

Consumer Protection: Its Theory and some suggestions.

The Honorable Robert B. Morgan
Attorney General of the State of North Carolina

Regardless of its purpose--whether it be political theory, humanitarian idealism, or persuasive rhetoric--and regardless of its constantly changing meaning, the language of these documents that found a government attains an inviolate character. Oaths of office often commit governmental officials to the preservation of the principles of these documents in the face of political, economical, cultural, and societal changes that were not and could not have been foreseen by a nation's founders. Yet as long as a society continues in existence, as long as its fundamental documents are not repudiated, the language of these documents must be preserved intact and must serve as the theoretical foundation for the society's policies. It is only when the fundamental documents of a society can no longer perform this theoretical foundation that these documents have outlived their usefulness, for only then can they no longer serve as a lex supra leges, which every fundamental document must be if it is to have anything more than merely a ceremonial place in a nation's history.

If a fundamental document is to maintain its status as a lex supra leges, in a world that changes continually and in unforeseeable ways, such a document must be a "living" document--it must be made

to mean anything that is considered necessary to justify those governmental policies which are needed to preserve the nation and its people's well being. But such reinterpretation must be justifiable; it must be continuous and consistent with the document's earlier meanings, for only in this way can a fundamental document maintain its authority as basic law and continue to receive the respect that such a document deserves from the citizens of the nation which the document establishes.

The need to protect the consuming public from fraud in the market place is of recent origin and was never foreseen by the founding fathers of our nation. The simple life of the eighteenth century amply justified the doctrine of caveat emptor, for in those days of relatively simple products and natural packaging, each buyer could examine the product he was buying and act on his own judgment and his own risk. But the simple days of the eighteenth century are gone forever. The products of an industrial age are far too complex to be judged by the buyer for whose use they were intended. Who among us can judge the quality and safety of those products which are now so familiar in households? Automatic can openers, radios, television sets, fans, air conditioners, furnaces, refrigerators, dishwashers, ovens, water heaters, garbage disposals --the list is endless. And what housewife can open packages in grocery stores to determine if an extra-large size box is full or partially empty, if the tomatoes packed in a box with a cellophane top are ripe on the bottom, if the hidden lower layer of pork

chops are as meaty as the visible upper layer. Our complex and prepackaged society makes it impossible for the consumer to examine the product he is buying, and if he cannot examine it, he cannot justly be held responsible for the purchase of its deficiencies and dangers. The doctrine of caveat emptor is no longer workable, for the buyer is now completely at the mercy of the producer and packager.

But if the doctrine of caveat emptor is no longer workable, what legal doctrine is to replace it, and how can this new doctrine be justified? What justification is there in the fundamental documents of American government for the legal protection of the consuming public from fraud in the market place? As the Attorney General of North Carolina and as a person who believes that the consuming public deserves such protection, I find these questions pertinent, and I have tried to find a basis for such protection in the fundamental documents of American government.

Whenever a person studies those documents carefully, he cannot escape the impression that one of the major functions of government is the protection of individual rights, and of course, the Bill of Rights was not meant to confer rights but to fulfill this function of protecting them. As Jefferson said, "The care of human life and happiness . . . is the first and only legitimate object of good government."¹

When people think of the Bill of Rights, however, they usually think of things like freedom of speech and religion, the rights of

assembly and of petition, the right to protection from unreasonable searches and seizures, and if one is a states' righter, the 10th amendment which is supposed to invest the states with certain powers. But in thinking of the Bill of Rights, people never remember the 9th amendment, which reads,

The enumeration in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.²

It is well known that this amendment embodies the political theory upon which our nation is based. That theory teaches that before the establishment of government men existed in a state of nature under a natural law that endowed them with certain natural rights. When by mutual consent men created government, they granted to it their authority to adjudicate and execute the natural law, but they retained their natural rights, for such rights are unalienable, as our Declaration of Independence states.

John Locke, of course, is the 18th century philosopher whose writings most influenced the founding fathers, and Locke held that "the state of nature has a law of nature to govern it, which teaches that no one ought to harm another in his life, health, liberty, or possessions."³ This law gives to all men an unalienable right to fair treatment in matters affecting their lives, health, liberty, and possessions, and natural rights such as these are those that the 9th amendment must have been meant to guarantee. This natural law which Locke states implies that the right to engage in free

interprise has never included the right to deceive someone through misleading or false representation, for if it did, such deception would always be unfair treatment in matters affecting the consumer's possessions, perhaps affect his health and even the length and quality of his life. That John Locke understood this implication of the natural law is amply demonstrated in his maxim that "political power . . . [is the] right of making laws with penalties of death, and consequently all less penalties, for the regulating and preserving of property, and of employing the force of the community in the execution of such laws, and in the defense of the commonwealth from foreign injury, and all this only for the public good."⁴ It is for this purpose that most legislation is made, but such legislation must not be framed in any way that infringes the civil liberties of the people or their right to the pursuance of happiness.

