Like advancement in Science and Technology, a palpable advancement in the Paradigms, techniques, designs and methods of fraud and dishonesty with a view to bilk consumers came to notice. Consumers who are generally ill informed, ignorant and inexperienced, most often than not fall in the trap of unscrupulous traders who by their garrulity and glib coax successfully consumers to purchase unwanted goods. In order to protect consumers, a rapid increase in the recent past came to witness in the volume of legislation against not only fraud and dishonesty in commercial transactions but also against false or misleading advertisements, oppressive bargains and dangerous products. This regulation of unfair business practices is based on twin principles of curbing directly injurious practices which are caused by the imbalance in bargaining power between the parties or indirectly by restraining unfair competition and thereby ensuring high quality goods at lower prices.

The Monopolies and Restrictive Trade Practices Act, 1969 until 1984 had power to prevent monopolistic and restrictive trade practices only and there was no provision to tackle the unfair business practices. The rationale was that if dealer, manufacturer or producer can be prevented from distorting competition, the consumers will get fair deal. However, this proved

2. Hereinafter referred to as the MRTP Act, 1969.
partly true. Thus in order to curb unfair business practices, parliament on the recommendations of the Sachar Committee inserted a chapter on unfair trade practices in the MRTP Act\textsuperscript{4} to bolster and supplement the law relating to restrictive Trade Practices\textsuperscript{5}.

Section 36-A of the MRTP Act defines unfair trade practices and similar definition of unfair trade practices has been provided in the Consumer Protection Act\textsuperscript{5a}.

\textbf{Definition of Unfair Trade Practice:}

The first part of this definition runs as under:

In this part, unless context otherwise requires, unfair trade practice means a trade practice which for the purpose of promoting sale, use or supply of goods or for the provision of services, adopts any unfair method or unfair or deceptive trade practice... 

Further, clauses (1) to (5) of section 36-A of the MRTP Act and section 2(r) of the CP Act cover various forms of unfair trade practices such as false representation; bargain sale; offering gifts and conducting of promotional contests; supply of products which do not comply with the safety standards; and hoarding and destruction of goods.

\textsuperscript{4} Gazette of India Text 22 Dec., 1984 part 1Ind Sec 2 (No.54) at 37.

\textsuperscript{5} However, preamble to the MRTP Act was not amended to reflect this change. See T.N panday; Inadequacies in the Bill, The Economic Times (New Delhi) P 11,1984.

\textsuperscript{5a} Herein-after referred to as the CP Act.
The first part of the definition makes it clear that the existence of trade practice is necessary for sustaining charges under section 36-A of the MRTP Act or under section 2(r) of the CP Act. This Trade Practice means a practice relating to carrying on of a trade and trade means any business; industry, profession or occupation relating to the production, supply, distribution or control of goods and includes the provisions of any service. However, there are no definitions of "Trade practice" and "Trade" provided under the CP Act. It is suggested that the definitions of these two expressions be also provided in the CP Act to avoid any ambiguity.

The second ingredient of the definition is that the objective of the trade practice must be the promotion of sale, use or supply of goods or services. It is immaterial whether due to such promotion sale did go up or not.

The words "sale", "use" or "supply" used in the definition are of wide connotation. The word "use" is concomitant result of sale or supply. If trader promotes use of the goods or services, he in fact promotes sale or supply of those goods or services. Thus there is an obvious reason to include "use" within the confines of the definition.

7. See Section 2 (v) of the MRTP Act.
8. Section 2 (s).
The word "supply" is much wider than the "sale" and includes transaction by which goods are leased or supplied under the hire purchase arrangements.

The definition prohibits promotion of goods or services by employing unfair method or unfair or deceptive practice. However, it is not clear whether this prohibition applies to only existing goods or also to future goods.\(^{10}\)

MRTP Commission in *Surya Scooters (p) v. Greaves Cotton & Co*\(^{11}\) observed:

That before there can be any trade, there must be some goods with respect to which any trade or business or industry can be carried on or run. There can be no trade practice if there are no goods.

The above opinion of the MRTP commission is based on the ground that the goods mean as defined in the Sale of Goods Act and includes among other things products manufactured, processed or mined in India. The words used here are "manufactured, processed or mined" which in the present context imply, goods which have been already manufactured, processed or mined and not which will be manufactured, processed or mined.

It is a submitted that the observation of the MRTP Commission is not based on correct interpretation of the term "goods"

\(^{10}\) Future Goods have been defined as those goods which are not both existing and identified. A purported present sale of such goods operates as a contract to sell UCC 2-105 (2).

