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A Comprehensive Look at the Fair Packaging and Labeling Act of 1966 and the FDA Regulation of Deceptive Labeling and Packaging Practices: 1906 to Today

by

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Abstract

This paper discusses the regulation of packaging and labeling of foods throughout the 20th century, with a focus on the Fair Packaging and Labeling Act of 1966. The paper is divided into three sections: first, an overview of the regulatory environment and packaging and labeling practices from the Federal Food and Drugs Act of 1906 to the Senate Hearings in 1961 to discuss reform of packaging and labeling law; second, a detailed examination of the development of Fair Packaging and Labeling Act; and third, a survey of government, media, industry, and public response to the Act and an analysis of the efficacy of the Act both at the time of passage and today.

I. Introduction

“To shop rationally, the housewife would need the impulses of a sleuth, the stamina of a weight-lifter, and the skill of a certified public accountant.”

Mowbray

Thumb on the Scale

I consider myself to be a value-conscious consumer, particularly in the aisles of the supermarket. I compare products and prices whenever possible, and I am never surprised to find manufacturers and retailers using tricky packaging and labeling techniques to exaggerate the attractiveness of their products. Information is my ally in the pursuit of value; I am confident that if I am fully informed of my options, the food industry has a formidable competitor if it wishes to deceive me. Unfortunately, information comes at a cost, and the more information I have the less my dollar buys me.

In the area of economic regulation of food, drugs and cosmetics, our government has struggled for the past 100 years to strike a balance between the efficiencies of the free market system and the adequate protection of the “ignorant, unthinking and credulous” consumer. On one side is the historic guiding principle of commerce: *caveat emptor*, as described by Justice Brandeis in 1913:

Primitive barter was a contest of wits, instead of an exchange of a indeed, an equation of two unknown quantities. Trading took its money was adopted as the medium of exchange. That removed o incident to a trade; but only one-half. The transaction of buying a contest of wits. The seller still gave as little value and got as r And the law looked on at the contest declaring solemnly and o beware.”¹

The rule of *caveat emptor* is particularly unsettling when we recognize the bargaining parties are on drastically unequal footing, as is the case when the American consumer enters the prodigious supermarket. Among

other challenges, the consumer has to struggle to compare odd package sizes, worry about whether or not the package is full, and search to find how much the package contains. Thus, the past hundred years has witnessed a slow shift to the other side of the balance, namely, the economic protection of the consumer. The most notable protection provided by the government against the deceptive practices in the supermarket is the Fair Packaging and Labeling Act of 1966 (the FPLA). The FPLA successfully helped equalize bargaining power by forcing manufacturers to provide consumers with a clear statement of what their package contained and whom it was from. Unfortunately, the FPLA was less successful at protecting the consumer from deceptive packaging practices and marketing ploys utilized by manufacturers to give as little value for the consumer's dollar as possible.

This objective of this paper is tri-fold: to briefly review the regulation of deceptive food packaging and labeling practices prior to the enactment of the FPLA; analyze its efficacy at the time FPLA was passed; and briefly address how effective FPLA is at ameliorating deceptive practices today. Although there are numerous packaging and labeling concerns that have surfaced over the last 100 years, my attention will be focused on the problems that the FPLA was designed to prevent.

Although the focus of this paper is the FPLA and the FDA regulations promulgated there under, one cannot discuss the topic of deceptive practices in the supermarket without mentioning the substantial role of the Federal Trade Commission (FTC) in the regulation of deceptive practices. "Labeling" regulation is clearly the responsibility of the FDA and advertising is clearly the responsibility of the FTC,² but there is a world of gray area where the two overlap; the most notable of which is in the area of deceptive packaging. In 1914 Congress passed the Federal Trade Commission Act, which empowered the FTC to stop "unfair methods

²Wesley E. Forte, *Food and Drug Administration, Federal Trade Commission and the Deceptive Packaging of Foods*, 21 FOOD DRUG COSM. L.J. 4, 205 (1966) (citing 3 Trade Reg. Rep. ¶9850 at 16482-83: the working agreement provides that the FTC will exercise sole jurisdiction over all advertising of foods, drugs, devices and cosmetics and the FDA will exercise jurisdiction over all labeling of foods, drugs, devices and cosmetics.).

of competition in commerce.”³This grant of authority gave the FTC little or no jurisdiction over false and misleading practices directed at the consumer, for the “unfair methods” were those injuring competitors rather than consumers.⁴ In the Wheeler-Lea Amendments of 1938, Congress responded by further empowering the FTC to stop “unfair or deceptive acts or practices in commerce.”⁵ This grant technically gave the FTC and the FDA (authority discussed below) concurrent jurisdiction over the distribution of deceptively packaged foods, drugs, devices and cosmetics in interstate commerce at the time Congress was considering a fair packaging and labeling bill.⁶ However, through a working agreement the FTC has generally left the policing of deceptive packaging to the FDA.⁷

³Federal Trade Commission Act § 5, 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a)(6) (1964).

⁴Robert Sabatino, *Federal Government Agency Activities in Consumer Protection from Deceptive Advertising*, in CONSUMER PROTECTION FROM DECEPTIVE ADVERTISING (Dr. Fredric Stuart ed., 1974).

⁵52 Stat. 111, 114.

⁶Forte, *supra* note 2, at 207.

⁷*Id.* at 208 (citing *Hearings Pursuant to S. Res. 258 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 87th Cong., 1st & 2nd Sess. 821-22, 824 (1962)). FTC Chairman Dixon’s position is that that the FDA has the responsibility for policing deceptive packaging of foods, drugs, devices and cosmetics under the present working agreement between the agencies.

II. Packaging and Labeling Abuses Prior to the 1906 Act

A. Regulation of Deceptive Practices under the 1906 Act

The 1906 Federal Food and Drugs Act (the 1906 Act) prohibited the use of false or misleading labeling.⁸ However, the 1906 Act did not require an accurate statement of ingredients⁹ or a correct statement of weight or measure, and did nothing to prohibit the use of misleading packaging.¹⁰ Only five years after the enactment of the 1906 Act, Congress passed the Gould Amendment of 1913 to require a statement of net quantity of contents of food.¹¹ The amended Act provided that a food was deemed to be misbranded if “the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count.”¹² It quickly became clear that even the amended Act was inadequate to protect the consumer from many economic frauds, the most prominent of which were *slack fill* and *deceptive packaging*.¹³ In general, slack fill is the practice of intentionally filling only a portion of the capacity of a container in order to deceive the consumer into believing the package contains more product.¹⁴ Although these packages usually contained an accurate statement of net weight as required by the statute, consumers either could not read or ignored the weight statement and purchased the product based on the size and shape of the package. Deceptive packaging, on the other hand, is the practice of shaping containers such that consumers are deceived as to their true capacity.¹⁵ One example of this type of abuse is a bottle with an inverted bottom designed to falsely indicate a greater quantity of food than is actually present.¹⁶

⁸1906 Federal Food and Drugs Act § 8, 34 Stat. 768 (1906).

⁹*Id.* Section 8 only required that statements regarding the ingredients not be false or misleading.

¹⁰*Id.* Section 8 states that a food shall be deemed to be misbranded if “it be *labeled* or *branded* so as to deceive or mislead the purchaser. . . .” The statute clearly did not prohibit *packaging* that misleads the consumer.

¹¹Peter Barton Hutt, *Development of Federal Law Regulating Slack Fill and Deceptive Packaging of Food, Drugs, and Cosmetics*, 42 FOOD DRUG COSM. L.J. 1, 3 (1987).

¹²*Id.*

¹³*Id.* at 7.

¹⁴*See Id.* at 4. Another prevalent form of slack fill was the practice of adding water to a product to fill the required content. This practice was more common in products where it was difficult to detect the addition of water, such as canned tomatoes.

¹⁵*Id.* at 7.

¹⁶*Id.*

Despite the obvious nature of these frauds, the FDA had a difficult time prosecuting fraudulent containers. In a 1912 Food Inspection Decision interpreting the 1906 Act, the FDA claimed that the package is not only a container but also gives the consumer an indication of the quantity of food contained therein, and should therefore be as filled as feasibly possible.¹⁷ Nonetheless, a Solicitor of the Department of Agriculture ruled that there was no authority in the 1906 Act for the FDA to correct such abusive practices. The FDA pleaded its case to Congress, and in 1919 Congressman Gilbert N. Haugen, Chairman of the House Committee on Agriculture, introduced legislation in the House of Representatives to prohibit slack fill and deceptive packaging.¹⁸ Among those favoring the bill were members of the spice industry, as they recognized the need for protection against deceptive filling of containers.¹⁹ Extensive committee hearings in both the House and Senate were held and the legislation passed the House four times, but it never passed the Senate.²⁰ Proponents of legislation on slack fill were more successful with the McNary-Mapes Amendments of 1930. The final version of the 1906 did not grant the FDA authority to fix food standards for the guidance of the states and the courts;²¹ however, the FDA proceeded to work with the canned food industry to establish voluntary standards of fill. In an effort by the FDA to legitimize their standards and the industry to enhance their credibility, both groups supported the new legislation enacted in 1930 as an amendment to the 1906 Act.²² The legislation stated that canned food was adulterated if it fell below the standard of “quality, condition, and/or fill of container” promulgated by the FDA. The FDA was authorized to set reasonable standards for each class of canned food and require that manufacturers state on the label if the canned food doesn’t meet the standards.²³

¹⁷Franklin M. Depew, *The Slack-filled Package Law*, 1 FOOD DRUG COSM. L. Q. 86, 88 (1946), (citing Food Inspection Decision 144 of Secretary of Agriculture James Wilson, dated May 22, 1912, published May 27, 1912).

¹⁸See *Amendments to the Pure Food and Drugs Act, Hearings Before the Comm. On Agriculture, H. of Rep.*, 66th Cong., 1st Sess., 8 (1919). The legislation was introduced on behalf of the FDA, which felt that existing statutory authority was insufficient to preventing slack fill and deceptive packaging. H.R. 8954, 66th Cong., 1st Sess. (1919).

¹⁹Depew, *supra* note 17, at 89.

²⁰Hutt, *supra* note 11, at 5.

²¹*Id.* at 9 (citing H.R. Rep. No. 5096, 59th Cong., 1st Sess. 9 (1906).

²²46 Stat. 1019 (1930).

