 14.29 percent more than an 8-ounce box selling at the same price per package? How many are even likely to read the label and discover there is a difference in the weights?

The Ritz experience was hardly unique. Procter and Gamble

¹⁴ A. DAVIS, *PACKAGE AND PRINT* 32 (1967).

¹⁵ *Id.* at 34.

¹⁶ See J. HANDLER, *supra* note 7, at 27-28; L. GUSS, *PACKAGING IS MARKETING* 25-31 (1967).

¹⁷ *Hearing on S. 985 Before the Senate Comm. on Commerce*, 89th Cong., 1st Sess., ser. 89-28, at 293 (1965).

ultimately found itself using the same box for eight different brands of laundry cleansing compounds — all of different weights owing to the varying density of each product.¹⁸ Kellogg's standard box held dry cereals weighing as little as 6½ ounces — and as much as 14 ounces!¹⁹

If the practice of packaging generically related products of different weights in the same size package was deceptive, the deception was, at the outset, unintentional. Just as Humpty Dumpty's tumble from the wall was as inevitable as the law of gravity, the problem of the fractured pounds and pints was dictated by the law of the marketplace. As consumer demand increased (or was stimulated by advertising) for a greater variety of goods,²⁰ manufacturers discovered they could hold or expand their share of the market by adding products to their existing lines. As companies added new products, they found it was cheaper to utilize existing packages rather than tool-up the equipment necessary to produce containers which would have made it possible to offer the new products in the standard pound and half-pound weights. Avoiding this cost permitted the manufacturer to introduce a new product at the lowest price possible, to minimize his risk and, in some cases, to introduce items with limited consumer appeal (salt-free crackers, as one example). Furthermore, using one standard container for several products allowed the manufacturer to forego the added cost and inconvenience of storing and transporting odd-sized packages.

Even if it is assumed that the savings were passed on to the consumer, those savings have been greatly offset in recent years because of the inordinate increase in the number of package sizes which are used. As a consequence of that increase, shoppers have been foreclosed from comparing the relative values of the 5,000 to 15,000 items²¹ which today line a typical supermarket's shelves. Moreover, the increased number of package sizes available has tended in recent years to reduce rather than heighten competition. The incentive to price competitively is diminished by the realiza-

¹⁸ *Id.* at 244.

¹⁹ *Id.* at 335.

²⁰ See P. SAYRES, *supra* note 8, at 26-27; R. MARKIN, *supra* note 7, at 50-51, 62.

²¹ The average supermarket carries 8,000 commodities. Sanford, *Know What You're Buying — New Proposals by Ben Rosenthal*, THE NEW REPUBLIC, Jan. 24, 1970, at 12. In 1961, the average supermarket stocked over 6,300 items, an increase of 3,300 items over the corresponding figure for 1946. R. MARKIN, *supra* note 7, at 60. Executives of five Southern California market chains were interviewed for this report. The smallest inventory per chain store among this group was 6,000 items, with averages more usually ranging from 8,500 to 15,300. *Infra* note 47, p. 106.

tion that there is no practical way for shoppers to compare the price of one size of package with the price of another. The meaninglessness of price per package is made dramatically clear when one studies the practice of "packaging to price." The manufacturer packages to price when he reduces the contents of his package while retaining the same price. Illustratively, the so-called nickel Hershey bar was reduced in weight three times during the 1960's before it was discontinued altogether.²²

UNIFORM PACKAGING

By the 1950's, it had become apparent to some members of Congress that the only shopper who could fare effectively in the marketplace was one possessing a lightning-fast arithmetical mind, a vise-like memory and an absolute indifference to the shape, size or boldface promises appearing on the thousands of containers lining the grocers' shelves. In 1960, Senator Philip M. Hart (D-Mich.) proposed legislation²³ which would have required, among other things, standardization of weights or liquid volumes of packaged commodities found in grocery stores. Supporters of the bill reasoned that even if the standard measures ultimately adopted were in arbitrary quantities, no housewife would be unable to compare the prices of uniformly packaged goods. This hope proved futile, however, when Congress enacted the Fair Packaging and Labeling Act²⁴ in 1966 without the mandatory provisions of the original Hart bill. Instead, uniform packaging was left to be implemented by industry on a voluntary basis.²⁵

Despite the disappointment of those advocating uniform packaging, Congress' rejection of that feature of the Hart proposal did no disservice to consumers. This is true for at least three reasons. First, the usefulness of uniform packaging as an aid to comparison shopping is open to question so long as the standards selected are not even pounds, pints and quarts (or divisibles or multiples thereof).²⁶ To illustrate, suppose that a shopper loyal to Tide laun-

²² Mowbray, *Truth in Packaging: How Much a Pound?*, 208 *NATION* 730 (1969); Sanford, *supra* note 20.

²³ 117 *CONG. REC. S. JOUR* 1516 (daily ed. Feb. 18, 1971) (remarks of Senator Nelson).

²⁴ 15 U. S. C. §§ 1451-61 (1970).

²⁵ Shortly after the Fair Packaging and Labeling Act was enacted, Senator Hart expressed his opinion that uniform packaging was more likely to succeed if voluntarily implemented than if mandated. Sanford, *supra* note 21.

²⁶ Sanford, *supra* note 21; Friedman, *Dual Price Labels: Usage Patterns and Potential Benefits for Shoppers in Inner-City and Suburban Supermarkets*, October, 1970 (unpublished report to Safeway Stores, Inc., and the National Association of Food Chains). See Mowbray, *supra* note 22.

dry detergent was attempting to decide which size package yielded the best value. In choosing between the "Giant," "King" and "Family" sizes, it would be necessary for her to calculate the price per pound to ascertain which was the best bargain. The weights of these three sizes are, respectively, 3 pounds 1 ounce, 5 pounds 4 ounces, and 10 pounds 11 ounces.²⁷ Clearly, the calculation is not a simple one.²⁸

The second reason why uniform packaging might prove undesirable requires a consideration of the relationship between containers currently utilized and the products they contain. Packaging probably played a secondary role in the development of most products now sold in food markets. In formulating a new product, the manufacturer was least likely to be concerned by the fact that the article would not weigh the same as previously developed goods packaged in the processor's standard container. To conform many, if not most, popular products to a standard weight so that they could be contained in existing packages would either be impossible, or it would require reformulating those products in such a manner that they could comply. If reformulated, the products would cease to be available in the form or quality popular with consumers.²⁹ If merely repackaged in a container of different overall dimensions, a new kind of packaging deception would appear on grocery shelves. To illustrate, let us suppose that breakfast cereals were required to be containerized in half-pound and one-pound quantities. Many "puffed" cereals are sold in markets and appear to be popular with consumers, if long continued availability on grocery shelves is any indication. Other shoppers seem to prefer the dense, granular variety of breakfast food. One can imagine the temptation of shoppers to select the puffed cereal over the granular type if overall package dimensions were altered so that the former cereal were to appear in a larger package and the dense variety in an even smaller container than as at present. Recalling the fact that Kellogg's standard box contains breakfast food ranging in weight from 6½ to 14 ounces, one can appreciate the deception which

²⁷ The weights of the package sizes designated are among six weights supposedly standardized voluntarily by manufacturers as of December, 1969. *Hearings on Review of the Fair Packaging and Labeling Act Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 91st Cong., 2d Sess., ser. 91-30, at 86 (1970).

²⁸ Solving for X where X equals the price per pound and a commodity weighing 5 pounds 4 ounces is priced at \$1.41 per package:

$$(1) \frac{84 \text{ oz.}}{\$1.41} : \frac{16 \text{ oz.}}{X}, (2) 84X = \$1.41 \times 16, (3) X = \frac{\$22.56}{84}, (4) X = 26.9¢$$

²⁹ See 1965 Hearing, *supra* note 17, at 98.

would result if these cereals were containerized in half-pound quantities.

The final consideration affecting the desirability of uniform packaging is the cost of such a practice. Although there are no satisfactory figures available to pinpoint this cost, some examples cited by manufacturers at the 1965 Senate hearing demonstrate that Congress was justified in hesitating to mandate uniform packaging. National Biscuit told the Senators that it would cost the company \$5,000,000 to tool-up the necessary equipment which would enable the company to package its 14 nonconforming cookies in half-pound weights.³⁰ This figure did not include the additional expense involved in storing, crating and transporting the odd-sized packages. Kellogg estimated this latter cost would amount to \$2,050,000 per year (in addition to an initial conversion cost of \$4,060,000).³¹ Armstrong Cork Company, manufacturer of the bottles for most baby foods produced in America, estimated that retail prices of these commodities would rise up to 30 percent as a result of increased processing and handling costs.³² Even were we to discount the reliability of these figures because of their sources, nevertheless, the author of this article (and presumably Congress) was unable to discover any different figures which would support the feasibility of uniform packaging when the practice is subjected to cost-benefit analysis. And it must be kept in mind that National Biscuit, Kellogg and Armstrong are only three of the thousands of manufacturers whose products are sold in grocery stores.

UNIT PRICING LAWS

Accepting the futility of promoting uniform packaging because of its apparent unacceptability and doubtful utility as a solution to the problem of the uneven pounds and pints which rule grocery manufacturing and merchandising, a handful of congressmen shifted their support to an alternative solution — one which would require retail sellers to *unit price* commodities. Two years have passed since bills³³ were first introduced to amend the Fair Pack-

³⁰ *Id.* at 293.

³¹ *Id.* at 335.

³² *Id.* at 104.

³³ Congressman Rodino proposed the first unit pricing law January 26, 1970. H. R. 15531, 91st Cong., 2d Sess. (1970). A companion bill was introduced three months later by Senator Pearson. S. 3752, 91st Cong., 2d Sess. (1970). The bills expired when they were not reported out of committee by the end of the 91st Congress. Seven bills have been introduced in the 92nd Congress. S. 868, 928 and H. R. 990, 1572, 4425, 5939, 6776, 92d. Cong., 1st Sess. (1971).

aging and Labeling Act to add the unit pricing requirement without and visible progress towards attainment of this goal. Where the congressmen have failed, however, legislators of Massachusetts, Connecticut, Maryland and the City of New York have succeeded in obtaining passage of unit pricing laws.³⁴

Unit pricing — or more accurately, *dual* pricing — requires the grocer to inform his patrons how much each commodity costs per pound, quart, 100-count, 100-square-feet, or other standard unit of measurement. The retailer is required to do no more than what his predecessor did sixty years ago when goods were sold from bulk containers. He is also permitted to retain the price per package. While the usual unit pricing requirement involves affixing a label containing the price per measure to the shelf at point of sale,³⁵ the retailer may also include the price per package on this label, or continue to stamp this information on the package itself. Thus, by merely glancing at the labels along the shelves, shoppers are able to determine which product in each commodity grouping is priced lowest per unit of measure. From this information, bargain shoppers are afforded an opportunity to reduce their weekly grocery bill by as much as 10 to 15 percent!³⁶

As is to be expected, unit pricing has drawn both criticism and support. Detractors argue that the practice of dual pricing is too expensive; that it will add from one percent to one-and-a-half percent³⁷ to the cost of doing business and that this cost must be passed on to consumers. They claim that the practice has been met with

³⁴ MASS. GEN. LAWS ch. 885, § 115A (1970); Unit Pricing Regulation, Mass. Consumers' Council Bulletin, No. UP-1-1971 (Mar. 9, 1971); Unit Pricing Regulations, Mass. Consumers' Council Bulletin, No. UP-2-1971 (Jan. 6, 1972); Mass. Consumers' Council, Unit Pricing Interpretative Bulletin, No. 1 (May 14, 1971). Conn. Pub. Act 856 (July 15, 1971); Unit Pricing Regulations, Conn. Dept. of Consumer Protection Bulletin. MD. ANN. CODE art. 83 § 21E (Supp. 1972). NEW YORK, N. Y., ADM. CODE ch. 64, art. 1, §§ B64-1.0-5.0 (1971); N. Y. Dept. of Consumer Affairs Regs. §§ 1-4 (June 1, 1971), *as amended* (July 1, 1971). For the provisions of the Massachusetts', Connecticut and New York City Regulations see Appendices B, C and D, *infra*, page MM.

