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Consumer Participation in the Law Drafting Process: Past, Present, and Future

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Whither Consumer Representation?

In this section we present three distinct perspectives on the critical issue of the consumer representation in government and quasi-government agencies. Silber looks at the historical development of the concept, analyzing the roots of today's limited formal participation of individuals labeled consumer representatives. The insights of Reverby and Cude demonstrate the diverse and at times conflicting roles contemporary consumer representatives play. We welcome your contributions to this discussion, which may be published in subsequent issues of *ACI*.

Consumer Participation in the Law-Drafting Process: Past, Present, and Future

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Consumers seldom realize how often their rights and responsibilities are determined by law-drafting committees. Routinely such committees draft laws, regulations, and standards for consumer conduct at the request of law-making bodies. Committees often present their proposals to elected legislative or executive bodies. Others report their recommendations to regulatory officials. Drafting work by committees of knowledgeable experts as well as by representatives of affected interests is also sponsored by private professional or industrial associations which adopt proposed laws and rules as part of a professional or an industrial standard.

Remarkably, it is the exception rather than the rule that consumer affairs professionals participate formally in drafting committees. A cynic might conclude that their absence reflects determined efforts to avoid acquainting consumer professionals with decisions that frequently are intended to affect consumers adversely. Today there is no legal or cultural expectation that consumer professionals should participate routinely in committee drafting efforts in order to confer legitimacy on them or improve their results. In this article, I explore past and present attitudes about participation by consumer professionals and attitudes about how the consumer interest is represented when they are absent. I conclude by suggesting how consumer affairs professionals might do more to increase respect for their expertise and to formalize their role in law-drafting committees.

A recent personal experience illustrates the problem. The chair of a bar association task force asked me for a consumer perspective on several proposed changes the drafting committee had made to a uniform state law governing securities.[2] At the time I didn't know very much about the subject but that the drafting usually involves the participation of leading academics and lawyers who are experts. I decided not to oppose the law if consumer problems already had been systematically identified by consumer participants in the drafting process and fairly dealt with by the law drafters.[3] Therefore, I asked whether the new law was "the product of a process of drafting in

which there was notable consumer representation." (P. Shupack, personal communication, June 6, 1995[4].)

The chair consulted with the chief draftsman or "reporter" and replied that consumer organizations were not represented, but consumer participation had been adequate:

> I raised this question [and the reporter] half-jokingly pointed to the list of members of the drafting committee [principally securities industry attorneys and government officials from the Federal Reserve Board and the Securities and Exchange Commission] and asked me to draw my own conclusions. ... I have met a couple of the Commissioners [and] *I know that they do not have special connections to the securities industry, and I believe they are prosperous enough to have portfolios. So long as they looked out for their personal interests as they contemplated Revised Article 8, there were consumer advocates involved in the drafting process.* (P. Shupack, personal communication, June 13, 1995, emphasis added.) According to the chair, lack of "formal consumer representation" was not important because some members of the drafting committee held a "consumer perspective."

THE "CONSUMER PERSPECTIVE" ARGUMENT

The reply presented a clear and superficially logical syllogism: Since (1) anyone who exercises a consumer role with regard to a particular product or service may claim a "consumer perspective" with regard to it; and (2) anyone with a personal consumer perspective will reflect that perspective in a law-making process in which she or he is involved; therefore (3) consumers can be said to participate meaningfully in many contexts even where formal consumer representation is missing. In my example, this logic rationalized the complete absence of formal, identifiable consumer participants in an important, lengthy private law-making process that had considered matters of importance to consumers. Indeed, the product left consumers in a position inferior to their position under existing law. (Facciolo, 1996, p. 1.)

Consumer advocates mainly would agree, I think, that the "consumer perspective" argument is flawed. It does not suffice to assert that an interest has been adequately considered because of the inclusion of the personal sympathies of individuals with other distinctive formal roles and responsibilities—especially roles that require them to try to *separate* themselves from such sympathies. To make the point personally, I may go swimming every week at the university pool but when I attend the university's senate I do not watch out for the budget of the athletic program or lobby for the building of an indoor swimming center. In the securities case, the fact that some drafters had their own stock portfolios tells us little or nothing about whether they represented the interests of consumers.

