**INTRODUCTION**

Consider the nature of the consumer products discussed below:

NASHVILLE, Tenn., February 26, 2004—Bridgestone/Firestone announced a recall Thursday of about 490,000 Steeltex tires linked to sport utility vehicle crashes that killed five people. … The tires were made for use on Ford Excursions from 2000 to 2002 and some 2003 models. The recall comes 3 years after the company began a recall of 17 million ATX, ATX II and Wilderness AT tires. More than 200 people were reported killed and hundreds more injured in rollover crashes after the tread on those tires separated. The company has spent an estimated $1.5 billion on that recall.1

SAN DIEGO, Calif., June 24, 2004—Metabolife International yesterday was ordered to pay $7.46 million to a Texas woman who suffered a stroke after taking the company’s ephedra diet pill … Metabolife 356 … . federal jury in Alabama awarded $4.1 million in damages to four people who suffered heart attacks or strokes after taking Metabolife 356. In April, federal regulators banned the use of ephedra supplement products after the herbal stimulant was linked to 155 deaths and numerous serious injuries.2

[*Consumer Reports* in May 2004 stated it] easily purchased 12 [dangerous supplements] in February 2004 in a few days of shopping online and in retail stores. These unsafe supplements include aristolochia, an herb conclusively linked to kidney failure and cancer in China, Europe, Japan, and the U.S.; yohimbe, a sexual stimulant linked to heart and respiratory problems; bitter orange, whose ingredients have effects similar to those of the banned weight-loss stimulant ephedra; and chaparral, comfrey, germander, and kava, all known or likely causes of liver failure. . . .3

WASHINGTON, D.C. April 29, 2003—Some of the hazardous products that consumers are most likely to find in their homes: *Window Blind Cords with Loops* that can strangle children. … the U.S. Consumer Product Safety Commission (CPSC) knows of about 160 strangulation deaths to children in looped window covering cords … *Halogen Torchiere Floor Lamps* that can cause fires when combustibles such as drapes come too close to the bulb. … CPSC knows of 290 fires and 25 deaths since 1992 related to halogen torchiere floor lamps. *Cadet Heaters* that could cause a fire. CPSC is aware of more than 320 reports of Cadet and Encore heaters that smoked, sparked, caught fire, emitted flames, or ejected burning particles or molten materials. These incidents have allegedly resulted in four deaths, two serious burn injuries and property damage claims exceeding $4.3 million. *Disposable and Novelty Lighters That Are Not Child-resistant*. … in a recent year there were still 2,400 fires resulting in 70 deaths and 480 injuries because of children under age 5 playing with lighters. 4

Americans are exposed daily to astonishingly high levels of risk from the use of consumer products. Each year some 20 million people suffer serious accidental injuries and about 100,000 are killed, more than half of them in accidents involving consumer products. After declining by more than 20 percent between 1979 and 1992 (when deaths reached a 68-year low of 86,777), accidental deaths have been rising again since 1992. The Consumer Product Safety Commission estimated that the total cost of these injuries in 2003 alone was $700 billion.

However, product injuries make up only one category of costs imposed on unwary consumers. Consumers must also bear the costs of deceptive selling practices, shoddy product construction, products that immediately break down, and warranties that are not honored. For example, several years ago, the engine of Martha and George Rose’s Chevrolet station wagon began hissing and white smoke poured out of the tailpipe as she drove it 6 miles to work.5 Two non-Chevrolet mechanics who then checked the car later testified that the radiator and cooling system were “in satisfactory condition,” that the radiator “was not boiling over,” and that the temperature light on the dashboard “was not burning.” Upon taking the engine apart, a mechanic found that a hair-line crack in the engine block had allowed water to enter the cylinder head, meaning that the car would need an expensive new engine. The engine was still under a “5-year or 50,000-mile” warranty, so the Roses thought the Chevrolet division of General Motors would bear the large costs of repairing what they concluded was an inherently defective engine block. However, when a Chevrolet service manager examined the dismantled car, he insisted that the problem was that the radiator thermostat had stuck shut so no coolant had reached the engine. Because the thermostat was only under a “12-month or 12,000-miles” warranty that had by then expired, and because, the Chevrolet manager claimed, the faulty thermostat had caused the engine to overheat and the engine block to crack, Chevrolet had no responsibility under the warranty. Moreover, the car had been torn down and worked on by unauthorized mechanics. Although the Roses pointed out that the other mechanics had found no evidence of overheating and that no Chevrolet mechanic had suggested replacing the thermostat at any of their regular maintenance servicings, the General Motors field manager and his superiors, both in New Orleans and Detroit, refused to honor the warranty. Without the engine, the car that General Motors had sold them was now worth only 10 percent of what they had originally paid for it. Because they could not afford an attorney for a trial they might lose, the Roses could not file suit against General Motors.

The sales practices of Pacific Bell Telephone Company (now SBC) provide another illustration of the difficulties that face consumers. In 2003, Pacific Bell paid $15 million in fines imposed by the Public Utilities Commission (PUC) of the State of California for deceptive marketing of telephone services. The charges were related to an earlier $17 million fine the PUC ordered Pacific Bell to pay 15 years earlier when sales representatives were duping phone customers into buying expensive optional features without informing them the features were optional and that cheaper basic service was available. A sales representative described her sales pitch at that time:

I’m going to tell you that “you will get unlimited local calling, Touchtone service, our four, custom-calling services and a 20 percent discount in the Pacific Bell service area; the central office fee to turn the services on is $37.50 and I have all of these things available and it’s only $22.20 a month.” Most customers will say, “That’s fine.” It really isn’t a bad deal, but how many people know they don’t have to buy all those things, that they can get basic service for $9.95? The company says, “People should be intelligent enough to ask; why should it be PacBell’s job to tell them?” People who don’t speak English, well, they end up with those services. Sometimes they call back and say, “What is this? I didn’t want this.” [Pacific Telephone sales representative]6

During 1998–1999, the PUC conducted a new investigation into Pacific Bell’s marketing that culminated in the $15 million fine the company paid in 2003 for deceptive marketing practices similar to those the PUC had fined in 1986.7 The PUC found that Pacific Bell could make up to $210 million a year if enough customers could be convinced to “unblock” their numbers so that their numbers could be revealed on caller ID phones. When customers called Pacific Bell, they were offered a free “up-grade” that in fact downgraded their phone by unblocking their number. Some customers were told blocking was being discontinued or was no longer available, and others that blocking would now mean added charges, none of which was true. In addition, Pacific Bell named an expensive package of optional services “The Basics” without informing customers that “The Basics” was not its low-cost basic service, but was, in fact, a package of pricy options such as three-way calling, call forwarding, and distinctive ringing. Finally, Pacific Bell offered customers only the highest-priced insurance for inside telephone wire repair without informing them of less-expensive options and without telling them they could hire non-Pacific Bell personnel to repair their inside phone wiring.

Consumers are also bombarded daily by an endless series of advertisements urging them to buy certain products. Although sometimes defended as sources of information, advertisements are also criticized on the grounds that they rarely do more than give the barest indications of the basic function a product is meant to serve and sometimes misrepresent and exaggerate its virtues. Economists argue that advertising expenditures are a waste of resources and sociologists bemoan the cultural effects of advertising.8

This chapter examines the many ethical issues raised by product quality and advertising. The first few sections discuss various approaches to consumer issues, and the last sections deal with consumer advertising. We begin with a focus on what is perhaps the most urgent issue: consumer product injuries and the responsibilities of manufacturers.

**6.1**  **Markets and Consumer Protection**

Consumer advocates point out that there were more than 500,000 injuries requiring hospital treatment inflicted on youngsters and adults using toys, nursery equipment, and playground equipment; close to 300,000 people were mangled using home workshop equipment; over 2,000,000 people needed emergency treatment for injuries involving home furnishings; and over 3,000,000 people required treatment for injuries involving home construction materials.9 Injuries from auto-related accidents in 2003 averaged 56,270 each week and deaths averaged 117 per day; financial losses were estimated at $479 million per day.10

Many people believe that consumers automatically will be protected from injury by the operations of free and competitive markets and that neither governments nor businesspeople have to take special steps to deal with these issues. As we have seen in earlier chapters (particularly in Chapter 4), free markets promote an allocation, use, and distribution of goods that are, in a certain sense, just, respectful of rights, and efficiently productive of maximum utility for those who participate in the market. Moreover, in such markets, the consumer is said to be “sovereign.” When consumers want and will willingly pay for something, sellers have an incentive to cater to their wishes. If sellers do not provide what consumers want, then sellers will suffer losses. However, when sellers provide what consumers want, they will profit. As the author of a leading textbook on economics wrote, “Consumers direct by their innate or learned tastes, as expressed in their dollar votes, the ultimate uses to which society’s resources are channeled.”11

In the **“market” approach to consumer protection**, consumer safety is seen as a good that is most efficiently provided through the mechanism of the free market whereby sellers must respond to consumer demands. If consumers want products to be safer, they will indicate this preference in markets by willingly paying more for safer products and showing a preference for manufacturers of safe products while turning down the goods of manufacturers of unsafe products. Producers will have to respond to this demand by building more safety into their products or they risk losing customers to competitors who cater to the preferences of consumers. Thus, the market ensures that producers respond adequately to consumers’ desires for safety. However, if consumers do not place a high value on safety and demonstrate neither a willingness to pay more for safety nor a preference for safer products, then it is wrong to push increased levels of safety down their throats through government regulations that force producers to build more safety into their products than consumers demand. Such government interference, as we saw earlier, distorts markets, making them unjust, disrespectful of rights, and inefficient. It is just as wrong for businesspeople to decide on their own that consumers should have more protection than they are demanding as to force on them costly safety devices that they would not buy on their own. Only consumers can say what value they place on safety, and they should be allowed to register their preferences through their free choices in markets and not be coerced by businesses or governments into paying for safety levels they may not want.

**market approach to consumer protection** Consumer safety is seen as a good that is most efficiently provided through the mechanism of the free market whereby sellers must respond to consumer demands.

For example, an appliance selling for $100 may indicate that it will overheat if it is used for more than an hour and a half, whereas one selling for $400 may indicate that it can be run safely all day and night continuously. Some buyers will prefer the cheaper model, willingly trading the somewhat higher risk for the $300 cut in price, whereas others will prefer the more expensive one. If government regulations forced all appliance makers to make only the safer model or if manufacturers voluntarily decided to make only the safer model, then consumers who do not feel that the increase in safety is worth $300 extra to them will be out of luck. If they cannot do without the appliance, they will be forced to pay the extra $300 even if they would have preferred spending it on something else that is more valuable to them. Thus, they are unjustly forced to pay money for something they do not want, and their resources are inefficiently wasted on something that produces little utility for them.

Critics of this market approach respond, however, that the benefits of free markets obtain with certainty only when markets have the seven characteristics that define them: (a) There are numerous buyers and sellers, (b) everyone can freely enter and exit the market, (c) everyone has full and perfect information, (d) all goods in the market are exactly similar, (e) there are no external costs, (f) all buyers and sellers are rational utility maximizers, and (g) the market is unregulated. Critics of the market approach to consumer issues argue that these characteristics are absent in consumer markets, focusing especially on characteristics (c) and (f).