³⁵ The label may be attached to the item or the shelf over or under the item. Unit Pricing Reg. § 3(a), Mass. Consumers' Council Bulletin, No. UP-2-1971 (Jan. 6, 1972). The label may be attached to the item, or "directly adjacent to the item, or on the shelf on which the item is displayed." MD. ANN. CODE art. 83, § 21E(d)(1) (Supp. 1972). The commodity shall be signified or labeled at "the point of display." NEW YORK, N. Y., ADM. CODE ch. 64, art. 1, § B64-3.0 (1971).

³⁶ See discussion notes 5 and 6 *supra*.

³⁷ Interviews with Roy Bryant, Vice President, Sales and Merchandising, Shopping Bag Food Stores, Inc., in El Monte, Calif., Dec. 3, 1970; Sam Novicoff, Grocery Merchandiser and Buyer, Food Fair Stores, Inc., Pacific Division, in Los Angeles, Dec. 10, 1970; Perry Burnside, President, Buy-Fair Markets, Inc., in Covina, Calif., Dec. 17, 1970. These retailers projected the increase indicated, although all admitted to having performed no studies on the subject. They stated that this expected increase was the principal concern regarding unit pricing, should it be required by law.

consumer indifference where implemented.³⁸ They suggest it would cause undue hardship and possibly force some operators out of business (especially the so-called "mom and pop" stores).³⁹ And finally, they conclude that the practice is fraught with its own inherent deceptions, which mislead shoppers into purchasing cheaper products, thus defeating its purpose of providing a way for consumers to make value comparisons and obtain the most from their household financial resources.⁴⁰

Careful examination of the facts advanced in support of the preceding arguments will reveal that they contain misleading seeds of truth. However, the experiences of retailers who have adopted unit pricing, plus studies conducted on the subject, prove conclusively that the practice can achieve its objectives if intelligently and selectively applied.

COST OF UNIT PRICING

Studies commissioned by industry itself,⁴¹ plus the experiences reported by chains which have tested unit pricing,⁴² demonstrate that the cost of unit pricing is negligible if the practice is limited to pricing at the shelf level (by way of attaching a shelf tag at point of sale) and does not require stamping each product with the unit price.⁴³ Additional savings to retailers may be obtained if the prac-

³⁸ Fisher, *Few Shoppers Understand U-Pricing*, Supermarket News, May 17, 1971, at 2. Ms. Martha Randall, Director of Home Economics, Ralphs Grocery Company, Los Angeles, reported that a survey of shoppers disclosed that only 20% understood unit pricing. *But see* text p. mm, *infra*.

³⁹ Interview with Bryant, *supra* note 37.

⁴⁰ Interview with Robert Laverty, President, Thriftmart, Inc., in Los Angeles, Dec. 4, 1970. Padberg & McCullough, *A Test of Unit Price Marking of Packaged Grocery Products 14-15*, November, 1970 (unpublished report by Consumer Research Institute, Inc., 1425 K Street, N.W., Washington, D.C. 20005 [hereinafter cited as Padberg]).

⁴¹ Padberg, *supra* note 40; see Statement of Congressman Benjamin S. Rosenthal (D-L, NY) at Press Conference on Unit Pricing 2, Oct. 30, 1970 (unpublished matter furnished by Safeway Stores, Inc.).

⁴² Statement of Congressman Benjamin S. Rosenthal, *supra* note 41; interview with Byron Allumbaugh, Executive Vice President, Ralphs Grocery Company, in Los Angeles, Dec. 2, 1970; *Bay Staters Wrangling Over Measures; Arizona Chain Decides to Go Maverick*, Supermarket News, Mar. 1, 1971, at 12; *Unit Pricing Costs Chain \$3 Weekly for Each Store*, Supermarket News, June 28, 1971, at 6; *Two Bay State Chains Seek Nationwide U-Price Laws*, Supermarket News, Dec. 20, 1971, at 8; *Wholesaler in Low-Cost Unit Pricing*, Supermarket News, Dec. 13, 1971, at 8; *Marketing — Unit Pricing Chalks Up Some Surprises*, BUS. WEEK, Oct. 31, 1970 at 80; see *\$1.20 Divided by Fourteen Ounces Is What?*, FORBES, Apr. 1, 1970, at 55; McCullough, *Oshawa Extends U-Pricing to 138 Ontario IGA Units*, Supermarket News, May 17, 1971, at 14; Kilich, *Albertson's N. Calif. Unit-Pricing Brings More Sales of Large Items, Private Label*, Supermarket News, Aug. 9, 1971, at 8.

⁴³ Clarence Adams, President of the National Association of Food Chains, estimates that to stamp each individual item with the unit price would increase the nation's grocery bill by as much as \$300 million yearly. *Yes, But How Much Is It Per Pound?*,

tice is further limited to dual pricing only those commodities for which the price per unit is helpful to consumers.⁴⁴ Both these tests are satisfied by a Model Unit Pricing Act⁴⁵ included in the Appendix to this report. (The Model Act was drafted by the author of this article for the purpose of comparing provisions of various legislative enactments and proposals on the subject of unit pricing.)

Since consumers shopping for bargains compare the price tags placed by grocers along the shelf molding at point of sale, it would be unproductive of any real benefit to require stamping each grocery item with the unit price. Furthermore, since virtually all supermarkets have been equipped with shelves whose edges are slotted or otherwise designed to receive tags, and since shelf tags are capable of being printed by electronic data processing equipment (a resource directly or indirectly available to nearly all grocers affected by existing and proposed unit pricing legislation⁴⁶), limiting the practice to shelf marking would reduce the cost of dual pricing to retailers, and ultimately to the public. Finally, the average supermarket expends from two to three hours weekly changing shelf tags to accommodate price changes, whereas its personnel require from nine to twelve hours to stamp (or re-stamp) commodities with their price per package.⁴⁷ Since shelf labels are capable of carrying both the unit price and price per package, no increase in labor costs is necessitated at the store level to maintain this phase of its pricing operation.⁴⁸ To require stamping each commodity with its unit price would mean that the market operator must either abandon pricing per package or double the man-hours expended

BUS. WEEK, Jan. 31, 1970, at 51. Adamy is then quoted as stating, "Unit pricing changes from something very expensive to something quite nominal if only the shelving below the individual items has to be marked." *\$1.20 Divided by Fourteen Ounces Is What?*, *supra* note 42.

⁴⁴ Interview with Allumbaugh, *supra* note 42.

⁴⁵ For the provisions of the MODEL UNIT PRICING ACT see Appendix A, *infra* p.MM.

⁴⁶ As of 1964, fully 85 percent of all independent supermarkets were affiliated with independent or cooperative wholesalers and this percentage was increasing. J. HANDLER, *HOW TO SELL THE SUPERMARKETS* 19 (1966). The affiliated and chain operators accounted for 91 percent of total grocery sales. *Id.* at 21. "Through their membership in [voluntary wholesale affiliates or retailer-owned cooperatives], independent supermarkets obtain services similar to those provided to the chain supermarket by its company headquarters." *Id.* at 19. See MUELLER & GARDIAN, *supra* note 8, at 17, 117, 120-121, 168; R. MARKIN, *supra* note 7, at 34-35. It is believed, for example, that all independent California supermarket operators are affiliated with Certified Grocers of California, Ltd., United Grocers, Ltd., or Orange Empire Stores, wholesalers providing extensive data processing services to their affiliates. Interviews with Allumbaugh, *supra* note 42; Burnside, *supra* note 37.

⁴⁷ Interviews with Bryant, Novicoff and Burnside, *supra* note 37; Laverty, *supra* note 40; Allumbaugh, *supra* note 42.

⁴⁸ Interview with Allumbaugh, *supra* note 42.

for commodity pricing.⁴⁹ If he abandons pricing per package, this would result in inconveniences and delays at the checkout stand, since no clerk could be expected to remember the prices of all 5,000 to 15,000 grocery items sold by the average supermarket.⁵⁰

Reference was also made earlier to limiting dual pricing to items for which such information is helpful to consumers. A great many items sold by markets are already packaged in even units of measure (or divisible or multiples of those units). For example, an 8-ounce package of cookies requires no unit price label to inform the shopper of its cost per pound. A half-gallon bottle of ordinary household bleach similarly requires no explanation of its price per quart or gallon. And since uniform packaging in even units of measure remains a desirable goal, elimination of goods thus packaged from the unit pricing requirement would tend to recruit retailers into the struggle to compel manufacturers to implement this practice where feasible.⁵¹

Regarding the studies and experiences of retailers on the subject of unit pricing, in no reported instance has the practice added anything near the 1 to 1½ percent increase predicted by some operators in their food prices. Consumer Research Institute, Inc., an industry-sponsored research group, was commissioned in 1970 to survey Kroger Company's experience with unit pricing in its Toledo, Ohio, division. The study⁵² was conducted to gather data concerning the cost of installing and maintaining the particular unit pricing systems utilized by Kroger, to study the movement of goods among the 5,000 items unit priced in each store, and to measure the awareness and attitudes of consumers regarding the practice.⁵³ The Institute's report of the results of this study was published in November, 1970. Including amortization of set-up costs over two years, it was figured that unit pricing entailed an annual expense per store ranging from \$3,113.62 downward to \$2,479.11.⁵⁴ Translating these figures into costs in terms of per-

⁴⁹ Interviews with Bryant, *supra* note 37; Allumbaugh, *supra* note 42.

⁵⁰ Interview with Bryant, *supra* note 37.

⁵¹ *Id.* When asked if unit pricing laws were to favor uniform packages if this would cause retail grocers to exert pressure on manufacturers to standardize packages in even units of measurement, Mr. Bryant volunteered the observation that they would be compelled to do so. The provisions of the following should be compared: MASS. GEN. LAWS ch. 885 §115A (1970); N. Y. City Dept. of Consumer Affairs, Truth-in-Pricing Reg. § 2(c) (June 1, 1971) (set forth in Appendix B, *infra* p. MM); Conn. Dept. of Consumer Protection, Prop. Unit Pricing Reg. § 3(d) (1972) (set forth in Appendix C, *infra* p. MM); MODEL UNIT PRICING ACT § 1(e) (set forth in Appendix A, *infra* p. MM).

⁵² Padberg, *supra* note 40.

⁵³ *Id.* at 3.

⁵⁴ *Id.* at 8.

centage of sales, since the typical gross sales of all but a few supermarkets is between \$1 and \$4 million annually,⁵⁵ at the lowest end of this range, unit pricing would represent a maximum expense of one-fifth of one percent of sales. To stores at the highest range of sales (\$4 million annually), unit pricing would represent an operating expense of no more than .075 percent of sales.