The intensity of feeling, the depth of experience, and the quality of a putative consumer participant's training matter intensely in assessing whether the participant's involvement demonstrates that there was adequate consumer participation. The matter of proportional advocacy or voting strength also should be taken into account. If a few people in a drafting group have a "consumer outlook" but not enough votes among them to make a significant difference in the outcome, or enough strength to make a significant impact on debate, it is an exaggeration to describe consumer participation as meaningful.

THE POLITICAL COHERENCE ARGUMENT

The securities law proponents (returning to my example) advanced other arguments for not formally including consumer participants. Earlier attempts to involve consumer participants, they claimed, demonstrated it was too difficult to choose participants with sufficient legitimacy to defuse consumer opposition after any legislative compromise was reached. The consumer interest, they said, was so amorphous, with so little "political coherence," that no matter who the consumer participants chosen were, others with different consumer agendas disavowed the representativeness of the participants.

This political incoherence argument is not persuasive because drafting and negotiating bodies seem to value the participation of other interest groups despite *their* weak coherence. They value bona fide environmental group participants in negotiations about environmental regulations, and they value labor unions in labor negotiations, despite the fact that leaders cannot always "deliver" their constituencies, and despite the fact that there are many different views of the "labor interest" or the "environmental interest." Moreover, there are almost always a limited number of authentic consumer organizations interested in discrete consumer problems, and a finite number of persons with expertise about discrete kinds of consumer transactions who are unaffiliated with regulatory or industry interests—and who can be said to hold a consumer viewpoint. The field of appropriate candidates is narrowed further because few of these organizations and individuals have the resources and the incentive to take part in drafting processes which require a substantial commitment of time, energy, and money.

No single consumer participant can always reflect a multiplicity of competing consumer priorities. When chosen as consumer participants, however, those who are genuine and skilled consumer participants try to anticipate the reactions of others in whose interest they

believe they are acting. They are not always successful, but, like their counterparts who represent other interests, they at least do some highly important work: they bring a consumer's point of view to law-making discussions.

Though the rationalizations of "consumer perspective" and "political coherence" may be weak, they resonate with a great many people. For much of our history, policymakers have on similar grounds resisted the suggestion that consumer participation is essential to legitimacy, or they have limited participation to the opportunity for any member of the public to be heard at an open hearing or two. They have accepted the absence of consumer participation as the political science equivalent of a normal, natural phenomenon. (See Olson, 1967.) They have argued that consumers are too diverse a group to be represented by one or two consumer affairs professionals or one or two leaders from consumer advocacy organizations and they have argued that lawmakers have the public interest at heart and so they take the consumer interest into account without formal assistance from others.

Why has the absence of consumer participation in law-drafting and rulemaking processes been easily tolerated by lawmakers and the public generally, more easily than comparable omissions of other interests? At the broadest level it is because the theoretical underpinning for interest-group activities in law drafting, and for an appreciation of the role of consumer participants and their unique contributions to developing rules, has not been broadly accepted. This problem merits further discussion.

THE DISTRUST OF SPECIAL INTERESTS

The idea of the participation of discrete interest groups in lawmaking, whether through parties or other special groups, began early in our history. It even frightened the framers of the Constitution. Political parties and their tendency toward "faction" were considered threats to the viability of a democracy. (See Wood, 1969.) Disinterested, knowledgeable, and objective persons of property and substance were ideally the makers of law. The early American political theorists, furthermore, largely subscribed to a theory of *virtual*, as opposed to *actual* representation of their constituents, basing their votes not on the views of their constituents but rather on their own consciences. Virtual political representation and the danger of factions have remained powerful elements of American political thought, working against the idea that any legislative or deliberative body must include a membership whose views or physical characteristics correspond to those of the population.