***Quick Review 6.1***

**Problems with the Assumption of Full Information**

• Many products are too complex for consumers to understand

• Markets cannot provide consumers with product information

Markets are efficient, critics point out, only if condition (c) obtains—that is, only if participants have full and perfect information about the goods they are buying. Obviously, consumers are frequently not well informed about the products they buy simply because the sophisticated consumer products on contemporary market shelves are too complex for anyone but an expert to be knowledgeable about them. Not surprisingly, manufacturers, who are knowledgeable about their products, might not voluntarily provide information about the safety levels or defective characteristics of their products to consumers. Because gathering information is expensive, consumers may not have the resources to acquire the information on their own by, for example, testing several competing brands to determine which provides the most safety for the cost.

In theory, it would be possible for consumers who want information to turn to organizations such as the Consumers Union, which make a business of acquiring and selling product information. That is, market mechanisms should create a market in consumer information if that is what consumers want. However, for two reasons related to the nature of information, it is difficult for such organizations to cover their costs by selling information to consumers. First, as several economists have pointed out, once information is provided to one person who pays for it, it is easily leaked to many others who do not pay, especially in this age of photocopiers.12 Because people know they can become ***free riders*** and acquire the information compiled by others without paying for it themselves, the number of people who willingly pay for the information is too small to allow the organization to cover its costs. Second, consumers are often unwilling to pay for information because they do not know what its value to them will be until after they get it and then they no longer need to pay for it because it is already in their possession. For example, consumers may pay for the information contained in a research report and then find that they already knew what was in the report, that it is about products other than those they want to buy, or that it is irrelevant information about those products. Consumers cannot know in advance precisely what they are buying when they buy information, thus they are unwilling to pay the costs organizations must charge to gather the information.13 Markets alone, then, are not able to support organizations that can provide consumers with the information they need. Instead, such organizations must rely on charitable contributions or government grants.

**free riders** Individuals who enjoy the benefits of a good without paying their share of its costs.

A second criticism of the argument that free markets can deal with all consumer issues takes aim at characteristic (f) of free markets: the assumption that the consumer is a “rational utility maximizer.” As one author put it, the consumer assumed by such arguments is “a budget-minded, rational individual, relentlessly pushing toward maximizing his satisfaction … [who is able] to think well ahead, to ‘wait,’ to consider. The consumer defined by the theory watches every penny.”14 More precisely, the ***rational utility maximizer*** that the consumer is assumed to be is a person who has a well-defined and consistent set of preferences and who is certain how personal choices will affect those preferences.

**rational utility maximizer** A person who has a well-defined and consistent set of preferences, and who knows how personal choices will affect those preferences.

Unfortunately, virtually all consumer choices are based on probability estimates we make concerning the chances that the products we buy will function as we think they will. All the research available shows that we become highly inept, irrational, and inconsistent when we make choices based on probability estimates.15

First, as is obvious to any observer, few of us are good at estimating probabilities. We typically underestimate the risks of personal life-threatening activities, such as driving, smoking, or eating fried foods, and of being injured by the products we use, and we overestimate the probabilities of unlikely but memorable events such as tornadoes or attacks by grizzly bears in national parks.16 Studies have shown that our probability judgments go astray for a number of reasons, including the following:

1. Prior probabilities are ignored when new information becomes available, even if the new information is irrelevant.

2. Emphasis on “causation” results in the underweighing of evidence that is relevant to probability but is not perceived as “causal.”

3. Generalizations are made on the basis of small sample findings.

4. Belief is placed in a self-correcting but nonexistent “law of averages.”

5. People believe that they exert control over purely chance events.17

Second, as a number of researchers have shown, people are irrational and inconsistent when weighing choices based on probability estimates of future costs or payoffs. For example, one set of researchers found that when people are asked to rank probable payoffs, they inconsistently will rank one payoff as being both better and worse than another. Another investigator found that when people were asked which of two probable payoffs they preferred, they would often say that they would pay more for the payoff that they least preferred. Another set of studies found that, in many cases, a majority of persons would prefer one probable payoff to another in one context but reversed their preferences in a different context although the probable payoffs were identical in both contexts.18

Finally, as several critics have pointed out and as we saw in Chapter 4, markets often fail to incorporate the most fundamental characteristic of competitive markets: the presence of numerous buyers and sellers. Although buyers or consumers in most markets are numerous, still many, perhaps most, consumer markets are monopolies or oligopolies; that is, they are dominated by one or a few large sellers. Sellers in monopoly and oligopoly markets are able to extract abnormally high profits from consumers by ensuring that supply is insufficient to meet demand, thereby creating shortages that put upward pressures on prices.

On balance, then, it does not appear that market forces by themselves can deal with all consumer concerns for safety, freedom from risk, and value. Market failures, characterized by inadequate consumer information, irrationality in the choices of consumers, and concentrated markets, undercut arguments that try to show that markets alone can provide adequate consumer protection. Instead, consumers must be protected through the legal structures of government and through the voluntary initiatives of responsible businesspeople. We turn then to examining several views about the responsibilities of businesses toward consumers—views that have formed the basis of many of our consumer laws and of increased calls for greater acceptance of responsibility for consumer protection on the part of business.

***Quick Review 6.2***

**Problems with the Assumption of Rational Utility Maximization**

• Few people are good at estimating probabilities

• People are irrational and inconsistent when weighing choices

• Many consumer markets are monopolies or oligopolies

It is clear, of course, that part of the responsibility for consumer injuries must rest on consumers. Individuals are often careless in their use of products. “Do-it-yourselfers” use power saws without guards attached or use flammable liquids near open flames. People often use tools and instruments that they do not have the skill, knowledge, or experience to handle.

Injuries also arise from flaws in product design, in the materials out of which products are made, or in the processes used to construct products. Insofar as manufacturing defects are the source of product-related injuries, consumer advocates claim, the duty of minimizing injuries should lie with the manufacturer. The producer is in the best position to know the hazards raised by a certain product and to eliminate the hazards at the point of manufacture. In addition, the producer’s expertise makes the producer knowledgeable about the safest materials and manufacturing methods and enables it to build adequate safeguards into the design of the product. Finally, because the producer is intimately acquainted with the workings of the product, it can best inform the consumer on the safest way to use the product and on the precautions to be taken.

Where, then, does the consumers’ duty to protect their own interests end, and where does the manufacturer’s duty to protect consumers’ interests begin? Three different theories on the ethical duties of manufacturers have been developed, each one of which strikes a different balance between the consumers’ duty to themselves and the manufacturer’s duty to the consumers: the contract view, the “due care” view, and the social costs view. The contract view would place the greater responsibility on the consumer, whereas the due care and social costs views place the larger measure of responsibility on the manufacturer. We examine each of these in turn.

**6.2**  **The Contract View of Business Firm’s Duties to Consumers**

According to the **contract view of the business firm’s duties to its customers**, the relationship between a business firm and its customers is essentially a contractual relationship, and the firm’s moral duties to the customer are those created by this contractual relationship.19 When a consumer buys a product, this view holds, the consumer voluntarily enters into a “sales contract” with the business firm. The firm freely and knowingly agrees to give the consumer a product with certain characteristics, and the consumer in turn freely and knowingly agrees to pay a certain sum of money to the firm for the product. By virtue of having voluntarily entered this agreement, the firm then has a duty to provide a product with those characteristics, and the consumer has a correlative right to get a product with those characteristics.

**contract view of the business firm’s duties to its customers** The view that the relationship between a business firm and its customers is essentially a contractual relationship, and the firm’s moral duties to the customer are those created by this contractual relationship.

The contract theory of the business firm’s duties to its customers rests on the view that a contract is a free agreement that imposes on the parties the basic duty of complying with the terms of the agreement. We examined this view earlier (Chapter 2) and noted the two justifications Kant provided for the view: A person has a duty to do what the person contracts to do because failure to adhere to the terms of a contract is a practice that (a) cannot be universalized, and (b) treats the other person as a means and not as an end.20 Rawls’s theory also provides a justification for the view, but one that is based on the idea that our freedom is expanded by the recognition of contractual rights and duties: An enforced system of social rules that requires people to do what they contract to do will provide them with the assurance that contracts will be kept. Only if they have such assurance will people feel able to trust each other’s word and, on that basis, to secure the benefits of the institution of contracts.21

We also noted in Chapter 2 that traditional moralists have argued that the act of entering into a contract is subject to several secondary moral constraints:

1. Both of the parties to the contract must have full knowledge of the nature of the agreement they are entering.

2. Neither party to a contract must intentionally misrepresent the facts of the contractual situation to the other party.

3. Neither party to a contract must be forced to enter the contract under duress or undue influence.

These secondary constraints can be justified by the same sorts of arguments that Kant and Rawls use to justify the basic duty to perform one’s contracts. Kant, for example, easily shows that misrepresentation in the making of a contract cannot be universalized, and Rawls argues that if misrepresentation were not prohibited, fear of deception would make members of a society feel less free to enter contracts. However, these secondary constraints can also be justified on the grounds that a contract cannot exist unless these constraints are fulfilled. A contract is essentially a free agreement struck between two parties. Because an agreement cannot exist unless both parties know what they are agreeing to, contracts require full knowledge and the absence of misrepresentation. Because freedom implies the absence of coercion, contracts must be made without duress or undue influence.

Hence, the contractual theory of business firms’ duties to consumers claims that a business has four main moral duties: the basic duty of (a) complying with the terms of the sales contract and the secondary duties of (b) disclosing the nature of the product, (c) avoiding misrepresentation, and (d) avoiding the use of duress and undue influence. By acting in accordance with these duties, a business respects the right of consumers to be treated as free and equal persons—that is, in accordance with their right to be treated only as they have freely consented to be treated.

**The Duty to Comply**

The most basic moral duty that a business firm owes its customers, according to the contract view, is the duty to provide consumers with a product that lives up to those claims that the firm expressly made about the product, which led the customers to enter the contract freely and which formed the customers’ understanding concerning what they were agreeing to buy. Winthrop Laboratories, for example, marketed a painkiller that it advertised as *nonaddictive*. Subsequently, a patient using the painkiller became addicted to it and shortly died from an overdose. A court found Winthrop Laboratories liable for the patient’s death because, although it had expressly stated that the drug was nonaddictive, Winthrop Laboratories had failed to live up to its duty to comply with this express contractual claim.22 As this example suggests, our legal system has incorporated the moral view that firms have a duty to live up to the express claims they make about their products. The Uniform Commercial Code, for example, states in Section 2-314:

Any affirmation of fact or promise made by the seller to the buyer that related to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

In addition to the duties that result from the express claim a seller makes about the product, the contract view also holds that the seller has a duty to carry through on any implied claims knowingly made about the product. For example, the seller has the moral duty to provide a product that can be used safely for the ordinary and special purposes for which the customer, relying on the seller’s judgment, has been led to believe it can be used. Sellers are morally bound to do whatever they know the buyers understood the sellers were promising because at the point of sale sellers should have corrected any misunderstandings of which they were aware.23 This idea of an implied agreement has also been incorporated into the law. Section 2-315 of the Uniform Commercial Code, for example, reads:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is … an implied warranty that the goods shall be fit for such purpose.

The express or implied claims that a seller might make about the qualities possessed by the product range over a variety of areas and are affected by a number of factors. Frederick Sturdivant classified these areas in terms of four variables: “The definition of product quality used here is: the degree to which product performance meets predetermined expectation with respect to (1) reliability, (2) service life, (3) maintainability, and (4) safety.”24

**Reliability**

Claims of reliability refer to the probability that a product will function as the consumer is led to expect that it will function. If a product incorporates a number of interdependent components, then the probability that it will function properly is equal to the result of multiplying together each component’s probability of proper functioning.25 As the number of components in a product multiplies, therefore, the manufacturer has a corresponding duty to ensure that each component functions in such a manner that the total product is as reliable as it is implicitly or expressly claimed to be. This is especially the case when malfunction poses health or safety hazards. The U.S. Consumer Product Safety Commission lists hundreds of examples of hazards from product malfunctions in its periodic announcements.26

**reliability** The probability that a product will function as the consumer is led to expect that it will function.

**Service Life**

Claims concerning the life of a product refer to the period of time during which the product will function as effectively as the consumer is led to expect it to function. Generally, the consumer implicitly understands that service life will depend on the amount of wear and tear to which one subjects the product. In addition, consumers also base some of their expectations of service life on the explicit guarantees the manufacturer attaches to the product.