Significantly, the Kroger Company's cost of unit pricing is the highest reported in the industry. Other operators have been able to accomplish dual pricing at a fraction of the above costs. For example, Ralphs Grocery Company of Los Angeles, which had gross sales from 63 stores of \$260 million in 1970, ascertained that unit pricing entailed a weekly expense of \$35 per store while indicating that the expense of programming and maintaining its unit pricing system at the company's data center was so negligible that it could not be estimated.⁵⁶ The \$35 weekly cost to Ralphs represents an operating expense of only .044 percent of sales — not the 1 to 1½ percent projected by other operators, but less than one-half of one-tenth of one percent!

Other companies have been able to do even better than Ralphs. Chicago-based Jewel Food Stores estimate their cost to be under \$20 per store per week.⁵⁷ Benner Tea Company's 23 Illinois, Iowa and Missouri stores project an additional expense of only \$4 per store per week.⁵⁸ Twelve stores in Oklahoma's Independent Grocers Alliance report a weekly cost of \$8.57 (plus an additional set-up expenditure of \$80.40 per store.)⁵⁹ Fox Grocery Company's 85 Pennsylvania stores each expend \$3 per week (after investing \$100 to convert to unit pricing).

The most impressive achievement reported this far was scored by New York's S. M. Flickinger Company, a wholesaler serving Buffalo retailers. Flickinger charges its customers \$20 to supply them with initial shelf labels, plus \$1 per week for tags needed to accommodate price changes.⁶⁰ Since Flickinger's business consists of selling goods and services to supermarket operators, the company's achievement is perhaps the most reliable gauge of the ability of the industry to perform dual pricing at a low cost.

⁵⁵ *Id.* at 10; HOW TO SELL THE SUPERMARKETS, *supra* note 46, at 14.

⁵⁶ Interview with Allumbaugh, *supra* note 42.

⁵⁷ *Marketing — Unit Pricing Chalks Up Some Surprises*, *supra* note 42.

⁵⁸ *Price of Everything*, (NEWSWEEK) June 15, 1970, at 76.

⁵⁹ *Dual Pricing to Twelve Oklahoma City IGA's*, *Supermarket News*, Feb. 1, 1971, at 8.

⁶⁰ *Unit Pricing Costs Chain \$3 Weekly for Each Store*, *supra* note 42.

Finally, more recent reports suggest that unit pricing may not be costing retailers anything, on account of unanticipated savings accruing from the practice. A & P and Star Market Company, both switching over to unit pricing under compulsion of Massachusetts law, have been reported as observing that the practice has resulted in "spinoff benefits" in the form of better inventory control, which in some instances has "more than justified the cost of unit pricing."⁶¹ Albertson's, Inc., which has adopted unit pricing in its Northern California, Los Angeles, Denver, Salt Lake City and Idaho⁶² Divisions, has also indicated that its cost of unit pricing has been offset by unexpected benefits. As a direct consequence of unit pricing, Albertson's Northern California Division reports it has been able to improve allocation of shelf space and eliminate costly duplication of shelf tags by consolidating information previously posted on one or more tickets into one tag printed out by computer.⁶³ Alpha Beta, which shifted over to unit pricing last September, also expects to reduce operating costs by eliminating duplicative price tags.⁶⁴

CONSUMER INDIFFERENCE

Having seen that unit pricing is not costly, we turn now to the objection that the practice is not justified because too few shoppers pay attention to the labels in stores where they are posted.

It is true that patrons of *some* markets do pay little attention to the tags.⁶⁵ On the other hand, several surveys have demonstrated that *other* markets' customers do heed the tickets and use them in selecting their purchases.⁶⁶ One suspects that the relatively low impact dual pricing has made in some outlets is not a fault of the practice but an indication that the operators of those stores have failed to promote and educate the public regarding the use of labels. One suspects, further, that non-promotion is rooted in the hope that, through benign neglect, the dual price labels may eventually be phased out of operation, and that public censure or criticism for eliminating the practice will be avoided with the observation, "We tried it and it didn't work."⁶⁷

⁶¹ *Two Bay State Chains Seek Nationwide U-Price Laws*, *supra* note 42.

⁶² *Unit-Pricing at Albertson's*, *Supermarket News*, Aug. 16, 1971, at 8.

⁶³ Kilich, *supra* note 42.

⁶⁴ Zwiebach, *Alpha Beta Targets September for Chain-wide Pricing*, *Supermarket News*, June 14, 1971, at 8.

⁶⁵ Interview with Allumbaugh, *supra* note 42; Fisher, *supra* note 38.

⁶⁶ Friedman, *supra* note 26; Padberg, *supra* note 40, at 14; *Marketing — Unit Pricing Chalks Up Some Surprises*, *supra* note 42.

⁶⁷ Ralphs Vice President Byron Allumbaugh, although admitting that his company

Ralphs Grocery Company and Alpha Beta Markets, both California operators, voluntarily added unit pricing to their merchandising. Ralphs did so, ostensibly, to find out if there was a genuine public interest in the practice.⁶⁸ Neither Ralphs nor Alpha Beta have substantially promoted their customers' awareness of unit pricing. Several months after introducing the labels (to merely 1,700 items of its average outlet's total inventory of 15,300 commodities), Ralphs reported it had noticed no unusual trends in sales of "private labels" (brand name goods sold under the market's label, usually at significant reductions in the retail price).⁶⁹ Alpha Beta added unit price labels with so little fanfare that several months after the tickets appeared this writer discovered that even some clerks employed at one of its local markets were unaware of their existence.⁷⁰

By contrast, Albertson's two California divisions extensively promote unit pricing. The company's television and newspaper advertising feature a unit pricing theme. As a consequence of its promotional efforts, Albertson's Northern California Division has reported significant increases in sales of private labels and other bargain-priced goods.⁷¹ Similarly, Fox Grocery Company of Pennsylvania stated that it experienced a substantial increase in overall sales after it became the first operator to dual price commodities in Pittsburgh.⁷²

Jewel Food Stores, testing unit pricing in all 258 of its Midwestern outlets, discovered that 62.9 percent of its customers were aware of unit pricing, that 45 percent use the labels one or more times, and 29.8 percent use them regularly.⁷³ These figures correspond to the results of a six-month survey of shoppers in two Safeway stores dual pricing in Washington, D. C. The study⁷⁴ was sponsored by Safeway and the National Association of Food Chains. Thirty-eight percent of respondents in the suburban store surveyed

performed no survey of shoppers, stated his opinion that there had been "enough experimentation to confirm the suspicions of retailers who didn't think it would work." In justification of this position, Allumbaugh stated in an interview with the author of this article that Safeway had discontinued unit pricing when, in fact, Safeway had two weeks previously expanded unit pricing from its Washington, D. C., outlets to 256 stores in four states. Safeway later implemented the practice nationwide. Interview with Allumbaugh, *supra* note 42.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Friendly Hills Store, East Whittier, California.

⁷¹ Kilich, *supra* note 42.

⁷² *Unit Pricing Costs Chain \$3 Weekly for Each Store*, *supra* note 42.

⁷³ *Marketing — Unit Pricing Chalks Up Some Surprises*, *supra* note 42.

⁷⁴ Friedman, *supra* note 26.

stated that they used the dual-price tags, and 25 percent of those polled in the inner-city store similarly reported their use.⁷⁵ Most shoppers responding affirmatively continued to use the labels beyond the early period of the study.⁷⁶ A few months after the results of this survey were announced, Safeway instituted unit pricing on a nationwide basis.

Also tested in the Safeway study was the effectiveness of unit pricing as a means by which buyers could improve their ability to select the lowest priced commodities. It was found that shoppers were from 2½ to 7 times more likely to select the best bargains with unit pricing than without the aid of the labels.⁷⁷ It was also discovered that the voluntary implementation of uniform packaging and corresponding reduction in the number of package sizes by manufacturers since enactment of the Fair Packaging and Labeling Act was of little help to consumers in making value judgments, although some assistance was afforded in comparing the prices of packages of the same size. Uniform packaging ceased to be helpful in comparing prices of packages of different sizes.⁷⁸

The Consumer Research Institute study⁷⁹ attempted to measure Kroger Company's patrons' attitudes towards unit pricing. There it was found that 64.2 percent stated that the labels saved time, and 13.9 percent said they saved money.⁸⁰ Of the 64.2 percent responding favorably to the labels, about half stated they had not changed brands in the 16 weeks they had observed the price tags. But one-fifth said they had, and the remaining 28 percent could name a brand to which they had switched on account of the labels.⁸¹

A survey⁸² of 222 women conducted last summer by the Bureau of Advertising of the American Newspaper Publishers Association determined that 69 percent of those polled were aware of unit pricing. Forty-three percent understood the practice completely. Of the 31 percent who had not heard of unit pricing, only 3 percent were unable to comprehend the practice after a brief explanation. Thirty-eight percent of the women had noticed unit price tags at the market, and 18 percent used them. It was found that women

⁷⁵ *Id.* at 3.

⁷⁶ *Id.*

⁷⁷ *Id.* at 4.

⁷⁸ *Id.* at 5.

⁷⁹ Padberg, *supra* note 40.

⁸⁰ *Id.* at 14.

⁸¹ *Id.*

⁸² 69% of Women in Study Aware of Unit Pricing, *Supermarket News*, July 19, 1971, at 10.

spending in excess of \$11 were more likely to use the labels than those spending less.

Although the preceding surveys do not support the claim that supermarket customers are indifferent to unit pricing, they do reveal that the majority of shoppers do not utilize the price labels. This fact can be read to mean that market operators, government and others concerned with advancing consumer interests have a large task ahead of them to re-educate the public concerning the usefulness of unit pricing as a means of conserving household financial resources. Remembering that unit pricing has been virtually absent from the marketplace for nearly two generations — since the disappearance of bulk merchandising — it is not surprising to find that only a minority of consumers (albeit a large minority) take advantage of the practice once it reappears. It must also be stressed that the surveys discussed above were conducted mere weeks or months after the practice was re-introduced by certain retailers. But even despite this circumstance, the studies demonstrate rather remarkably just how many consumers recognize the inadequacy of price per package as an aid to economizing on food purchases. Otherwise, why would any shoppers use the unit price labels at all?

UNIT PRICING UNFAIR TO SOME GROCERS?

As was discussed above, it is possible to dual price at a negligible cost — and, possibly, at no cost whatsoever.

The fact that unit pricing is inexpensive can be attributed to the widespread use of computer technology by supermarkets.⁸³ When Ralphs Grocery Company began dual pricing, it simply programmed its electronic data processing equipment to combine price and inventory information already stored in its computer files.⁸⁴ Although Ralphs initially utilized the services of a private printer to prepare the shelf labels, the company decided to re-program its computer to print out the shelf labels in order to further reduce its costs. The regular weekly posting of the labels themselves represented no additional cost to Ralphs since the new unit price tickets were substituted for shelf tags used formerly. Alpha Beta was able to avoid Ralphs' initial cost of converting over to unit pricing by adding the new labels over a period of months; that is,

⁸³ Interview with Allumbaugh, *supra* note 42.

