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### Observing Reasonable Consumers: Cognitive Psychology, Consumer Behavior and Consumer Law

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# OBSERVING REASONABLE CONSUMERS: COGNITIVE PSYCHOLOGY, CONSUMER BEHAVIOR AND CONSUMER LAW

Norman I. Silber\*

## I. Introduction

One widely shared premise of modern American legal thought is that the law should not readily proscribe or punish conduct that is reasonable or unavoidable. Toward that end, courts and legislatures usually search for legal standards that correspond to our empirical knowledge of human be-

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havior. In response to behavioral psychologists' experiments and observations of consumers, courts have come to appreciate limits and errors in the consumer decision-making process, and have developed “reasonable consumer” standards in accord with those cognitive realities.

In the past decade, concern has grown over the impact of “psychology-driven” legal standards. In fact, several legal theorists argue that legislators and jurists misuse or rely excessively on psychological theories developed by consumer behavioralists.<sup>1</sup> These include “neoformalists,” who claim that instead of encouraging freedom of contract and promoting economic efficiency, “psychology-driven” standards rest on incomplete information about consumer behavior<sup>2</sup> and thereby tolerate, even promote, consumer unreasonableness, irrationality and ignorance. Although the neoformalist views have merit, they disregard important realities of consumer decision-making.

This article examines neoformalist views and recent empirical

studies of the consumer decision-making process. Part II discusses the neoformalist “rational utility-maximizer” standard and its underlying assumptions. Part III explores several recent studies of consumer behavior and discusses how the empirical evidence is incompatible with the neoformalist prescriptions for consumer law. Part IV considers whether and to what extent this research should be applied in formulating legal standards that govern consumer transactions. This article concludes that courts and legislatures appropriately take into consideration consumers' cognitive limitations in developing regulations and “reasonable consumer” standards.

## II. Neoformalist Viewpoints

For neoformalists, promises are inviolable and consumer assent to contract terms should be strictly interpreted and enforced.<sup>3</sup> The most extreme of neoformalist postures is exemplified by a Camus character: “No excuses ever, for anyone; that's my principle at the outset. I deny the good intention, the respectable mistake, the indiscretion, the extenuating circumstance.”<sup>4</sup> The view that consumer promises should be strictly enforced, and that consumers' ability to enter into agreements should be unfettered, is founded on the assumption that consumers are motivated by and effectively able to pursue what they believe to be in their own best interest.<sup>5</sup>

A leading discussion of the neoformalist analysis of contract law is Charles Fried's *Contract as Promise*,<sup>6</sup> which attaches great importance to the sanctity of the contractual promise. Neoformalists suggest that psychologically sensitive legal standards reduce the moral clarity and precision of contract and tort law.<sup>7</sup> Moreover, neoformalists argue that the freedom

to contract and the enforceability of consumer contracts is being seriously diminished by the present “reasonable consumer” standards.<sup>8</sup> Irresponsible individual behavior supposedly is excused without promoting collective social or economic well-being.

These and related concerns have led neoformalists to press for a new approach to consumer transactions. Peter Huber, for example, advocates a “journey back to contract,” whereby consumers would be more strictly held to their contractual commitments and would be freer to contract away potential liability claims.<sup>9</sup> Among other recommendations, Huber suggests that courts (1) judge “deceptive” and “misleading” practices against a stricter, more objective standard of consumer reasonableness, rationality, and sophistication; and (2) curb the ability of consumers to escape the unhappy consequences of risks they have contracted to

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assume.<sup>10</sup> Notably, these suggestions have found some favor in judicial rulings and government agency decisions in recent years.<sup>11</sup>

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### III. Recent Consumer Behavioral Research

Consumer behavioral research indicates that consumers are limited in their ability to calculate and maximize their expected utilities. This deficiency exists, among other reasons, because consumer choices are affected by such external factors as "framing effects," "puffery," and induced disinclinations to maximize utility under particu-

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lar conditions. Human cognitive limitations also play a role: for example, inherent information processing limits and inabilities to estimate probabilities accurately. Even when consumers can calculate probabilities accurately, "irrationality" may be reasonable where the decisionmaking task is overwhelming. As a result of these cognitive limitations, "reasonable" consumers cannot consistently maximize their rational best interests. Several cognitive errors and limitations that prevent consumers from maximizing their expected utilities are discussed below.

#### A. Framing effects and puffery

The preferences of reasonable consumers are susceptible to "framing effects."<sup>12</sup> That is, in some situations consumers will exhibit a marked preference for one of two choices, based not exclusively on the objective, expected value of the choices, but also upon

the way in which the choices are presented.