**service life** The period of time during which the product will function as effectively as the consumer is led to expect it to function.

A more subtle factor that influences service life is the factor of obsolescence.27 Technological advances may render some products obsolete when a new product appears that carries out the same functions more efficiently. Purely stylistic changes may make last year’s product appear dated and less desirable. The contract view implies that sellers who know that a certain product will become obsolete have a duty to correct any mistaken beliefs they know buyers will form concerning the service life they may expect from the product.

**Maintainability**

Claims of maintainability are claims concerning the ease with which the product can be repaired and kept in operating condition. Claims of maintainability are often made in the form of an express warranty. Whirlpool Corporation, for example, appended this express warranty on one of its products:

**maintainability** The ease with which the product can be repaired and kept in operating condition.

During your first year of ownership, all parts of the appliance (except the light bulbs) that we find are defective in materials or workmanship will be repaired or replaced by Whirlpool free of charge, and we will pay all labor charges. During the second year, we will continue to assume the same responsibility as stated above except you pay any labor charges.28

But sellers often also imply that a product may be easily repaired even after the expiration date of an express warranty. In fact, however, product repairs may be costly, or even impossible, because of the unavailability of parts.

**Product Safety**

Implied and express claims of product safety refer to the degree of risk associated with using a product. Because the use of virtually any product involves some degree of risk, questions of safety are essentially questions of acceptable and known levels of risk. That is, a product is safe if its attendant risks are known and judged to be “acceptable” or “reasonable” by the buyer in view of the benefits the buyer expects to derive from using the product. This implies that sellers comply with their part of a free agreement if the sellers provide a product that involves only those risks they say it involves, and buyers purchase it with that understanding. The National Commission on Product Safety, for example, characterized *reasonable risk* in these terms:

**product safety** The degree of risk associated with using a product.

Risks of bodily harm to users are not unreasonable when consumers understand that risks exist, can appraise their probability and severity, know how to cope with them, and voluntarily accept them to get benefits they could not obtain in less risky ways. When there is a risk of this character, consumers have reasonable opportunity to protect themselves; and public authorities should hesitate to substitute their value judgments about the desirability of the risk for those of the consumers who choose to incur it. But preventable risk is not reasonable (a) when consumers do not know that it exists; or (b) when, though aware of it, consumers are unable to estimate its frequency and severity; or (c) when consumers do not know how to cope with it, and hence are likely to incur harm unnecessarily; or (d) when risk is unnecessary in that it could be reduced or eliminated at a cost in money or in the performance of the product that consumers would willingly incur if they knew the facts and were given the choice.29

Thus, the seller of a product (according to the contractual theory) has a moral duty to provide a product whose use involves no greater risks than those the seller expressly communicates to the buyer or those the seller implicitly communicates by the implicit claims made when marketing the product for a use whose normal risk level is well known. If the label on a bottle, for example, indicates only that the contents are highly toxic (“Danger: Poison”), the product should not include additional risks from flammability. If a firm makes and sells skis, use of the skis should not embody any unexpected additional risks other than the well-known risks that attend skiing (e.g., it should not involve the added possibility of being pierced by splinters should the skis fracture). In short, sellers have a duty to provide a product with a level of risk that is no higher than they expressly or implicitly claim it to be and that consumers freely and knowingly contract to assume.

**The Duty of Disclosure**

An agreement cannot bind unless both parties to the agreement know what they are doing and freely choose to do it. This implies that the seller who intends to enter a contract with a customer has a duty to disclose exactly what the customer is buying and what the terms of the sale are. At a minimum, this means the seller has a duty to inform the buyer of any characteristics of the product that could affect the customer’s decision to purchase the product. For example, if the product the consumer is buying possesses a defect that poses a risk to the user’s health or safety, the consumer should be so informed. Some have argued that sellers should also disclose a product’s components or ingredients, its performance characteristics, costs of operation, product ratings, and any other applicable standards.30

Behind the claim that entry into a sales contract requires full disclosure is the idea that an agreement is free only to the extent that one knows what alternatives are available: Freedom depends on knowledge. The more the buyer knows about the various products available on the market and the more comparisons the buyer is able to make among them, the more one can say that the buyer’s agreement is voluntary.31

The view that sellers should provide a great deal of information for buyers, however, has been criticized on the grounds that information is costly and, therefore, should be treated as a product for which the consumer should either pay or do without. In short, consumers should freely contract to purchase information as they freely contract to purchase goods, and producers should not have to provide it for them.32 The problem with this criticism is that the information on which a person bases a decision to enter a contract is a rather different kind of entity from the product exchanged through the contract. Because a contract must be entered into freely and free choice depends on knowledge, contractual transactions must be based on an open exchange of information. If consumers had to bargain for such information, the resulting contract would hardly be free.

**The Duty Not to Misrepresent**

Misrepresentation, even more than the failure to disclose information, renders freedom of choice impossible. That is, misrepresentation is coercive: The person who is intentionally misled acts as the deceiver wants the person to act and not as the person would freely have chosen to act if the person had known the truth. Because free choice is an essential ingredient of a binding contract, intentionally misrepresenting the nature of a commodity is wrong.

Sellers misrepresent a commodity when they represent it in a way deliberately intended to deceive the buyer into thinking something about the product that the seller knows is false. The deception may be created by a verbal lie, as when a used model is described as new, or it may be created by a gesture, as when an unmarked used model is displayed together with several new models. That is, the deliberate intent to misrepresent by false implication is as wrong as the explicit lie.

***Quick Review 6.3***

**Moral Duties to Consumers Under Contractual Theory**

• Duty to comply with express and implied claims of reliability, service life, maintainability, and safety

• Duty of disclosure

• Duty not to misrepresent

• Duty not to coerce

The varieties of misrepresentation seem to be limited only by the ingenuity of the greed that creates them.33 A computer software or hardware manufacturer may market a product it knows contains “bugs” without informing buyers of that fact; a manufacturer may give a product a name that the manufacturer knows consumers will confuse with the brand name of a higher-quality competing product; the manufacturer may write *wool* or *silk* on material made wholly or partly of cotton; the manufacturer may mark a fictitious “regular price” on an article that is always sold at a much lower “sale” price; a business may advertise an unusually low price for an object that the business actually intends to sell at a much higher price once the consumer is lured into the store; a store may advertise an object at an unusually low price, intending to “bait and switch” the unwary buyer over to a more expensive product; and a producer may solicit paid “testimonials” from professionals who have never really used the product. We return to some of these issues when we discuss advertising.

**The Duty Not to Coerce**

People often act irrationally when under the influence of fear or emotional stress. When a seller takes advantage of a buyer’s fear or emotional stress to extract consent to an agreement that the buyer would not make if the buyer were thinking rationally, the seller is using duress or undue influence to coerce. An unscrupulous funeral director, for example, may skillfully induce guilt-ridden and grief-stricken survivors to invest in funeral services they cannot afford. Because entry into a contract requires freely given consent, the seller has a duty to refrain from exploiting emotional states that may induce buyers to act irrationally against their own best interests. For similar reasons, the seller also has the duty not to take advantage of gullibility, immaturity, ignorance, or any other factors that reduce or eliminate the buyer’s ability to make free rational choices.

**Problems with the Contractual Theory**

The main objections to the contract theory focus on the unreality of the assumptions on which the theory is based. First, critics argue, the theory unrealistically assumes that manufacturers make direct agreements with consumers. Nothing could be farther from the truth. Normally, a series of wholesalers and retailers stands between the manufacturer and the ultimate consumer. The manufacturer sells the product to the wholesaler, who sells it to the retailer, who finally sells it to the consumer. The manufacturer never enters into any direct contract with the consumer. How then can one say that manufacturers have contractual duties to the consumer?

Advocates of the contract view of manufacturers’ duties have tried to respond to this criticism by arguing that manufacturers enter into *indirect* agreements with consumers. Manufacturers promote their products through their own advertising campaigns. These advertisements supply the promises that lead people to purchase products from retailers, who merely function as “conduits” for the manufacturer’s product. Consequently, through these advertisements, the manufacturer forges an indirect contractual relationship not only with the immediate retailers who purchase the manufacturer’s product but also with the ultimate consumers of the product. The most famous application of this doctrine of broadened indirect contractual relationships is to be found in a 1960 court opinion, *Henningsen v. Bloomfield Motors*.34 Mrs. Henningsen was driving a new Plymouth when it suddenly gave off a loud cracking noise. The steering wheel spun out of her hands and the car lurched to the right and crashed into a brick wall. Mrs. Henningsen sued the manufacturer, Chrysler Corporation. The court opinion read:

Under modern conditions the ordinary layman, on responding to the importuning of colorful advertising, has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use; he must rely on the manufacturer who has control of its construction, and to some degree on the dealer who, to the limited extent called for by the manufacturer’s instructions, inspects and services it before delivery. In such a marketing milieu his remedies and those of persons who properly claim through him should not depend “upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone on privity of contract [that is, on a direct contractual relationship]. It should rest, as was once said, upon “‘the demands of social justice’” *Mazetti v. Armous & Co*. (1913). “If privity of contract is required,” then, under the circumstances of modern merchandising, “privity of contract exists in the consciousness and understanding of all right-thinking persons. . . .” Accordingly, we hold that under modern marketing conditions, when a manufacturer puts a new automobile in the stream of trade and promotes its purchase by the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser. Absence of agency between the manufacturer and the dealer who makes the ultimate sale is immaterial.

Thus, Chrysler Corporation was found liable for Mrs. Henningsen’s injuries on the grounds that its advertising had created a contractual relationship with Mrs. Henningsen and this contract created an “implied warranty” about the car, which Chrysler had a duty to fulfill.

A second objection to the contract theory focuses on the fact that a contract is a two-edged sword. If a consumer can freely agree to buy a product with certain qualities, the consumer can also freely agree to buy a product without those qualities. That is, freedom of contract allows a manufacturer to be released from contractual obligations by explicitly disclaiming that the product is reliable, serviceable, safe, and so on. Many manufacturers fix such disclaimers on their products. The Uniform Commercial Code, in fact, stipulates in Section 2-316:

a. Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like “as is,” “with all faults,” or other language that in common understanding calls the buyer’s attention to the exclusion of warranties and makes plain that there is no warranty, and

b. When the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired, or has refused to examine the goods, there is no implied warranty with regard to defects that on examination ought in the circumstances to have been revealed to him.

The contract view, then, implies that if the consumer has ample opportunity to examine the product and its disclaimers and voluntarily consents to buy it anyway, the consumer assumes the responsibility for the defects disclaimed by the manufacturer, as well as for any defects the customer may carelessly have overlooked. Disclaimers can effectively nullify all contractual duties of the manufacturer.