Section 6 of the Sale of Goods Act, 1930 defines future goods as those goods which have been agreed to be produced or manufactured or procured by the seller.

\(^{11}\) Supra note 6.
and has overlooked the history behind the amendment made to goods which resulted in the incorporation of the words "products manufactured, processed or mind in India".

The original definition of the goods in the MRTP Act was defined with reference to the sale of Goods Act, 1930. This definition was amended in the year, 1984 on the recommendations of the Sachar Committee. The Committee made following pertinent remarks:

The existing definition of goods does not cover the case of investment companies dealing in stocks and shares and other activities like mining or processing eg. fish and animal products which are not covered under the definition of goods in the Sale of Goods Act. Many Investment companies maintain that they are not undertakings within the meaning of the Act as the existing definition of Goods would not include dealings in stocks and shares. In order to put matter beyond doubt, We would therefore, recommend that the definition of the goods should be revised... The proposed definition would run as follows:-

"Goods" means goods as defined in the Sale of Goods Act (ACT III of 1930) and includes products manufactured, mined or processed in India

Thus it is amply clear that the object of incorporating an additional clause in the definition of the "goods" was not to restrict it to only those goods which have been already manufactured, processed or mined but the purpose of this amendment was as mentioned by the Sachar Committee.

The definition of the "goods" taken as a whole reads: Goods means as defined in the Sale of Goods Act, 1930 (3 of 1930) and includes:

1) Products manufactured, processed or mined in India.
2) ....


13. Supra note 3 at 240.
The manner of construing an inclusive clause and its widening effect has been explained in *Dilworth v. Commissioner of Stamps* and has been followed in a series of cases in India, it has been laid down:

"include" is very generally used in order to enlarge meaning of the words or phrases occurring in the body of the Statute, and when it is so used, these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the definition clause declares that they shall include.

Thus clause (1) cannot limit the operation of the main definition but has definitely widened the scope of the main definition by virtue of the word "includes".

If the interpretation of the commission given in *Surya Scooters* is taken as the correct proposition of law, then two practical difficulties will crop up.

Firstly, where for example a company whose goods are still in the manufacturing stage falsely advertises that the goods are of particular quality and discontinues the advertisement when goods are actually thrown open in the market. Then a consumer who purchases goods in pursuance of the advertisement, will get no compensation for any loss or injury as the goods were not in existence at the time when advertisement was made.

14. 1899 AC 99

Secondly, if the view that the goods must be in existence at the time when representation was made is upheld then the same test must be applied to "services" also. Since services unlike goods have no permanent existence and may be regarded as being inchoate until they are actually supplied\(^\text{16}\), it will be difficult to apply the Act to a representation, for example, the quality of services which have not at the time the representation is made, actually been supplied\(^\text{17}\). The stand of the Australian courts is that where a person makes a statement in an advertisement about the quality of service that he is offering, it will be read in the advertisement as containing not only a promise that service of that quality will be provided to those responding to the advertisement, but also statement of fact that the service which the advertiser is currently offering or providing (or has in the past provided) to his customers \(^\text{18}\), of the stated quality, and where it is not possible on facts, says Hartnell\(^\text{19}\), it may well be possible to imply a representation of the fact concerning the advertiser's intention as to the future or ability to provide services of the quality promised\(^\text{20}\). It is therefore submitted that where a representation is made regarding the goods not in existence, the approach adopted should be to


\(\text{17} \) Ibid.

\(\text{18} \) Henderson V. Poineer Homes Pvt (1980) 29 ALR 597.

\(\text{19} \) Supra note 16.

\(\text{20} \) Id at 550.
read an intention on the part of the advertiser that when goods will come into existence, they will be of stated quality etc and of course a person will get remedy only when goods come into existence but devoid of the represented quality.

The application of the MRTP and CP Acts to shares and debentures was time and again debated before the MRTP commission and redressal agencies. The term goods has been defined under these Acts with reference to Sale of Goods Act, 1930\(^{21}\) and shares and stocks are expressly mentioned in that definition\(^{22}\). However, that definition is silent on the shares before allotment. The supreme court in *Gopal Jalan and co v. S E Association*\(^{23}\) laid down that till allotment, shares do not exist and it is only after allotment that they come in to existence. This opinion was also followed by the MRTP commission in subsequent cases\(^{24}\) and in *Consumer Education Centre v. T T K Pharma*\(^{24a}\) the Full Bench of the

\(^{21}\) See section 2 (e) of the MRTP Act and section 2 (1) (1) of the CP Act.