²³*Id.*

B. Regulation of Deceptive Practices under the Federal Food Drug and Cosmetic Act of 1938

The Federal Food, Drug, and Cosmetic Act of 1938 (the 1938 Act) was approved on June 25, 1938.²⁴

One of the major purposes of the 1938 Act was to provide stronger regulation over slack fill and deceptive packaging.²⁵ Section 343(d) of the 1938 Act prohibited the use in interstate commerce of containers for food, drugs and cosmetics that were “so made, formed, or filled as to be misleading.”²⁶

The 1938 Act also granted the FDA the broad power to establish standards for the fill of container of food.²⁷ Subsequently, the FDA established standards of fill for various products, such as certain canned fruit and fruit juices, canned shellfish, canned tuna fish, canned vegetables, and canned tomatoes.²⁸ If the food did not meet the standard of fill, it must be labeled “Below Standard in Fill,” but even if so labeled it may be considered slack-filled if the container is misleading. The FDA prevailed in the one case in which the standard of fill was attacked as invalid, *Willapoint Oysters, Inc. v. Ewing*.²⁹

Despite the clear message from Congress that slack fill and deceptive packaging were targeted practices of the 1938 Act, the FDA was notably unsuccessful in attacking misbranding in the courts. Although an early decision held that the language of Section 343 was not so broad as to make it unconstitutional,³⁰ the word “misleading” was not definite enough to convince the courts manufacturers were violating the statute. The FDA brought four major cases involving foods that were allegedly packed in containers that were so made, formed or filled as to be misleading, and lost all of them. The failure of the government to win any of these

²⁴Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040 (1938).

²⁵Peter Barton Hutt, *Development of Federal Law Regulating Slack Fill and Deceptive Packaging of Food, Drugs, and Cosmetics*, 42 FOOD DRUG COSM. L.J. 1, 10 (1987).

²⁶21 U.S.C. § 343(d).

²⁷21 U.S.C. § 341.

²⁸Forte, *supra* note 2 at 210.

²⁹174 F. 2d 676 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949).

³⁰See *United States v. 149 Gift Packages* 52 F. Supp. 993, 994 (S.D.N.Y. 1943) (“It seems to me that the provision is specific and does not violate any constitutional rights of the claimant”).

cases was one of the principal forces behind the eventual passage of the FPLA.

In the first of the four cases, *United States v. 738 Cases of Jiffy-Lou Vanilla Flavor Pudding*,³¹ the FDA instituted condemnation proceedings against cases of vanilla pudding shipped in interstate commerce, alleging that they were misbranded under section 343(d) of the 1938 Act. The pudding filled approximately fifty-five percent of the exterior container “without allowance for the removable inner package,” which the court said was “reasonable necessary.”³² The court found that the container used for the pudding was a standard container, with a standard amount of ingredients to make a standard amount of pudding expected by the consumer. The court also found that despite the size of the package, the public was aware that the ingredients were sufficient to make one pint of pudding. The court concluded that the container was not so made, formed or filled as to be misleading in fact, and rendered a judgment for the claimant.

In the second case, *United States v. Cataldo*,³³ the FDA condemned 3,474 boxes of candy in which the product only occupied forty-five percent of the box. Each box of candy contained eighteen smaller boxes, each containing one piece of candy wrapped in a piece of wafer. In affirming a judgment for the claimant that the package was not misleading, the court of appeals refused to establish a rule that less than fifty percent fill was *per se* illegal. The court noted that such bulky wrapping was common among other manufacturers of the trade, and the FDA failed to demonstrate that any consumer was *in fact* deceived by the packaging.³⁴

United States v. 116 Boxes of Arden Assorted Candy Drops,³⁵ also a case involving boxes of candy, focused on the thirty-three percent empty space that primarily resulted from machine packing. The claimant argued that seventeen drops was the maximum fill using machine packing, even though the box could fit twenty

³¹71 F. Supp. 279 (D. Ariz. 1946).

³²*Id.* at 280.

³³157 F. 2d 802 (1st Cir. 1946).

³⁴*Id.* at 803

³⁵80 F. Supp. 911 (D. Mass. 1948).

drops if packed by hand. The court flatly rejected the government’s argument that the expectation of a five-year-old child was the test for misleading. Rather, the court used an “ordinary person” standard, who “had been led to expect and desire machine-packing.”³⁶ Such a consumer would prefer the economies and sanitation of machine-packing versus hand-packing, and come to expect some slack or air space.³⁷ Applying the ordinary person standard, the court held that the packaging did not constitute misbranding as long as the “non-infantile purchaser” had received approximately as many drops “as could conveniently be packed in a standard rectangular carton by machine. . . .”³⁸

The final and most notorious of the four cases is *United States v. 174 Cases of Delson Thin Mints*.³⁹ *Delson Thin Mints* involved boxes of candy in which only forty-four percent of the total volume (and seventy five percent of the practical volume) was filled with candy.⁴⁰ Although the government presented extensive evidence that the ordinary consumer would expect more mints than were contained in the box, the district court held that there was no adequate proof that the average adult of normal intelligence would expect any particular number of mints when purchasing the boxes. The district court added:

The type of container construction employed by the claimants, w
cuses in this case, is efficacious to a degree for the protective purp
claimants and was not adopted and is not being used for the purpos
purchasers respecting the contents of the container.⁴¹

³⁶ *Id.* at 912.

³⁷ *Id.*

³⁸ *Id.*

³⁹ 180 F. Supp. 863 (D. N.J. 1960) [hereinafter *Delson Thin Mints*].

⁴⁰ *Id.* at 863. Thomas P. Wharton, president of Packaging Consultants, Inc., described the package to the Senate subcommittee during the subsequent hearings on fair packaging and labeling legislation: “I am convinced that the housewife who opens this package is shocked and bitter at the obvious steps which have been taken to reduce the quantity of mints in the package. In the inner package, the ends have been recessed a full half inch. Two hollow partitions have been provided, each of which occupies another half inch of space. This deception isn’t even subtle. A full two inches of length had been faked within the package.” A.Q. MOWBRAY, *THE THUMB ON THE SCALE; OR THE SUPERMARKET SHELL GAME* 32 (1967).

The court of appeals disapproved of the district court's number-of-mints
remanded the case. The court of appeal stated that there are only two ways
the claimant in such cases:

First, the court can find as a fact that the accused package is not
such a way that it would deceive the ordinary purchaser as to the
Alternatively, the court may find as a fact that even though the
package deceives the ordinary purchaser into thinking that it contains
actually does, the form and filling of the package is justified by cost
is reasonable in the light of available alternative safety features. . .

The court of appeals said that it didn't matter whether the ordinary purchaser would expect to find a
particular number of individual candies in the box but whether "such a purchaser would expect to find more
of the Delson box filled. . . ." ⁴³ On remand, the district court found that the package was not deceptive,
but even if it were deceptive the efficacy of the present package outweighed any deception and there was
no alternative means of packaging that was less deceptive. On appeal from this determination, the court of
appeals upheld the decision, *per curiam*, as not clearly erroneous. ⁴⁴

These case caused a load of aggravation for the FDA, but also some general principles by which containers
of food should be judged under the 1938 Act. First, a container may correctly state the quantity of its
contents on the label and still be misleading to the consumer; a container not only makes a representation
as to the net weight of its contents, but also a representation as to its volume. ⁴⁵ Second, the court (at
that time) would use the "ordinary person" standard when determining what representations are made by
the container, and whether or not they are misleading. ⁴⁶ Contrast this with the more liberal standard of
"the ignorant, the unthinking and the credulous" applied to FTC cases against deceptive advertising, ⁴⁷ and

⁴³ *Id.*

⁴⁴ See *United States v. 174 Cases of Delson Thin Mints*, 302 F.2d 724 (3d Cir. 1962).

⁴⁵ See *Cataldo*, *supra* note 33, at 803.

⁴⁶ Forte, *supra* note 2 at 214 (citing § 343(f) of the 1938 Act, which provides that mandatory labeling of foods is tested by
the standard of the "ordinary individual under customary conditions of purchase and use.").

⁴⁷ *Id.* at 215 (citing *Delson Thin Mints*, at 247).

in misleading labeling cases under the 1938 Act after 1969.⁴⁸ Third, even if the representations made by the container are misleading to the consumer, the form or filling of the container may be justified by other considerations (e.g. the safety of the product) as long as it is reasonable in light of available alternatives.⁴⁹ Although some observers thought that the cases laid down a framework that adequately protected the consumer,⁵⁰ others were pessimistic. One law reviewer stated, “In view of the decision in the *Delson Thin Mints* case, it is difficult to conceive how the government will ever win a case under the present wording of section 403(d).”⁵¹ The Assistant General Counsel of the FDA took a optimistic view: “I do not think we can improve on that rule announce by the court of appeals [in *Delson Thin Mints*] that the burden is on the person who is using the deceptive container to justify it in terms of reasonable need.”⁵² The FDA never had the chance to prove the strength of the rule, as mounting consumer complaints would set Congress into motion.

C. Consumer Complaints under the Existing Statutory and Regulatory Regime

At the same time that the FDA was becoming more and more frustrated with its efforts at deterring slack fill, the everyday shopper was beginning to voice her criticisms of the packaging and labeling of grocery items.⁵³ In 1960, Consumers Union received over 500 letters accusing packagers of food and other household

⁴⁸See *United States v. Article Consisting of 216 Cartoned Bottles . . . “Sudden Change”*, 409 F.2d. 734 (2nd Cir. 1969) (holding the law should protect “the ignorant, the unthinking and the credulous”); See also, *United States v. An Article of food . . . “Schmidt’s Blue Ribbon”*, 1969-1974 FDLI Jud. Rec. 139 (D. Md. 1973) (claiming the standard is the “often unthinking and gullible consumer”).

⁴⁹Forte, *supra* note 2 at 220.

⁵⁰See, e.g., Note, “Federal Regulation of Deceptive Packaging: The Relevance of Technological Justifications,” 72 Yale L.J. 788, 797 (1963) (concluding Section 343(d) “appears to offer adequate scope for a balanced treatment of conflicting consumer interests and to provide an effective means for regulating the use of slack-filled packages.”).

⁵¹Legislation and Administration, *The Consumer in the Marketplace – A Survey of the Law of Informed Buying*, 38 Notre Dame Law. 555, 571 (1963).

⁵²Forte, *supra* note 2, at 222 (citing *Hearings Pursuant to S. Res. 258 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 87th Cong., 1st & 2nd Sess. 805 (1962)).

⁵³See A.Q. MOWBRAY, *THE THUMB ON THE SCALE; OR THE SUPERMARKET SHELL GAME* (1967).

items of fraud and deceit.⁵⁴Slack fill was only one of the seven general categories of complaint, which are described below. Although all these complaints would surface during the hearing that preceded the passage of the FPLA, only a few of them would be directly addressed in the final legislation.

First, consumers criticized the common food industry practice of slightly reducing the net contents of a container (such that the purchaser doesn't notice) while keeping the price (and often the size of the container) the same.⁵⁵ Although consumers realized that inflation naturally causes the price of a given amount of product to rise over time and the lower net contents were accurately stated on the label, most considered this a concealment of price increase.⁵⁶ This practice, which came to be known as "packaging to price," could be condemned simply because it made it more difficult for the consumer to make a rational choice in the supermarket, especially if the consumer's decision rest upon information learned by studying the size of the container the week before.