In one study, two alternative programs to combat an unusual and deadly Asian disease were proposed to two groups of people.<sup>13</sup> Both groups were told that absent any program 600 people would die of the disease. One group of subjects was given the choice between program A, which guaranteed that 200 people would be *saved*, and program B, which offered a 1/3 probability that all 600 people would be *saved* and a 2/3 probability that no one would be *saved*. The second group was given the same statistical choices, but the choices were phrased in terms of lives *lost*, instead of lives *saved*. In other words, the second group of subjects was given a choice between program C, which guaranteed that 400 people would *die*, and program D, which offered a 1/3 probability that no one would *die* and a 2/3 probability that all 600 people would *die*.

Objectively, the expected value of the choices (i.e., the value of the particular outcome multiplied by the probability that the outcome would be realized) was identical: under each choice 200 people probably would be saved. According to neoformalists' assumptions, the individuals should have been indifferent between the choices. However, despite the net equivalence of the choices, the individuals' preferences differed vastly depending upon how the choices were "framed." When the alternative programs were stated in terms of lives *saved*, 72% preferred the *certain* alternative (choice A). When the alternatives were stated in terms of lives *lost*, 78% preferred the *riskier* program (choice D).

Similar cognitive anomalies were illustrated with this hypothetical:<sup>14</sup> imagine yourself on your way to a Broadway play with a pair of tickets for which you have paid \$40. Upon entering the theater you

discover that you have lost the tickets. Would you pay \$40 for another pair of tickets? Now imagine you are on your way to the same play without having bought tickets at all. Upon entering the theater you realize that you have lost \$40 in cash. Would you now buy tickets to the play? Most people presented with this situation said they would be more likely to buy new tickets if they had lost money than if they had lost the tickets, despite the fact that the two situations are identical in objective terms.

One possible explanation for framing effects is that individuals are inherently more reluctant toward placing at risk a prospective gain than they are toward potentially worsening an anticipated loss. That may explain why, in the first example above, when presented with choosing between prospective gains, the individuals chose the more certain alternative (choice A), but when presented with choosing between prospective

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losses, the individuals chose the riskier alternative (choice D). Stated differently, the individuals "weigh[ed] out-of-pocket losses more heavily than foregone gains of equal expected value."<sup>15</sup>

Another hypothesis, the "regret theory,"<sup>16</sup> proposes that consumers' choices are affected by their desire to avoid later finding that they would have done better had they chosen differently. For example, assume that two choices have the same expected value, but choice A has a higher *probability* of the preferred outcome, whereas

choice B has a higher *value* of the preferred outcome. Consumers tend to choose B because they do not want later to regret choosing the lesser valued A, should the preferred outcome actually be realized.<sup>17</sup>

Neoformalists assume that consumer preferences reflect consumer values, independent of the context of the choice.<sup>18</sup> Behavioralists' studies indicate that this assumption is unwarranted, and that courts should consider the consequences of framing effects. A court inquiry into framing effects clearly might have relevance, for example, in determining whether some liability and warranty releases are the product of poorly or deceptively framed alternatives.

Framing studies also suggest further avenues of inquiry in advertising regulation. One way in which sellers capitalize upon framing effects is through "two-sided" advertising appeals. This advertising technique places particular emphasis on those product attributes that are more important to consumers, and downplays or even disclaims

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**"[R]easonable consumers are susceptible to arriving at inconsistent opinions about substantively identical alternatives depending upon the context of the marketing appeals."**

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product attributes that are less important to consumers. By downplaying or disclaiming less important attributes, advertisers seek "to establish credibility without deterring a purchase."<sup>19</sup> In effect, advertisers appear more honest by "confessing" product weaknesses, which are really less-preferred product strengths. Research has shown that, compared to one-sided appeals (where the product is presented only in a positive fashion), two-sided appeals lead to diminished perceived product weaknesses, increased perceived product

strengths, and greater advertiser credibility.<sup>20</sup>

"Puffery" is a related advertising tactic in which an advertiser makes unsupported, subjective opinions and exaggerations. Courts do not consider such advertising practices to be deceptive, on the assumption that consumers recognize and are not deceived into believing puffed claims. Researchers, however, have discovered that many consumers believe that the puffed claims are partly or entirely true, and therefore consumers' decisions are affected by the puffed claims.<sup>21</sup>

Whatever the explanation for the effects discovered by researchers, it appears that reasonable consumers are susceptible to arriving at inconsistent opinions about substantively identical alternatives depending upon the context of the marketing appeals. If "deceptive advertising" is advertising capable of manipulation and deceit, then courts should consider framing effects and puffery in determining whether a particular advertisement is deceptive and thus improperly has affected a consumer's decision.