A third objection to the contract theory criticizes the assumption that buyer and seller meet each other as equals in the sales agreement. The contractual theory assumes that buyers and sellers are equally skilled at evaluating the quality of a product and that buyers are able to adequately protect their interests against the seller. This is the assumption built into the requirement that contracts must be freely and knowingly entered into: Both parties must know what they are doing and neither must be coerced into doing it. This equality between buyer and seller that the contractual theory assumes derives from the laissez-faire ideology that accompanied the historical development of contract theory.35 Classical laissez-faire ideology held that the economy’s markets are competitive and that in competitive markets the consumer’s bargaining power is equal to that of the seller. Competition forces the seller to offer the consumer as good or better terms than the consumer could get from other competing sellers, so the consumer has the power to threaten to take business to other sellers. Because of this equality between buyer and seller, it was fair that each be allowed to try to outbargain the other and unfair to place restrictions on either. In practice, this laissez-faire ideology gave birth to the doctrine of *caveat emptor:* Let buyers take care of themselves.

In fact, sellers and buyers do not exhibit the equality that these doctrines assume. A consumer who must purchase hundreds of different kinds of commodities cannot hope to be as knowledgeable as a manufacturer who specializes in producing a single product. Consumers have neither the expertise nor the time to acquire and process the information on which they must base their purchase decisions. Consequently, consumers must usually rely on the judgment of the seller in making their purchase decisions and are particularly vulnerable to being harmed by the seller. Equality, far from being the rule, as the contract theory assumes, is usually the exception.

**6.3**  **The Due Care Theory**

The **“due care” theory of the manufacturer’s duties to consumers** is based on the idea that consumers and sellers do not meet as equals and that the consumer’s interests are particularly vulnerable to being harmed by the manufacturer who has a knowledge and an expertise that the consumer lacks. Because manufacturers are in a more advantaged position, they have a duty to take special care to ensure that consumers’ interests are not harmed by the products that they offer them. The doctrine of ***caveat emptor*** is here replaced with a weak version of the doctrine of ***caveat vendor***: Let the seller take care. A New York court decision neatly described the advantaged position of the manufacturer and the consequent vulnerability of the consumer:

**due care theory of the manufacturer’s duties to consumers** The view that because manufacturers are in a more advantaged position, they have a duty to take special care to ensure that consumers’ interests are not harmed by the products that they offer them.

**caveat emptor** Let the buyer take care.

**caveat vendor** Let the seller take care.

Today as never before the product in the hands of the consumer is often a most sophisticated and even mysterious article. Not only does it usually emerge as a sealed unit with an alluring exterior rather than as a visible assembly of component parts, but its functional validity and usefulness often depend on the application of electronic, chemical, or hydraulic principles far beyond the ken of the average consumer. Advances in the technologies of materials, of processes, of operational means have put it almost entirely out of the reach of the consumer to comprehend why or how the article operates, and thus even farther out of his reach to detect when there may be a defect or a danger present in its design or manufacture. In today’s world it is often only the manufacturer who can fairly be said to know and to understand when an article is suitably designed and safely made for its intended purpose. Once floated on the market, many articles in a very real practical sense defy detection of defect, except possibly in the hands of an expert after laborious, and perhaps even destructive, disassembly. By way of direct illustration, how many automobile purchasers or users have any idea how a power steering mechanism operates or is intended to operate, with its “circulating work and piston assembly and its cross shaft splined to the Pitman arm”? We are accordingly persuaded that from the standpoint of justice as regards the operating aspect of today’s products, responsibility should be laid on the manufacturer, subject to the limitations we set forth.36

The “due care” view holds, then, that because consumers must depend on the greater expertise of the manufacturer, the manufacturer not only has a duty to deliver a product that lives up to the express and implied claims about it but also has a duty to exercise due care to prevent others from being injured by the product even if the manufacturer explicitly disclaims such responsibility and the buyer agrees to the disclaimer. The manufacturer violates this duty and is negligent when there is a failure to exercise the care that a reasonable person could have foreseen would be necessary to prevent others from being harmed by use of the product. Due care must enter into the design of the product, the choice of reliable materials for constructing the product, the manufacturing processes involved in putting the product together, the quality control used to test and monitor production, and the warnings, labels, and instructions attached to the product. In each of these areas, according to the due care view, the manufacturer, in virtue of a greater expertise and knowledge, has a positive duty to take whatever steps are necessary to ensure that when the product leaves the plant it is as safe as possible, and the customer has a right to such assurance. Failure to take such steps is a breach of the moral duty to exercise due care and a violation of the injured person’s right to expect such care—a right that rests on the consumer’s need to rely on the manufacturer’s expertise. Edgar Schein sketched out the basic elements of the “due care” theory several years ago when he wrote:

[A] professional is someone who knows better what is good for his client than the client himself does … . If we accept this definition of professionalism … we may speculate that it is the *vulnerability of the client* that has necessitated the development of moral and ethical codes surrounding the relationship. The client must be protected from exploitation in a situation in which he is unable to protect himself because he lacks the relevant knowledge to do so … . If [a manufacturer] is … a professional, who is his client? With respect to whom is he exercising his expert knowledge and skills? Who needs protection against the possible misuse of these skills? … Many economists argue persuasively … that the consumer has not been in a position to know what he was buying and hence was, in fact, in a relatively vulnerable position. … Clearly, then, one whole area of values deals with the relationship between the [manufacturer] and consumers.37

The due care view, of course, rests on the principle that agents have a moral duty not to harm or injure other parties by their acts and that this duty is particularly stringent when those other parties are vulnerable and dependent on the judgment of the agent. This principle can be supported from a variety of different moral perspectives, but it is most clearly implied by the requirements of an ethic of care. The principle follows almost immediately, in fact, from the requirement that one should care for the well-being of those with whom one has a special relationship, particularly a relationship of dependence, such as a child has on its mother. Moreover, an ethic of care imposes the requirement that one should carefully examine the particular needs and characteristics of the person with whom one has a special relationship to ensure that one’s care for that person is tailored to that person’s particular needs and qualities. As we see, this emphasis on carefully examining the specific needs and characteristics of a vulnerable party is also an explicit and critically important part of the due care view.

**ON THE EDGE:**  ***The Tobacco Companies and Product Safety***

On May 24, 2004, U.S. District Judge Gladys Kessler ruled the big tobacco companies—Philip Morris, Reynolds, and Liggett—would be liable for $280 billion—almost all their profits during the past 50 years—if the U.S. Department of Justice (DOJ) proved that since 1953 they knowingly conspired to deceive the public about the risks of smoking and its addictive nature, and so operated as outlaw companies in violation of the Racketeer-Influenced and Corrupt Organizations Act. The DOJ claimed that in 1953 the companies met in New York and formed a group called the Tobacco Industry Research Committee (TIRC) that began a “conspiracy to deny that smoking caused disease and to maintain that whether smoking caused disease was an ‘open question’ despite having actual knowledge that smoking did cause disease.” In the 1950s, despite published research showing that smoking causes cancer, the group advertised “there is no proof that cigarette smoking is one of the causes” of lung cancer, and from the 1960s to the 1990s advertised that “a cause and effect relationship between smoking and disease has not been established.” The DOJ alleged the tobacco companies advertised that nicotine is not addictive even as they “controlled the nicotine delivery of cigarettes so that they could addict new users.” The DOJ also claimed the companies “researched how to target their marketing at children and actively marketed cigarettes to children.” Finally, the DOJ stated that while the companies had a duty to test their product, to design a safe product, and to warn users of all dangers, the companies instead did no research and tried to suppress research on smoking risks, marketed a product that kills 400,000 Americans a year, designed “low tar/low nicotine” cigarettes whose risks were the same as regular cigarettes, failed before 1969 to warn of the risks and addictive nature of smoking, and targeted children who could not know the true risks of smoking.

If the DOJ claims are true, what do the three theories of manufacturers’ duties imply?



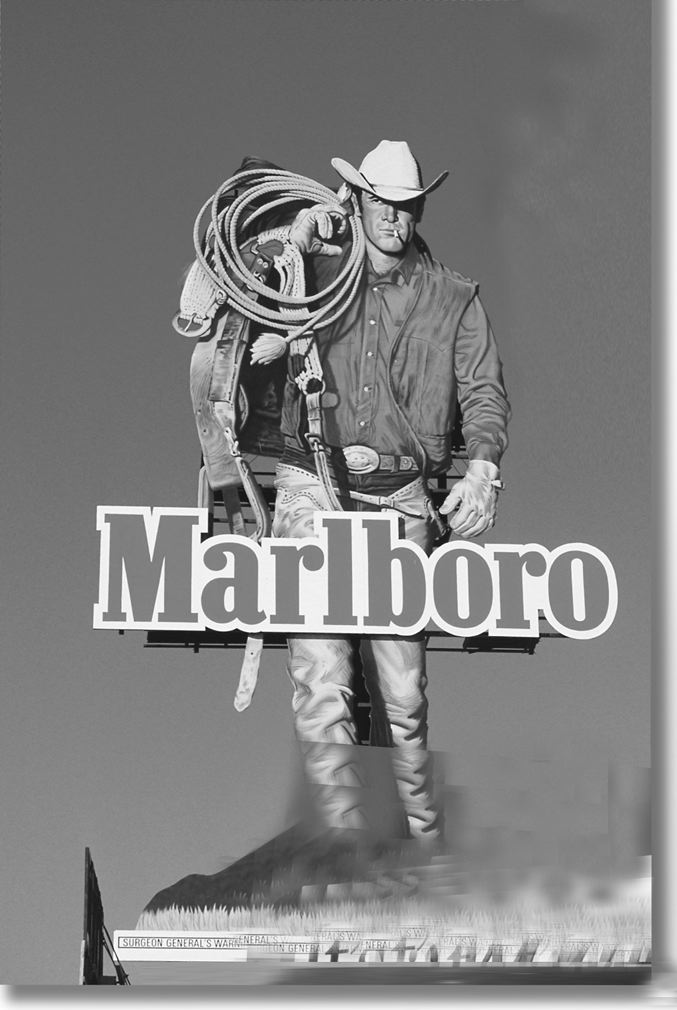
***Miami Dade County Judge Robert Kaye reads the jury verdict that ordered U.S. tobacco companies to pay $145 billion in punitive damages to sick Florida smokers.***



***Canadian Minister of health Allan Rock unveiled proposed a new packaging for cigarette packs at a news conference in Ottawa in 2000. The regulations also required tobacco companies to list toxic chemicals present in cigarettes and in second-hand smoke.***



***A young boy smoking a cigarette attests to the powerful impact of advertising and adult behavior on children.***



***Cigarette advertisers appeal to many different aspects of consumer behavior and attitudes.***



Although the demands of an ethic of care are aligned with the due care principle that manufacturers have a duty to protect vulnerable consumers, the principle has also been defended from other moral perspectives. Rule utilitarians have defended the principle on the grounds that if the rule is accepted, everyone’s welfare will be advanced.38 The principle has been argued for on the basis of Kant’s theory because it seems to follow from the categorical imperative that people should be treated as ends and not merely as means—that is, that they have a positive right to be helped when they cannot help themselves.39 Rawls has argued that individuals in the “original position” would agree to the principle because it would provide the basis for a secure social environment.40 The judgment that individual producers have a duty not to harm or injure vulnerable parties, therefore, is solidly based on several ethical perspectives.