\(^{22}\) Section 2 (7) of the Sale of Goods Act defines goods as every kind of movable property other than actionable claims and money; and includes stocks and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before or under the contract of sale.

\(^{23}\) *AIR 1964 SC 250.*


\(^{24a}\) * (1990) 68 Comp Cas 89.*
MRTP commission went a head by holding that issuing of shares or debentures is a mode of raising capital. Raising capital is making of arrangements for carrying on of any trade. It is just like purchasing furniture or appointing employees which are necessary arrangements for trade but has no connection with the mode or method of carrying on a trade. The definition of trade practice under the MRTP Act makes it clear that it is a trade practice relating to carrying on of any trade and cannot be said that a company is trading in shares when it issues shares to public²⁵.

In order to obviate the effect of the above rulings, the MRTP (Amendment) Act, 1991 amended section 2 (c) to the effect that the shares and stocks including issue of shares before allotment would be treated as goods for the purposes of the MRTP Act. However, this amendment has not removed all those flaws which were pointed out by the Full Bench in T T K Pharma i.e. the definitions of trade and trade practice have not been amended nor any explanation to this effect has been appended so as to clear the present ambiguity. After this amendment to the definition of goods, the MRTP Commission had an occasion in Dinesh Gupta v. Reliance polyethylene ltd²⁶ and


26. (1993) 1 CTJ MRTPC
K G v. Skypak Couriers to deliberate upon a complaint alleging unfair trade practice in relation to issue of shares and convertible debentures. But in neither of the cases the issue of maintainability of the complaint on the ground that the issue of shares does not amount to "trade" and "trade practice" was raised. So the commission decided these cases on merits. In Sohan lal M Baldva v N E P C Agro Goods ltd however, the MRTP commission without making any reference to the controversial issues like the definition of trade and trade practice held that delay in refunding share application money is a case of unfair trade practice as the services were not of the quality as claimed.

On the other hand the definition of goods has not been amended under the CP Act like the MRTP Act. Keeping in view the opinion of the supreme court in Gopal Jalan, a complaint in respect of the shares before allotment cannot lie before the redressal agencies. However, without touching to the root of the problem, the Rajasthan state commission in LC Chandgotya v Northern leasing and Industries upheld the opinion of the District forum that the stocks and shares are included in the definition of the goods and in N Maduram Financial services pvt ltdv. Modern woolen ltd, the Tamil Nadu state commission in order to protect

27. (1993) 1 C T J 20 MRTPC.
the interest of consumer and to escape from the controversy of the definition of Trade and Trade practice held that those who purchase the shares and debentures from the existing share holders and seek the transfer from the company in their name, are persons who have hired services of the company for consideration, the consideration being the value of the shares or debentures and they are therefore, consumers within the meaning of section 2 (1) (d) (ii) of the Act. In between these two opinions, the complainant's counsel in *DR. B S Goha v. Steel Authority of India*³¹ stated that although allotment of shares is not a service, the delay in such allotment will amount to deficiency of service. This plea was not accepted by the commission and held that in a contract of sale of goods simplicitor, mere delay in delivery therefore, beyond the agreed date would not convert it into deficiency of service within the meaning of the Act.

The National commission found opportunity to deliberated on this issue in *Gurdial sing and ors v. united land and Housing ltd and sons*³² and *Ram Naryana Paramesh Warayar v. Larsen and Toubro ltd*³³. In Gurdial Singh, issue was relating to sale shares to complainant with a stipulation for repurchase. The apex commission held that this was purely a transaction of sale of goods and not an agreement of hiring of any service³⁴. This proposition

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32. 11(1993) CPJ NC 216.
33. (1993)1 CTJ 116
34. Id at 217.
was carried further by the Haryana state commission in *M/s P Fizer ltd v. Hanssar Singh*\(^{35}\) by holding that stocks and shares, being goods, their purchase by investor prima facie is not for consumption or use, but for commercial purpose\(^{36}\). In *Ram Naryan Paramesh* the complaint was regarding delay in the delivery of allotment letters to the allottee of the debentures. The National commission without delving on the basic issue held that if the debenture holder had purchased the debentures for resale which he could not effect in the absence of allotment letters, the transaction would become a transaction for commercial purpose and therefore he would not be a consumer. Thus held the debenture holder as the consumer of goods. The commission also held that the consumer forum can consider his claim for compensation under section 14 (1) (d) for any liquidated damages only in case it is established that he has suffered loss due to deficiency in service and negligence on the part of the respondent.