Secondly, consumers complained of slack fill, as discussed in the cases above. In addition to finding unnecessary packaging, consumers were also angered to find cans, boxes and bags that weren't as full as they expected.⁵⁷ The economic abuse the FDA had focused upon for the previous fifty years was still perceived to be a substantial problem by consumers.

Third, consumers complained the net weight or volume was often printed in difficult to read type or color. For example, the statement of net quantity on an aluminum foil candy wrapper would be printed with silver ink, making the statement almost invisible unless the wrapper was positioned at a certain angle to the light.⁵⁸ On some products the statement of net quantity was difficult to find and varied from package to

⁵⁴*Id.* at 9. In its 25 years of existence, no other subject has generated a greater volume of mail for the Consumers Union.

⁵⁵*Id.* at 9. Note the manufacturer is prohibited by antitrust law from setting the retail price. Thus the retailer is responsible for setting the price, but in practice the retailer's price is heavily dependent on the wholesale price charged by the manufacturer.

⁵⁶CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE PACKAGING-LABELING CONTROLS BILL (S. 985) (1965) [hereinafter *Chamber*].

⁵⁷*Id.* at 9.

⁵⁸Mowbray, *supra* note 53, at 2.

package.⁵⁹ The worst offenders would use a size of type for the net quantity statement so small as to make the information virtually unreadable.⁶⁰

Fourth, consumers were overwhelmed by the proliferation of odd weights of packages of food and detergents – sometimes including fractions of an ounce – that made it difficult for purchasers to compute the cost per unit of quantity and compare products. For example, there were fifty-seven different sizes of toothpaste available to the consumer prior to the passage of FPLA.⁶¹ As indicated in the opening quote of this paper, it was often suggested the consumer needed a slide-rule in order to compare prices across brands (and even between sizes of the same brand). Several surveys were conducted to test the ability of the consumer to choose the most quantity of a class of product for the cheapest price (irrespective of perceived differences in quality), and the consumers universally failed.⁶² Retailers also took advantage of the common consumer perception that it was cheaper to sell in larger quantities by raising the per ounce price as the package increased in size, a so-called “quantity surcharge.”⁶³ Although economic analysis shows us it is reasonable to charge a premium on higher quantities of scarce resources, few, if any, of the items in a grocery store are scarce resources. It was clear that retailers were opportunistically taking advantage of the consumer assumption of economies of scale that they themselves had been pushing for years.⁶⁴

Fifth, consumers complained that the shelves were flooded by terms such as Jumbo, Giant, Super and Economy to describe a package even though there are no standards for these descriptions and they often were meaningless in relation to other brands. Manufacturers would even add descriptive terms to the fixed statement of net quantity of contents in order to make the product sound bigger, such as a “full gallon” or

⁵⁹ *Chamber*, *supra* note 56, at 2.

⁶⁰ *Id.*

⁶¹ JENNIFER CROSS, *THE SUPERMARKET TRAP: THE CONSUMER AND THE FOOD INDUSTRY* 83 (1974).

⁶² *Hearings on the Fair Packaging and Labeling Bill, U.S. Congress, House Committee on Interstate and Foreign Commerce, 89th Cong., 2nd Sess.* 155 (1966).

⁶³ Omprakash K. Gupta & Anna S. Rominger, *Blind Man's Bluff: The Ethics of Quantity Surcharges*, *JOURNAL OF BUSINESS ETHICS*, at 3, Dec. 1996.

⁶⁴ *Id.*

“jumbo pound.”⁶⁵ Although consumers had acquired a degree of immunity to such adjectives over the years, they desired a clear statement of quantity at the time of the buying decision.

Sixth, consumers were troubled by the practice of declaring of the number of servings in a package without stating the serving size.⁶⁶ There was no statute or regulation governing the size that a serving had to be, or even requiring that the manufacturer state the size of his proposed serving. Thus, some products skimped on serving size in order to claim more servings.

Seventh and finally, consumers complained of “cents-off” and other bargains imprinted on the package by the manufacturer, who is prohibited by law to set retail prices and cannot guarantee such a discount. A product will have a label stating, “This product is 7 cents off,” and the consumer is left to wonder “7 cents off what?”⁶⁷ Was the manufacturer claiming that the product was seven cents off yesterday’s price, the “regular” price, or perhaps the stamped price? Even if the manufacturer gave the retailer a seven cents discount on a particular shipment, there was no guarantee that the retailer would pass that discount on to the consumer.

Many of the complaints can be traced to the period following World War II. The effects of World War II on the food industry were two-fold: First, the harsh economic environment pushed some honest manufacturers to resort to slack-filling of containers as a way to help sagging profits.⁶⁸ Second, and more importantly, the period following World War II was marked by the explosion of the supermarket and prepackaged food.⁶⁹ Whereas once a clerk behind the counter of a local mom-and-pop grocery store sliced up, ladled out, weighed, and packaged the product, the container is its own salesman in the supermarket. Food manufactures became food marketers, and there was an upsurge in the fields of advertising management, brand, product and mer-

⁶⁵Mowbray, *supra* note 53, at 9.

⁶⁶*Id.*

⁶⁷*Id.* at 111.

⁶⁸*Id.*

⁶⁹*Id.* at 10.

chandising management and package consulting.⁷⁰ Today we are accustomed to the food industry studying our psychological preferences and creating an aesthetic package and persuasive advertising campaign, but in the late 1950's consumers were more naïve to such corporate practices.⁷¹ Proponents of packaging and labeling legislation claimed that the manufacturing industry had crossed the line into abusive practices in their zeal to create a more persuasive salesman.⁷²

D. Presidential Concern

President Kennedy delivered to Congress in 1962 the first Presidential message devoted exclusively to the consumer interest.⁷³ In his historic consumer message, President Kennedy spelled out the four major rights of the consumer:

1.

The right to safety

2. The right to be informed

3. The right to choose

4. The right to be heard

President Kennedy recognized that improvements were needed to bolster each of these rights in the realm of packaging regulation:

⁷⁰*Id.*

⁷¹*Id.* at 14.

⁷²*Chamber, supra* note 56, at 4.

⁷³Ester Peterson, *The Consumer's Interest*, 21 FOOD DRUG COSM. L.J. 2, 92 (1966).

In our modern society, good packaging meets many consumer needs, among them convenience, freshness, safety, and attractive appearance. But often in recent years these benefits have been accompanied by practices which frustrate the consumer's efforts to get the best value for his dollar.⁷⁴

President Johnson later echoed this concern for consumers and established the President's Committee on Consumer Interests.⁷⁵ Esther Peterson, the Special Assistant to the President for Consumer Affairs, became one of the chief proponents of a fair packaging and labeling bill to address these rights outlined by President Kennedy.⁷⁶ Although she generally advocated a cooperative environment between government and business, she proclaimed that cooperation had failed in regard to packaging and providing the consumer with meaningful information.⁷⁷ Mrs. Peterson noted that unlike the farmer, the laborer and the businessman, the consumer did not have the same type of special representation in Washington.⁷⁸ She acknowledged that the consumer's interest was served by the FDA, FTC and the Department of Agriculture, but that the splintering of authority between these groups had left gaps of protection for the consumer.⁷⁹

III. The Fair Packaging and Labeling Act of 1966

A. Congressional Response: Overview of the Fair Packaging and Labeling Legislation

On June 28, 1961, the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee began hearings to investigate whether new federal legislation was necessary to curtail the packaging and labeling abuses that consumers faced.⁸⁰ Senator Philip A. Hart (D-Mich.), a member of the subcommittee and a strong proponent of packaging and labeling law reform, conducted the hearings.⁸¹ Senator Hart declared:

⁷⁵ *Id.*

⁷⁶ *Id.* at 99.

⁷⁷ *Id.*

⁷⁸ *Id.* at 93.

⁷⁹ *Id.*

⁸⁰ *Chamber, supra* note 56, at 1.

⁸¹ *Id.*

The consumer has a right to be able to find out what he is buying, how much he is buying, what it is costing on a per unit basis. We are not proposing to determine whether any large stones have been thrown at the free enterprise system. What we intend to inspect is whether the system is suffering because every day millions of grains of sand are being thrown in the consumers' eyes. The old-fashioned butcher was often accused of weighing his thumb. We want to be sure that today's consumer isn't still buying that thumb, but in a fancy package.⁸²

Senator Hart was assisted by staff council S. Jerry Cohen, who just joined the subcommittee after a term as Assistant Attorney General for the State of Michigan.⁸³ The chief Congressional opponent of new legislation was Senator Everett M. Dirksen (R-Ill.), represented by minority council Peter N. Chumbris.⁸⁴ During the investigative hearings, held in June, October, and December 1961 and February, March and April 1962, forty-one witnesses testified and twenty-two statements were placed in the record.⁸⁵ The committee received testimony from sixty different sources, including representatives from food manufacturers, organizations and publications, federal and state government, women's groups, cooperative organizations and unions.⁸⁶

On Sept. 23, 1962, Hart proposed a "Truth-in-Packaging Bill" to the Senate.⁸⁷ It was introduced late in the 87th Congress, primarily to promote study and discussion of the subject prior to reintroduction in the 88th Congress. On January 21, 1963, Senator Hart reintroduced his Truth-in-Packaging Bill as S. 387. Additional hearings were held in February, March and April 1963, in which forty-seven witnesses were heard and forty-six statements were submitted.⁸⁸ The bill was reported favorably to the Judiciary Committee, but no action was taken on the bill for the entirety of the 88th Congress.⁸⁹

Senator Hart, becoming frustrated with the opposition he faced in the Judiciary Committee, decided to take a different approach. He reintroduced his bill in 1965 to the 89th Congress (as S. 985), and had it moved from the Senate Judiciary Committee to the Commerce Committee. No action was taken for all of 1965, but

⁸³Mowbray, *supra* note 53, at 27.

⁸⁴*Id.*

⁸⁵*Id.* at 23.

⁸⁶*Chamber, supra* note 56, at 1.

⁸⁷S. 3745, 87th Cong., 2d Sess. (1962); 108 CONG. REC. 20,402 (1962) (hereinafter referred to as the Hart Bill).