#### **B. Disinclinations to maximize expected utility**

Regulations that govern consumer transactions often are founded on the assumption that consumers are utility-maximizers and will search for information about products and services until the search costs appear to outweigh the benefits.<sup>22</sup> Empirical studies of consumer shopping behavior, however, demonstrate the weakness of any blanket assumption that "reasonable" consumers are inclined, let alone able, to operate effectively as rational utility-maximizers.

Disclosure rules regarding home mortgages, for example, seem to assume that homebuyers shop vigorously and compare alternatives.<sup>23</sup> However, a study of two high-income Connecticut communities revealed that despite the importance of the purchase, "about one-third of homebuyers

spent less than a month actively searching for a home and visited or sought information about fewer than six homes; almost one-half of the homebuyers did not shop for a loan."<sup>24</sup> In a study of real estate closing costs, two-thirds of the homebuyers sampled did not shop for a lender, and over 80 percent did not shop for a title insurer or other provider of closing services.<sup>25</sup>

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Why do consumers behave in a way that confutes neoformalist theory regarding such an important decision? According to one theory, the greater the stress and perceived risk in the decision, the less effective the decisionmaking process.<sup>26</sup> Real and perceived risks involved in important purchasing decisions can lead to "defensive avoidance," a state in which the consumer becomes frustrated by the stress of choosing among hard to compare, costly alternatives.<sup>27</sup> A high level of risk also can lead to "hypervigilance," in which further information may be useful, but the consumer thinks there is insufficient time to search for and assimilate that information.<sup>28</sup> "[T]he high stakes and overwhelming complexity of the transaction will paralyze many home buyers' desire to shop for the best deal."<sup>29</sup> "Irrationality" in this setting is a reasonable response to the decision-making circumstances because of the high emotional costs involved.

#### **C. Inaccurate probability estimates**

Strictly holding a consumer to all of a contract's terms is justifiable only if that consumer has

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adequately consented to the contract. In determining whether "adequate consent" exists, neoformalists assume that consumers are able accurately to anticipate the consequences and calculate the potential value of their contracts. Research has shown, however, that individuals frequently err even in simple calculations, and sometimes avoid complicated calculations entirely.

In one experiment, subjects

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**"In many cases involving form contracts, 'the average consumer knows that he probably will be unable to fully understand the dense text of a form contract . . . .'"**

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were asked to determine the likelihood that a witness, who was known to be 80 percent reliable, correctly stated that a taxi was blue, given that 15 percent of the taxis in the vicinity were blue.<sup>30</sup> Most subjects confronted with this problem — even students at elite colleges — provided widely erroneous estimates: most estimated the probability to be 80%, whereas the probability is closer to 40%.<sup>31</sup> In another study, the vast majority of the participants considered themselves better-than-average drivers; obviously many of them overstated their abilities.<sup>32</sup> Absent an injury to himself, the consumer is reinforced in his belief that he is safe: accidents happen to other people.<sup>33</sup> As a result, consumers demand less safety than the objective risk level warrants.<sup>34</sup>

Where accurately estimating probability is particularly difficult, consumers frequently appear to avoid that fallible process entirely and proceed to solve consumer problems not from probability calculations toward decisions, but the other way around. For example,

one psychologist suggests that some people may decide to smoke for arbitrary, uncalculated reasons.<sup>35</sup> Later they rationalize their decision by assigning a low probability to getting lung cancer, and only because they have already chosen to smoke.<sup>36</sup>

These studies indicate that law-makers should not presume that consumers are capable of making certain risk decisions accurately and in their best interests when those decisions involve relatively complex probability calculations. This is true, for example, in estimating the likelihood and extent of injury when consenting to a liability waiver, or in anticipating the probability of default in assuming a mortgage. In determining whether consumers have adopted such risks, courts should consider the limited ability of consumers to calculate those risks and thereby adequately consent to an agreement.

### D. Information overload

Neoformalists would argue that consumers who are able to understand all of the terms to a contract should be held responsible for failing to do so. Consumers' ability to understand contracts, however, is significantly affected by the quantity and complexity of the information presented to them. Information overload, as consumer psychologists use the term, is a function of trying to "process too much information in a limited time."<sup>37</sup> It also may occur when the information environment (*i.e.*, the ingredient label on a product or the print in an apartment lease) is very complex relative to the consumer's time or expertise.