**The Duty to Exercise Due Care**

According to the due care theory, manufacturers exercise sufficient care only when they take adequate steps to prevent whatever injurious effects they can foresee that the use of their product may have on consumers after having conducted inquiries into the way the product will be used and after having attempted to anticipate any possibly misuses of the product. A manufacturer then is not morally negligent when others are harmed by a product and the harm was not one that the manufacturer could have possibly foreseen or prevented. Nor is a manufacturer morally negligent after having taken all reasonable steps to protect the consumer and ensure that the consumer is informed of any irremovable risks that might still attend the use of the product. For example, a car manufacturer cannot be said to be negligent from a moral point of view when people carelessly misuse the cars the manufacturer produces. A car manufacturer would be morally negligent only if it had allowed unreasonable dangers to remain in the design of the car that consumers cannot be expected to know about or cannot guard against by taking their own precautionary measures.

What specific responsibilities does the duty to exercise due care impose on the producer? In general, the producer’s responsibilities would extend to the following three areas:41

**Design**

The manufacturer should ascertain whether the design of an article conceals any dangers, whether it incorporates all feasible safety devices, and whether it uses materials that are adequate for the purposes the product is intended to serve. The manufacturer is responsible for being thoroughly acquainted with the design of the item and to conduct research and tests extensive enough to uncover any risks that may be involved in employing the article under various conditions of use. This requires researching consumers and analyzing their behavior, testing the product under different conditions of consumer use, and selecting materials strong enough to stand up to all probable usages. The effects of aging and wear should also be analyzed and taken into account in designing an article. Engineering staff should acquaint themselves with hazards that might result from prolonged use and wear, and it should warn the consumer of any potential dangers. There is a duty to take the latest technological advances into account in designing a product, especially where advances can provide ways to design a product that is less liable to harm or injure its users.

**Production**

The production manager should control the manufacturing processes so as to eliminate any defective items, identify any weaknesses that become apparent during production, and ensure that shortcuts, substitution of weaker materials, or other economizing measures are not taken during manufacture that would compromise the safety of the final product. To ensure this, there should be adequate quality controls over materials that are to be used in the manufacture of the product and over the various stages of manufacture.

***Quick Review 6.4***

**Areas of Producer Responsibility According to Due Care Theory**

• Design

• Production

• Information

**Information**

The manufacturer should fix labels, notices, or instructions on the product that will warn the user of all dangers involved in using or misusing the item and that will enable the user to adequately guard against harm or injury. These instructions should be clear and simple, and warnings of any hazards involved in using or misusing the product should also be clear, simple, and prominent. In the case of drugs, manufacturers have a duty to warn physicians of any risks or dangerous side effects that research or prolonged use have revealed. It is a breach of the duty not to harm or injure if the manufacturer attempts to conceal or downplay the dangers related to drug usage.

In determining the safeguards that should be built into a product, the manufacturer must also take into consideration the capacities of the persons who will use the product. If a manufacturer anticipates that a product will be used by persons who are immature, mentally deficient, or too inexperienced to be aware of the dangers attendant on the use of the product, the manufacturer owes them a greater degree of care than if the anticipated users were of ordinary intelligence and prudence. For example, children cannot be expected to realize the dangers involved in using electrical equipment. Consequently, if a manufacturer anticipates that an electrical item will probably be used by children, steps must be taken to ensure that a person with a child’s understanding will not be injured by the product.

If the possible harmful effects of using a product are serious or if they cannot be adequately understood without expert opinion, then sale of the product should be carefully controlled. A firm should not oppose regulation of the sale of a product when regulation is the only effective means of ensuring that the users of the product are fully aware of the risks its use involves.

**Problems with “Due Care”**

The basic difficulty raised by the “due care” theory is that there is no clear method for determining when one has exercised enough “due care.” That is, there is no hard-and-fast rule for determining how far a firm must go to ensure the safety of its product. Some authors have proposed this general utilitarian rule: The greater the probability of harm and the larger the population that might be harmed, the more the firm is obligated to do. However, this fails to resolve some important issues. Every product involves at least some small risk of injury. If the manufacturer should try to eliminate even low-level risks, this would require that the manufacturer invest so much in each product that the product would be priced out of the reach of most consumers. Moreover, even attempting to balance higher risks against added costs involves measurement problems; for example, how does one quantify risks to health and life?

A second difficulty raised by the “due care” theory is that it assumes that the manufacturer can discover the risks that attend the use of a product before the consumer buys and uses it. In fact, in a technologically innovative society, new products whose defects cannot emerge until years or decades have passed will continually be introduced into the market. Only years after thousands of people were using and being exposed to asbestos, for example, did a correlation emerge between the incidence of cancer and exposure to asbestos. Although manufacturers may have greater expertise than consumers, their expertise does not make them omniscient. Who, then, is to bear the costs of injuries sustained from products whose defects neither the manufacturer nor the consumer could have uncovered beforehand?

Third, the “due care” view appears to some to be paternalistic: It assumes that the manufacturer should be the one who makes the important decisions for the consumer, at least with respect to the levels of risks that are proper for consumers to bear. One may wonder whether such decisions should not be left up to the free choice of consumers, who can decide for themselves whether they want to pay for additional risk reduction.

**6.4**  **The Social Costs View of the Manufacturer’s Duties**

**social costs view of the manufacturer’s duties to consumers** The view that a manufacturer should pay the costs of any injuries sustained through any defects in the product, even when the manufacturer exercised all due care in the design and manufacture of the product and has taken all reasonable precautions to warn users of every foreseen danger.

A third theory on the duties of the manufacturer would extend the manufacturer’s duties beyond those imposed by contractual relationships and beyond those imposed by the duty to exercise due care in preventing injury or harm. This third theory holds that a manufacturer should pay the costs of any injuries sustained through any defects in the product, even when the manufacturer exercised all due care in the design and manufacture of the product and has taken all reasonable precautions to warn users of every foreseen danger. According to this third theory, a manufacturer has a duty to assume the risks of even those injuries that arise out of defects in the product that no one could reasonably have foreseen or eliminated. The theory is a strong version of the doctrine of *caveat vendor:* Let the seller take care.

This third theory, which has formed the basis of the legal doctrine of ***strict liability***, is founded on utilitarian arguments.42 The utilitarian arguments for this third theory hold that the “external” costs of injuries resulting from unavoidable defects in the design of an artifact constitute part of the costs society must pay for producing and using an artifact. By having the manufacturer bear the external costs that result from these injuries as well as the ordinary internal costs of design and manufacture, all costs are internalized and added on as part of the price of the product. Internalizing all costs in this way, according to proponents of this theory, will lead to a more efficient use of society’s resources. First, because the price will reflect all the costs of producing and using the artifact, market forces will ensure that the product is not overproduced and resources are not wasted on it. (Whereas if some costs were not included in the price, then manufacturers would tend to produce more than is needed.) Second, because manufacturers have to pay the costs of injuries, they will be motivated to exercise greater care and thereby reduce the number of accidents. Therefore, manufacturers will strive to cut down the social costs of injuries, and this means a more efficient care for our human resources. To produce the maximum benefits possible from our limited resources, therefore, the social costs of injuries from defective products should be internalized by passing them on to the manufacturer even when the manufacturer has done all that could be done to eliminate such defects. Third, internalizing the costs of injury in this way enables the manufacturer to distribute losses among all the users of a product instead of allowing losses to fall on individuals who may not be able to sustain the loss by themselves.

**strict liability** A legal doctrine that holds that manufacturers must bear the costs of injuries resulting from product defects regardless of fault.

***Quick Review 6.5***

**The Social Costs View**

• Manufacturer should pay the costs of all injuries caused by defect in a product even if exercised due care

• Argues that injuries are external costs that should be internalized

Underlying this third theory on the duties of the manufacturer are the standard utilitarian assumptions about the values of efficiency. The theory assumes that an efficient use of resources is so important for society that social costs should be allocated in whatever way will lead to a more efficient use and care of our resources. On this basis, the theory argues that a manufacturer should bear the social costs for injuries caused by defects in a product even when no negligence was involved and no contractual relationship existed between the manufacturer and user.

**ON THE EDGE:**  ***Advertising Death?***

In 2004, New York, Illinois, and Maryland—possibly to be joined by 30 other states—sued Brown & Williamson Tobacco Co (now part of R. J. Reynolds) for its “Kool Mixx” hip-hop promotions (CD-ROMs, DJ contests, hip-hop-themed cigarette packs, free magazines, free “Mixx Stick” radios, a website) as targeted at youth in violation of the 1998 tobacco settlement. Although the settlement prohibits ads aimed at teens, the industry spends each year $5.5 billion on U.S. ads that teens see. Tobacco companies must get 2 million kids each year to start smoking before age 18 to replace those who die or quit (90 percent of smokers start before they are 21, most before 18). According to the Surgeon General’s 2004 report, *Health Consequences of Smoking*, cigarettes injure nearly every bodily organ. Smoking kills 440,000 Americans each year and 4,000,000 globally by generating excruciating and deadly cancerous tumors inside the mouth, lungs, throat, larynx, esophagus, bladder, stomach, cervix, kidney, and pancreas and by causing emphysema and heart attacks. In the United States, annual health-related economic losses total $157 billion. Though lethal and addictive, cigarettes are sold alongside soap, bread, and candy. Joe Tye, an industry critic, notes: “No advertising is more deceptive than that used to sell cigarettes. Images of independence are used to sell a product that creates profound dependence. Images of health and vitality are used to sell a product that causes disease and suffering. Images of life are used to sell a product that causes death.” Many studies show advertising increases tobacco sales and advertising bans reduce smoking up to 16 percent. Brown & Williamson rejects ad restrictions, saying they violate free speech, cigarette ads are not deceptive and smokers know the risks which are on every pack and ad, people have a right to smoke and to have information about cigarette brands, ads do not make people start smoking or smoke more but only keep smokers from changing brand, their ads don’t target kids, the Kool Mixx promotion is aimed at adults, and some studies show ad restrictions do not reduce smoking.

**1.** Should the Brown & Williamson hip-hop promotion, and cigarette ads in general, be banned?

**2.** What do the three theories on the ethical duties of manufacturers imply about cigarettes?

**Problems with the Social Costs View**

The major criticism of the social costs view of the manufacturer’s duties is that it is unfair.43 It is unfair, the critics charge, because it violates the basic canons of compensatory justice. Compensatory justice implies that a person should be forced to compensate an injured party only if the person could have foreseen and prevented the injury. By forcing manufacturers to pay for injuries they could neither foresee nor prevent, the social costs theory (and the legal theory of “strict liability” that flows from it) treats manufacturers unfairly. Moreover, insofar as the social costs theory encourages passing the costs of injuries on to all consumers (in the form of higher prices), consumers are also being treated unfairly.

A second criticism of the social costs theory attacks the assumption that passing the costs of all injuries on to manufacturers will reduce the number of accidents.44 On the contrary, critics claim, by relieving consumers of the responsibility of paying for their own injuries, the social costs theory will encourage carelessness in consumers. An increase in consumer carelessness will lead to an increase in consumer injuries.

***Quick Review 6.6***

**Criticisms of the Social Cost View**

• Unfair to manufacturers since it forces them to compensate unforeseeable injuries

• Assumption that adherence to the social cost view will prevent accidents is false

• Leads to successful consumer lawsuits in cases where manufacturers took all due care

A third argument against the social costs theory focuses on the financial burdens the theory imposes on manufacturers and insurance carriers. Critics claim that a growing number of consumers successfully sue manufacturers for compensation for any injuries sustained while using a product even when the manufacturer took all due care to ensure that the product was safe.45 Not only have the number of “strict liability” suits increased, critics claim, but the amounts awarded to injured consumers have also escalated. Moreover, they continue, the rising costs of the many liability suits that the theory of “strict liability” has created have precipitated a crisis in the insurance industry because insurance companies end up paying the liability suits brought against manufacturers. These high costs have imposed heavy losses on insurance companies and have forced many insurance companies to raise their rates to levels that are so high that many manufacturers can no longer afford insurance. Thus, critics claim, the social costs or “strict liability” theory wreaks havoc with the insurance industry, forces the costs of insurance to climb to unreasonable heights, and forces many valuable firms out of business because they can no longer afford liability insurance nor can they afford to pay for the many and expensive liability suits they must now face.