The issue of shares came up before the supreme court also in *Morgan stanly Mutual Fund v. Kartikdas*\(^{37}\). The apex court first made it clear that although there is no definition of Trade Practice under the CP Act, yet as per rules, the expression Trade practice shall have the same meaning as provided under the MRTP Act. Then the apex court made the same observation as was made by the MRTP commission in *T T K Pharma*. It was held that the share

\(^{35}\) 11(1993) CPJ 1721.

\(^{36}\) Id at 1728 See also *Braham Dutta Agarwal v. San Tubes ltd and ors* (1994) 3 CPR 78.

\(^{37}\) 11 (1994) CPJ 7 Sc at 16.
means share in capital. The object of issuing the same is for building of capital. To raise capital means making arrangements for carrying on the trade. It is not a practice relating to carrying on of any trade. Creation of share capital without allotment of shares does not bring shares into existence. Therefore, a prospective investor is not a consumer, nor do have consumer courts jurisdiction in the matters of this kind.

The decision in Sohan lal M Baldawa laid down by the MRTP commission was overruled by it in D G V. Deepak Fertilizer co ltd in the light of the supreme court's ruling in Morgan Stanley. The commission held (1) that the debentures before allotment are not goods under MRTP Act, 1969 and it makes no difference whether the debentures are convertible or ordinary. (2) Even assuming that the debentures are goods even prior to their allotment, no 'Trade' or 'Trade practice' is involved where the company merely offers the issue for subscription to the public by way of raising capital for its trade or business; (3) it can also not amount to hiring of service.

From the afore discussed case law, it is still not clear as to whether MRTP Act or CP Act applies to shares and debentures. One view is that the shares and debentures before allotment are not goods and even after allotment, company issuing shares cannot be said as trading in them but it is simply a mode of raising capital. This means that the MRTP (Amendment Act) 1991 which

38. Id at 17 see also Godrej soaps ltd v sham Sunder Gupta and ors (1994) 2 C T J 753 (supreme court)
included shares before allotment in the definition of goods, has not changed any position as the corresponding changes in the definition of "Trade" and "Trade practice" have to be made so that shares and debentures before and after allotment are covered and even if these amendments are made, a complaint cannot lie before the consumer redressal agencies as the consumer who purchases the goods for commercial purpose or for resale is excluded from the purview of the CP Act. Another views is to hold it as a service to the consumer and to provide relief in case service is found deficient. It is submitted that the latter approach is more beneficial & in accord with the objectives of the two Acts. If it is hold otherwise, then the investors will be left without any protection as his complaint will neither be covered under the MRTP Act nor CP Act. Such beneficial construction to the CP Act was advocated by the supreme court in Lucknow Development Authority v. M K Gupta which will apply mutatis mutandis to the MRTP Act also. It was said:

The provisions of the Act have to be construed in favour of the consumer to achieve the purpose of enactment as it is a social benefit oriented legislation. The primary duty of the court while construing the provisions of such an Act is to adopt a constructive approach subject to that it should not do violence to the language of the provisions and is not contrary to attempted objectives of the enactment.

If the above approach is adopted, then there is no need of making any amendment in the two Acts as the word "Financial" is

41. Id at 111.
expressly mentioned in the definition of service and services even if of commercial nature, are included in the CP Act. It will not be out of place to mention here that in order to protect investors from the unfair trade practices of the business community, Truth in Lending Act and Financial Services Act, 1986 have been passed in America and England respectively but in India quasi-judicial bodies are still groping in the dark to understand as to what constitutes financial service.

The MRTP and CP Acts enjoy the distinction of giving protection not only to consumers of goods but also consumers of services. For this purpose definition of the word "Service" has been provided under the both Acts. It is in three parts. The main part is followed by inclusive clause and ends by exclusionary clause. The main clause itself is very wide. It applies to "any service made available to potential users". The word "any" and "potential" are significant. Both are of wide amplitude. The word "any" dictionarily means "one or some or all" and has a diversity of meaning and may be employed to indicate "all" or "every" as well as "same" or "one" and its meaning in a given statute depends upon the context and subject matter of the statute. The


43. Section 2(o) of the CP Act and 2(r) of the MRTP Act defines the term service as: Service means service of any description which is made available to potential users and includes the provisions of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both (housing construction) entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.
other word "potential" is again very wide. It means capable of coming into being, possibility. In other words service which is not only extended to actual users but those who are capable of using it are covered in the definition. The clause is thus very wide and extends to any or all, actual or potential users. But the legislature did not stop here. It expanded the meaning of service further in modern sense by extending it to even such facilities as are available to a consumer in connection with banking, financing etc \(^{44}\). In absence of any indication, express or implied, the definition covers services provided by the authorities created by the statute \(^{45}\). This definition is wide enough to cover not only services enumerated but also other services which can be read as implied in the definition \(^{46}\).