As a result of information overload, finding the desired information is more difficult and the consumer must spend more time and effort in the search. Research indicates that when faced with at-

tempting to read and understand complicated contract terms, normal consumers become anxious and overwhelmed.<sup>38</sup> In many cases involving form contracts, "the average consumer knows that he probably will be unable to fully understand the dense text of a form contract, whether term-by-term or as an integrated whole."<sup>39</sup> If the additional time, effort, and concomitant anxiety are sufficiently great, the consumer reasonably may respond by not searching for the information at all or simply not digesting the available information.<sup>40</sup> Information overload may cause a consumer to choose a product or enter into a contract that, if he had been able to acquire and process all of the relevant information, he would have rejected.<sup>41</sup> Although consumers act on incomplete information in choosing to avoid complicated text, they may be entirely reasonable in not reading such text, considering the effort required, the emotional consequences, and the prospects for understanding the information.

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The studies of information overload suggest an important function for legal disclosure rules: to make manageable the task consumers face when the high "cost" of information processing inhibits effective decisionmaking.<sup>42</sup> Before the federal Truth-in-Lending law,<sup>43</sup> for example, information concerning interest rates was displayed in a variety of ways. Consumers could not compare different creditors' loan terms unless the consumers converted different creditors' disclosure methods to a common met-

ric; this required complex calculations and comparison among large amounts of dense text. As a result of the Truth-in-Lending regulations, consumers are faced with a less overwhelming and confusing array of information.

The reality of consumer anxiety and avoidance suggests that the strict "duty to read" implied by formalist contract law is not justifiable in the case of dense form contracts.<sup>44</sup> Courts may appropriately find that consumers are acting reasonably in avoiding the complicated texts, and so should not punish reasonable consumers by binding them to uncomprehended contract terms.

#### E. Other variables affecting consumer decisionmaking

Many other variables beyond the control of individual consumers affect consumers' ability to understand the terms of a bargain or the value of a purchase. One such variable is the consumer's familiarity with product attributes and customs of the trade. In *Hall v. T.L. Kemp Jewelry, Inc.*,<sup>45</sup> for example, the court granted summary judgment in favor of a jewelry store owner who had made no express warranty as to the value of a bracelet, although the jeweler orally stated that the bracelet was

worth \$2,000 and then mailed an appraisal that claimed the bracelet was worth more than \$2,600. An independent appraiser subsequently estimated that the bracelet was worth less than \$600. In rejecting the plaintiff's claim, the court held that "[t]he law recognizes that some seller's statements are only sales palaver and not express war-

ranties."<sup>46</sup> Should consumers be expected to know that a seller's appraisal does not warrant value other than for insurance purposes? Can courts expect consumers to be aware that an explicit statement of value for one purpose is "palaver" (idle talk) for another?

Courts occasionally also recognize that otherwise unobjectionable selling practices may become misleading because of the sales medium used. In *Committee on Professional Ethics v. Humphrey*,<sup>47</sup> for example, an attorney's self-laudatory television advertising was held misleading to consumers because of the "special problems" of persuasion in electronic media advertising.<sup>48</sup> Although advertising trade publications abound with articles about the "effectiveness" of various advertising media, courts in many situations fail to appreciate how different media create or exacerbate information processing problems.

Researchers have explored other factors affecting cognitive processing: availability of product alternatives; familiarity with product attributes; uncertainty about similar products; the frequency with which consumers make a particular type of decision; the number of attributes per available alternative; the information source and format; the background "noise" level; time pressure; and the consumer's reliance on the seller's expertise.<sup>49</sup> Unexplored by consumer behavioralists, consumer illiteracy is an absolute barrier to effective information processing that represents a growing problem in the United States.

Consumer behaviorist literature is replete with factors that directly affect how consumers process information concerning product attributes, proper product uses, and the risks that consumers believe they assume in entering into contracts. Any "reasonableness" standard that purportedly reflects consumers' ability to adequately assent to contracts should, at a minimum, allow for the consideration of these factors.

#### IV. Applying Behavioral Theories to Consumer Law

Having discussed some of the cognitive limitations that detrimentally affect consumer decision-making, it must be emphasized that courts should not excuse or encourage consumer irresponsibility. Courts should not release consumers from responsibility for all of their poor choices. Minimizing

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consumer accountability for all poor choices simply diminishes incentives for consumers to choose well. The central questions raised by this discussion concern when legal standards should be sensitive to consumers' cognitive limitations and when cognitive errors are more likely to be reduced by regulation than by judicial decisions.