Defenders of the social costs view, however, have replied that in reality the costs of consumer liability suits are not large. Studies have shown that the number of liability suits filed in state courts has increased at a fairly low rate.46 Less than 1 percent of product-related injuries results in suits, and successful suits average payments of only a few thousand dollars.47 Defenders of the social costs theory also point out that insurance companies and the insurance industry as a whole have remained quite profitable; they also claim that higher insurance costs are due to factors other than an increase in the amount of liability claims.48

The arguments for and against the social costs theory deserve much more discussion than we can give them here. The theory is essentially an attempt to come to grips with the problem of allocating the costs of injuries between two morally innocent parties: the manufacturer who could not foresee or prevent a product-related injury and the consumer who could not guard against the injury because the hazard was unknown. This allocation problem will arise in any society that, like ours, has come to rely on technology whose effects do not become evident until years after the technology is introduced. Unfortunately, it is also a problem that may have no “fair” solution.

**6.5**  **Advertising Ethics**

The advertising industry is a massive business. Over $236 billion was spent in 2002 on advertising.49 More than $58 billion was spent on broadcast and cable television advertising alone; another $44 billion was spent on newspaper advertisements.50 There are over 6,000 advertising agencies doing business in the United States, many of which employ several thousand people.

Who pays for these advertising expenditures? In the end, advertising costs must be covered by the prices consumers pay for the goods they buy—the consumer pays. What do consumers get for their advertising dollar? According to most consumers, they get very little. Surveys have shown that 66 percent of consumers feel that advertising does not reduce prices, 65 percent believe it makes people buy things they should not buy, 54 percent feel advertisements insult the intelligence, and 63 percent feel advertisements do not present the truth.51 However, defenders of the advertising industry see things differently. Advertising, they claim, “is, before all else, communication.”52 Its basic function is to provide consumers with information about the products available to them—a beneficial service.53

Is advertising, then, a waste or a benefit? Does it harm consumers or help them?

**A Definition**

**Commercial advertising** is sometimes defined as a form of “information” and an advertiser as “one who gives information.” The implication is that the defining function of advertising is to provide information to consumers. This definition of advertising, however, fails to distinguish advertisements from, say, articles in publications like *Consumer Reports*, which compare, test, and objectively evaluate the durability, safety, defects, and usefulness of various products. One study found that more than half of all television ads contained no consumer information whatsoever about the advertised product and that only half of all magazine ads contained more than one informational cue.54 Consider how much information is conveyed by the following advertisements:

**commercial advertising** Communication between a seller and potential buyers that is publicly addressed to a mass audience and is intended to induce members of this audience to buy the seller’s products.

“Got Milk?” (America’s Dairy Farmers and Milk Processors)

“Be late” (Neiman Marcus watches)

“Embrace your demons” (cinnamon-flavored Altoids)

“For the way it’s made” (KitchenAid home applicances)

“Connect with style” (Nokia cell phones)

“Inside every woman is a glow just waiting to come out” (Dove soap)

“It is, in the end, the simple idea that one plus one can, and must, equal more than two” (Chrysler cars)

“Marlboro country” (Marlboro cigarettes)

“Before there was a Land Rover there was a dream” (Land Rover S.U.V.)

Advertisements often do not include much objective information for the simple reason that their primary function is not that of providing unbiased information. The primary function of commercial advertisements, rather, is to sell a product to prospective buyers, and whatever information they happen to carry is subsidiary to this basic function and usually determined by it.

A more helpful way of characterizing commercial advertising is in terms of the buyer–seller relationship: Commercial advertising can be defined as a certain kind of communication between a seller and potential buyers. It is distinguished from other forms of communication by two features. First, it is publicly addressed to a mass audience as distinct from a private message to a specific individual. Because of this public feature, advertising necessarily has widespread social effects.

Second, advertising is intended to induce members of its audience to buy the seller’s products. An advertisement can succeed in this intent in two main ways: (a) by creating a desire for the seller’s product in consumers and (b) by creating a belief in consumers that the product is a means of satisfying some desire the buyer already has.

Discussion of the ethical aspects of advertising can be organized around the various features identified in the prior definition: its social effects, its creation of consumer desires, and its effects on consumer beliefs. We begin by discussing the social effects of advertising.

***Quick Review 6.7***

**Characteristics of Advertising**

• Public communication aimed at a mass audience

• Intended to induce members of its audience to buy the seller’s products

• Succeeds by creating a desire for the seller’s product or a belief that a product will satisfy a preexisting desire

**Social Effects of Advertising**

Critics of advertising claim that it has several adverse effects on society: It degrades people’s tastes, it wastes valuable resources, and it creates monopoly power. We examine these criticisms one by one.

**Psychological Effects of Advertising**

A familiar criticism of advertising is that it debases the tastes of the public by presenting irritating and aesthetically unpleasant displays.55 To be effective, advertisements must often be intrusive, strident, and repetitive. Therefore, so that they are understood by the most simple-minded person, advertisements are often boring, insipid, and insult the intelligence of viewers. In illustrating the use of toothpaste, mouthwashes, deodorants, and undergarments, for example, advertisements sometimes employ images that many people find vulgar, offensive, disgusting, and tasteless. However, although these sorts of criticisms may be quite accurate, they do not seem to raise important ethical issues. It is certainly unfortunate that advertisements do not measure up to our aesthetic norms, but this does not imply that they also violate our ethical norms.

More to the point is the criticism that advertising debases the tastes of consumers by gradually and subtly inculcating materialistic values and ideas about how happiness is achieved.56 Because advertising necessarily emphasizes the consumption of material goods, people are led to forget the importance of their other, more basic needs and of other, more realistic ways of achieving self-fulfillment. As a result, personal efforts are diverted from “nonmaterialistic” aims and objectives, which are more likely to increase the happiness of people, and are instead channeled into expanded material consumption. Consumer advocate Mary Gardiner Jones wrote:

The conscious appeal in the television commercial is essentially materialistic. Central to the message of the TV commercial is the premise that it is the acquisition of things that will gratify our basic and inner needs and aspirations. It is the message of the commercial that all of the major problems confronting an individual can be instantly eliminated by … the use of a product. … A second inescapable premise of these ads is that we are all externally motivated, concerned to do and be like our neighbors or to emulate popular successful individuals. … Personal success in the TV ad is externally contrived, not the product of years of study and training. … In addition, … the TV commercial presents a very special and limited view of American society. Here, according to the TV commercial … is what the young and successful are wearing and how they furnish their homes. … [But] the TV world [is] typically that of the white suburban middle-income, middle-class family.57

The difficulty with this criticism, however, is that it is uncertain whether advertising actually has the large psychological effects the criticism attributes to it.58 A person’s beliefs and attitudes are notoriously difficult to change without there being a willingness to accept the message being offered. Thus, the success of advertising may depend more on its appeal to the values consumers already possess than on its ability to instill new values. If this is so, then advertising does not so much create society’s values as reflect them.

**Advertising and Waste**

A second major criticism brought against advertising is that it is wasteful.59 Economists sometimes distinguish between ***production costs*** and ***selling costs***. Production costs are the costs of the resources consumed in producing or improving a product. Selling costs are the additional costs of resources that do not go into changing the product, but are invested instead in getting people to buy the product. The costs of resources consumed by advertising, critics claim, are essentially “selling costs”: They are not used to improve the product, but to merely persuade people to buy it. The resources consumed by advertisements do not add anything to the utility of the product. Such resources, critics conclude, are “wasted” because they are expended without adding to consumer utility in any way.

**production costs** The costs of the resources consumed in producing or improving a product.

**selling costs** The additional costs of resources that do not go into changing the product, but are invested instead in getting people to buy the product.

One reply made to this argument is that advertising does in fact produce something: It produces and transmits information on the availability and the nature of products.60 Yet as many have pointed out, even in these respects, the information content of advertisements is minimal and could be transmitted by substantially less expensive means.61

Another more persuasive reply to the argument is that advertising serves to produce a beneficial rise in demand for all products. This rising general demand in turn makes mass production possible. The end result is a gradually expanding economy in which products are manufactured with ever greater efficiency and ever more cheaply. Advertising adds to consumer utility by serving as an incentive to greater consumption and thereby indirectly motivating a greater productivity and efficiency and a lower price structure.62

However, there is substantial uncertainty surrounding the question of whether advertising is responsible for a rise in the total consumption of goods.63 Studies have shown that advertising frequently fails to stimulate consumption of a product, and consumption in many industries has increased despite minimal advertising expenditures. Thus, advertising appears to be effective for individual companies not because it expands consumption, but only because it shifts consumption away from one product to another. If this is true, then economists are correct when they claim that, beyond the level needed to impart information, advertising becomes a waste of resources because it does nothing more than shift demand from one firm to another.64

Moreover, even if advertising were an effective spur to consumption, many authors have argued, this is not necessarily a blessing. E. F. Schumacher, Herman E. Daly, and other economists have claimed that the most pressing social need at present is finding ways of decreasing consumption.65 Increasing consumption has led to a rapid industrial expansion that has polluted much of the natural environment and has rapidly depleted our nonrenewable resources. Unless we limit consumption, we will soon outrun the finite natural resources our planet possesses with disastrous consequences for us all. If this is so, then the claim that advertising induces ever higher levels of consumption is not in its favor.

**Advertising and Market Power**

For many decades, Nicholas Kaldor and others have claimed that the massive advertising campaigns of modern manufacturers enable them to achieve and maintain a monopoly (or oligopoly) power over their markets.66 Monopolies, as we have seen, lead to higher consumer prices. Kaldor’s argument was simple. Large manufacturers have the financial resources to mount massive and expensive advertising campaigns to introduce their products. These campaigns create in consumers a “loyalty” to the brand name of the manufacturer, giving the manufacturer control of a major portion of the market. Small firms are then unable to break into the market because they cannot finance the expensive advertising campaigns that would be required to get consumers to switch their brand loyalties. As a result, a few large oligopoly firms emerge in control of consumer markets from which small firms are effectively barred. Advertising, then, is supposed to reduce competition and raise barriers to entry into markets.

However, is there a connection between advertising and market power? If advertising does raise costs for consumers by encouraging monopoly markets, there should be a statistical connection between the amount of advertising revenues spent by an industry and the degree of market concentration in that industry. The more concentrated and less competitive industries should exhibit high levels of advertising, whereas less concentrated and more competitive industries should exhibit correspondingly lower levels. Unfortunately, the statistical studies aimed at uncovering a connection between advertising intensity and market concentration have been inconclusive.67 Some concentrated industries (soaps, cigarettes, breakfast cereals) expend large amounts on advertising, but others (drugs, cosmetics) do not. Moreover, in at least some oligopoly industries (e.g., the auto industry), smaller firms spend more per unit on advertising than the large major firms. Whether advertising harms consumers by diminishing competition is an interesting but unsettled question.

The criticisms of advertising based on its social effects are inconclusive. They are inconclusive for the simple reason that it is unknown whether advertising has the capacity to produce the effects that the criticisms assume it has. To establish the case for or against advertising on the basis of its effects on society will require a great deal more research on the exact nature of the psychological and economic effects advertising has.