The services free of charge or "under a contract of personal service" are excluded from the purview of the two Acts. The term, "contract of personal service" has not been defined under the act

\(^{44}\) Supra note 40 at 113.

\(^{45}\) See Indian Medical Association v. V P Shantha & Ors (1995) 11 CPR 412 in which medical services were held to be included in the definition. Similarly education has been held as covered in the definition of service see Oza Nirav Kanubhai v. Central Head apply Industries Ltd. and Ors (1992) 1 CPR 735; Abel Pachelo Gracio v. Principal Bharathi Vidye Peeth 1(1992) CPJ 105; M. Subesh v. Official in charge 11(1992) CPJ 933 and Tilak Raj v. Haryana School Education Board (1991) 2CPR 309.

\(^{46}\) (1992) 2 Comp. LJ 242 See also Cosmopolitan Hospital Authorities & Anr v. V P Nair (1992) 3 Comp. LJ 80.
the Act. However, the National Commission in *Modgi v. Crosswell Tailors*\(^47\) held that there is a well established difference between "contract of personal service" and contract for personal service". The contract of personal service involves a master servant relationship where servant has no discretion but has to follow the directions of the master. In other words, contract of personal service covers a situation where master not only dictates the servant what he has to do but also how he has to do. But in contract for personal service, the master only informs his servant what he has to do and how he will do it is the job of the servant. This distinction was also confirmed by the Supreme Court in *Indian Medical Council Authorities v. V. P. Shantha*\(^48\).

The present definition of unfair trade practice provided in the MRTP and CP Act, was incorporated through MRTP (Amendment) Act, 1991 and CP (Amendment) Act, 1993 respectively. The unamended definition was restrictive in its scope and was confined to only those unfair business practices which were mentioned in the definition itself. Thus those practices which were not mentioned in the definition, could not be questioned before the MRTP Commission or Redressal Agencies.

47. Supra note 46.

48. The definition before amendment was as follows: In this part, unless the context otherwise requires, unfair trade practice means a trade practice which for the purpose of promoting sale, use or supply of any goods or for the provision of any services, adopts one or more of the following practices and thereby causes loss or injury to the consumers of such goods or services, whether by eliminating or restricting competition or otherwise.
The first para of the amended definition of the unfair trade practice is almost similar to Section 5(a)(1) of the definition provided under the Federal Trade Commission Act, 1914 as amended by Wheeler-Lea Amendment Act, 1938 of United States. This definition runs as follows:

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

Since the words "unfair method and unfair or deceptive practices" are of seminal importance and in fact have to a considerable extent widened the scope and ambit of the definition, neither these words have been defined in any of the two Acts nor have either FTC or Consumer Redressal Agencies found chance to expound these concepts. So for proper understanding of these terms, exposition of the American courts can be of great help. The words inserted in the amended definition of the Unfair Trade Practice have wide connotation and have potential to embrace the situations not yet conceived. So instead of enumerating the few practices and leaving many, the best possible approach was adopted by inserting the words which can cover any trade practice which can fairly be said as unfair or deceptive. United States Congress stated the reasons for not enumerating the

49. Commenting on the dynamic nature of original section 5 of FTC Act, Senator Cummins said, "The words unfair competition can grow and broaden and mould themselves to meet circumstances as they arise, just as the words restraint of trade have grown and been moulded in order to meet the necessities of the American people." 51 Cong. REC 1400 3(1914).
specific practices with unusual candour in the Conference Report\textsuperscript{50} in the following words:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would at once be necessary to begin over again. If congress were to adopt the method of definitions, it would undertake endless task. It is also practically impossible to define unfair practices so that the definition will fit business of ever sort in every part of the country\textsuperscript{51}.

The concepts incorporated in the definition are discussed hereunder:

\textbf{Unfairness Doctrine}

In United States after the wheeler-lea Amendment Act, 1938 till, 1972, there was no authoritative opinion as to what constitutes unfair trade practice. In 1964, Federal Trade Commission issued a policy statement popularly known as Cigarette Rule\textsuperscript{52}.