Along with the widespread effects of mass production, mass consumption, and with the rise of views we identify as Populist, Progressive, or Socialist, in the later nineteenth century the perception of a discrete *consumer* viewpoint began to emerge in politics, journalism, and literature. Social reformers urged consumers to assert their interests by making their views known through their pocketbooks, through boycotts and labor actions, and by organizing to elect sympathetic political representative to work for a more "open" political process. The first of the government agencies charged during the Progressive Era with significant consumer responsibilities, the Food and Drug Administration and the Federal Trade Commission, were tasked by Congress to look after the "public" interest in health and in fair competition; but in their early years they were not authorized to solicit consumer opinions or invite consumer participation in the regulatory process. (See Williams, 1960.)

THEORETICAL JUSTIFICATIONS FOR CONSUMER PARTICIPATION

During the New Deal the first special offices charged with protecting the consumer interest developed and the intellectual rationalization for professional consumer representation matured. Franklin D. Roosevelt created a Consumers Advisory Board to the National Recovery Administration (NRA), as well as to the Council of Economic Advisors and the Agricultural Adjustment Agency, and Consumers Counsels to the Coal Commission and the Public Service Commission. Some in his Administration even proposed a Department of the Consumer, which did not come to pass either then or later. As these offices were being established a negative, oppositional reaction to specialized consumer representation mounted. Critics questioned the purpose or need for these offices, the opportunities for political opportunism which they created, and the logic behind the appointment of any "John" or "Jane Does" to represent consumers separately from government officials charged with representing the public interest. "Who is a consumer? Show me a consumer," demanded General Hugh Johnson, the head of the NRA (Silber, 1983, p. 15).

I know of two pioneering consumer economists of this era who tried to respond to prevailing concerns and provide a theoretical underpinning for explicit consumer advice by consumer professionals to rulemakers and lawmakers. In her book *Consumption in Our Society*; Elizabeth Hoyt (1938), a professor of economics at Iowa State College, addressed the matter of consumer representation as a mechanism for (1) preserving Adam Smith's consumer sovereignty in the face of governmental interference with competition (through such acts as the passage of trade laws), and as (2) a way to develop consumer-friendly rules in those "fields in which free private enterprise could not be expected to operate competitively." Aggressively asserting that the consumer interest was identical to the public interest, Professor Hoyt argued that "In the

consumers' interest alone do we find the interest of all." She contended that consumer participation in lawmaking was essential to create market rules that permitted meaningful consumer choices (pp. 85-86). Professor Persia Campbell, also an economist and a consumer advocate, complemented Hoyt's analysis by trying to give consumer lobbyists a better reputation than their industry counterparts. She believed that the representation of special interest groups had become "an integral part of our extra-legal machinery of government" (Campbell, 1949, p. 556) recognizing that it took "knowledge and experience on a continuing basis to bring opinion effectively to bear on the vast range of operations that affect the consumer interest, but as yet consumer opinion is not sufficiently well organized." (p. 562).

Campbell's works—which include *Consumer Representation in the New Deal* and *The Consumer Interest* — along with those of Professor Hoyt, were among the serious efforts of that period to explore the development of consumer advisory institutions within governmental units. These did not challenge the treatment of everyone as a consumer, and in many ways they affirmed the viewpoint that anyone could present her or his own general view of consumer welfare. They equated the consumer interest and the public interest, with the public interest transcending narrow interests. Nonetheless, while "everyone" was a consumer, they recognized that people with "knowledge and experience" needed to come forward and to advocate actively the consumer/public interest.