⁸⁸*Packaging and Labeling Practices, Hearings before the Subcomm. On Antitrust and Monopoly of the Comm. On the Judiciary, U.S. Senate, 87th Cong., 1st Sess. (1961).*

⁸⁹*Id.*

it was finally reported out of the Commerce Committee in 1966. On June 9, 1966, the senate overwhelmingly passed S. 985 by a margin of seventy-two to nine in a slightly watered-down form from the original bill.⁹⁰ The House Committee on Interstate and Foreign Commerce then held hearings on the bill in July, August and September 1966, during which ninety-nine witnesses were heard and 145 statements and exhibits were placed in the record.⁹¹ The House Commerce Committee submitted a substantially revised bill to the House, which passed the bill on October 3, 1966 by a vote of 300 to eight.⁹² The Senate accepted the House's version of the bill, and it was signed into law by President Johnson on November 3. The legislation became Public Law 89-755, "The Fair Packaging and Labeling Act," with an effective date of July 1, 1967.⁹³

B. The Senate and House Hearings

The FDA, FTC, Department of Commerce, Department of Labor, Consumers Union of the United States and the AFL-CIO were some of the leading proponents of new packaging and labeling legislation.⁹⁴ Proponents conceded that the abuses were not a result of intentional deception by the manufactures; rather, they blamed the "excesses and short cuts growing out of the pressures of competition in a highly competitive sector of the economy operating on low profit margins."⁹⁵ Proponents also cited the rapid proliferation of products on the grocery shelves as an aggravating factor.⁹⁶ Further, they felt that the existing legislation had not kept pace with the packaging revolution and emphasized that the regulatory agencies needed more power to prevent abusive practices.⁹⁷

The extent of the proponents' paternalism was rooted in a few idiosyncrasies of the food industry. First of

⁹⁰Mowbray, *supra* note 53, at 168.

⁹¹*Id.* at 169.

⁹²*Id.*

⁹³Fair Packaging and Labeling Act, 15 U.S.C. 1451-1461. The FPLA as enacted contained twelve sections (2-13), and sections 2-12 correspond to sections 1451 through 1461 of the current statute (section 13 provided for the effective date). In this paper I use the sections from the original version of the code. *See* 80 Stat. 1296 (1966).

⁹⁴*See Chamber, supra* note 56, at 30 for a more complete list of proponents and opponents of the S. 985 Packaging-Labeling Controls Bill.

⁹⁵*Id.* at 4.

⁹⁶*Id.* at 5. It was estimated that the 1,500 items on the shelves of the average grocery store immediately after World War II had grown to over 8,000 items, and was expected to increase to 20,000 in the following decade.

⁹⁷*Id.* at 5.

all, packaging and labeling legislation covered a large percentage of the average American's expenditures. Of total retail trade of \$284 billion in 1965, over \$61 billion, or twenty-one percent, was spent in grocery stores.⁹⁸ That percentage was even higher for low-income families.⁹⁹ Secondly, Americans have to buy food in some form or another; unlike many consumer products, food is not generally a luxury item and the public deserves to be protected when attempting to address its basic needs.

Not surprisingly, the general response by the food industry to the prospect of new federal packaging and labeling legislation was overwhelmingly negative. Most of the opponents to legislation were either manufacturers or industry associations.¹⁰⁰ In general, opponents to legislation argued that the existing law was adequate to protect consumers against deceptive and abusive practices, and that any further legislation would unnecessarily raise the cost of food to the consumer.¹⁰¹

The leader in the movement against new legislation was the Grocery Manufacturers of America (GMA), which itself links more than one hundred national food processing trade associations.¹⁰² Paul S. Willis, president of GMA, was an outspoken opponent to any new legislation, claiming that any change, if necessary, should come voluntarily from the industry. As support for his claim, he noted:

Our industry, along with others, created an Industry Committee on Quantity Declaration which filed a report with the National Conference Committee on Laws and Regulations. The National Conference on Weights and Measures then adopted a model regulation on package labeling which industry now supports. This regulation basically protects the public by requiring a prominent quantity declaration, yet it does not discourage research, innovation and improvements, nor does it limit the consumer's freedom of choice.¹⁰³

Mr. Willis also pointed out that GMA had recently distributed more than a million copies of a consumer education booklet entitled "The Label Tells the Story," as well as more than 600,000 copies of the booklet,

⁹⁸Mowbray, *supra* note 53, at 2.

⁹⁹*Id.*

¹⁰⁰*See Chamber, supra* note 56, at 30.

¹⁰¹*Id.* at 11.

¹⁰²*Id.*

“Your Grocery Dollar.”¹⁰⁴ Mr. Willis also cited a recent nation-wide survey that showed that consumers were generally pleased with the food industry; however, the survey was conducted by GMA.¹⁰⁵

In preparation for the hearings, the Library of Congress had given the subcommittee a 134-page report on all packaging and labeling laws.¹⁰⁶ The report found no statutory provision or regulation dealing with the following abuses: packaging-to-price, use of descriptive adjective to describe quantity, use of cents-off deals, undeclared serving sizes and fractional-weight packages.¹⁰⁷ Despite these obvious deficiencies in the existing statutory regime, witness after witness at the Senate hearings claimed there was no need for new laws to outlaw deception in packaging. Senator Dirksen corroborated on this point:

Existing Federal Trade Commission and the Food and Drug Administration law are sufficient and effective. . . It is abundantly clear that present laws, if they are vigorously enforced, afford protection against most, if not 100 percent, of the major complaints made at the subcommittee hearings. . . I might add parenthetically, if existing law is inadequate as the proponents of [the Truth-in-Packaging bill] advocate, it means that we, the Members of Congress around this table, have been negligent for the past 15 to 25 years and that includes 8 of this Judiciary Committee.¹⁰⁸

The numerous consumer complains did not necessarily indicate that there wasn't adequate law, but may mean that there is no adequate administration of the current law.¹⁰⁹ This was the position of the Committee on Laws and Regulation of the National Conference on Weights and Measures. The Committee reported:

¹⁰⁴ *Id.* at 110.

¹⁰⁵ *Id.* at 111.

¹⁰⁶ Mowbray, *supra* note 53, at 29. The Report detailed all packaging and labeling laws under the jurisdiction of the FDA, the Department of Agriculture, the Department of Commerce, the FTC, the Bureau of Commercial Fisheries of the Department of the Interior, the Internal Revenue Service of the Department of the Treasury, the Bureau of Customs, the Coast Guard, the Interstate Commerce Commission, the Federal Aviation Agency, and the Post Office Department.

¹⁰⁷ Some limitation of package size has been provided under other Federal laws on products such as oleomargarine, wine and distilled spirits, milk, cream, corn meal and grits, flour, oats, butter, bread, berries and small fruits, ice cream, beer, and animal feeds. *Id.* at 30.

¹⁰⁹ Chamber, *supra* note 56, at 20.

It is the belief of the committee that the Federal Government, through its appropriate agencies, has ample legislative authority and a definite obligation to initiate the necessary action to bring about proper corrective measures in an area of commerce that will do proper credit to the United States.¹¹⁰

The vice-president of Safeway Stores insisted that no legislation was necessary even though he found some labels to be substandard:

Senator Hart: Is there anything on your shelves that you would not approve, if produced by yourself? In other words, in this category is there anything on your shelves that would not pass muster out of your own processing plant?

Mr. Anderson: There might be. I know of no specific instances at the moment.

Senator Hart: In other words, do you apply the same standards to items that you get in to put on the shelves as you require of your own?

Mr. Anderson: No, I would not say that we do. We might be out of business in some items, but we do make suggestions. One of the biggest—

Senator Hart: Do you think there are items in great public demand which bear labels which you yourself would not put out?

Mr. Anderson: I believe that we would probably change them. Yes.

Senator Hart: So if you were to write the law, you would raise the level for those other labels?

Mr. Anderson: Well, as I stated, I do not see that a law is necessary.

Senator Hart: I stayed with you to the very last answer.¹¹¹

Proponents responded that the current legislation was not designed to deal with the complexities of the modern marketplace.¹¹² They cited the vague nature of the terms “false,” “misleading,” “unfair,” and “deceptive,” which require agencies to go into court and show actual deceit or capacity to deceive or mislead in each case.¹¹³ Proponents believed that agencies should be allowed to make regulations in advance saying that certain specified things are automatically illegal.¹¹⁴

¹¹² *Chamber*, *supra* note 56, at 5.

¹¹³ *Id.*

¹¹⁴ *Id.*

The proponents had plenty of ammunition to back up their claim that current law was inadequate to deal with many deceptive practices. Senator Abraham A Ribicoff, Democrat from Connecticut and former Secretary of Health, Education, and Welfare, brought three cans of baking powder to the hearing room to illustrate packaging-to-price and slack fill abuse. The three cans were made by the same manufacturer, contained the same product, were the same size, but had three different net weights: 16 ounces, 14.3 ounces, and 14 ounces.¹¹⁵ Allegedly they were all on sale at the same store for the same price.¹¹⁶ Senator Ribicoff nonchalantly suggested that this could be perceived as misleading, despite the fact that each one of the labels complies with the current law.¹¹⁷

Most industry witnesses cited competitive reasons for the practice of packaging-to-price. E. Lee Feller, general manager of Alliance Associates¹¹⁸ told the subcommittee that packaging-to-price was necessary in order to remain competitive with national brands. He pointed out that when the hurried consumer doesn't notice that one brand of canned food is slightly smaller, the consumer will buy that can at its slightly lower price even though the smaller can is more expensive per ounce. Mr. Feller asked, "What other alternative do we have, other than to reduce the size of our own can?" Caroline F. Ware, consultant on Consumer Problems, expanded on how one manufacturer's deception can have a ripple effect across a product line:

¹¹⁵Mowbray, *supra* note 53, at 35.

¹¹⁶Mowbray, *supra* note 53, at 36.

¹¹⁷*Id.* at 36.

¹¹⁸Alliance Associates specialized in the production and distribution of what are known as distributor-controlled brands of grocery products, such as Topco, IGA, Food Club or Ann Page. *Id.* at 45.

I do not believe that the vast majority of American industry and business want to deceive. Most would, I am convinced, prefer to do business honestly, fairly, and on the basis of intelligent consumer choice. But there is always a minority that wants to trade on deception. And the lamentable fact is that unless there is a framework which provides the conditions to which all must conform, those who are inclined toward deception eventually create a whole deceptive pattern, which then is followed by the majority, not because they want to deceive, but because that has become the normal way that business is carried on.¹¹⁹

The regulation of slack fill and deceptive packaging was also hotly debated during the Senate hearings and afterward. Senator Hart's original Truth-in-Packaging Bill contained a provision designed to deal with slack fill and deceptive packaging; Senator Hart described it in the following way:

This subsection is aimed at three practices: First is the slack-filled container—the package that has more empty space than is reasonably necessary considering the nature of the product and the technological problems of fill. It seeks to limit, therefore, nonfunctional slack fill. Next it is concerned with those packages wherein the dimensional proportions have become so distorted as to be likely to deceive the buyer as to the amount inside. Finally, it is concerned with those containers which are so shaped as to be likely to deceive the buyer as to the amount of content inside. This subsection is keyed to deception. It does not seek to interfere with convenience-packaging in any way, unless the package is likely to deceive.¹²⁰

The provision for slack fill and deceptive packaging was struck from the Truth-in-Packaging bill,¹²¹ which some felt was appropriate given the then-current law dealing with the problems. Senator Cotton had this to say about slack fill regulation:

A half a pound is half a pound, and if it is put out in a package that looks like a pound, and it has a lot of empty space in it, then the manufacturer is already in violation of the law, which provides against deception. A large package with a small amount in it is deception, and could properly be found to be deception and moved against it.¹²²

Senator Hart had cited the *Delson Thin Mints* case earlier in the hearings as strong evidence that the substance of Senator Cotton's statement didn't hold true in practice.¹²³ In regard to proliferation of package

¹²¹See discussion *infra* Section II.C.