\begin{itemize}
\item \textsuperscript{51} The senate Committee on interstate commerce Report Endorsing the trade Commission bill voiced same sentiments: The Committee gave careful consideration to the question as to whether it would attempt to define the many variable unfair practices which prevail in commerce and to forbid their continuance or whether it would by a general declaration condemning unfair practices, leave it to commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason, as stated by one of the representatives of the Illinois Manufacturer Association, that there were too many practices to define, and after writing 20 of them in to the law, it would be quite possible to invent others. Ibid.
\item \textsuperscript{52} Statement of Basis and purpose of Trade Regulation, Unfair or Deceptive Advertising and labeling of cigarettes in relation to the Health Hazards of Smoking, 29 Fed Reg 8325, 8355 (1964).
\end{itemize}
The Criteria set out in this rule were apparently approved by the US Supreme Court in *Federal Trade Commission v. Sperry & Hutchinson Co.* which are as follows:

1. Whether the practice, without necessarily having been previously considered unlawful, offend public policy as it has been established by statutes, the common law or otherwise whether in otherwords, it is within at least the penumbra of some common law statutory, or other established concepts of unfairness;

2. Whether it is immoral, unethical, oppressive, or unscrupulous;

3. Whether it causes substantial injury to consumers (or competitors or other businessmen).

This judgment has cast bread on wide waters. The public policy, morality and ethics which are devoid of precise meaning have been declared as a touchstone to label the trade practice as unfair. Although nineteenth century judges tried to crystalize the heads of public policy, yet judicial views inevitably differ upon whether a particular contract is immoral or subversive of the common good, there is no necessary continuity in the general policy of law, for what is anathema to one genera-

53. 405 US 233, 244-45 n. 5(1972).

54. For instance, a contract of marriage brokerage, unfair or unreasonable dealings, the creation of perpetuity, a contract in restraint of trade, wagering contract are declared as void for being opposed to public policy. For illuminating discussion on public policy see, winfield, public policy in the English Common Law, 42 Har LR 76-102 (1928).

tion seems harmless to another. So Lord Atkin's words of caution merits highlighting that the doctrine of public policy should only be invoked in clear case in which harm to the public is substantially incontestable and does not depend upon the idiosyncratic inference of a few judicial minds. Otherwise public policy is a vague and unsatisfactory term and when once you get astride it, you never know where it will carry you.

Like public policy, ethics and morality are also dependent on the vagaries of individual and social outlook. If ethics be termed as ideal pictures of life, individually formed and followed by men and morality as rules or principles governing human behavior which apply universally within a community or class, then the question is whose ethics and whose morality should determine the character of a trade practice. Since the law relating to trade practices cannot be framed for each individual, community or class separately, should then only those moral principles be gleaned which in the eyes of Hart, are so originally connected

56. For instance, a contract to hire a hall for a meeting to promote atheism was held contrary to public policy in Cowan v. Milbourn (1867) LR 2 Exch-230 but fifty years later this view was rejected in Bowman v. Secular Society (1917) A C 406.

57. Fender V. St. John Mildmay (1938) AC 1 See also Gherulal V. Mohadeodes AIR 1959 SC 781.

58. Parke B In Egerton V. Brown Low (1853) 4 HLC 1, 123.


with the central core\textsuperscript{62} that its preservation is required as a vital bastion. Again the test is subjective one and will be coloured by the idiosyncrasies of the judges which Lord Atkin so vehemently tried to abjure while deliberating on the public policy issue\textsuperscript{63}. There is also no consensus on the extent to which the law should enforce moral values\textsuperscript{64}.

Commenting on the \textit{Sperry & Hutchinson} doctrine an Australian writer observes\textsuperscript{65}:

The breadth of the American provision seems, on the casual observation of an outsider, to be its greatest asset and (potentially) its greatest failing. On the one hand, it is extremely flexible and therefore can be employed in furtherance of almost any regulatory policy. On the other hand, it is startlingly vague. It is clear from the decision in \textit{Sperry & Hutchinson} that the prohibition is not limited to deceptive practices nor confined to activities with antitrust or other economic implications. What then are its limits. In its lack of definition, it runs the danger of becoming a rallying point for an almost infinite variety of causes. Unreasoned application of the standard might ultimately...

\textsuperscript{62} For Hart in every society there is to be found ... a central core of rules or principles which constitutes it Ibid.

\textsuperscript{63} Supra note 59.

\textsuperscript{64} John Stuart Mills opined that coercion can only be justified for the purpose of preventing harm to others. For a discussion on Mill's stand see Smark, \textit{49 Can. Bar. Rev.} 188, 197-200. On the other hand Hart extends the role of the law by his acceptance of "Paternalism" in addition to Mills reliance on harmful consequences to others, law Liberty and Morality (1963), at 30-34. Lord Derlin has advocated another extreme by holding that he was not seeking to say that law must automatically punish in the case of offences against morality, but rather there are no circumstances in which you can say that law may not punish in such cases. The Listener June 18, 1964 Cf. Lord Lloyd, Introduction to Jurisprudence, (1972) (3 ed) at 53.

either erode the effectiveness of regulatory activity or threaten the survival of the activity regulated.