EXPANSION AND CONSTRICTION OF CONSUMER PARTICIPATION

By adopting the consumer interest/public interest equation and reminding elected officials that all voters were consumers, leaders of the consumer movement in later years successfully increased the participation of advisors to governors and to Presidents (Morse, 1993; Peterson, 1982). Government agencies and rulemaking bodies at lower levels, too, slowly became aware of the need to solicit the opinions of consumer experts. In 1953, the Food and Drug Administration initiated a "Consumer Consultant Program," hiring "highly qualified women, carefully chosen for their professional background," as part-time consultants to seek out consumer opinions (Williams, 1960). President Kennedy kept his campaign pledge and added consumer advisors to the Council of Economic Advisors, and a consumer counsel in the Office of the President (Morse, 1993, p. 173, n. 156). The single biggest expansion of consumer participation in lawmaking occurred in 1979, when President Jimmy Carter, spurred by his Consumer Affairs Council (chaired by Esther Peterson), issued an executive order, requiring most federal agencies to improve their consumer programs.

With exceptions, however, many of the consumer boards established pursuant to the Executive Order and through other means in this period were not composed mainly of knowledgeable consumer affairs professionals (one wonders, of course, where Peterson might have found many of them at that time) or of persons who had made any serious study of consumer problems before they began to provide their "consumer input." My impression is that Peterson mostly nurtured existing government officials who did not have any special consumer affairs expertise, as well as "John and Jane Does" who were chosen because they had an inclination to serve and no obvious commercial axe to grind. The involvement of "average consumers" added currency to the idea that everyone or anyone could serve as a consumer representative. It de-emphasized expertise as a minimum qualification for a legitimate consumer participant. A thorough analysis of the plans that were established by Carter's Executive Order would show whether agencies established participating roles for consumer affairs professionals or merely were more open to grass roots complaints from consumers.

During the Reagan and Bush years there was a backlash against consumer protection initiatives at the federal level and some sense that consumer affairs professionals might be biased in favor of intrusive regulatory actions (see Pertschuk, 1982). Formal consumer participation did not end, since popular sentiment required that an agency provide satisfactory service to consumers, who were, after all, taxpayers and voters. But public cynicism about the self-interest of public interest lobbyists and their special pleading and their misplaced paternalism became deeply entrenched. Severed from identification with the overall public interest, consumer groups came to be understood as simply another interest group whose leaders needed either to organize to achieve protection or else to leave consumers to bear the consequences of underparticipation themselves.[5] Subsequently, law drafters generally declined to acknowledge an obligation for consumer interests to be vigorously asserted in lawmaking, or to make any special place for consumer professionals in the process of law drafting.

TOWARD BROADER ACCEPTANCE OF FORMAL CONSUMER PARTICIPATION

The challenge for consumer affairs professionals is to develop models for appropriate consumer participation that are broadly acceptable in today's political environment and legal culture. Ironically, consumer specialists advocating formal participation have played into the hands of their opponents by communicating a number of problematic positions about the nature of con-

sumer participation.

Consider the fact that we often have dwelled on the enormity of the task of identifying the consumer interest, when the task should in my view be described as manageable by competently trained consumer affairs professionals. In her 1949 book, for example, Persia Campbell emphasized the difficulties involved:

> The formulation of a consumer point of view is itself likely to be a controversial process. It involves clarification of issues by recognized leaders, followed by discussion and opinion making by those especially conscious of the problems involved; and they are tremendous (p. 9).

In the process of emphasizing the enormity of the task, she and other consumer leaders and academics communicated to some a sense of futility about the value of a specialization in consumer studies. This may well have led to an underestimation of the contribution of professionals. It is a misunderstanding that needs to be addressed.

Consider that we academics and consumer leaders have sometimes argued, in the opposite vein, that consumer interests are readily apparent and that consumer interests are identical to the public good, which often is a matter of intuitive knowledge of "what's right." This has fueled the argument that we are all able to spot the consumer interest—and that no special consumer representation ought to be necessary.