Jefferson, when he drafted the Declaration of Independence, attempted to concisely formulate this general political philosophy of Locke's in the well known first part of the declaration's second paragraph: He there wrote that

We hold these truths to be self-evident, that all men were created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men . . .

The framers of our state constitution thought so much of this political philosophy that they repeated it almost word for word in Article I, Section 1 of our state constitution.⁵

All of this is so well known, it hardly needs mention, but what is not so well known is that this political philosophy can be used as the basis for [all] social legislation, for it states that all men have an unalienable right to the pursuit of happiness.

Thomas Jefferson was very clear about what he took to be the meaning of the word happiness:

The art of life is the art of avoiding pain. Let the gloomy monk, sequestered from the world, seek unsocial pleasures in the bottom of his cell! Let the sublimated philosopher grasp visionary happiness, while pursuing phantoms dressed in the garb of truth! Their supreme wisdom is supreme folly; and they mistake for happiness the mere absence of pain. Had they ever felt the solid pleasure of one generous spasm of the heart, they would exchange it for all the frigid speculations of their lives. . . . 6

To Jefferson, Happiness is the aim of life; the absence of pain (although not the mere absence of pain) is the true felicity.

The summum bonum is not to be pained in body, nor troubled in mind.⁷ ^{MUCH} All social legislation stems from these principles, for

[all] social legislation aims at the removal of the body's pains and the mind's tribulations. Thus social legislation is as American as the Declaration of Independence, for it is the consequence of our unalienable right to the pursuance of happiness. To oppose social legislation "on principle" therefore is unpatriotic.

Patriotic sentiments, however, can be expressed in many ways. It has been said that "The patriot's blood is the seed of freedom's tree."⁸ And Shakespeare asked, "Who is there so vile that will not love his country?"⁹ And we would all agree that no notion can

be great in which patriotism is not extolled as a virtue. I am sure also that all of us like to think of ourselves as patriotic, even though we will from time to time complain about paying taxes or about having to send our sons off to war; yet few of us would hesitate to pledge our allegiance. But I often wonder how many of us have seriously thought about that pledge and what it says. Of course, we all remember pledging our allegiance to the flag, to the republic, to one nation under God, indivisible. But how many of us recall pledging liberty and justice for all? Yet liberty and justice for all is part of the pledge, too.

Liberty is not my present concern, however, important as it is, for liberty seems to speak for itself. As Addison recognized, "When liberty is gone, life grows insipid and has lost its relish."¹⁰ Thus man will fight for his liberty and die for it if necessary. But a man will quite often endure injustice.

As a member of the bar, justice is my main concern, but it is also a patriotic virtue without which no government can truly acquire the respect of its people. George Washington recognized this when he said that "The administration of justice is the firmest pillar of government."¹¹ But most people think of the administration of justice as a governmental affair which they need not bother themselves with. Yet the true realm of justice lies in the field of everyday transactions between men, for what is justice except giving every man his due? Fraud in the market-place does not render justice to the consumer.

Whenever an unscrupulous businessman deceives a customer about the true price of a product, leading him to believe that it is more expensive than it should be or that it will cost less than it actually does, the customer has not been treated justly. Pricing a product in accordance with the laws of supply and demand is one thing; deceiving the customer is something else. The one is sound business, the other is fraud.

Whenever an unscrupulous businessman advertises a product he never intends to sell in order to attract customers to his place of business, he is willfully and deliberately engaged in deception, and justice is not being served. Such bait and switch advertising is not only intended to defraud the customer, but the legitimate businessman as well.

Whenever an unscrupulous businessman deceives a purchaser into believing that he shall receive a product for practically nothing if he will merely refer the seller to additional customers to whom he will then make the same offer, justice is not being served, for we all know that no man can stay in business while giving products away merely for the names of other people. Such chain-referral selling does not serve justice, for we all know that no business is honest that pretends to give products away. Business is not charity.

Whenever a fraudulent businessman offers a "free gift" with the hidden provision that the recipient purchase some other and usually unwanted product, justice is not being served.

Whenever an unscrupulous businessman frightens an unwary customer into buying products he neither wants or needs by *misleadingly* telling him that what he has is unsafe, justice is not being served.

Whenever a producer deceptively packages his product in order to deceive or confuse the consumer, justice is not being served.

Whenever a manufacturer places dangerous products on the market without making such dangers known, justice is not being served.