Exclaiming the reality of cognitive limitations is not the same as proclaiming the superiority of regulatory solutions. There inevitably is a gap between what a consumer gets and what he would have expected to get, if circumstances had been ideal. Whether this gap justifies regulation is the subject of debate.

Numerous statutes and government regulations are justified by considerations of consumers' cognitive limitations. The FTC, for example, argues that it legitimately may regulate the remedies provided to consumer debtors in the context of consumer security agreements and home mortgages, in part because there is no effective negotiation over, and thus no market in, remedies.<sup>50</sup> Cognitively, "debtors do not expect to default; therefore, they do not bargain over

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the effects of default or shop around for less onerous default terms."<sup>51</sup> Auto safety standards require elimination of those risks that are "unreasonable" to consumers.<sup>52</sup> The Consumer Product Safety Act<sup>53</sup> requires the Consumer Product Safety Commission to remove all "unreasonable risks" from consumer products and to do so in a manner that is "in the public interest."<sup>54</sup> A similar mandate is given to the Occupational Safety and Health Administration.<sup>55</sup>

Replacing a market mechanism by a regulatory mechanism should depend on whether an intrinsic market weakness exists — including within that concept consumers' cognitive limitations — and whether regulation is more effective and efficient than the forces of the marketplace. Professor Scott aptly has warned that the literature on consumer cognitive error and limitations should not be misunderstood by lawyers:

The "error" in human judgment and decisionmaking that the psychological literature posits is the deviation between empirically observed behavior and some theoretical conception of ideal rationality. The legal analyst must guard against the problematic assumption that inherently fallible behavior is correctable through legal regulation.<sup>56</sup>

Clearly, some consumer decisionmaking limitations may not be correctable through regulation. Where common law remedies are appropriate, consumers' cognitive limitations should be acknowledged and taken into consideration by the judiciary in formulating "reasonable consumer" standards.

### V. Recommendations and Conclusion

Certain recommendations for

lawmakers and courts emerge from reviewing the consumer behaviorist literature. When determining whether consumers possess understanding sufficient to meaningfully assume a cost or a risk, both external influences on consumers and innate consumer processing abilities should be examined. Where appropriate, such an examination should consider cognitive problems including intentionally deceptive framing effects and puffery. Courts should explore whether consumers can accurately make the probability assessments that are minimally necessary for assenting to contractual costs and risks. Information overload and consumer anxiety also should be considered in deciding whether consumers understand the terms of agreements, or whether they are reasonable in not pursuing available information prior to entering into agreements.

Courts and legislators would be unwise to ignore the accumulating empirical evidence about how consumers actually make decisions. In many instances consumers are prevented or dissuaded from effectively maximizing their utilities by manipulative seller practices. In others, the complexity of accurately computing the costs and risks of a bargain, and thereby determining the "maximum expected utility," prevents consumers from truly understanding crucial contract terms and requirements. Adopting a neoformalist "rational utility-maximizer" position in effect punishes consumers for failing to live up to a standard they are unable to — or are prevented from — achieving.

#### ENDNOTES

1. See Scott, *Error and Rationality in Individual Decisionmaking*, 59 S. CAL. L. REV. 329 (1986); P. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988); W. VISCUSI and W. MAGAT, *LEARNING ABOUT RISK* (1987); W. VISCUSI, *Toward a Diminished Role for Tort*

*Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Safety*, 6 YALE J. ON REG. 65 (1989); Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U.L. REV. 349 (1988).