In my view, we might instead work harder to disentangle consumer interests from other discrete interests (labor, environmental, and civil rights interests, and even economic efficiency interests come to mind) which at times compete with consumer interests when legislative drafting demands viable and appropriate rules. Doing so would create the profile of credible consumer affairs professionals who seek responsible solutions to complicated problems. Consumer organizations, educational programs, and professional associations might do much more than at present to train and help to identify qualified consumer participants who are able to speak out for and protect consumer interests within this context.[6]

I have here only outlined some directions in which consumer affairs professionals might move intellectually and pragmatically to improve consumer participation: establishing that not everyone has a "consumer perspective"; defining the consumer interest in clear terms; and teaching about the attributes that will make consumer affairs professionals valued and necessary participants in law-drafting efforts. There remains much work to be done to understand how consumer affairs professionals can be included more regularly and formally in the process of consumer law drafting.

NOTES

1. This article is adapted from a lecture presented to the University of Wisconsin Department of Consumer Science and the University of Wisconsin Law School on October 24, 1996. Thanks to Rima Apple, Professor of Consumer Sciences for her resourcefulness; to Rima Apple, Robin Douthitt, Tom Garman, Cathy Zick, Stephen Meili, Robert Mayer and Richard L.D. Morse for sharing their insight; and to faculty and students at UW-Madison.
2. See Article 8, Uniform Commercial Code, Revised. This is a set of statutory rules that a year earlier had been approved by the American Law Institute and the National Conference of Commissioners on Uniform State Laws after a lengthy process which had gone on for several years. Because these rules must be enacted by state legislatures to become effective, and because consumer-rights oriented legislators inhabit some state legislatures, proponents of the UCC occasionally seek the endorsement by consumer advocates of new legislative initiatives.
3. Designation as a "participant" in law-making processes generally confers not more than the opportunity to offer evidence or opinions to others who hold decisive authority about a matter. Designation as a "representative" in a law-making process generally establishes a larger role than mere participation which in many representative processes include voting or veto powers.
4. When this letter was written, Professor Norman Silber was chair of the ABCNY Consumer Affairs Committee, and Professor Paul Shupack was chair, ABCNY Task Force to Study Revisions to Article 8 of the UCC.
5. The contemporary argument that would leave consumer interests to fend for themselves was explored and rejected twenty years ago. It is no longer acceptable to suggest that interest groups will organize whenever those interests require protection. Mancur Olson's classic book *The Logic of Collective Action.*
6. An organization such as ACCI, for example, might consider appropriate ways to credential consumer participants and attempt systematically to reach out to law-drafting committees; and to suggest that drafting efforts include the formal participation of persons with training in consumer studies who are without ties to affected commercial interests.

REFERENCES

Apple, R.D. (1990). *Women, Health and Medicine in America.* New York: Garland Publishing Inc.

Campbell, P. (1949). *The Consumer Interest, A Study in Consumer Economics.* New York: Harper.

Campbell, P. (1940). *Consumer Representation in the New Deal.* New York: Columbia University Press.

Facciolo, F.J. (1996). Legislature Mulls Change of Article 8. *New York Law Journal* (October 17, 1996), p.1.

Hoyt, E. (1938). *Consumption in Our Society.* New York: McGraw-Hill Book Co.

Morse, R.L.D. (Ed.). (1993). *The Consumer Movement, Lectures by Colston E. Warne.* Manhattan, KA: Family Economics Trust Press.

Peterson, E. (1982). Consumer Representation in the White House. *In Consumer Activists: They Made a Difference.* Mount Vernon, NY: National Consumers Committee for Research and Education, Consumers Union Foundation.

Olson, M. (1965). *The Logic of Collective Action.* Cambridge, MA: Harvard University Press.

Pertschuk, M. (1982). *Revolt Against Regulation: The Rise and Pause of the Consumer Movement.* Berkeley: University of California Press.

Silber, N.I. (1983). *Test and Protest.* New York: Holmes & Meier Publishers.

Williams, C.S. (1960). The FDA's Consumer Consultant Program. *Food, Drug, Cosmetic Law Journal*, 15, pp. 748).

Wood, G. (1969). *The Creation of the American Republic: 1776-1787.* Williamsburg VA: Published for the Institute of Early American History and Culture by the University of North Carolina Press.