**Advertising and the Creation of Consumer Desires**

John K. Galbraith and others have long argued that advertising is manipulative: It is the creation of desires in consumers for the sole purpose of absorbing industrial output.68 Galbraith distinguished two kinds of desires: those that have a “physical” basis, such as desires for food and shelter, and those that are “psychological in origin,” such as the individual’s desires for goods that “give him a sense of personal achievement, accord him a feeling of equality with his neighbors, direct his mind from thought, serve sexual aspiration, promise social acceptability, enhance his subjective feeling of health, contribute by conventional canons to personal beauty, or are otherwise psychologically rewarding.”69 The physically based desires originate in the buyer and are relatively immune to being changed by persuasion. The psychic desires, however, are capable of being managed, controlled, and expanded by advertising. Because the demand created by physical needs is finite, producers soon produce enough to meet these needs. If production is to expand, therefore, producers must create new demand by manipulating the pliable psychic desires through advertising. Advertising is therefore used to create psychic desires for the sole purpose of “ensuring that people buy what is produced”—that is, to absorb the output of an expanding industrial system.

The effect of this management of demand through advertising is to shift the focus of decision in the purchase of goods from the consumer, where it is beyond control, to the firm, where it is subject to control.70 Production is not molded to serve human desires; rather, human desires are molded to serve the needs of production. If this view of Galbraith’s is correct, then advertising violates the individual’s right to choose: Advertising manipulates the consumer. The consumer is used merely as a means for advancing the ends and purposes of producers, and this diminishes the consumer’s capacity to freely choose.71

It is not clear that Galbraith’s argument is correct. As we have already seen, the psychological effects of advertising are still unclear. Consequently, it is unclear whether psychic desires can be manipulated by advertising in the wholesale way that Galbraith’s argument assumes.72 Moreover, as F. A. von Hayek and others have pointed out, the “creation” of psychic wants did not originate with modern advertising.73 New wants have always been “created” by the invention of novel and attractive products (such as the first bow and arrow, the first painting, the first perfume), and such a creation of wants seems harmless enough.

However, although it is unclear whether advertising as a whole has the massive manipulative effects that Galbraith attributes to it, it is clear that some particular advertisements are at least intended to manipulate. They are intended to arouse in consumers a psychological desire for the product without consumers’ knowledge and without consumers being able to rationally weigh whether the product is in their own best interests. Advertisements that intentionally rely on “subliminal suggestion,” or that attempt to make consumers associate unreal sexual or social fulfillment with a product, fall into this class, as do advertisements that are aimed at children.

Suppa Corporation in Fallbrook, California, for example, briefly tested candy advertisements printed on paper on which the word *buy* was written so it would register subconsciously but could not be consciously perceived unless one specifically sought it out. Subsequent tests showed that the ads created more of a desire to buy candy than those printed on paper on which the word *no* appeared in a similar subliminal manner.74 Manipulative ads aimed at children are exemplified by a criticism the National Advertising Division of the Council of Better Business Bureaus recently leveled at a Mattel, Inc., television commercial aimed at children, which mixed animation sequences with group shots of dolls. Children who are still learning to distinguish between fantasy and reality, the council felt, would not be given “an accurate depiction of the products” pictured in the advertisements.75 The council also criticized a Walt Disney Music Co. advertisement of a limited-time offer that conveyed a “sense of urgency” that children might find “overwhelming.” Critics have also claimed that television shows of animated characters who resemble toy dolls and figures that are advertised on the same show are in effect prolonged advertisements for these toys. The effect of such “half-hour advertisements,” they allege, is to manipulate vulnerable children by feeding them commercials under the guise of entertainment.76 Moreover, such advertisement programs often contain high levels of violence because their cartoon superhero characters, such as “He-Man,” “Rambo,” “GI Joe,” and “Transformers,” are violent. Advertising that promotes toys modeled on violent characters or promotes military toys indirectly promotes aggression and violent behavior in children who are highly suggestible and easily manipulated, critics claim, and it is therefore un-ethical.77 Advertisements of this sort are manipulative insofar as they circumvent conscious reasoning and seek to influence the consumer to do what the advertiser wants and not what is in the consumer’s interests.78 They violate, that is, the consumer’s right to be treated as a free and equal rational being.

**Advertising and Its Effects on Consumer Beliefs**

The most common criticism of advertising concerns its effect on the consumer’s beliefs. Because advertising is a form of communication, it can be as truthful or deceptive as any other form of communication. Most criticisms of advertising focus on the deceptive aspects of modern advertising.

Deceptive advertising can take several forms. An advertisement can misrepresent the nature of the product by using deceptive mock-ups, using untrue paid testimonials, inserting the word *guarantee* where nothing is guaranteed, quoting misleading prices, failing to disclose defects in a product, misleadingly disparaging a competitor’s goods, or simulating well-known brand names. Some fraudulent forms of advertising involve more complex schemes. For example, bait advertisements announce the sale of goods that later prove not to be available or to be defective. Once consumers are lured into the store, they are pressured to purchase another, more expensive item.

A long ethical tradition has consistently condemned deception in advertising on the grounds that it violates consumers’ rights to choose for themselves (a Kantian argument) and on the grounds that it generates a public distrust of advertising that diminishes the utility of this form and even of other forms of communication (the utilitarian argument).79 The central problem, then, is not understanding why deceptive advertising is wrong, but understanding how it becomes deceptive and, therefore, unethical.

All communication involves three elements: (a) the author(s) who originates the communication, (b) the medium that carries the communication, and (c) the audience who receives the communication. Because advertising is a form of communication, it involves these three elements, and the various ethical problems raised by the fact that it is a form of communication can be organized around them.

**The Authors**

Deception involves three necessary conditions in the author of a communication: (a) The author must intend to have the audience believe something false, (b) the author must know it is false, and (c) the author must knowingly do something that will lead the audience to believe the falsehood. This means that the deliberate intent to have an audience believe something false by merely implying it is wrong is an express lie. It also means, however, that the advertiser cannot be held morally responsible for misinterpretations of an advertisement when these are the unintended and unforeseen results of unreasonable carelessness on the part of the audience. The “author” of an advertisement includes, of course, not only the heads of an advertising agency but also the persons who create advertising copy and those who “endorse” a product. By offering their positive cooperation in the making of an advertisement, they become morally responsible for its effects.

**The Medium**

Part of the responsibility for truth in advertising rests on the media that carry advertisements. As active participants in the transmission of a message, they also lend their positive cooperation to the success of the advertisement and so they, too, become morally responsible for its effects. Therefore, they should take steps to ensure that the contents of their advertisements are true and not misleading. In the drug industry, retail agents who serve as company sales agents to doctors and hospitals are in effect advertising “media” and are morally responsible for not misleading doctors with respect to the safety and possible hazards of the drugs they promote.

**The Audience**

The meaning attributed to a message depends in part on the capacities of the person who receives the message. A clever and knowledgeable audience, for example, may be capable of correctly interpreting an advertisement that may be misleading to a less-knowledgeable or less-educated group. Consequently, advertisers should take into account the interpretive capacities of the audience when they determine the content of an advertisement. Most buyers can be expected to be reasonably intelligent and possess a healthy skepticism concerning the exaggerated claims advertisers make for their products. Advertisements that will reach the ignorant, credulous, immature, and unthinking, however, should be designed to avoid misleading even those potential buyers whose judgment is limited. When matters of health or safety, or the possibility of significant injury to buyers is involved, special care should be exercised to ensure that advertisements do not mislead users into ignoring possible dangers.

The third category of issues (“The Audience”) raises what is perhaps the most troubling problem in advertising ethics: To what extent do consumers possess the capacity to filter out the puffery and bias most advertising messages carry? When an advertisement for a Norelco electric shaver proclaims, “You can’t get any closer,” do consumers automatically discount the vague, nonspecific, and false implication that Norelco was tested against every possible method of shaving and was found to leave facial hair shorter than any other method? Unfortunately, we have little knowledge of the extent to which consumers are able to filter out the exaggerations advertisements contain.

**ON THE EDGE:**  ***New Balance and the “Made in USA” Label***

For years, New Balance had labeled its shoes “Made in USA.” New Balance is the only major manufacturer of athletic shoes that still assembles shoes in the United States, where it employs 1,600 people (up from 670 in 1994). All other shoemakers (Nike, Reebok, Adidas, Fila, Saucony) moved their plants overseas, where labor is cheaper. With 10 percent of the market and revenues of $1.2 billion, New Balance is committed to hiring U.S. workers and keeping its five U.S. factories going by using technology, tight teamwork, fast delivery, and close communication to keep costs near the level of the cheap Asian factories that make all its competitors’ shoes (a pair costs $4 to make in the United States and $1.30 in China). Although it, too, has factories in Asia and Mexico, New Balance has continued expanding its U.S. workforce. But in the 1990s, the Federal Trade Commission (FTC), which regulates advertising, clamped down on New Balance, saying the “Made in USA” label cannot be used “unless all, or virtually all [98 percent], of the components and labor are of U.S. origin.” New Balance shoes contain rubber (25 percent of the shoe) not of U.S. origin because rubber is not grown in the Unites States. When New Balance complained that its shoes were the only ones still 100 percent assembled in the United States by U.S. workers out of all U.S. parts except for rubber, which is impossible to source in the United States the FTC backed down, ruling that “Made in the USA” meant at least 75 percent U.S. parts and labor. But labor unions, consumer groups, and 150 members of Congress attacked the ruling, saying it made the label “deceptive” because it should mean 100 percent U.S. content. Darlene Adkins of the National Consumers League said, “we live in an increasingly global marketplace, and consumers want to support U.S. jobs and manufacturing.” The FTC revised its ruling to say a product had to be 90 percent domestic to say “Made in USA.” But that rule, too, was attacked. In the end, FTC officials went back to their original rule: “all, or virtually all [98 percent], of the components and labor are of U.S. origin” New Balance can no longer use the label.