⁸⁴ *Id.*

substituting the shelf tags as commodity prices changed rather than all at one time.⁸⁵

It is scarcely to be imagined that a market chain of any size does not own or lease electronic data processing equipment in this age of computer technology. Independent and small chain operators are another matter. Not owning or leasing computers, these operators are served by independent or cooperative wholesalers who do utilize such equipment.⁸⁶ For example, Southern California's independent markets are provided reports of inventory movement based on orders placed with their wholesalers.⁸⁷ These reports are utilized to determine allotments of shelf space, whether seasonal commodities are to be continued or discontinued, and so forth.⁸⁸ Transactions between the wholesalers and independents are almost entirely dependent upon electronic data processing facilities.⁸⁹ It takes no imagination to recognize that the wholesalers are capable of furnishing the dual price labels as an additional service to their customers or members. As a matter of fact, small chains required by Massachusetts' law to unit price were able to do so by this method.⁹⁰

Although it might be thought that operators leasing or owning their own equipment would enjoy a competitive edge over retailers dependent upon others for labels, the Consumer Research Institute determined that this is not the case. The Institute found that the cost of unit pricing is dependent upon another and altogether different factor. As was discussed previously, the Institute reported that the yearly cost to install and maintain unit pricing had a probable range of from \$2,479.11 to \$3,113.62 (based on Kroger Company's system of dual pricing).⁹¹ The report noted that the principal factor affecting costs is the number of stores served by the computer furnishing the labels, regardless of whether the computer is owned or leased by the chain operator or by a wholesaler serving independents.⁹² Thus, the highest cost quoted represents the expense to an operator served by a wholesaler fur-

⁸⁵ *Many Retailers With Dual Pricing, Open Dating*, Supermarket News, Nov. 30, 1970, at 12; Zwiebach, *supra* note 64.

⁸⁶ Interviews with Burnside and Novicoff, *supra* note 37; *Allumbaugh*, *supra* note 42.

⁸⁷ Interviews with Burnside and Novicoff, *supra* note 37.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Calkins, *Wholesalers Color Dual Pricing Costly*, Supermarket News, Dec. 7, 1970, at 26 (criticizing the Massachusetts dual pricing law for de-emphasizing price per package in general merchandising).

⁹¹ Padberg, *supra* note 40, at 8.

⁹² *Id.* at 8, 9.

nishing labels to 20 stores, or the cost per store in a chain of 20 stores owned by one company.⁹³ The lowest figure represents the expense per market in a 90-store distribution system.⁹⁴ Recall, however, that Kroger's costs were the highest reported, and that one New York wholesaler has offered to furnish his customers with unit price tags at a cost of \$1 per week (plus a one-time charge of \$20 for the initial labels).⁹⁵

The familiar neighborhood grocery ("mom and pop") stores and intermediate-sized "superettes," as distinguished from supermarkets, require special consideration. To require operators of these small outlets to unit price would be as expensive as it would be unproductive of any real benefit to consumers. Since these stores offer a limited variety of commodities, and few package sizes within each commodity grouping, one suspects that few shoppers have much difficulty selecting the least expensive among goods offered. Furthermore, shoppers do business in these establishments knowing the prices to be much higher than in nearby supermarkets.⁹⁶ Consumers usually patronize these small stores because they are more conveniently located for the one- or two-purchase shopping trip, or because they offer special items not to be found at supermarkets (such as ethnic foods), or because they are open for business at hours when the supermarkets' doors are closed.⁹⁷ Finally, since neighborhood grocery stores are least likely to have access to computer facilities, unit pricing would require some additional manual labor to prepare the dual price tags. This expense need not be necessarily exorbitant, owing to the very fact that these stores carry so few items. It might also be expected that price conversion tables would be published so that manual calculations could be avoided, but is the expense, however little, really justified?

The unit pricing laws of Maryland,⁹⁸ Connecticut,⁹⁹ Massachusetts¹⁰⁰ and the City of New York¹⁰¹ took note of the neighborhood

⁹³ *Id.* at 8.

⁹⁴ *Id.*

⁹⁵ *Wholesaler in Low-Cost Unit Pricing*, *supra* note 42.

⁹⁶ Shaw, *Mom-Pop Stores Appeal in Ethnic Neighborhoods*, Los Angeles Times, Dec. 27, 1970, § B, at 1, 3.

⁹⁷ *Id.*

⁹⁸ MD. ANN. CODE art. 83, §21E (Supp. 1972).

⁹⁹ Conn. Pub. Act 856 (July 15, 1971); Conn. Dept. of Consumer Protection, *Unit Pricing Regulations* (1972). For the provisions of the Connecticut regulations see Appendix C, *infra* p. MM.

¹⁰⁰ MASS. GEN. LAWS ch. 885, §115A (1970); *Unit Pricing Regulations*, Mass. Consumers' Council Bulletin, No. UP-1-1971 (Mar. 9, 1971), as amended by No. UP-2-1971 (Jan. 6, 1972). For the provisions of the Massachusetts regulations see Appendix D, *infra* p. MM.

¹⁰¹ NEW YORK, N.Y., ADM. CODE ch. 64, art. 1, §§ B 64-1.0 - 5.0 (1971); N.Y. City

grocery stores and attempted to relieve them of the dual pricing burden. Maryland exempts stores owned by "one owner" (presumably corporations would qualify as "one owner"), so long as no more than 10 outlets are owned by the "same company" (but only those outlets doing less than \$750,000 business yearly are exempted) and the company does under \$30 million business annually.¹⁰² Connecticut's regulations exempt "owner operated single retail stores," whether doing business as a sole proprietorship or partnership, or in corporate form.¹⁰³ Massachusetts relieves every "retail establishment operated by a person as his sole place of business. . . ."¹⁰⁴ New York City's ordinance requires stores to unit price only if they do \$250,000 or more business yearly (or if they are affiliated with other stores doing aggregate business in excess of \$250,000).¹⁰⁵

Legislation submitted to Congress would exempt persons "who, because of few employees or other factors, would be seriously burdened . . ."¹⁰⁶ or "whose total gross sales do not exceed \$250,000 per annum. . . ."¹⁰⁷

The Model Unit Pricing Act¹⁰⁸ ignores the dollar volume or form of ownership of the enterprise, but focuses attention instead on the underlying causes creating the need for unit pricing. If the problem facing the consumer is one of selecting the most economical purchases from among a great many products offered for sale (a situation which does not exist in the neighborhood grocery stores), then only those places of business offering a large and confusing array of articles should be required to unit price. Thus, the model legislation proposes that establishments offering more than a stated number of commodities — 2,500 food items¹⁰⁹ —

Dept. of Consumer Affairs, Truth-in-Pricing Regulations (June 1, 1971), *as amended* (July 1, 1971). For the provisions of the New York City ordinance and regulations see Appendix B, *infra* p. MM.

¹⁰² Md. ANN. CODE art. 83, § 21E(b) (1) (i)(ii)(iv) (Supp. 1972).

¹⁰³ Conn. Dept. of Consumer Protection, Prop. Unit Pricing Reg. § 2(b) (1972). For the provisions of this regulation see Appendix C, *infra* p. MM.

¹⁰⁴ Unit Pricing Reg. § 2(e), Mass. Consumers' Council Bulletin, No. UP-1-1971 (Mar. 9, 1971). For the provisions of this regulation see Appendix D, *infra* p. MM.

¹⁰⁵ NEW YORK, N.Y., ADM. CODE ch. 64, art. 1, § B-64-3.0 (1971). For the provisions of this ordinance see Appendix B, *infra* p. MM.

¹⁰⁶ S. 928 § 3, 92d Cong. 1st Sess. (1971).

¹⁰⁷ S. 868 § 2, H.R. 4425 § 2, and H.R. 5939 § 92d Cong., 1st Sess. (1971).

¹⁰⁸ For the provisions of the MODEL UNIT PRICING ACT see Appendix A, *infra* p. MM.

¹⁰⁹ Market Basket, a California subsidiary of Kroger Company, Ohio, reports that 65 percent of its inventory consists of food items. This ratio of food to non-food is believed to be typical. Therefore, markets stocking slightly in excess of 4,000 items would be compelled under the Model Act to unit price. Since all but a few supermarkets

should be compelled to post the price tags. This approach avoids certain difficulties apparent in the preceding statutory schemes. Under the former acts, must a department store selling some imported foods unit price those commodities? What are the consequences to the marginally profitable neighborhood outlet doing a high dollar volume of business? Under the Model act neither of enterprises would be required to add dual pricing labels.

NEW DECEPTIONS TO SUPPLANT THE OLD?

The strongest argument against unit pricing is the fact that, to some degree, dual pricing contains within it the seed of a new and subtler form of deception, capable, in some cases, of supplanting familiar ones.

By way of example, when a shopper chooses a can of water-packed corn over one which is vacuum-packed, relying on the fact that the price per package of the former is less than the price of the latter she selects a commodity which yields less food value per ounce than one she rejects.¹¹⁰ This is so because the net contents shown on the label of the water-packed corn includes the weight of the water. Since both these products appear side by side in a supermarket, unit pricing these goods would tend to even further mislead her into selecting the cheaper water-packed product, despite the fact that the more expensive vacuum-packed product might be the better bargain. Certain brands of liquid detergents have higher concentrations of suspended solids (the active ingredients) than other less expensive brands, just as some paper towels are of superior quality,¹¹¹ and so forth.

In other words, dual pricing informs the shopper what she is

stock in excess of 5,000 items, the Act would reach those outlets in which consumers are confronted by the problem discussed in the text. See the discussion at p. MM *supra*.

Alternatively, the following statutory language would distinguish those grocery stores which should be required to unit price (supermarkets) from those which should not (neighborhood stores and "superettes"): "The unit prices of all canned, bottled and packaged commodities described in this (act) shall be displayed by merchants in places of business containing 3,500 or more square feet of floor area accessible to the public, but only in such places of business which offer commodities for sale at retail to the public, fifty (50) percent or more of which commodities consist of food items." This language would capture the supermarkets, the smallest of which contain an average of 3,722 square feet of floor area, and exempt the "superettes," the largest of which house an average of 3,159 square feet of area open to the public. R. MARKIN, *supra* note 7, at 22-23. The suggested alternative statutory language should be compared with the MODEL UNIT PRICING ACT § 1, which is set forth in Appendix A, *infra* p. MM.

¹¹⁰ Padberg, *supra* note 40, at 14-15.

¹¹¹ Interview with Lavery, *supra* note 40.

paying per pound or pint, but it tells her nothing about what that pound or pint contains. Conceivably, unit pricing could be used by less than scrupulous manufacturers to deceive customers in ways not commonly practiced today. Mentioned earlier was the device of "packaging to price" — the practice of reducing the contents of a package while retaining the same price.¹¹² One can easily foresee that some processors might be tempted to "formulate to price," that is, to reduce the properties of his product while retaining the same price per unit.

Although the preceding argument weighs against unit pricing, the following observations are in order. First, even if the manufacturer does get away with "formulating to price," the shopper would still be able to use the dual price tags to determine which of that manufacturer's various package sizes yields the best bargain. One of the most commonly accepted myths of the marketplace is the fable that bigger packages are invariably better bargains. One has only to compare unit prices in markets where tags are available to discover that all too often goods sold in a smaller size are priced lower per pound or pint than the same brand offered in a larger size.¹¹³ This is frequently the case because manufacturers mount special promotions of "popular" sizes, discounting the wholesale price to stimulate sales of the brand label.¹¹⁴ Secondly, even if processors toy with the quality of their product — an uncertain gamble in any event — the housewife is better off with unit pricing information than without it. The unit price affords her the best opportunity to recognize sharp reductions in commodity prices during manufacturers' special promotions. The practice also encourages, rather than discourages, improved buying habits by stimulating value awareness. Although a shopper might tend to select the lowest priced commodity on the basis of the unit price information, it is probably just as likely that the shopper who does base her selection on such information will be more critical of her purchase. Thus, if her experience with the cheapest article proves unsatisfactory, nothing prevents her from selecting the *next* lowest priced article on her next shopping trip, and so on, until she has located that commodity which performs best to her satisfaction at the least cost.