¹²³Mowbray, *supra* note 53 at 32.

sizes, the industry offered several explanations for proliferation of weights. One credible justification was the economics of processing and manufacturing. R. Allen Hickman, Vice Chairman of the All-Industry Packaging Advisory Committee provided an illustration:

“Standards of weight or quantity could certainly be a disservice to the consumer by prohibiting economical use of raw materials. For example, in the fish industry, fish sticks are fish portions are normally manufactured by cutting from frozen blocks of fish fillets. It is obvious that the dimensions of these blocks then determine limits and parameters for weights and quantities. Forcing an artificial standard in this area could well result in wastage which would result in a lower value for the customer. And since different cutting techniques are used by different producers, it is not feasible to develop a standard even for a specific product which would result in the most economical design in terms of value to the consumer.”¹²⁴

Manufacturers of other products such as cereal and detergent made a similar argument, claiming that for efficient production, different products having different densities were packaged in cartons of the same size, resulting in a wide variety of package weights.

Although these arguments had a sound logical base, at least one fact undermined their validity in practice: manufacturers often varied net quantities without varying package size. A survey by Consumers Cooperative of Berkeley, California introduced at the hearings revealed that the net weight of a box of Wheat Chex had dropped from 18 ounces to 14 $\frac{1}{2}$ ounces, Corn Chex from 9 to 8 ounces, and Sunshine Shredded Wheat from 12 to 11 ounces, all without a change in package size.¹²⁵ This practice suggests that the reasons for odd sizing (at least in some cases) is due to conscious filling policy rather than the economic constraints on packaging.

The use of size adjectives on a package fell into two categories: descriptive words that directly qualified the statement of net quantity of contents (such as “full quart”) and descriptive adjectives found anywhere

¹²⁵Mowbray, *supra*, note 53, at 65.

else on the package. The first category fared much worse during the hearings than the second. Most witnesses believed “puff” adjectives such as “jumbo” or “king-size” placed on various parts of the package were standard advertising tools that may attract the attention of the consumer but not likely deceive her.¹²⁶ In contrast, most witnesses acknowledged that the statement of net quantity of contents should be clear and accurate, and is not the appropriate place for marketing.¹²⁷

Lastly, manufacturer labeling of “cents-off” and other bargains earned its share of attention. In one store two identical cans of coffee were found, one marked “10 cents off” and the other marked “15 cents off.” Both cans were priced at fifty-nine cents and rang up at the register for that amount.¹²⁸ Another consumer noticed a can claimed the price was fifty cents-off the retail price of a dollar, even though it had been selling at fifty cents for ten years. It appeared unlikely (at least to that consumer) that the can was ever sold for a dollar.¹²⁹

C. Evolution of the Legislation

Senator Hart’s original bill introduced in September 1962 was much broader in many ways than the FPLA that was signed into law in November 1966. The Hart Bill gave both the FDA (for food, drugs and cosmetics) and the FTC (for all other consumer commodities) jurisdiction to regulate the size and shape of packages, and the place, prominence and content of label information. The bill mandated the FDA and FTC to promulgate certain regulations (mandatory regulations) and gave the authority to promulgate others as necessary to achieve the purpose of the bill (discretionary regulations).

Section 3(a) of the Hart Bill contained a list of mandatory rules that the FDA and FTC must be adopted for all consumer commodities. The mandatory regulations provision contained six sections, which required regulations be promulgated to:

¹²⁶ *Id.* at 106.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 115.

1.

Require that the net quantity statement must appear on the front panel of the package;

2. Establish standards for type size and face with respect to the quantity statement;

3. Prohibit the use of any qualifying terms in addition to net quantity statements (such as “full” 16 ounces);

4. Allow for exceptions to the foregoing requirements when necessary;

5. Prohibit the labeling of “cents-off” deals; and

6. Prevent misleading illustrations on the label.¹³⁰

In addition, Section 3(b) contained six discretionary provisions that the FDA and FTC have the authority to promulgate when necessary to “(1) establish or preserve fair competition between or among competing products by enabling consumers to make rational comparison with respect to price and other factors, or (2) to prevent the deception of consumers as to such product.” Generally, the discretionary provisions empowered the FDA and FTC to:

1.

¹³⁰S. 985, 89th Cong., 1st Sess. (1965). The numbering corresponds to the numbering of the provisions of the bill but the language is paraphrased.

Establish “reasonable weights or quantities, or fractions or multiples thereof, in which that the commodity shall be distributed for retail sale,” but that standards cannot be fixed in amounts less than two ounces or change standards set by the Secretary of Commerce;

2. “Prevent the distribution of that commodity for retail sale in packages of sizes, shapes, or dimensional proportions which are likely to deceive retail purchasers in any material respect as to the net quantity of the contents thereof,” except in the cases where standards have been fixed under the first section;
3. Establish standards for size descriptions (such as when a manufacturer can use the terms small, medium and large);
4. Establish serving standards;
5. Establish standards for designating contents of a package where the traditional measures of net weight, volume or count are not meaningful; and
6. Require information about ingredients to be displayed on the package.

The most noteworthy of the discretionary regulations was the second, which was designed to address the problems of slack fill and deceptive packaging.¹³¹ However, this provision was deleted from the final version of the Hart Bill passed by the Senate.¹³² Although Senator Hart was unhappy to see the provision deleted, he still felt that the bill had teeth:

The practice of obscuring net weight will be corrected in the bill now before the Senate – and effectively. The bill would require weight designation to be printed clearly, prominently, and in simplified form. Yet it is regrettable that all possible tools are not being brought to bear on the problem.”¹³³

Nonetheless, the bill that passed the House and was eventually adopted was even less protective of consumers

¹³¹*Fair Packaging and Labeling, Hearings Before the Comm. on Commerce, U.S. Senate, 89th Congress., 1st Sess. 730 (1965).*

¹³²S. REP. NO. 1186, 89th Cong., 2d Sess. (1966).

than the revised Hart Bill. The FPLA generally retained the mandatory regulations in regard to the location, size and type of the net quantity statement,¹³⁴ but made regulation of cents-off and savings promotions discretionary, and removed the provision for deceptive illustrations entirely.¹³⁵ The FPLA also empowered the FDA and FTC to issue regulations preventing non-functioning slack fill, a rare instance in which the original bill was broadened.¹³⁶ However, the final bill did not have the same language that purported to prohibit deceptive packaging as Section 3(b) of the Hart Bill's discretionary regulations; instead, Section 5(c)(4) gives FDA and FTC authority to promulgate regulations only to "prevent the nonfunctional-slack-fill of packages containing consumer commodities."¹³⁷ Under the FPLA, a package is deemed to be nonfunctionally slack filled "if it is filled to substantially less than its capacity for reasons other than (A) protection of the contents of such package or (B) the requirements of machines used for enclosing the contents in such package."¹³⁸

Another noteworthy change to the bill in the house was in the language used in the congressional declaration of policy (and also the grant of authority to the FDA and FTC to issue discretionary regulations). The original bill declared it a policy of the United States to assist consumers by "facilitating *price* comparisons."¹³⁹ The House changed the word "price" to "value," which appears in the final version of the FPLA.¹⁴⁰ Members of Congress had different views on whether or not the change in wording was an expansion or a contraction of the legislation. Senator Hart claimed that by changing "price" to "value," Congressional policy was enlarged to include "quality" comparisons – a component of "value" – in addition to price comparisons.¹⁴¹ However, Congressman Gilligan, who authored the change, claimed that the change in wording was meant to restrict

¹³⁴15 U.S.C. § 1451; Public Law 89-755. The FPLA also required a statement of the name and place of business of the manufacturer, packer, or distributor, but this was already required of foods, drugs and cosmetics under the 1938 Act.

¹³⁵*Id.* at § 1454.

¹³⁶*Id.* Although I have not found supporting authority, my inclination that a Fair Packaging and Labeling Act that didn't at least address the issue of slack fill would be a political nightmare. Discussions of the abuses of slack fill and deceptive packaging were a substantial portion of the record of the legislative hearings in both the Senate and the House.

¹³⁷*Id.*

¹³⁸*Id.*

¹³⁹S. 985, 89th Cong., 1st Sess., (1965).

¹⁴⁰15 U.S.C. § 1451.

¹⁴¹Senator Philip A. Hart, *Truth-in-Packaging Revisited*, 22 FOOD DRUG COSM. L.J. 317, 320 (1967).

the power granted to agencies to regulate pricing:

[The change] is designed to insure that the government agencies and officials charged with enforcing the law and issuing regulations thereunder do not exercise the powers conferred upon them, particularly section 5, for the sole purpose of facilitating a mathematical computation; that is, a price comparison, in the supermarket aisle. Price is only one element in a *consumer value decision*; other factors of equal or greater importance are product performance, the convenience of the package, and the suitability of the size or quantity of the product in satisfying a *consumer's* personal desire or need. Obviously what constitutes value is highly subjective.¹⁴²

Congressman Gilligan's version indicates a strong deference to the consumer in deciding what products to purchase, whereas Senator Hart's version gives agencies even more discretion in their application of the FPLA. In the end, most observers felt Congressman Gilligan's interpretation more accurately reflected the sentiment in the House when the change was made.¹⁴³

Another substantial change involved the first section of the Hart Bill's discretionary regulations. Whereas the Hart Bill granted the FDA and FTC the authority to "establish reasonable weights or quantities, or fractions or multiples thereof," the final bill asks the Secretary of Commerce to work with industry groups to write "voluntary" standards when the Secretary deems it necessary to remedy "undue proliferation."¹⁴⁴

In sum, FPLA created three main responsibilities for the Secretary of Commerce:

1.

Determine whether there is undue proliferation;

2. Request manufacturers, packers, and distributors to participate in the development of a voluntary product standard where the Secretary determines there is undue proliferation; and

¹⁴³ *Id.*

¹⁴⁴ 15 U.S.C. § 1454(d).