**1.** Was New Balance’s use of the “Made in USA” label deceptive advertising?

**2.** In your view, should New Balance have been allowed to use the label? Why?

***Quick Review 6.8***

**Deceptive Advertising Is a Function of**

• The author’s intent to make the audience believe what is known to be false

• The media’s communication of the false message

• The audience’s vulnerability to deception

The moral issues raised by advertising are complex and involve several still unsolved problems. However, the following summarizes the main factors that should be taken into consideration when determining the ethical nature of a given advertisement:

**Social Effects**

1. What does the advertiser intend the effect of the advertisement to be?

2. What are the actual effects of the advertisement on individuals and on society as a whole?

**Effects on Desire**

1. Does the advertisement inform or does it also seek to persuade?

2. If it is persuasive, does it attempt to create an irrational and possibly injurious desire?

**Effects on Belief**

1. Is the content of the advertisement truthful?

2. Does the advertisement have a tendency to mislead those to whom it is directed?

**6.6**  **Consumer Privacy**

Advances in computer processing power, database software, and communication technologies have given us the power to collect, manipulate, and disseminate personal information about consumers on a scale unprecedented in the history of the human race. This new power over the collection, manipulation, and dissemination of personal information has enabled mass invasions of the privacy of consumers and has created the potential for significant harms arising from mistaken or false information. For example, a pair of British investigators reported that in England, where companies register with the government the kind of information they will collect, businesses were collecting highly detailed and very personal information about their customers:

The Midland Bank has approval to hold details about the sex lives of potential customers seeking insurance; BNLF is registered to store sexual and political information for “business and technical intelligence”; W. H. Smith, the High Street retailer, has official sanction to hold sexual data for “personnel and employee administration” as well as for marketing purposes; Grand Metropolitan, the leisure company, is entitled to hold similar information for use by corporate lawyers; BT is licensed to hold information about political party membership “as a reference tool.”80

In the United States, fairly complete files on the medical history of consumers is maintained by the Medical Information Bureau (MIB), a company founded in 1902 to provide insurance companies with information about the health of individuals applying for life insurance to detect fraudulent applications. The MIB currently has medical histories on about 15 million people. Information is collected from the forms consumers fill out when applying for life insurance, the applicant’s physician, hospitals, employment records, the Department of Motor Vehicles, and even interviews with employers or friends. The information kept by the MIB is translated into certain codes (e.g., the code “45GTY” might refer to lung cancer) to lessen the chance that unauthorized persons who see the records will be able to interpret them. Information in these files is sometimes inaccurate. One individual was erroneously reported to have AIDS and to be gay, whereas another was wrongly reported to be an alcoholic.81

The most complete files on consumers are those maintained by credit bureaus. Credit bureaus provide credit reports about specific individuals to banks, retailers, employers, and other businesses who ask for information about specific customers. These credit reports include information about a person’s credit card accounts, mortgages, bank loans, student loans, history of payments on these with special notes on late payments, foreclosures, bankruptcies, details about loan amounts, nonpayment of property taxes, personal or property liens, divorce proceedings, marriage licenses, driver licenses, civil lawsuits, present and past employers, present and previous addresses, and other personal information compiled from various sources. There are currently three main bureaus—Experian (formerlly TRW), Equifax, and Trans Union LLC—that together compile information on about 150 million consumers. Every day fresh credit data come into each bureau that must be entered into the appropriate files. Equifax has estimated that its staff must input some 65 million updates each day. Not surprisingly, a study by *Consumer Reports* found errors in 43 percent of the reports they analyzed.82 These errors can result in being refused a loan, credit card, or job. Beyond the problems created by errors in the data files maintained on them, consumers worry that the detailed information that credit bureaus compile on them will be given to inappropriate parties. For example, until a few years ago, credit bureaus would sell names from their files to junk mailers. The potential for invading consumers’ privacy is clearly quite high. To discuss this issue, however, it is important to have a clearer idea about what privacy is and why consumers and others have a right to privacy.

Speaking broadly, the right to privacy is the right to be left alone. We do not discuss this broad characterization of the right to privacy, however, but concentrate on privacy as the right of individuals not to have others spy on their private life. In this more narrow sense, the **right to privacy** can be defined as the right of persons to determine what, to whom, and how much information about themselves will be disclosed to other parties.83

**right to privacy** The right of persons to determine what, to whom, and how much information about themselves will be disclosed to other parties.

There are two basic types of privacy: *psychological* and *physical*.84 **Psychological privacy** is privacy with respect to a person’s inner life. This includes the person’s thoughts and plans, personal beliefs and values, feelings, and wants. These inner aspects of a person are so intimately connected with the person that to invade them is almost an invasion of the very person. **Physical privacy** is privacy with respect to a person’s physical activities. Because people’s inner lives are revealed by their physical activities and expressions, physical privacy is important in part because it is a means for protecting psychological privacy. However, many of our physical activities are considered “private” apart from their connection to our inner life. What kinds of activities are considered private depends to some extent on the conventions of one’s culture. For example, a person in our culture normally feels degraded if forced to disrobe publicly or perform biological or sexual functions in public. Physical privacy, therefore, is also valued for its own sake.

**psychological privacy** Privacy with respect to a person’s inner life.

**physical privacy** Privacy with respect to a person’s physical activities.

The purpose of rights, as analyzed in Chapter 2, is to enable individuals to pursue their significant interests and to protect these interests from the intrusions of other individuals. To say that persons have a moral right to something is to say at least that they have a vital interest in that “something.” Why is privacy considered important enough to surround it with the protection of a right?85 To begin with, privacy has several protective functions. First, privacy ensures that others do not acquire information about us that, if revealed, would expose us to shame, ridicule, embarrassment, blackmail, or other harm. Second, privacy also prevents others from interfering in our plans simply because they do not hold the same values we hold. Our private plans may involve activities that, although harming no one, might be viewed with distaste by other people. Privacy protects us against their intrusions and thereby allows us the freedom to behave in unconventional ways. Third, privacy protects those whom we love from being injured by having their beliefs about us shaken. There may be things about ourselves that, if revealed, might hurt those whom we love. Privacy ensures that such matters are not made public. Fourth, privacy also protects individuals from being led to incriminate themselves. By protecting their privacy, people are protected against involuntarily harming their own reputations.

Privacy is also important because it has several enabling functions. First, privacy enables a person to develop ties of friendship, love, and trust. Without intimacy, these relationships could not flourish. Intimacy, however, requires both sharing information about oneself that is not shared with everyone and engaging in special activities with others that are not publicly performed. Therefore, without privacy, intimacy would be impossible and relationships of friendship, love, and trust could not exist. Second, privacy enables certain professional relationships to exist. Insofar as the relationships between doctor and patient, lawyer and client, and psychiatrist and patient all require trust and confidentiality, they could not exist without privacy. Third, privacy also enables a person to sustain distinct social roles. The executive of a corporation, for example, may want, as a private citizen, to support a cause that is unpopular with the firm. Privacy enables the executive to do so without fear of reprisal. Fourth, privacy enables people to determine who they are by giving them control of the way they present themselves to society in general and of the way that society in general looks on them. At the same time, privacy enables people to present themselves in a special way to those whom they select. In both cases, this self-determination is secured by one’s right to determine the nature and extent of disclosure of information about oneself.

***Quick Review 6.9***

**Importance of Privacy**

• Protects individuals from shame, interference, hurting loved ones, self-incrimination

• Enables the development of personal relationships, professional relationships, distinct social roles, and self-determination

It is clear, then, that our interest in privacy is important enough to recognize it as a right that all people have, including consumers. However, this right must be balanced against the rights and legitimate needs of others. If banks are to provide loans to consumers, for example, they need to know something about the credit history of the individuals to whom they are providing loans and how diligent they have been in repaying previous loans. Consumers ultimately benefit from such a banking system. Insurance companies that want to provide life insurance to individuals need to know whether such individuals have any life-threatening illnesses, and so they must have access to their medical information. Consumers benefit from having life insurance available to them. Thus, there are significant consumer benefits that businesses can provide but that they can provide only if there exist agencies that can collect information about individuals and make that information available to those businesses. Thus, consumers’ rights to privacy have to be balanced with these legitimate needs of businesses. Several considerations have been suggested as key to balancing legitimate business needs with the right to privacy, including (a) relevance, (b) informing, (c) consent, (d) accuracy, (e) purpose, and (f) recipients and security.

**Relevance**

Databases containing information on consumers should include only information that is directly relevant to the purpose for which the database is being compiled. Thus, credit information provided to banks or credit card issuing agencies should not include information about sexual orientation, political affiliations, medical history, or other information not directly relevant to determining an individual’s creditworthiness.

**Informing**

Entities collecting information on consumers should inform consumers that the information is being collected and inform them about the purpose for which the information is being collected. This enables consumers to voluntarily choose not to engage in those transactions that will result in revealing information about themselves that they do not want to reveal.

**Consent**

A business should collect information about an individual person only if that person has explicitly or implicitly consented to provide that information to that business and only if the information is to be used for the purpose for which the person consented to have it used. Consent may be explicit, such as when a person provides information on a credit card application. But consent may be implicit, such as when a person makes a purchase with a credit card knowing that a record of that purchase will be kept by the company issuing the credit card and the record will be collected by a credit bureau. In the latter case, the very act of using the credit card constitutes acceptance of the conditions the credit card company imposes on use of the card, particularly if the credit card company has explicitly advised the consumer that such information will be collected and reported to a credit bureau.

**Accuracy**

Agencies collecting information on a person must take reasonable steps to ensure that the information they store is accurate and that any inaccuracies called to their attention are corrected. Toward this end, agencies should allow individuals to see what information they have collected on them and allow them to bring inaccuracies to their attention.

**Purpose**

The purpose for which information about specific consumers is collected must be legitimate. In this context, a purpose is legitimate if it results in benefits that are generally enjoyed by the people about whom the information is being collected. Consumers benefit, for example, if banks are generally willing to extend loans, insurers are generally willing to insure them, and credit card companies are generally willing to provide credit. This does not mean that a specific individual will benefit from having personal information available to, say, a bank, because the bank may refuse to give that specific person a loan on the basis of the person’s credit record. It merely means that consumers benefit generally from having available a banking system (or credit card or insurance companies) that is willing to provide loans, and such a system requires a mechanism for collecting information on its potential customers.

**Recipients and Security**

Agencies that collect information on specific individuals must ensure that information is secure and not available to parties that the individual has not explicitly or implicitly consented to be a recipient of that information. If an individual provides information to one business so that the business can better serve that individual, it is wrong for the business to sell that information to another business without the individual’s consent.

**Questions for Review and Discussion**

1. Define the following concepts: contractual theory (of a seller’s duties), duty to comply, implied claim, reliability, service life, maintainability, product safety, reasonable risk, duty of disclosure, duty not to misrepresent, duty not to coerce, manufacturer’s implied warranty, disclaimer, caveat emptor, due care theory (of a seller’s duties), caveat vendor, professional, manufacturer’s duty to exercise due care, social costs theory (of a seller’s duties), advertisement, production costs, selling costs, to expand consumption, to shift consumption, Kaldor’s theory of advertising and market power, brand loyalty, Galbraith’s theory of the creation of consumer desires, bait advertisements, deception.

2. Discuss the arguments for and against the three main theories of a producer’s duties to the consumer. In your judgment, which theory is most adequate? Are there any marketing areas where one theory is more appropriate than the others?

3. Who should decide (a) how much information should be provided by manufacturers, (b) how good products should be, and (c) how truthful advertisements should be? The government? Manufacturers? Consumer groups? The free market? Explain your views.

4. “Advertising should be banned because it diminishes a consumer’s freedom of choice.” Discuss this claim. Review the materials available in your library and decide whether you agree that “criticisms of advertising based on its social effects are inconclusive.”

5. Carefully examine two or more advertisements taken from current newspapers or magazines and assess the extent to which they meet what you would consider adequate ethical standards for advertising. Be prepared to defend your standards.

6. A manufacturer of electric coffee pots recalled the pots (through newspaper announcements) when he found that the handles would sometimes fall off without warning and the boiling contents would spill. Only 10 percent of the pots were returned. Does the manufacturer have any additional duties to those who did not return the pots? Explain your answer.

**Web Resources**

Readers wishing to conduct research on consumer issues through the Internet might begin by turning to the websites of the following organizations: The National Safety Council (*http://www.nsc.org*), the Consumer Product Safety Commission (*http://www.cpsc.gov*), The Consumer Law Page (*http://consumerlawpage.com*), the Federal Trade Commission (*http://www.ftc.gov*). Articles on consumer law can be found at The Nolo Press (*http://www.nolo.com*), Consumer Reports (*http://www.consumerreports.org*), and Consumer World (*http://www.consumerworld.org*). Statistics on consumer injuries can be found at Fatality Analysis Reporting system (*http://www-fars.nhtsa.dot.gov*), National Highway Traffic Safety Administration (*http://www.nhtsa.dot.gov*), FedStats (*http://www.fedstats.gov*), and The National Center for Health Statistics (*http://www.cdc.gov/nchs*).

(Velasquez. *Business Ethics, 6th Edition*. Pearson Learning Solutions pp. 260 - 292).

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