¹¹² See the discussion at p. MM.

¹¹³ See note 2, *supra*. From the example of laundry cleansers, it was observed that the lowest priced commodity was Imperial detergent in the package containing 3 pounds 1 ounce. The commodity next lowest in price was Imperial detergent in the 20-pound container. The shopper would have saved 24 cents if she purchased 20 pounds of Imperial detergent in the small containers rather than in the large one.

¹¹⁴ Interviews with Novicoff, *supra* note 37; Laverty, *supra* note 40.

Ideally, the problem of comparing products of different quality would best be solved by congressional legislation requiring manufacturers to grade their products according to established government standards¹¹⁵ — just as meats, poultry products and dairy items are graded. The Maryland and Model Acts provide an alternative, although admittedly a less satisfactory solution. The Acts contain an exemption feature¹¹⁶ which would permit the retail seller to refrain from dual pricing a stated percentage of his inventory. The retailer can thus use this exemption to avoid dual pricing articles when his judgment informs him that to do so might mislead consumers into making inaccurate value judgments on the basis of the unit price labels. Since it is presumed that the grocer is in a better position than the consumer to know which products are so inferior that their low prices are more indicative of a fraud than a bargain, the exemption would make it possible for the retailer to do a public service by withholding the unit price information concerning those articles. Furthermore, since it is the grocery industry which has suggested that extreme quality differences among some products argues against unit pricing legislation, the argument is robbed of much of its persuasiveness when the particular unit pricing law enacted would allow the retail food industry to overcome the difficulty.

UNIT PRICING LAWS — A DISCUSSION OF LEGISLATIVE PROPOSALS AND ENACTMENTS

To gain some understanding and appreciation of grocers' reasons for opposing unit pricing laws, this writer interviewed the presidents or vice presidents of four supermarket chains, and the legal counsel and chief grocery merchandiser of one other, during December, 1970.¹¹⁷ Four of the principal reasons why these businessmen personally opposed laws requiring them to unit price are set forth and discussed in earlier sections of this report. Although the studies and experiences of grocers who have implemented the practice since the interviews were conducted clearly establish that those objections are largely groundless, other fears cited by the market executives to whom this writer spoke appear to have been borne out in the laws enacted or proposed. Mr. Robert Laverty, President of Thriftmart, Inc., expressed the concern that operators with stores

¹¹⁵ Interview with Laverty, *supra* note 40.

¹¹⁶ MODEL UNIT PRICING ACT § 1(f). The provisions of this act are set forth in Appendix A, *infra* p. MM; cf. MD. ANN. CODE art. 83, § 21E (c)(2)(ii) (Supp. 1972).

¹¹⁷ Interviews with Bryant, Novicoff and Burnside, *supra* note 37; Laverty, *supra* note 40; Allumbaugh, *supra* note 42. Novicoff was interviewed along with Eugene L. Kramer, Counsel, Food Fair Stores, Inc., Pacific Division.

in more than one state would be prejudiced by conflicting provisions contained in the laws enacted by each state. Mr. Byron Allumbaugh, Executive Vice President of Ralphs stores, remarked that the draftsmen of such laws, not being grocers, would legislate too broadly, with the result that many products inappropriate for unit pricing would be required to be tagged at a tremendous inconvenience, if not expense, to the industry.

CONFLICT OF LAWS

Conflicting laws are an understandable, and too often justifiable, cause of vexation and concern to persons doing interstate business. And so it is with unit pricing.

Differences have already appeared among the few laws and regulations enacted. Others appear in measures which have been proposed. Where provisions of the various laws are contradictory, the resulting confusion and expense become all too plain. For example, New York City requires that products packaged and sold by count (such as toothpicks, facial tissues, and so forth) be priced per 500 count,¹¹⁸ whereas Connecticut, Massachusetts and Maryland require them to be priced per 100 count.¹¹⁹ While New York, Connecticut and Massachusetts provide that packaged goods measured by area (such as rolls of aluminum foil) be sold per 50 square feet,¹²⁰ Maryland insists that they be priced per 100 square feet.¹²¹ Massachusetts allows retailers to price liquids per pint, quart or gallon;¹²² Connecticut states that some liquids shall be sold by quart while others shall be priced per pint;¹²³ Maryland allows no other than the quart measure;¹²⁴ and New York requires that either the pint or the quart, but not both, shall be used.¹²⁵

Although no one would seriously argue that Congress lacks

¹¹⁸ N. Y. City Dept. of Consumer Affairs. Truth-in-Pricing Reg. 3(a)(ii) (June 1, 1971), as amended (July 1, 1971). For the provisions of this regulation, see Appendix B, *infra* p. MM.

¹¹⁹ Conn. Dept. of Consumer Protection Pricing Reg. § 5(d) (1967); Unit Pricing Reg. 4(d), Mass. Consumers' Council Bulletin, No. UP-2-1971 (Jan. 6, 1972); Md. ANN. CODE art. 83, § 21E(a) (Supp. 1972).

¹²⁰ Conn. Dept. of Consumer Protection, Prop. Unit Pricing Reg. 5(c) (1972); Unit Pricing Reg. § 4(c), Mass. Consumer's Bulletin, No. UP-1-1971 (Mar. 9, 1971).

¹²¹ Md. ANN. CODE art. 83, § 21E(a) (Supp. 1972).

¹²² Unit Pricing Reg. § 4 (b), Mass. Consumers' Council Bulletin, No. UP-1-1971 (Mar. 9, 1971). See Appendix D, *infra* p. MM.

¹²³ Conn. Dept. of Consumer Protection, Unit Pricing Reg. § 6 (1972). See Appendix C, *infra* p. MM.

¹²⁴ Md. ANN. CODE art. 83, § 21E(a) (Supp. 1972).

¹²⁵ N.Y. City Dept. of Consumer Affairs, Truth-in-Pricing Reg. § 3(b)(iii) (June 1, 1971). See Appendix B, *infra* p. MM.

power under the Commerce¹²⁶ and Supremacy¹²⁷ Clauses of the United States Constitution to establish uniformity among the states' unit pricing laws, either by pre-empting the field or by establishing limits within which each state might legislate, the several bills pending before the national legislature deal only inferentially with this problem, while others ignore it completely. Bills introduced by Senator Nelson and Congressmen Corman and Rosenthal to amend the Fair Packaging and Labeling Act would exempt retail outlets doing business in states which have enacted mandatory unit pricing laws "comparable in scope and comprehensiveness"¹²⁸ to the federal laws, thus implying that the states would have the authority to legislate such laws within some vaguely defined limits. Measures proposed by Senator Pearson,¹²⁹ Congressmen Ryan¹³⁰ and Po-dell,¹³¹ and Congresswoman Grasso¹³² would simply defer the question of the states' right to enact unit pricing laws to Section 1461 of that act, which declares that Congress intends "to supersede any and all laws . . . insofar as they may now or hereafter provide for the *labeling* of the net quantity of contents of the *package* . . . which are less stringent than, or require information different from," the disclosures required by the act.¹³³ (Emphasis furnished.) Arguably, the Section 1461 prohibition might be construed by the states as having no bearing on the question of the contents of a label placed upon the *shelf* and not upon the *package*.¹³⁴ In any event, irrespective of the outcome should the matter ever be made the subject of a lawsuit, the unit pricing bills should be amended to deal frankly with the subject so that the states,¹³⁵ and federal enforcement officers, might have some clearer guidance on the matter.

¹²⁶ U.S. CONST. art. I, § 8.

¹²⁷ U.S. CONST. art. VI.

¹²⁸ S. 868, 92d Cong., 1st Sess. § 2 (1971); H.R. 5939, 92d Cong., 1st Sess. § 2 (1971); H.R. 4425, 92d Cong., 1st Sess. § 2 (1971).

¹²⁹ S. 928, 92d Cong., 1st Sess. (1971).

¹³⁰ H.R. 1572, 92d Cong., 1st Sess. (1971).

¹³¹ H.R. 990, 92d Cong., 1st Sess. (1971).

¹³² H.R. 6776, 92d Cong., 1st Sess. (1971).

¹³³ 15 U.S.C. § 1461 (1970).

¹³⁴ This construction finds support in *Ocean Products, Inc. v. Leth*, 292 F. Supp. 615, 618 (D. Ore. 1968), where the court, after reciting the section, ruled that Congress merely intended to supersede state "net contents" regulations pertaining to labeling appearing on the package. By necessary implication, if Congress chooses to require only that the dual price information appear on the package itself, the states would be free to regulate shelf pricing.

¹³⁵ Even if Congress chooses not to deal with the problem, the states having unit pricing laws may overcome the conflicts in their laws on their own initiative. The Massachusetts Consumers' Council and the University of Massachusetts Cooperative Extension Service jointly sponsored a Northeastern Conference on Unit Pricing held March 13-14, 1972, at Amherst. Participating in the conference were Massachusetts, Connecti-

UNIT PRICING WHERE NOT NEEDED?

Assuming *arguendo* that Congress resolves the conflicts problem, there still remains the troublesome question of how much of an umbrella should a unit pricing law provide. Should supermarkets' entire inventories be covered, or are exceptions to be made as to particular commodities or groups of commodities? Obviously, many goods are sold by modern supermarkets which do not lend themselves to unit pricing, as for example, clothing, hardware and other commodities of a similar nature. But there are other items which invite disagreement as to their suitability — or the lack thereof — for dual pricing. One might include cosmetics in this category (where brand name preferences might, or might not, be the exclusive consideration of consumers choosing between articles available at their supermarket). Arguments can be made for and against including prepared frozen foods within the reach of a unit pricing law. In favor of dual pricing such items is the observation that food is food, and if consumers knew precisely how much more expensive it is to buy the prepared commodity than it is to buy the ingredients separately, they might be encouraged to forego the convenience and prepare the particular item themselves. Equally persuasive is the fact that it is the convenience which consumers purchase. And can there be any doubt that even the least knowledgeable shopper is aware that prepared foods cost considerably more than the component ingredients if purchased separately?

The Connecticut, Massachusetts and New York City legislatures chose to enact laws of general purpose and leave it to their enforcement agencies to promulgate the regulations which govern the details of the unit pricing requirement. The regulations describe with particularity the commodities to be tagged by grocers. Thus, labels must be provided for "peanut butter,¹³⁶ baby foods,¹³⁷ coffee"¹³⁸ and so forth. In contrast, the Maryland and Model Acts

cut, Maryland and the City of New York. The purpose of the conference was to consider ways in which these jurisdictions (and other northeastern political entities proposing to adopt unit pricing laws) could achieve uniformity among their unit pricing requirements. Northeastern Conference on Unit Pricing, Mass. Consumers' Council Press Release (Jan. 18, 1972).

¹³⁶ Conn. Dept. of Consumer Protection, Unit Pricing Reg. § 6(a), (1972); N.Y.

¹³⁷ Conn. Dept. of Consumer Protection, Unit Pricing Reg. § 6(a), (1972); N.Y. City Dept. of Consumer Affairs, Truth-in-Pricing Reg. § 4(e) (June 1, 1971); Unit Pricing Reg. § 5(b), Mass. Consumers' Council Bulletin, No. UP-1-1971 (Mar. 9, 1971).