And finally, whenever industry rapes for its own profit an environment which belongs equally to every citizen, justice is not being served.

These unjust business practices, however, cheat not only the consumer, they are also a drain on the financial and social sector of society, for they breed contempt for law and order and loss of faith in our free enterprize system and way of life. In short, such business practices are unpatriotic, for they weaken the nation. Fraudulent business practices not only create hardships for unsuspecting customers, they stifle growth, cheat the business community out of legitimate sales, breed disrespect for law, and destroy the citizen's faith in our form of government. We cannot afford to tolerate them if liberty and justice for all is to prevail in this land. Such practices must be prohibited.

But the prohibition of such practices is not easy, for our

legal system lacks a comprehensive statement of standards of fairness and safety in the market place, and because of the swiftness of changing conditions within our society, such standards may be impossible to formulate in anything but a temporary way. Furthermore, our legal system which embodies the maxim that the accused is innocent until proven guilty requires not only that an injured party bring suit but that he prove his contention that he accused was responsible for the injury. Since legal actions are expensive to initiate and carry out, and since most fraudulent business practices involve a vast number of minute injuries, the consumer cannot profitably sue even though the fraudulent business practice is enormously profitable to the seller.

The regulatory agency has been our government's attempt to devise and impose effective standards of fairness and safety. But ^{in so many areas} the regulatory agencies have proven themselves incapable to performing the task effectively. The business communities which the regulatory agencies are called upon to regulate can exert powerful pressures which the consumers who the regulatory agencies are called upon to protect cannot match. And attempts by consumers to initiate class action suits in an attempt to overcome the excessive expense of individual suits have been frustrated by the the congress' reluctance to broaden the permissible grounds for them, the judicial fear of an overwhelming burden on the courts, and the length of time required to try such suits. Consequently, if the problems of consumer protection are to be solved, two things

must be done: regulative agencies must be made responsible to the people, and a way of awarding damage claims to consumers must be found which does not involve legal action of the traditional kind. These goals call for some fundamental changes in our governmental structure, if our citizens are to be protected and if they are to have a role to play in formulating the policies which are to govern consumer protection.

^{on}
[The only] effective way of making our regulative agencies responsible to the people which is consistent with the fundamental principles upon which this nation is built is to put these agencies under the control of elective officials. And although each agency head might be an elective official, it would in all likelihood be more effecient to put all the federal regulatory agencies under the direction of a National Regulatory Board made up of individuals elected by the people who should have both the power to appoint and dismiss the heads of the particular agencies.¹² This National Regulatory Board should have the power to formulate and continually revise standards of fairness and safety to which industry must conform and to levy penalties for nonconformity. In order to safeguard the independence of the members of this board, such things as compensation large enough to render industrial bribery and influence ineffective, recall, staggered terms of office beginning in off presidential election years, the prohibition of seeking this office in groups or by party affiliation, and severe penalties for corruption in office should be considered. For only if a branch of

government can be created which can be both independent of industrial influence and responsible to the people can we have effective consumer protection.

And in order to render the class-action suit practical, consideration should perhaps be given to providing the National Regulatory Board with an investigatory agency to receive and investigate the merits of citizen complaints, and a special Court of Consumer Affairs to award damages from which appeal would not be possible; otherwise our system of civil and criminal courts must be drastically reformed and expanded if consumer complaints are to be handled efficiently. Until such changes are made in our governmental structure, the only practical weapon that can be used to protect the consumer in the market place is the cease and desist injunction, which may end the unjust practices of specific concerns but which cannot compensate the exploited consumer or penalize the unscrupulous concern.

Our forefathers wrote that in order

That the great, general, and essential principles of liberty and free government may be recognized and established . . . we do declare . . . that we hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and enjoyment of the fruits of their own labor, and the pursuit of happiness.

That to secure these rights, governments are instituted among men.

That all political power is vested in, and derived from, the people; all government of right originates from the people, is

founded upon their will only, and is instituted solely for the good of the whole.

That the people . . . have the inherent, sole, and exclusive right of regulating the internal government and policies thereof, and of altering and abolishing their . . . form of government whenever it may be necessary for their safety and happiness; but every such right should be exercised in pursuance of the law, and consistently with the Constitution of the United States.

That a frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty. These famous words, taken from the Declaration of Independence and the Constitution of North Carolina, (which merely states in stronger language the sentiments of the United States Constitution) provide the basis for my political beliefs and impose upon our government and our people certain obligations. The government must preserve the lives and liberties of the people and enable them to enjoy the fruits of their own labor and engage in the pursuit of happiness. Any government which does less than this betrays the trust of the people. If we are not now to betray that trust, strenuous attempts to protect the consumer must be made now.