The unfairness doctrine propounded by the US Supreme Court in *Sperry & Hutchinson*'s case, was later on applied to a number of trade practices which can be classified as; claims published without reasonable prior substantiation; claims, which tend to reach or exploit particular vulnerable

66. Similar views were expressed by Robert Pitofsky in his article, "Beyond Nader: Consumer protection And the Regulation of Advertising; He observes: The Supreme Court's broad grant of authority to the FTC to develop new rules in the consumer protection field is too vague to provide any meaningful enforcement guidelines, Har L.Rev.Vol.90, No.4 Feb 1977 at 681. At another occasion the learned author observes: many people are legitimately concerned that the term (Unfairness) is so vague as to be useless in predicting what is legal and so general as to confer on the commission excessive legislative authority... sperry & Hutchinson makes even commissioners wonder about the limits of their authority see Pitofsky in Kirkpatrick; Elman, pitofsky and Baxter, Debate: The Federal Trade Commission under Attack: Should Commission's Role Be Changed? 49 Antitrust L J. 1481,1492 (1980).

67. Previous to Ptizer Inc, 81 FTC 23 (1972), substantiation of claims relating to health & safety was necessary but in ptizer's case this requirement of substantiation was extended even to the claims not relating to health & safety. The rationale of this requirement was held to be that it is impractical to expect individual consumers to run test on the thousands of products they purchase and that it is more efficient for a seller to run test once for each product claim. The consumers are entitled to the substantiation information and should not be compelled to enter into an economic gamble to determine whether a product will or will not perform as represented. Thus unsubstantiated claims that Firestone safety stops 25% quicker (Fire stone Tire & Rubber Co. (1970-73 Transfer binder) Trade Reg. Rep. 320, 112, at 22, 069 (FTC 1973), Vaga is the best handling passengers car ever built. (General Motors Corp et al (1970-73 Transfer binder) 3 Trade Reg.Rep 20747 at 20,600 (FTC 1974), reserve cooling power-only Fedders has this important features Fedders Corp; 3 Trade Reg. RP.S 20,825 at 20691 (FTC 1975) were declared unfair Trade practices. For criticism of this claim substantiation doctrine see Supra note 68 at 683.
groups and instances in which sellers fail to provide consumers with information necessary to make choice among competing products.

Unfairness Doctrine: New Approach:

In the process of expanding horizon of the Unfairness doctrine, the Federal Trade Commission of USA proposed in 1978 to regulate advertising on TV programme aimed primarily at children. While these ads were rarely 'deceptive' in the conventional sense, the commission argued that they 'unfairly' took the advantage of susceptibilities of the young viewing audience. By congressional dictate, however this rule making power was aborted in 1980. In the wake of criticism of the children's Advertising

68. In ITT Continental Baking Co. 83 FTC 1105 (1973), claim that wonder bread helps in dramatic growth of children was held to have exploited the aspirations of children and parental concern for rapid and healthy growth and development id at 872.

69. At one stage commission in Alberty v. FTC had opined that an advertisement cannot be said to be misleading if it is not more informative, 182 F 2d 36 (DC Cir) 340 US 818 (1950). But later on commission came with a different opinion. See for instance, non disclosure by the vocational schools of the percentage of enrollers who do not complete the course, the percentage of graduates who do not obtained employment and the salaries and employment of graduates who do obtain job was declared unfair, Lafayette United Corp. (1973-76) Transfer Binder) Trade Reg Rep (CCH) 20,499 (FTC 1974). Similarly failure to declare future land development programmes and failure to state that the purchase price of plots is not all inclusive by promoters was said to be unfair. AMREP. Corp,(1973-76 Transfer Binder) Trade Reg. Rep. CCH 20, 846 (FTC 1975) see also Horizon Corporation (1973-1976 Transfer Binder) Trade Reg. Rep (CCH) 20,845 (FTC 1975) Similarly In re International Harvester co. 104 FTC 949 (1984), ejection of hot fuel in the Harvester's tractors which could result in the serious fires and which was in the knowledge of the Harvester company but did not notify it was held as unfair practice.

70. FTC Act Section 18 (i), USCA Section 57 (a) (i) "The Commission shall not have authority to promulgate any rule in the children's advertising proceeding... On the basis... that such advertising constitutes an unfair act or practice".
Rule proposed in 1978, the Commission issued a policy statement on unfairness in 1980\textsuperscript{71} which delineated the implications of the three test criteria laid down in \textit{Sperry & Hutchinsons} (Supra). A resume of this policy statement is here under.