¹³⁸ Conn. Dept. of Consumer Protection, Unit Pricing Reg. § 6(a) (1972); N.Y. City Dept. of Consumer Affairs, Truth-in-Pricing Reg. § 4(k) (June 1, 1971); Unit Pricing Reg. § 5(a), Mass. Consumers' Council Bulletin, No. UP-1-1971 (Mar. 9, 1971).

describe the *classes* of consumer goods which retailers must label, as for example, "packaged foods,"¹³⁹ before going on to list exceptions for certain subclasses of commodities ("prepackaged food containing separately identifiable items segregated by physical division within the package,"¹⁴⁰ such as the ubiquitous TV dinner). Both the Maryland and Model Acts provide an additional exception for 10 percent of the retailer's otherwise non-exempt inventory¹⁴¹ and leave it entirely within the grocers' discretion to choose the articles which shall be excepted from the law.

The advantages of enumerating the articles to be labeled can be summarized as follows. First, the laws of Connecticut, Massachusetts and New York City operate uniformly. All stores within each state's borders must dual price the same items. Secondly, since the regulations leave no doubt as to which items shall be tagged, they are more easily enforceable, since the enforcement officer need only to go to the section of the supermarket where the article is found to determine whether the operator is in compliance with the law. Finally, because both businessmen and consumers are heard by the regulating agencies which adopt the regulations, a balance is struck between what the public seeks and what the industry claims it can practically deliver. Grocers can hardly complain that the commodities designated for unit pricing are selected arbitrarily or without consideration of the industry's point of view as to the practicability of including or excluding certain items.

Advantages of the Maryland-Model Act scheme can be divided into two general categories. First, by allowing retailers to use their discretion to withhold the unit price information from some items within broadly stated categories of goods, a means is afforded whereby deceptions can be avoided in the case of distinctly inferior products whose low unit prices are not indicative of their real value.¹⁴² Secondly, some items probably should not be dual priced because the expense may not be justified for one or more of a variety of reasons. For example, New York, Connecticut and Massachusetts

¹³⁹ MODEL UNIT PRICING ACT § 1(d). See Appendix A, *infra* p. MM. Maryland requires the pricing of any "consumer commodity." MD. ANN. CODE art. 83, § 21E(c) (Supp. 1972). A "consumer commodity" is defined as "any food, drug, cosmetic, or other article, product or commodity of any kind or class which is" consumed or used for personal use and which is not a durable item. *Id.* § 21E(a)(1)(2).

¹⁴⁰ MD. ANN. CODE art. 83, §21E(b)(2) (Supp. 1972); MODEL UNIT PRICING ACT § 1(e). For the provisions of the Model Act see Appendix A, *infra* p. MM.

¹⁴¹ The exemption is 30 percent during 1972. MD. ANN. CODE art. 83, § 21E (c) (2)(i) (Supp. 1972) Ten percent of sales of inventory are exempted after Jan. 1, 1973. *Id.* § 21E(c)(2)(ii). MODEL UNIT PRICING ACT § 1(f). See Appendix A, *infra* p. MM.

¹⁴² See discussion p. MM *supra*.

require that baby foods be labeled.¹⁴³ Baby foods are commonly sold in two sizes: the strained size for young infants and the junior size for older children. The strained size, exclusive of meats, is sold in two weights: $4\frac{1}{2}$ and $4\frac{3}{4}$ ounces. The number of foods available in this size is nearly equally divided between the two weights. In the junior size, a one-fourth ounce difference in weight represents only about 3 percent difference in price per pound. In the strained size, the difference is approximately 6 percent. From the grocer's viewpoint, dual pricing the junior size baby foods may not be very beneficial; other factors probably being far more important to consumers of this commodity than the price per pound (for example, taste preferences of the child, dietary considerations of the parent, brand name and price package¹⁴⁴). Since the Maryland and Model Acts would allow the grocer to exempt 10 percent of inventory otherwise required to be dual priced, it would be possible for the retailer to avoid the expense of unit pricing one size of articles where the number of sizes he carries is rather limited. Furthermore, the grocer is permitted to exclude particular articles for which there are no equivalent, as for example, some rare and exotic imported delicacy, where the unit price is all but meaningless.

In short, although the executives to whom this writer spoke were nearly unanimous in conceding that unit pricing could be beneficial to consumers, they believed it would be in the public's interest for grocers to retain some discretion in the final selection or rejection of articles to be labeled.

It is probably true that the differences between the two regulatory schemes thus far placed into practice are more apparent than real. Certainly, retailers are not unduly prejudiced because a few items must be unit priced which grocers themselves might not otherwise label. Concerning potential difficulties with enforcement of the dual pricing plan under the Maryland statute, it is submitted that no real obstacle is presented. Since inventory records are available at all retail outlets,¹⁴⁵ it would be a simple matter to ascertain from such records whether the grocer is in compliance with the law. Finally, if Connecticut, Massachusetts and New York law does not provide a means of overcoming the problems of extreme

¹⁴³ Conn. Dept. of Consumer Protection, Unit Pricing Reg. § 6(a) (1972); N.Y. City Dept. of Consumer Affairs, Truth-in-Pricing Reg. § 4(e) (June 1, 1971); Unit Pricing Reg. § 5(b), Mass. Consumers' Council Bulletin, No. UP-1-1971 (Mar. 9, 1971).

¹⁴⁴ These factors were suggested in interviews with Laverty, *supra* note 40; Allumbaugh, *supra* note 42.

¹⁴⁵ Interviews with Allumbaugh, *supra* note 42; Novicoff, *supra* note 37.

quality differences existing among products to be unit priced, there is no assurance under the Maryland and Model Act plan that retailers will utilize the exemption for this purpose.

In any event, either of the statutory plans thus far adopted by the states is preferable to the approach taken in the legislation now pending before the Congress. The bills awaiting approval of the Senate and House Commerce Committees would require the unit pricing of *all* packaged consumer commodities.¹⁴⁶

CONCLUSION

There has been sufficient experimentation with dual pricing to determine that it works, that it is practical, and that it effectively cements together the pounds, pints and other standard units of measurement fragmented over the years by the unchecked proliferation of package sizes.

If *caveat emptor* were still the paramount law of the marketplace, reluctance to legislate unit pricing laws might be justified. But the notion that enterprise ought to be fully sheltered has long been discredited. Our legal institutions have progressed from a policy given birth in *MacPherson v. Buick Motor Co.*¹⁴⁷ to maturation in the *Truth-in-Lending*¹⁴⁸ and *Truth-in-Packaging*¹⁴⁹ Act. The social policy underlying the expansion of law into the area of consumer protection recognizes that shoddy workmanship and deceptive or misleading practices are deserving of no more legal protection than negligence or blatant fraud in the manufacture or sale of goods. Lawmakers have come to recognize that free enterprise is neither harmed nor unduly burdened by laws requiring manufacturers and merchants to bear liability for defects in their products or to fully and truthfully inform the public concerning those products. Competition is not discouraged merely because the public is made aware that one brand of goods is inferior or costs more than another brand. On the contrary, a discerning public is more likely to recognize manufacturing and merchandising competence with the very pecuniary reward which is the basis of a free enterprise system. Excellence in the production of goods — and the marketing of commodities at the least cost to the public — have always been the ideal of a capitalistic or any other economic system. Truth-in-pricing — or dual pricing — is consistent with those goals.

—WILLIAM A. STEPHENS

¹⁴⁶ S. 868, 928 and H. R. 990, 1572, 4425, 5939, 6776, 92d Cong., 1st Sess. (1971).

¹⁴⁷ 217 N.Y. 382, 111 N.E. 1050 (1916).

¹⁴⁸ 15 U.S.C. §§ 1601-77 (1970).

¹⁴⁹ 15 U.S.C. §§ 1451-61 (1970).

APPENDICES**Appendix A****MODEL UNIT PRICING ACT.**

Section 1. The unit prices of all canned, bottled and packaged commodities described in this section shall be displayed by merchants in places of business offering more than 2,500 food items for sale at retail to the public.

(a) An item means a commodity, or commodities, distinguished from other commodities on account of weight, volume, area or numerical count; manufacturer, processor or distributor; trade name or species; or ingredients, recipe or formula; except that, for the purpose of determining whether the merchant is offering 2,500 food items for sale, fresh produce, meat and dairy products shall not be distinguished on account of weight or volume.

(b) Unit price means the retail price per ounce, pound, pint, quart, gallon, 50 square feet, 100 square feet, 500 square feet, 50 count, 100 count or 500 count for which each item is offered for sale.

(1) The unit measurement used to price each item shall be utilized for all comparable or similar commodities required under this section to be unit priced.

(2) The unit price displayed shall be raised to the nearest one cent or one-tenth of one cent.

(c) Display as used in this section means exhibiting the price per unit in type ten points or larger in size along the edge of the shelf or case on which or in which each item is offered for sale. The unit price shall be kept visible, legible, and unobstructed to public view. The unit price displayed shall state both the price and the unit to which it refers.

(d) Commodities for which unit prices are required to be displayed shall include and be limited to canned, bottled and packaged foods; paper, plastic, wood, and metal products packaged in counts of ten or more; paper, plastic, and metal products packaged in rolls; canned, bottled, and packaged personal, domestic, household, and laundry cleansing, finishing, waxing and polishing products; and drug and first aid products sold by liquid volume or in counts of ten or more.

(e) Excepted from the unit pricing requirements of this section are commodities whose net weight is expressly stated on the principal package label or panel as one-fifth pound, one-quarter pound (or four ounces), one-third pound, one-half pound (or eight ounces), one pound (or sixteen ounces), or multiples of one pound (but such items shall be excepted from the requirement only if the merchant prices all comparable or similar items per the pound measurement); liquids sold by pint, quart, half-gallon, or multiples of one gallon; goods packaged in counts of ten, twenty-five, fifty, one hundred, or multiples of one hundred; products offered in rolls of ten, twenty-five, fifty, or one hundred feet, or multiples of one hundred feet; fresh produce; durable goods; commodities offered for sale for ten cents or less; and frozen prepared foods physically separated within their containers.

(f) The merchant may also except from the requirements of this section ten percent of the items otherwise required to be unit priced under subsection (d).

(g) The violation of any provision of this section is a misdemeanor punishable by a fine of not less than twenty-five dollars (\$25) nor more than five hundred dollars (\$500), or by imprisonment in the county jail for not exceeding six months, or by both fine and imprisonment.

Appendix B

1. — CITY OF NEW YORK ADMINISTRATIVE CODE

CHAPTER 64, ARTICLE 1 SECTIONS B64-1.0 TO B-64-5.0

B64-1.0 Definitions — (a) “Consumer commodity” shall be defined as any article, product or commodity of any kind or class produced, distributed or offered for retail sale for consumption by individuals, or for use by individuals for purposes of personal care or in the performance of services rendered within the household, and which is consumed or expended in the course of such use. For the purposes of this article, drugs, medicines and cosmetics shall not be considered commodities.

(b) “Price per measure” shall be defined as the retail price of a consumer commodity expressed in terms of the retail price of such commodity per such unit of weight, standard measure or standard number of units as the commissioner of consumer affairs shall designate by regulation.

B64-2.0 Display of total selling price — All consumer commodities sold, exposed for sale or offered for sale at retail shall be plainly marked by a stamp, tag, label or sign at the point of display with the total selling price.

B64-3.0 Display of price per measure — All consumer commodities designated by the commissioner of consumer affairs in accordance with section B64-4.0 (a) hereof exposed for sale or offered for sale shall be plainly marked by a stamp, tag, label or sign at the point of display with appropriate price per measure; provided however that the provisions of this section shall not apply to any food store having had annual gross sales in the previous tax year of less than two hundred fifty thousand dollars (\$250,000) unless it is a part of a network of subsidiaries, affiliates, or other member stores, under direct or indirect common control, which, as a group, had annual gross sales in the previous tax year of two hundred fifty thousand dollars (\$250,000) or more.