2. See HUBER, *supra* note 1. The libertarian theory of contracts also contains elements of neoformalism. See, e.g., Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 291-300 (1986).
3. C. FRIED, *CONTRACT AS PROMISE* (1981), at 17.
4. Wilson, *The Morality of Formalism*, 33 UCLA L. REV. 431, 483 (1985) quoting CAMUS, *THE FALL*, (J. O'Brien trans. 1958).
5. See, e.g., Scott, *supra* note 2, at 331.
6. C. FRIED, *supra* note 3.
7. *Id.* at 6.
8. See P. HUBER, *supra* note 1, at 208-213; R. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 79-88, 497-502 (3d ed. 1986).
9. P. HUBER, *supra* note 1, at 18; Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L. J. 353, 361-68 (1988).
10. P. HUBER, *supra* note 1, at 18.
11. See, e.g., *Hinchliffe v. American Motors Corp.*, 39 Conn. Supp. 107, 471 A.2d 980 (Conn. Super. Ct. 1982); *In re Cliffdale Associates, Inc.*, 103 F.T.C. 110 (1984); see also, Shapiro, *Crossing Swords Over Consumer Safety*, U.S. NEWS AND WORLD REPORT, Oct. 26, 1987, at 28.
12. See Bettman and Suja, *Effects of Framing on Evaluation of Comparable and Noncomparable Alternatives by Expert and Novice Consumers*, 14 J. CONSUMER RES. 141 (1987).
13. Kahnman and Tversky, *Choices, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 343 (1984); Kahnman and Tversky, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981); Kahnman and Tversky, *The Psychology of Preferences*, 247 SCIENTIFIC AMERICAN 160 (1982).
14. Kahnman and Tversky, *supra* note 13, at 160.
15. Scott, *supra* note 1, at 339.
16. P. ASCH, *CONSUMER SAFETY REGULATION* 81 (1988).
17. See, Loomes and Sigden, *Regret Theory: An Alternative Theory of Rational Choice Under Uncertainty*,

- ECON. J. 805-24 (Dec. 1982).
18. P. HUBER, *supra* note 1, at 208-209.
19. Kamins and Marks, *Advertising Puffery: The Import of Using Two Sided Claims on Product Attitude and Purchase Intention*, 16 J. ADVERTISING 6, 7 (1987); *see also*, Feinberg and Schervish, *The Relevance of Bayesian Inference for the Presentation of Statistical Evidence and for Legal Decision Making*, 66 B.U.L. REV. 771, 791 (1986).
20. Kamins and Marks, *supra* note 19, at 8.
21. *Id.* at 7.
22. Eskridge, *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction*, 70 VA. L. REV. 1083, 1112-1113 (1984).
23. *Id.*
24. *Id.* at 1113.
25. *Id.* at 1113-1114.
26. *Id.* at 1115-1116.
27. *Id.* at 1115.
28. *Id.*
29. *Id.* at 1115-1116.
30. P. ASCH, *supra* note 16, at 75.
31. *Id.*
32. *Id.* at 76.
33. *Id.*
34. *Id.* at 77.
35. *Id.* at 76.
36. *Id.*
37. Eisenberg, *Text Anxiety*, 59 S. CAL. L. REV. 305, 307 (1986); Keller and Staelin, *Assessing Biases in Decision Effectiveness and Information Overload*, 15 J. CONSUMER RES. 504 (1989).
38. *Id.* at 309.
39. *Id.*
40. *Id.* at 310.
41. *Id.* at 309.
42. *Id.* at 311.
43. 15 U.S.C. §§ 1601-1691(f) (1982 & Supp. I 1990).
44. Eisenberg, *supra* note 37, at 311.
45. 71 N.C. App. 101, 322 S.E.2d 7, 10 (N.C. Ct. App. 1984).
46. *Id.*
47. 355 N.W.2d 565 (Iowa 1984).
48. *Id.* at 570; *see also* *Gootee v. Colt Industries, Inc.*, 712 F.2d 1057, 1063 (6th Cir. 1983)(directed verdict for a manufacturer reversed because a reasonable jury could have credited a consumer gun buyer's testimony that the instruction manual and advertisements for the product induced him to use the product improperly).
49. *See, e.g.*, Punj and Staelin, *A Model of Consumer Information Search Behavior for New Automobiles*, 9 J. CONSUMER RES. 366 (1983); Punj and Stewart, *An Interaction Framework of Consumer Decision Making*, 10 J. CONSUMER RES. 181 (1983).
50. Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U.L. REV. 349, 354-369 (1988).
51. Herber, *Straining the Gnat: A Critique of the 1984 Federal Trade Commission Consumer Credit Regulations*, 38 S.C.L. REV. 329, 332 (1985).
52. Viscusi, *Regulatory Economics in the Courts: An Analysis of Judge Scalia's NHTSA Bumper Decision*, 50 LAW & CONTEMP. PROBS. 17, 24 (1987); *see also* 15 U.S.C. § 1391(1) (1982 & Supp. I 1990).
53. 15 U.S.C. §§ 2051-2058 (1982 & Supp. I 1990).
54. 15 U.S.C. § 2058(d)(1)(B) (1982 & Supp. I 1990).
55. 29 U.S.C. § 651(b)(3) (1982 & Supp. I 1990).
56. Scott, *supra* note 1, at 330-331.