3. Report to Congress with a recommendation as to whether legislation is necessary if efforts to develop a voluntary product standard with private industry have failed.¹⁴⁵

Further, if the voluntary standards were published in accordance with the statute, their provisions would be binding upon the FDA and FTC.

IV. Packaging and Labeling After Enactment of the FPLA

A. Response to the FPLA

On October 4, 1966, A Herblock cartoon in the Washington Post celebrated the passage of the FPLA with a drawing which showed an angry consumer shaking a cereal box labeled “New Congressional House Size Super Shredded Truth in Packaging Bill, Fortified with Genuine Hot Air.” Four small flakes fell out of the cereal box as the consumer asked his congressman, “This is supposed to serve 200,000,000?”¹⁴⁶

Media response was also unfavorable, as a sample of newspaper and magazine titles illustrates:

1.

Packaging Truth Best No-Law Law

2. How a Good Consumer Idea Goes Wrong

3. Truth in Labeling Proves Elusive

4. Consumer Forces Say Packaging Law Fails to Clean Up Confusion

5. Fair Packaging Rules Lacking After 3 Years

¹⁴⁵Robert E. Giles, *The Fair Packaging and Labeling Act of 1966*, 22 FOOD DRUG COSM. L.J.169, 172 (1967).

¹⁴⁶JENNIFER CROSS, THE SUPERMARKET TRAP: THE CONSUMER AND THE FOOD INDUSTRY 81 (1974).

6. Fair Packaging Law: What's That? ¹⁴⁷

The *New York Times* said the FPLA was “little more than a shadow” of Senator Hart’s original bill.¹⁴⁸ Some observers believe that the food industry leaders used their powerful influence to reduce good packaging legislation down to what was essentially a labeling bill.¹⁴⁹ The provisions that did make it into the FPLA as mandatory regulations, such as name and address of the manufacturer, a clear statement of net quantity, and statement of serving size were hardly contested by anyone during the Senate and House hearings.

Senator Hart had the following to say after the FPLA was passed:

Yes, my fingers were crossed. But only to wish that strong regulations would be promulgated under the direction and standards of the bill. For as the President noted at its signing, the bill would prove either effective or non-effective, depending on how the administrative agencies responded to the legislative mandate.¹⁵⁰

Senator Hart also suggested that the funding for the enforcement of the FPLA was insufficient to carry out its purpose:

Relatively modest requests were made by the agencies involved for appropriations to cover their Truth-in-Packaging activities. These were cut, in some cases substantially, by the House Appropriations Committee. It would be ironic, if, after five years of legislative battle ending in almost unanimous Congressional approval, the war were to be lost because of inadequate agency appropriations.¹⁵¹

Many believed that the war was already lost, but the meager appropriations certainly did not improve the situation. In fiscal 1968, the FDA was only allocated \$115,300 to finance the extra staff needed to write the regulations and enforce the FPLA. In 1969 that amount was cut in half, and by 1970 the appropriations dried up completely.¹⁵²

¹⁴⁷John Colmilla, *A Progress Report on the Fair Packaging and Labeling Act*, 26 FOOD DRUG COSM. L.J. 37 (1971).

¹⁴⁸Mowbray, *supra* note 53, at 169.

¹⁴⁹*Id.* at 170.

¹⁵²CROSS, *supra* note 146, at 84.

B. FDA Regulations under the Fair Packaging and Labeling Act

The original effective date of the FPLA was July 1, 1967. However, the FDA wasn't able to publish proposed regulations until March 17, 1967. By the time the 300-plus comments were reviewed and the revised regulations were drafted, the effective date had passed.¹⁵³

Revised regulations were published on July 21, 1967, and in accordance with the rulemaking procedures of Section 371 of 1938 Act,¹⁵⁴ persons adversely affected were given thirty days to file objections and request a public hearing.¹⁵⁵ The FDA received almost fifty communications, some of which requested a public hearing.¹⁵⁶ The Commissioner of the FDA subsequently made a few amendments to the revised regulations, but denied all requests for public hearings. This action was arguably in violation of the language of Section 371(e)(3), which directs the Commissioner to hold a public hearing for the purpose of receiving evidence relevant and material to the issues raised by such objections.¹⁵⁷ The denial of a public hearing drew much criticism from the food industry, particularly among attorneys who viewed the it as a violation of an explicit Congressional instruction given to an administrative body.¹⁵⁸

The extension of the effective date to July 1, 1967 still would not afford label manufacturers enough time to make all the new plates, print the labels, and supply these to food packers, so the Commissioner issued a statement of policy that if the label complied with the old regulations under the 1938 Act, then the manufacturer would be allowed additional time to comply with the FPLA regulations; but in no case beyond June 30, 1968.

¹⁵³32 Fed. Reg. 10729-34.

¹⁵⁴Section 6(a) of the FPLA directs both the FDA and FTC to promulgate regulations in accordance with subsections (e), (f), and (g) of Section 371 of the 1938 Act. 15 U.S.C. 1455.

¹⁵⁵As required by Section 371(e)(2) of the 1938 Act.

¹⁵⁶32 Fed. Reg. 13,277 (1967).

¹⁵⁷21 U.S.C. § 371(e)(3).

¹⁵⁸For a complete analysis of this issue, see Wesley E. Forte, *Fair Hearing in Administrative Rule-Making: A Recent Experience Under the Federal Food, Drug and Cosmetic and Fair Packaging and Labeling Acts*, 23 FOOD DRUG COSM. L.J. 366 (1968).

The mandatory regulations under Section 4 of the FPLA and their clarifying amendments were published on September 20, 1967.¹⁵⁹ There are three general requirements of the FPLA regarding labeling of food for which the FDA issued regulations:

(1)

The identity or name of the product and name and place of business of the manufacturer, packer, or distributor;

(2) An accurate statement of the net quantity of contents at a uniform location on the principal display panel; and

(3) A statement describing the contents of a serving, if a declaration of the number of servings is given.

The regulations under the first and third categories are relatively straightforward.¹⁶⁰ Theodore Byers, Director of the Division of Case Guidance, Bureau of Regulatory Compliance of the FDA, summarized the second category, regulations requiring the declaration of quantity. “The declaration must:

(1)

Be located on the principal display panel and positioned within the lower 30 percent of the label in lines generally parallel to the base upon which the package rests. (This placement in the lower 30 percent does not apply to containers with a principal display panel of 5 square inches or less.)

¹⁵⁹21 C.F.R. 101.

(2) The declaration must be conspicuous in easily legible bold face type, in distinct contrast, and in a specific type size in relation to the area of the principal display panel of the package. This requirement means that the consumer packages of substantially the same size will state the quantity of contents with corresponding uniformity.

(3) On consumer packages of one pound, one pint, or more, but less than four pounds or one gallon, the declaration of net contents must be of a dual nature with the first expression in total ounces (avoirdupois) or fluid measure, followed by a parenthetical quantity of contents declaration in the largest whole unit of drug or liquid measure and subdivisions thereof.”¹⁶¹

The actual regulations are much more detailed, with specifications for exact size and proportion of the lettering.¹⁶² The only noteworthy expansion of the language of the FPLA was the requirement of a *dual declaration* of quantity, which was described everything from “helpful”¹⁶³ to “confusing.”¹⁶⁴

C. Discretionary Regulations under the Fair Labeling and Packaging Act

Although the FDA extensively studied regulation of slack fill in the years following the passage of the FPLA, the only regulations promulgated under Section 5 (discretionary regulations) by the FDA were with respect to “cents-off”¹⁶⁵ and “economy size”¹⁶⁶ savings representations. The regulations, effective March 31, 1972 for cent-off labeling and June 30, 1972 for economy size labeling, hardly received any attention as consumer and government interest had shifted toward nutrition labeling requirements. In 1997, both regulations were revoked as “obsolete.”¹⁶⁷ The FDA did, however, continue to promulgate fill of container standards for canned food under the McNary-Mapes Amendment to the 1938 Act.¹⁶⁸

D. Effectiveness of the FPLA

It is difficult to measure how effective the FPLA was at addressing the concerns of consumers, Congress and

¹⁶¹Theodore E. Byers, *Fair Packaging and Labeling Act*, 24 FOOD DRUG COSM. L.J. 60, 61 (1969).

¹⁶²21 C.F.R. 101.

¹⁶³Everette MacIntire, *Fair Packaging and the Informed Consumer*, 24 FOOD DRUG COSM. L.J. 173, 175 (1969).

¹⁶⁴George M. Burditt, *Fair Packaging and Labeling – The Cost to Consumers*, 22 FOOD DRUG COSM. L.J. 542 (1967).

¹⁶⁵38 F.R. 6392; 21 C.F.R. 1.31, effective March 31, 1972 (revoked).

¹⁶⁶38 F.R. 6392; 21 C.F.R. 1.35, effective June 30, 1972 (revoked).

¹⁶⁷62 F.R. 39439. The regulations were revoked as part of President Clinton’s “Reinventing Government” initiative. In his March 4, 1995 directive, the President ordered all Federal agencies to conduct a page-by-page review of their regulations and to “eliminate or revise those that are outdated or otherwise in need of reform.”

¹⁶⁸Mowbray, *supra* note 53, at 171.

the President, although we know that some food industry abuses were put to a halt following the passage of the FPLA. I will outline how the FPLA addressed (or failed to address) each of the seven categories of complaints by consumers prior to passage of the Act:

1. *The practice of slightly reducing contents of a package.* Although the net quantity of contents in a package is required to be much more clearly stated than under 1938 Act, nothing in the FPLA or the regulations that requires manufacturers to notify consumers about changes in package size. Thus, this practice continued, and is perceived to be one of the leading abusive practices today (as discussed below).

2. *Slack Fill.* Both the original version of the Hart Bill and the FPLA contained a provision for discretionary regulations to prohibit slack fill. However, Section 5(c)(4) of the FPLA only authorized the FDA and FTC to prohibit “nonfunctional” slack-filled containers, which are defined as containers filled to “substantially” less than its capacity for reasons other than protection of contents or requirements of machines used for packing.¹⁶⁹ It seems like the reasonable response of the FDA would have been to establish standards of fill for various packages and products, similar to the standards for canned foods mentioned above. However, the FDA never promulgated regulations under this subsection. This is attributed to two factors: lack of resources and difficulty in determining exactly what amount of slack fill was “nonfunctional.”

In June 1969, the Commissioner of the FDA testified before the Special Studies Subcommittee of the House Committee on Government Operations that the FDA has insufficient resources to promulgate regulations in regard to slack fill.¹⁷⁰ Between 1970 and 1976 the FDA conducted five surveys to study the problem of nonfunctional slack fill.¹⁷¹ The FDA found that it was a very time consuming and expensive process to study the details of the packing machinery used for the filling of containers, and the surveys were generally inconclusive as to whether or not there was an nonfunctional slack fill.¹⁷² After reviewing the results, the

¹⁶⁹15 U.S.C. § 1454(c)(4).