B64-4.0 Regulations — (a) The commissioner of consumer affairs after public hearings shall promulgate regulations designating those consumer commodities which shall come within the scope of section B64-3.0 whenever the commissioner shall find that, because of the nature, form, mode of packaging or other reason, such price display for that commodity shall be necessary and appropriate to provide adequate information to the consumer.

(b) The commissioner shall promulgate regulations exempting any class or classes of retail establishments from the requirements of section B64-3.0 hereof or modifying its application with respect to any class or classes of retail establishments to the extent that and under such conditions as are consistent with the policy of this article whenever the commissioner shall find that, because of the nature of such class or classes of retail establishments, compliance with section B64-3.0 hereof is unreasonably burdensome or unnecessary for adequate protection of consumers.

(c) The commissioner shall promulgate such other regulations as shall be necessary in his discretion to effectuate the purposes of this local law, including but not limited to, requirements as to the manner of display of unit price information.

B64-5.0 Penalties — Any person who shall violate the provisions of section B64-2.0 or section B64-3.0 hereof or regulations promulgated pursuant to this article shall pay a civil penalty of not less than \$25 nor more than \$250 for each violation and shall, upon conviction thereof, be punished by a fine of not less than \$25 nor more than \$250 for each such violation. For the purposes of this section, each group of identical consumer commodities for which on any single day the total selling price or price per measure is not displayed in accordance with section B64-2.0 or section B64-3.0 or regulations promulgated pursuant to this article shall be considered a single violation.

2. — CITY OF NEW YORK

DEPARTMENT OF CONSUMER AFFAIRS TRUTH-IN-PRICING REGULATIONS 1-4

1. Definitions

a. "Self service" shall mean the offering or display of consumer commodities for retail sale in such a manner that the consumer may examine and select commodities for purchase without the assistance of sales personnel.

b. "Retail establishment" shall mean a single geographical location in which consumer commodities are sold, displayed or offered for sale at retail.

c. "Retail entity" shall mean any person, partnership, corporation or other organization engaged in the sale, display or offering for sale of consumer commodities at retail from one or more retail establishments. For the purposes of these regulations, retail establishments owned or controlled by different persons, partnerships, corporations or other organizations, but associated together for the purpose of sharing a trade name or advertising expenses or for joint or cooperative purchase of merchandise or services, shall not constitute a single retail entity.

2. Exemptions

a. B64-3.0. "Display of Price per Measure," shall apply only to consumer commodities sold, displayed or offered for sale by self service.

b. B-64-3.0 "Display of Price per Measure," shall not apply to any con-

sumer commodity packaged without a declaration of volume, weight, quantity, or other appropriate size declaration.

c. B64-3.0, "Display of Price per Measure," shall not apply to any consumer commodity sold in one, two, five, or ten units of the applicable standard measure designated in regulation 3(b) below.

d. B64-3.0, "Display of Price per Measure," shall not apply to any retail establishment in which the total dollar volume sales of consumer commodities constitutes 20 percent or less of the total dollar volume of sales from such retail establishment.

d. B64-3.0, "Display of Price per Measure," shall not apply to any retail entity whose gross receipts from retail sales of merchandise of any sort for the preceding tax year of such retail entity were less than two million dollars.

3. Calculation and Display of Price per Measure

a. Price per measure shall be expressed at least to the nearest whole cent: fractional cents of one half cent or more to be rounded up, fractional cents of less than one half cent to be rounded down.

b. Price per measure shall be expressed as follows:

- i. price per pound for commodities bearing a size declaration by weight,
- ii. price per 500 units for items bearing a quantity declaration.
- iii. price per pint or quart for items bearing a size declaration in pints, quarts, gallons, or fluid ounces; however, no single retail establishment shall use both the pint and the quart as a basis for calculating price per measure.

c. All price information required by B64-2.0 and B64-3.0 shall be clear and conspicuous and shall be on a stamp, tag, label or sign directly above, below, adjacent to, or on the consumer commodity to which it relates. Such stamp, tag, label or sign shall:

- i. state the total selling price,
- ii. state the price per measure,
- iii. if not affixed to the consumer commodity, shall identify sufficiently the consumer commodity to which the price information relates.

d. Every retail establishment required to post price per measure by the regulations governing Truth-in-Pricing shall post at least five signs explaining the use of price per measure information to the consumer in conspicuous places in such retail establishment.

4. Consumer Commodities Regulated

The following commodities shall be labelled in accordance with the provisions of B64-3.0, "Display of Price per Measure," and of the regulations governing Truth-in-Pricing.

- a. canned and bottled vegetables which do not require refrigerated storage.
- b. canned and bottled fruits which do not require refrigerated storage.
- c. canned and bottled real and imitation vegetable and fruit juices which do not require refrigerated storage.

- d. canned and bottled tomatoes, tomato sauce, tomato paste, tomato puree and other related tomato products which do not require refrigerated storage.
- e. canned and bottled baby foods which do not require refrigerated storage.
- f. cooking and salad oils.
- g. canned and bottled salmon, tuna and sardines which do not require refrigerated storage.
- h. jams, jellies and preserves.
- i. peanut butter.
- j. carbonated beverages.
- k. coffee, instant and regular.
- l. dog and cat foods.
- m. breakfast cereals (does not include corn meal, rice, maize).
- n. cake, pie crust and other pastry mixes.
- o. macaroni, spaghetti and other dry pasta products (does not include pre-prepared or pre-flavored convenience pasta foods).
- p. paper towels, napkins, facial tissues, plates, cups and toilet paper.
- q. dishwashing and laundry soaps and detergents.
- r. scouring powders.

The above regulations shall be known as Truth-in-Pricing Regulations 1, 2, 3 and 4.

Appendix C

CONNECTICUT DEPARTMENT OF CONSUMER PROTECTION PROPOSED UNIT PRICING REGULATIONS 1-8 (APRIL 1, 1972)

1. Definitions

- (a) "Commissioner," as used in these regulations, means the Commissioner of Consumer Protection.
- (b) "Consumer Commodity" means any food, drug, device, cosmetic or other article, product or commodity of any other kind or class, except drugs sold by prescription only, which is customarily produced for sale to retail agencies or instrumentalities for consumption by individuals, or use by individuals for purposes of personal care or in the performance of services ordinarily rendered in or around the household, and which usually is consumed or expended in the course of such consumption or use.
- (c) "Unit Price" of a consumer commodity means the retail price of a consumer commodity expressed in terms of the retail price of such commodity per unit of weight, measure or count, computed to the nearest whole cent or fraction thereof.
- (d) "Point of Sale" as used in these regulations, means the point at which

consumer commodities are offered and displayed for retail sale in such a manner that the consumer may examine and select commodities for purchase without the assistance of sales personnel.

- (e) As used in these regulations, the terms food, drug, device and cosmetic are defined as in Section 19-212 of the Connecticut General Statutes:
- (i) "Food" means (1) articles used for food or drink for man or other animals, and (2) chewing gum, and (3) articles used for components of any such article;
 - (ii) "Drug" means (1) articles recognized in the official United States pharmacopœia, official homeopathic pharmacopœia of the United States or official national formulary, or any supplement to any of them; (2) articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals; (3) articles, other than food, intended to affect the structure or any function of the body of man or any other animal; and (4) articles intended for use as a component of any articles specified in this subsection; but shall not include devices or their components, parts or accessories;
 - (iii) "Device" means instruments, apparatus and contrivances, including their components, parts and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals, or (2) to affect the structure or any function of the body of man or other animals;
 - (iv) "Cosmetic" means (1) articles intended to be rubbed, poured, sprinkled or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness or altering the appearance, and (2) articles intended for use as a component of any such articles; except that such term shall not include soap.

2. Persons to Whom Regulations Apply

- (a) Any person who sells or offers or exposes for sale at retail any of the consumer commodities designated in Section 6 of these regulations shall disclose to the consumer the price per unit of weight or measure or count and the total price, as required by Section 4 of the regulations.
- (b) Owner-operated single retail stores are exempt from these regulations. This would include any single store operation wherein the ownership, be it corporate, proprietorship, or partnership, does not own or operate another store in the State of Connecticut in the sale and distribution of consumer commodities subject to this act.

3. Exempt Products

- (a) Drugs sold only by prescription.
- (b) Beverages subject to or complying with packaging or labeling requirements imposed under the Federal Alcoholic Administration Act.

- (c) Products which are required to be marked individually with the cost per unit of weight under the provisions of Section 42-1151 of the Connecticut General Statutes.
- (d) Such consumer commodities which are sold in units of even pounds, pints, quarts or gallons, and which have a retail price plainly marked thereon; but only the particular consumer commodities sold in such units shall be exempt.
- (e) Different brands or products co-mingled in one receptacle for the purpose of a one-price sale.
- (f) Products sold in one size limit only and which package contains three ounces or less in weight or fluid ounces.
- (g) Snack foods such as cakes, candies, or chips, sold in packages under five ounces in weight.

4. Method of Disclosure

- (a) All retail establishments subject to these regulations shall disclose the price per measure to the consumer by the attachment of a tag or label of any of the following colors on the item itself, or on the shelf or at any other point of sale immediately below the item, or above the item, so as to be conspicuously visible to the consumer. The permissible colors are red, blue, green, orange, yellow, or brown. The color white may be used in conjunction with any of these other colors, but white lettering on clear plastic or cellophane wrappers may not be used.
- (b) The tag or label shall contain the following three elements.
 - (i) The words "Unit Price" shall appear as a heading, with the unit price always appearing to the left of the then-selling price.
 - (ii) The price per measure expressed in terms of dollars or cents, as applicable, carried to three digits. If the price is over \$1.00 it is to be expressed to the nearest full cent, provided that said price is rounded off from .005 and over to the next higher cent; and if .004 or less cents, it be carried to three digits. Examples: "25.3 cents per pound"; "\$1.67 per quart."
 - (iii) The applicable unit of weight or measure per count.
- (c) The following additional information may appear on the tag or label at the option of the individual retailer:
 - (i) The description of the commodity being sold by item and size.
 - (ii) In items such as paper products, the applicable "ply" count or thickness may be included.
 - (iii) Such logistical information which the retail establishment requires such as order codes, number of rows, or shelf capacity.
- (d) If the consumer commodity is not conspicuously visible to the consumer or where the display space used for a particular consumer

commodity is inadequate to set forth separate price legends, as required by these regulations, a list of the prices per measure shall be conspicuously posted at or near the point of sale or the point of display; or the price per measure may be stamped or affixed to the item itself.

- (e) The price per measure shall be displayed in type no smaller than that used for the retail price of the item, but in no event shall the price per measure appear in size less than pica type. When a retail food establishment employs display material at the point of sale and the retail price appears thereon in sizes larger than pica type, the unit price information required by these regulations shall conspicuously appear thereon and shall appear in size no less than pica type or $\frac{1}{4}$ the size numerals used for the retail price, whichever is greater.

5. Price Per Measure

- (a) The price shall be designated as per pound or as per ounce, whichever offers the most meaningful basis of comparison for the consumer, on all commodities whose net quantity is customarily expressed in units of pounds or ounces or both, provided that the same unit of measure is used for the same commodity in all sizes sold in such retail establishment.
- (b) Price per pint, quart or gallon for commodities whose net quantity is customarily expressed in units of pints, quarts, gallons or fluid ounces, or a combination thereof; provided, that the same unit of measure is used for the same commodity in all sizes sold in such retail establishment.
- (c) Price per 50 feet or per 50 square feet, as appropriate, for commodities and items whose net quantity is customarily expressed in units of feet, inches, square feet or square yards, or whose net quantities are expressed in units of area or length.
- (d) Price per 100 units of commodities, whose net quantity is expressed by a numerical count.

Required Units of Measure for Unit Price Designation. The following list of products indicates the corresponding unit of measure which is required to be used in the designation of the unit price of such products by all retail food establishments subject to the unit price regulations. As a general rule all dry bulk products are unit priced by the pound; all products sold in aerosol cans are unit priced by the pound; and the majority of the liquid products are unit priced by the quart. There are several products on this list which may be unit priced by either of two limits of measure, provided that the same unit of measure is used for the same commodity in all sizes sold in a single retail food establishment.

6. Products Regulated

(a) Group 1:

<i>Product</i>	<i>Unit Measure</i>
Detergents:	
liquid	pints or quarts
dry	pound
Household cleansers, waxes, polishes & deodorizers:	
liquid	pints or quarts
dry	pound
aerosols	pound
Cereals	pound
Instant breakfast foods	pound
Butter	pound
Oleomargarine	pound
Coffee, instant & ground	pound
Cocoa, chocolate syrups	pints or pounds
Tea:	
bags	per 100 units
bulk	pound
instant	pound
Jellies & jams	pound
Peanut butter	pound
Mayonnaise	pints or quarts
Sanitary paper products, including napkins, paper towels, tissues	
	per 100 units
Aluminum & plastic wraps	per 50 square feet
Baby Foods:	
solids	pound
juices	pints

(b) Group 2:

<i>Fruits & Vegetables</i>	
canned	pound
jarred	pound
boxed	pound
Juices	quart
Shortenings	pound
Flours	pound
Cooking oils	pints or quarts
Canned fish & canned meats	pound
Spaghetti, macaroni, noodles & pasta products.....	pound
<i>Soups</i>	
canned	pound
dried	pound

(c) Group 3:

<i>Product</i>	<i>Unit Measure</i>
Frozen fruits, vegetables & juices	pound
Pet foods	pound
Prepared baking mixes, including cake, pancake & biscuit mixes	pound
Ketchup & mustard	pints or pounds
Tomato, spaghetti & meat sauces	pints or pounds
Pickles & relishes	pints or pounds
Snack foods, including potato chips & pretzels	pound
Bread & pastry products	pound
Bottled beverages	
Carbonated & non-carb	quart
Flavored syrups & powdered drink mixes	pints
Cookies & crackers	pound
Salad dressings:	
liquid	pints
dry mixes	pound
Toothpaste	pound
Shaving creams	pound
Deodorants	pound
Shampoos	pints
Cold cuts	pound
Fish products & meat	pound

7. Extension of Time for Compliance

Any retail establishment which is unable to comply with these regulations may make written application to the Commissioner for permission to extend such time compliance for a period not to exceed thirty days. Such retail establishment shall set forth, in as much detail as possible, the reasons for its inability to comply. The Commissioner may extend such period from time to time, upon such terms and conditions as may be deemed reasonable.

8. Responsibility for Compliance

In the event of a violation of these regulations, the owner, the manager, or the person in charge of such retail establishment, and the person employing such manager or person in charge, where applicable, shall be deemed to be responsible for compliance by such retail establishment with the requirements of these regulations.

Appendix D

MASSACHUSETTS CONSUMERS' COUNCIL UNIT PRICING REGULATIONS 1-7

BULLETIN UP-1-1971 (MARCH 9, 1971) AS AMENDED BY BULLETIN UP-2-1971 (JANUARY 6, 1972)

1. Definitions.

- (a) "Packaged Commodity" means any food, drug, device or cosmetic and any other article, product, or commodity of any kind or class which is customarily necessary or used for personal, family, or household use and offered for sale at retail and which is listed in paragraph 5, hereunder;
- (b) "Unit Price" means the price per measure.

2. Exemptions.

Sellers at retail need not comply with the provisions of these regulations as to the following packaged commodities:

- (a) Medicine sold by prescription only;
- (b) Beverages subject to or complying with packaging or labeling requirements imposed under the Federal Alcohol Administration Act.
- (c) Such packaged commodities which are required to be marked individually with the cost per unit of weight under the provisions of General Laws, Chapter 94, Section 181.
- (d) Such packaged commodities which are sold in units of even pounds, pints, quarts, or gallons, and which have a retail price plainly marked thereon; but only the particular packaged commodity sold in such units shall be exempt.
- (e) Packaged commodities sold by any retail establishment operated by a person as his sole place of business shall be exempt from these regulations.

3. Means of Disclosure.

All retail establishments subject to these regulations shall disclose the price per measure to consumers in the following manner:

- (a) Attachment of an orange stamp, tag or label on the item itself, or directly under or over the item on the shelf on which the item is displayed, and conspicuously visible to the consumer, such orange stamp, tag or label carrying the following data and no other:
 - (i) The words "Unit Price", as a heading.
 - (ii) The designation of the price per measure, shall be expressed in terms of dollars or cents, as applicable, carried to three digits. If the price is over \$1.00, it may be expressed to the nearest full cent, provided that said price is rounded off from .005 and over to the next higher cent; and if .004 or less down

to the next lower cent; but, that if it is expressed in cents, it be carried to three digits. Example: "25.3 cents per pound; \$1.67 cents per quart."

- (iii) The description of the packaged commodity by item and size of unit being sold may also be included thereon at the option of the retail establishment.
 - (iv) In such items as paper products, which are manufactured in numbers of folds showing in addition to such other information as may be required hereunder, the applicable "ply" count or thicknesses, customarily designated as "ply", by such packaged commodities.
 - (v) Except that the retail establishment shall not be required to comply with the provisions of paragraph 3(a) as to color and 3(c) as to size of type, where the product or commodity carries a pre-printed retail price on its package, *provided* that the unit price appears thereon in a size no smaller than that used for the retail price.
- (b) If the packaged commodity is not conspicuously visible to the consumer, a list of the price per measure conspicuously placed near the point of purchase, or a sign or list of price per measure posted at or near the point of display, or by stamping or affixing the price per measure on the packaged commodity itself, provided that the data, color code and size requirements of paragraph 3(a) and (c) are met.
- (c) The size of the print of the legend required under the provisions of paragraph 3(a) and 3(b) and in any other place within the retail establishment, where the price of commodities regulated hereunder is displayed, the price per measure shall be displayed in type no smaller than that used for the price of the item, but, in no event shall such price per measure appear in a size less than $7/16$ " in height; PROVIDED, that if any retail establishment is unable to meet the minimum size requirements, set forth herein, such retail establishment may apply to the Consumers' Council for permission to use a size and type no less than pica size for such periods of time as the Consumers' Council may deem to be reasonable.
- (i) PROVIDED, that when the retail establishment employs display material and the retail price appears thereon in size larger than $7/16$ ", the unit price required hereunder may appear in a size no less than $7/16$ " or $1/4$ the size used for the retail price, whichever is greater.
- (d) When the display space used for the packaged commodity is inadequate to set forth separate price legends as required hereunder, and where the price designations are not customarily used for the commodities, the retailer may set forth such legends as are required hereunder on display cards or other material used for the display of prices for such commodities. The display of unit price shall appear on an orange background, be conspicuously visible, and the size of type used for the legend shall be no less than the size of the type used for the price of such packaged commodity.

4. Price Per Measure.

The price per measure required to be disclosed under these regulations shall be:

- (a) Price per pound for commodities whose net quantity is customarily expressed in units of pounds or ounces or both.
- (b) Price per pint, quart or gallon for commodities whose net quantity is customarily expressed in units of pints, quarts, gallons, or fluid ounces, or a combination thereof; provided, that the same unit of measure is used for the same commodity in all sizes sold in such retail establishment.
- (c) Price per 50 feet or per 50 square feet, as appropriate, for commodities and items whose net quantity is customarily expressed in units of feet, inches, square feet or square yards, or whose net quantities are expressed in units of area or length.
- (d) Price per 100 units of commodities, whose net quantity is expressed by a numerical count, PROVIDED, that, where the contents of the packaged commodities are expressed by a measure other than count, either by weight, fluid measure, area, or length, the unit price per measure may be expressed either as a price per measure under the provisions of paragraphs 4(a), (b) or (c), or by count, provided further, that the same unit of measure is used for the same commodity in all sizes in such retail establishment.
- (e) For those products or commodities, which are universally sold in sizes less than three (3) ounces, the price per measure may be designated as the price per ounce, provided that the same unit of measure is used in all sizes in such retail establishment.

5. Packaged Commodities Regulated

- (a) The following commodities shall be labeled in accordance with these regulations no later than May 24, 1971. Thereafter, such commodities may not be sold in retail stores subject to these regulations, unless the conditions of these regulations shall have been met.

Detergents
 Household cleansers, waxes, deodorizers
 Cereals
 Instant breakfast foods
 Butter
 Oleomargarine
 Coffee, instant and ground
 Cocoa
 Tea
 Jellies, jams and sandwich spreads

- (b) The following commodities shall be labeled in accordance with these regulations no later than July 19, 1971. Thereafter, such commodities may not be sold in retail stores subject to these regulations, unless the conditions of these regulations shall have been met.

Fruits, vegetables, and juices — canned, jarred, boxed
 Pet foods
 Baby foods
 Shortenings
 Flour
 Baking mixes and supplies
 Canned fish and meats
 Sanitary paper products, such as napkins, paper towels, tissues, etc.
 Aluminum and plastic wraps
 Spaghetti, noodles and pasta products
 Ketchups — mustards — sauces
 Snack foods, such as potato chips, pretzels, etc.
 Soups — canned and dry mixes

- (c) The following commodities shall be labeled in accordance with these regulations no later than Sept. 20, 1971. Thereafter, such commodities may not be sold in retail stores subject to these regulations, unless the conditions of these regulations shall have been met.

Frozen fruits, vegetables, and juices
 Bread and pastry products
 Bottled beverages — carbonated and non-carbonated
 Flavored syrups and powdered drink mixes
 Cookies and crackers
 Salad Dressings
 Toothpaste
 Deodorants
 Shampoos
 Shaving Cream
 Retail sales of food made from bulk, if the quantity is weighed, measured or counted at the time of such sale by the retailer, such as
 Cold cuts
 Fish products and meat

6. Extension of Time for Compliance

(a) Any retail establishment which is unable to comply with these regulations within the time set forth herein, may apply to the Consumers' Council for permission to extend such time for compliance for a period not to exceed thirty days. Such retail establishment shall set forth, in as much detail as possible, the reasons for its inability to comply. The Consumers' Council may extend such period from time to time, upon such terms and conditions as it may deem reasonable.

(b) Exemption from compliance with the requirements of any of the provisions of paragraph 3 may be granted for cause by the Consumers' Council, upon the filing of a statement, setting forth the reason for inability to comply with any of the requirements of paragraph 3. Such exemption shall be granted by the Consumers' Council for such period of time as it may deem reasonable.

7. Responsibility for Compliance.

In the event of a violation of these regulations, the manager, or person in charge of such retail establishment and the person employing such manager or person in charge, where applicable, shall be deemed to be responsible for compliance by such retail establishment with the requirements of these regulations.