¹⁷⁰*Packaging and Labeling Matters, Hearings Before a Subcomm. Of the Comm. on Government Operations, H. of Rep., 91st Cong., 1st Sess. (1969).*

¹⁷¹Hutt, *supra* note 11, at 34.

¹⁷²*Id.* at 36. The first survey found that 11,000 of the 55,000 containers had some sort of slack fill, but the survey did not

FDA finally decided not to promulgate regulations governing nonfunctional slack fill.

Despite the fact that no substantive change to the law governing slack fill was made by the passage of the FPLA, the problem appears to have diminished in severity. Since the PFLA, the FDA has not been taken to court in a single seizure action based on slack fill.¹⁷³

A survey in 1984 by Good Housekeeping on women's perceptions in related to food showed a significant drop in consumer concern over slack fill in the 15 years following the enactment of FPLA.¹⁷⁴ Sixty-two percent of consumers felt that settling of contents accounted for the empty space at the top of a package. Twenty-five percent felt that the food company was indicating the correct weight but was trying to make the contents appear greater. Only eight percent thought that cheating was actually involved. A majority of those surveyed felt that no FDA intervention was necessary regarding slack fill as long as the net quantity is accurately and conspicuously displayed. Twenty-six percent would like to see mandatory standards of fill of containers to prevent slack-filling.

3. *The Marking of Net Quantity in Small, Obscure Type.* Of all the consumer complaints, this one was undoubted the most comprehensively and adequately addressed.¹⁷⁵ As stated above, the mandatory regulations contained exact specifications for the placement of the net quantity statement, eliminating any uncertainty as to whether or not a particular statement was deceptively printed on the label. As a confirmation of this point, consumers surveyed in the 1984 Good Housekeeping study did not show any concern for the placement, size, type, or color of the net quantity statement.¹⁷⁶ This was clearly a victory for the consumers, although a small one in relation to the economic abuses that persisted, such as in the proliferation of sizes.

4. *Proliferation of Package Sizes.* When the House transferred the authority to regulation the proliferation of

distinguish between functional and nonfunctional slack fill; the second survey defined the two categories of slack fill but the FDA reported that the results were inconclusive. The FDA did not report the results of the third and fourth surveys.

¹⁷³This statement is based on my own Lexis and Westlaw research, which revealed no cases of slack fill.

¹⁷⁴Kristen W. McNutt, Ph.D et al., *Consumer Perceptions on Consumer Protection*, 39 FOOD DRUG COSM. L.J. 86 (1984).

¹⁷⁵For the regulations of the net quantity of contents statement, see generally 21 C.F.R. 101.

¹⁷⁶McNutt, *supra* note 174, at 88.

packaging from the FDA/FTC to the Department of Commerce it was clear that the bill was weakened. The missions of the FDA and the FTC are to protect the consumer from harm; the mission of the Department of Commerce, on the other hand, is to promote the nation's commerce. Ralph Nader has noted the reluctance of the Department of Commerce to get involved in consumer legislation; he commented that the Department "is unsuited to handle consumer protection laws. The consumer's interest would take second place to the interest of the business community. This is the reason why manufacturing interest always try to steer what consumer legislation they cannot defeat over to the Commerce Department."¹⁷⁷

The Commerce department wasn't entirely passive, as they worked to remove 267 package sizes in twenty-five staples.¹⁷⁸ In some products the reductions were significant (the number of toothpaste sized dropped from fifty-seven to five), but undue proliferation of other products persisted (sixteen sizes of breakfast cereal and fifty-six sizes of crackers and cookies remained).¹⁷⁹

Regulation of undue proliferation was not the most direct way of dealing with the underlying problem facing the consumer: difficulty in comparing prices between products of varying sizes. A better method of addressing the problem is to mandate unit pricing displays next to the product on the supermarket shelf. Thus, regardless of how many different sizes a package comes in, the consumer can easily compare prices without complicated computations. In 1969 Senator Nelson proposed to require the retailer to place both the retail price of the entire package and the unit retail price (price per pound, quart, ounce, etc) on the principal display panel of every item he sells.¹⁸⁰ The legislation never made it out of Congress, but several states have enacted their own unit pricing legislation and voluntary unit pricing is common.¹⁸¹ Enforcement of such a law will necessitate regulation of the retailer, as the retailer is in charge of setting and marking the price

¹⁷⁷Mowbray, *supra* note 53, at 173.

¹⁷⁸JENNIFER CROSS, *THE SUPERMARKET TRAP: THE CONSUMER AND THE FOOD INDUSTRY* 83 (1974).

¹⁷⁹*Id.*

¹⁸⁰Peter M Phillipps, *Food Product Labeling – The Information Explosion and the Care and Feeding of the American Consumer* 24 *FOOD DRUG COSM. L.J.* 508 (1969).

¹⁸¹*See* 1 NYCRR § 345.1; FS § 501.135(1).

on the label. However, my impression is that most FDA action is directed at the product in the warehouse, before it goes onto the supermarket shelf, making regulation of pricing a substantial additional burden for the FDA.

5. *Descriptive Statements of Quantity and Size.* As done during the hearings, the FPLA divided descriptive statements into two categories: those that were included in the statement of net quantity of contents, such as “jumbo pound” or “full quart,” and those that described the package in general. As to the first category, Section 4(b) of the FPLA prohibits the distribution in commerce “any packaged consumer commodity if any qualifying words or phrases appear in conjunction with the separate statement of net quantity of contents.”¹⁸² As to the second category, Section 4(b) goes on to state

Nothing in this subsection. . . shall prohibit supplemental statements, at other places on the package, describing in non-deceptive terms the net quantity of contents: Provided, That such supplemental statements of net quantity of contents shall not include any term qualifying a unit of weight or mass, measure, or count that tends to exaggerate the amount of the commodity contained in the package.¹⁸³

However, Section 5(c) authorizes the FDA and FTC to issue discretionary regulations “to prevent the deception of consumers or to facilitate value comparisons” effective to “(1) establish and define standards for characterization of the size of a package enclosing any consumer commodity, which may be used to supplement the label statement of net quantity of contents of packages containing such commodity.”¹⁸⁴ In sum, manufacturers are not permitted to use qualifying words in conjunction with the net quantity of contents statement, but they are free to use such descriptive terms at other places on the package, as long as the terms are not deceptive. In addition, the FDA and FTC have the authority to issue regulations restricting the use of such descriptive terms if they feel it is necessary to prevent deception or facilitate value comparisons.

I found no evidence that use of descriptive terms on packaging continued to be a problem for consumers.

¹⁸²15 U.S.C. § 1453.

¹⁸⁴15 U.S.C. 1454(c).

I think customers were reasonably able to filter the sizing claims when making their purchasing decision, especially after these practices became publicized as marketing tools. The FDA has chosen not to utilize this discretionary authority, as there is no evidence that this is still a significant problem for consumers.

6. *Undefined Serving Sizes.* Section 4(a)(4) clearly states that if a manufacturer makes any representation as to number of servings, he must also indicate the net quantity of each serving. The FDA regulations echo this requirement.¹⁸⁵ Manufacturers are still permitted to choose what amount of net quantity composes a “serving,” which leaves room for deception by the manufacturer. A statement as to number of servings is clear: “this packages serves four.” However, when the manufacturers states that each serving is 2.3 ounces, the consumer is not easily able to gauge whether or not that is the size of serving he or she expects. It is worthy to note that the nutritional labeling amendments now mandate that the manufacturer include a statement of number of servings (and of course the size of each serving) with the nutritional information.¹⁸⁶

7. *Cents-off Bargains.* Section 5(c)(2) of the FPLA permits the FDA and FTC to “regulate the placement upon any package containing any commodity, or upon any label affixed to such commodity, of any printed matter stating or representing by implication that such commodity is offered for retail sale at a price lower than the ordinary and customary retail sale price or that a retail sale price advantage is accorded to purchasers thereof by reason of the size of that package or the quantity of its contents.” The second part of this provision refers to statements about the package such as “economy size.” As stated above, the FDA chose to issue regulations in respect to cents-off and economy size claims.

The cents-off regulations promulgated by the FDA and FTC were almost identical. In general, they required (1) that cents-off packages be priced by the retailer to reflect the full amount of the price reduction, (2) that cents-off packages or labels be imprinted with a phrase such as “Price marked is _____ cents off the regular price,” and (3) that the packages provide the retailers with “a sign, placard, shelf marker, or other device

¹⁸⁵21 C.F.R. § 101.9.

¹⁸⁶*Id.*

for the purpose of clearly and conspicuously displaying the retailer's regular price... in a position contiguous to the cents-off marked commodity."¹⁸⁷ These rules also applied to similar savings representations, such as bonus offers, two-for-one sales, and one-cent sales.¹⁸⁸ It's not clear that the regulations were the cause behind the disappearance of "cents-off" claims. Even at the time that new packaging and labeling legislation was being considered, coupons sent directly to the consumer were replacing "cents-off" labels in the grocery store. Regardless, the use of manufacturers' coupons is a much less ambiguous method of providing the consumer a discount from the regular price; the amount on the coupon is simply deducted from the price on the label.

E. Conclusion: The FLPA Today

Although it might not have been the intention of Congress, the FPLA is essentially a labeling act. The only provisions of the act that *required* the FDA and FTC to act were with regard to labeling, whereas the provisions for packaging gave the FDA, the FTC, and the Department of Commerce the discretion whether or not to regulate. It was argued at the hearings that this was the most efficient way of addressing deceptive acts; the agencies were in a much better position to set the detailed standards necessary to prevent fraud on the consumer.¹⁸⁹ However, this assumes that the agencies are both willing and capable of exercising their discretion. On the contrary, the agencies have neither had the interest or appropriations to adequately address the abuses that were exposed during the lengthy hearings in the House and Senate. The FDA's primary mission is to protect the consumer from harmful foods and harmful or ineffective drugs. Economic harm is certainly an element of this mission, but hardly a priority. Not that I fault the FDA; on the contrary, I agree with a policy of protecting American lives before their pocketbooks when faced with limited resources. However, many consumers feel that the currently amount of attention given to economic matter is insufficient.

¹⁸⁷LAWRENCE E. HICKS, *COPING WITH PACKAGING LAWS* 36 (1972). Additional provisions of the regulation limit the duration and the frequency of such offers and the volume of product so offered as well as regulate record keeping. *Id.*

¹⁸⁸38 F.R. 6392.

¹⁸⁹*Chamber, supra* note 56, at 3.

The Good Housekeeping survey of women's perceptions revealed that fifty-six percent of respondents felt that the FDA and the USDA should split their time and money *equally* between health/safety matters and economic protection measures.¹⁹⁰ Almost seventy-seven percent of respondents gave the FDA and USDA high marks for protecting the safety of food, but only fifty-one percent gave high marks for economic protection. The survey further revealed that respondents were not very concerned about the statement of net quantity of contents.¹⁹¹ These responses reflect favorably on the effectiveness of the FPLA as to labeling of the statement of net quantity of contents, but not as to other areas of deceptive practices.

Walking down the aisles of the neighborhood supermarket, I don't exactly feel adequately insulated from the marketing onslaught, either. Several of the economic abuses that existed prior to the FPLA still exist today, even if not exactly in the same form. Although consumers are accustomed to the marketing ploys used by retailers and manufacturers, today's consumers do not have all day to spend in the grocery store comparing prices. From 1960 to 1990, the number of workingwomen has tripled.¹⁹² This means less spare time to do the grocery shopping. At the same time, the number of products in the store has drastically increased, especially recently. According to Durk Jager, president and COO of Procter & Gamble:

In 1996, the average supermarket has about 31,000 SKUs. . . The number of SKUs stocked by the average store is estimated to have increased 20-50% in the past five years. During this same five-year period, the average time a consumer spends per shopping trip has declined 25% – to about 21 minutes per trip. Net, consumers are spending 25% less time to sort through 20-25% more SKUs.¹⁹³

As a result, consumers are even more susceptible to the deceptive practices employed by manufacturers and retailers. I present below three examples of abuses that either I have noted or have been reported upon that I believe should be prevented by an adequate fair packaging and labeling bill: (1) quantity surcharges, (2) product downsizing, (3) and discount pricing. Note that two of the three pertain to pricing, which implicates

¹⁹⁰McNutt, *supra* note 174, at 86.

¹⁹¹BARBARA E. KAHN & LEIGH MCALISTER, GROCERY REVOLUTION: THE NEW FOCUS ON THE CONSUMER, 83 (1997).

¹⁹²*Id.* at 28.

the complicated relationship between the manufacturer, retailer and FDA.

Quantity Surcharges. A consumer is subject to a quantity surcharge when retailers charge a higher unit price for a particular product and brand packaged in a larger quantity than the unit price for the same product and brand packaged in a smaller quantity. Numerous studies performed throughout the country have show that this practice occurs in as much as thirty-four percent of brands at a grocery store.¹⁹⁴ A survey in Northwest Indiana calculated both the incidence of quantity surcharge and the magnitude of such surcharge, represented as a percentage of product price.¹⁹⁵ The survey showed the average magnitude of quantity surcharge was almost eighteen percent, and in some cases as much as fifty percent.¹⁹⁶ As mentioned previously, shoppers who buy products with a quantity surcharge often do so under the misconception that the unit price of goods packaged in larger quantities will be less.¹⁹⁷ Quantity surcharges in most products fly in the face of economic reality. For the vast majority of products sold in a grocery store, it is cheaper for the manufacturer and retailer to produce, ship, handle, stock, price and sell the larger quantity container. In some cases quantity surcharges are used as a deterrent to purchasing in large quantities (such as oil and lumber) when resources are scarce. However this is rarely, if ever the case with commodities found in a grocery store. Retailers attribute quantity surcharges to one of three factors: human error in pricing, promotional specials, or conscious pricing policy.¹⁹⁸ At least one study found that quantity surcharges are more common among products that are packaged in odd sizes (which are difficult to compare to one another), suggesting that

¹⁹⁴ Omprakash K. Gupta & Anna S. Rominger, *Blind Man's Bluff: The Ethics of Quantity Surcharges*, JOURNAL OF BUSINESS ETHICS, at 3, Dec. 1996 (citing S.M. Widrick, *Measurement of Incidents of Quantity Surcharge Among Selected Grocery Products*, JOURNAL OF CONSUMER AFFAIRS 13, 99-107 (1979); R. W. Nason and A.J. Della Bitta, *The Incidence and Consumer Perceptions of Quantity Surcharges*, JOURNAL OF RETAILING 59, 40-54 (1983); R. Walker and B. Cude, *The Frequency of Quantity Surcharges: Replication and Extension*, JOURNAL OF CONSUMER STUDIES AND HOME ECONOMICS 8 121-128 (1984); J. Agrawal, et.al., *Quantity Surcharges on Groceries*, THE JOURNAL OF CONSUMER AFFAIRS 27 335-356 (1993)).

¹⁹⁵ *Id.* at 5.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (citing R. W. Nason and A.J. Della Bitta, *The Incidence and Consumer Perceptions of Quantity Surcharges*, JOURNAL OF RETAILING 59, 40-54 (1983); C. Granger and A. Billson, *Consumer Attitudes Toward Package Size and Price*, JOURNAL OF MARKETING RESEARCH 9 239-248 (1972)).

¹⁹⁸ *Id.* at 4.

conscious pricing policy is the dominant factor.¹⁹⁹

There are two reasons why consumers – who generally consider price to be an important factor in their purchasing decision – purchase goods subject to a quantity surcharge. First, as mentioned above, consumers are not aware of the existence of quantity surcharges and assume that the larger size has a cheaper price per unit of content. Secondly, the pricing of a product is often inaccurate or missing, making price comparisons a challenge for the consumer. A study done by *Nason and Della Bitta* in 1983 found that in forty percent of the cases the unit price tags in the audited stores were either missing, miss-located or simply incorrect.²⁰⁰ Quantity surcharges are particular troublesome given that those persons most likely to purchase larger package sizes are low-income families and individuals with less formal education.²⁰¹ The most troubling aspect of quantity surcharges is that there exists no regulation preventing it. A practice which survives almost entirely on the misconceptions of the consumer and increases the grocery bill of the American family without economic justification surely should be prohibited; especially by an FDA charged with protecting the “ignorant, unthinking and credulous.” Even the consumer that takes the time to carefully compare across and between brands is impeded by inaccurate or missing unit price labels almost half of the time. Regulation in this area is not simple, because the person in charge of producing the package is not the same person setting the price. It would be difficult to require the package to contain a statement to the effect that this particular product contains a quantity surcharge, because it would have to be done by the retailer rather than the manufacturer. On the other hand, complete prohibition of quantity surcharge would be over-inclusive, preventing the practice even when economically justified. Consumer education might be the appropriate solution, combined with better regulation of postings of unit prices.

¹⁹⁹ *Id.* at 4 (citing S. M. Widrick, “Quantity Surcharge: A Pricing Practice Among Grocery Store Items: Validation and Extension,” *JOURNAL OF RETAILING* 55, 47-58 (1979)).

²⁰⁰ *Id.* at 5.

²⁰¹ *Id.* at 7 (citing R. W. Shoemaker, *Consumer Decisions on Package Size; Research Frontiers in Marketing: Dialogues and Directions*, *AMERICAN MARKETING ASSOCIATION* 152-157 (1978)).

Product Downsizing. The House removed the provision of Senator Hart’s Truth-in-Packaging Bill that gave the FDA and FTC authority to “establish reasonable weights or quantities, or fractions or multiples thereof, in which [a] commodity shall be distributed for retail sale.” Instead, a very weak power was given to the business-friendly Department of Commerce to work with industry to develop voluntary standards where “undue proliferation” exists. Thus, the FDA had no power to regulate product downsizing, the practice of reducing the net contents of a package (with or without a corresponding decrease in package size) slightly enough that the consumer doesn’t realize the change.

In response to hundreds of letters sent to Consumer Reports complaining of product downsizing,²⁰² New York Attorney General Robert Abrams conducted a survey that found many popular products reduced their contents while keeping the packaging the same.²⁰³ Abrams then proposed legislation that would require package good companies to label downsized products with the words “reduced,” “decreased,” or “less” for at least six months.²⁰⁴ The Attorney Generals from Texas and California also investigated the issue, but no legislation on the problem has resulted.²⁰⁵

Discount Pricing. Almost all grocery stores have some sort form of regular discounting, most often in the form of weekly specials on particular items.²⁰⁶ Many supermarkets now have a “discount card,” which allows consumers to benefit from the weekly discounts without clipping coupons. In my own shopping experience, I have noticed that some products are regulars on the weekly supermarket insert, leading me to question the validity of the so-called “regular” price. Extensive research has shown that when consumers are contemplating a purchase, they evaluate price in relative terms.²⁰⁷ Consumers compare a product’s price to a reference price, which can be internal (memory of previous experience) or external (one that is found some-

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ Judann Dagnoli, *State AGs Attack Downsized Brands*, 62 ADVERTISING AGE 8, 2 (1991).

²⁰⁵ As of 1997, New York is still considering the legislation; See Kahn, *supra* note 191, at 22.

²⁰⁶ This form of marketing is called a “high-low” pricing scheme. *Id.* at 20.

²⁰⁷ Joel E. Urbany et. al., *The effect of Plausible and Exaggerated Reference Prices on Consumer Perceptions and Price Search*, JOURNAL OF CONSUMER RESEARCH, 15, 95-110 (1988).

where in the marketing environment). A common external reference price is the regular price indicated on the shelf display, and evidence shows that these regular prices affect the perceptions of the value of the sale offer.²⁰⁸The following chart shows the categories of foods that are most often purchased when discounted, and the percent of total dollars spent when the product is discounted:²⁰⁹

²⁰⁸Donald R. Lichtenstein and William O. Bearden, *Contextual Influences on Perceptions of Merchant-Supplied Reference Prices*, JOURNAL OF CONSUMER RESEARCH, 16, 55-66 (1989).

²⁰⁹David Litwak, *What Price Sales Glory?*, SUPERMARKET BUSINESS 35 (July 1996).

Category	Percent of Dollars Bought on Promotion
Carbonated soft drinks	70%
Suntan products	65
Frozen pizza	51
Canned ham	44
Wine coolers	44
Crackers	43
Cookies	43
Chips and snacks	43
Stuffing mixes	41
Refrigerated Juices	41

Note that because the price of each product is lower during the promotion or sale, the percentage of total product purchased at a discount is even higher than the figures above. Thus, it is likely that all the products on this list are sold at a discount more often than at the “regular” price. According to Proctor & Gamble, in some of their product categories 100 percent is sold at some discount from the regular price.²¹⁰ My argument is simple: if the retailer or manufacturer want to claim a “regular” price, they must be able to demonstrate sales of some designated percentage of their product at that price. Otherwise, the consumer will be often duped into thinking they are getting a deal, when in fact they are subject to manipulative pricing practices by the retailer and manufacturer. What is less clear is what agency should be responsible for the regulation of such practices. The FTC traditionally governs advertising of products, and discounting is a form of advertising. However, the FDA governs the labeling of foods, which includes displays on and

²¹⁰Gupta, supra note 194, at 20.

around the product.²¹¹

²¹¹21 U.S.C. § 321(m).