**Consumer injury:**

The commission in its policy statement laid down that the independent nature of the consumer injury does not mean that every consumer injury is legally 'unfair'. To justify a finding of unfairness the injury must satisfy two tests. It must be substantial. It must not be outweighed by any counter-vailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided\textsuperscript{72}. As examples of substantial injury, the statement referred to monetary harm as when sellers coerce consumers into purchasing unwanted goods and services or when consumers buy defective goods or services on credit but are unable to assert against the creditor claims or defenses arising from the transaction or unwarranted health and safety risks. On the other hand, emotional impact and other more subjective type of harm were ordinarily excluded.

\textsuperscript{71}The policy statement had a political purpose—to keep congress off from stripping the FTC all or part its power to regulate unfair practices. Infra note 72. This policy statement has no binding effect and could be disregarded or rejected by courts or future commissions.

\textsuperscript{72}These are excerpts of the letter called FTC's policy statement. For full text of the letter see 4 CCH Trade Reg.Rep.50,421.
Violation of Public Policy:

The Second S & H Standard asks in the opinion of the commission whether the conduct violates public policy as it has been established by statute, common law, industry practice or otherwise. This criterion may be applied in two different ways. It may be used to test the validity and strength of the evidence of consumer injury or loss often, it may be cited for a disposition of legislative or judicial that such injury is present. Although public policy was made by Sperry and Hutchinson's case an independent criterion for determining the character of a trade practice, it is used in the opinion of the commission as an additional evidence on the degree of consumer injury caused by specific practices.

To the extent that Commission relies heavily on public policy to support a finding of unfairness, the policy should be clear and well established. In other words, the policy should be declared or embodied in formal sources such as statutes, judicial decisions, or the constitution as interpreted by the Courts; rather than being ascertained from a general sense of national values. The policy should likewise be one that is widely shared and not the isolated decision of a single state or a single court.

Unethical, immoral or unscrupulous conduct:

Finally, the third Sperry and Hutchinson's standard asks whether the conduct was immoral, unethical, oppressive or unscrupulous. The test in the opinion of the Commission was included in
order to be sure of reaching all the purposes of the underlying statute, which forbids 'unfair acts or practices. Only general principles of recognised standards of the business ethics are declared as the yardstick. This test has proven largely duplicative. Conduct that is truly unethical and unscrupulous will almost always injure consumers or violate public policy as well. The Commission has never relied on the third criteria of Sperry & Hutchinson as an independent basis for a finding of unfairness and has decided to act in future only on the basis of the first two.

Thus 1980 policy statement of Federal Trade Commission places primary emphasis on Consumer injury which must be substantial, and must be an injury that consumer could not reasonably avoid. Public policy has become a second confirming factor and public morality has been dropped completely. Thus, the unfairness doctrine has lost its original intuitive meaning based on moral considerations, and has become more of a cost benefit analysis. The policy statement of Federal Trade Commission while refining the unfairness doctrine gave more weight to the consumer injury and consumer was burdened with an onus of proof that he was not in a position to avoid this injury a hint at the emergence of Caveat emptor approach under which a practice might


not be considered unfair, despite a significant injury, if consumer could, or should have been more vigilant in avoiding it.\textsuperscript{75}

\textbf{Deceptive Practices:}

The term "deceptive or misleading practice" has found place in various legislations of the world\textsuperscript{76} but has proved difficult to ascribe any exact meaning\textsuperscript{77}. The term deceptive has been

\begin{quote}
75.\textit{See} for contrary opinion, Jean Braucher, \textit{Defining unfairness: Empathy and Economic Analysis At the Federal Trade Practices}, Boston. Univ. L. Rev 1988 Vol 68 at 413, wherein the learned author opined that the two major concerns raised by the policy statement; uncertainty about the nature of the cost benefit analysis contemplated and the possibility of the advent of a consumer beware approach, were allayed by the credit practice Rule Analysis, published in March 1, 1984 and which came into force in 1987.

76.\textit{For instance} see section 5 of the Federal Trade Commission Act, 1914 as amended by the Wheeler Lea Act, 1938, section 52 of the Trade Practice Act, 1977 of Australia, section 33(c) of Combines Investigation Act, 1923 of Canada; Section 3 of the Trade Descriptions Act, 1968 of England.

77.\textit{The reason for this difficulty is laid down as under:}}\textit{\textbf{The fertility of man's invention in devising new schemes of fraud is so great that courts have always declined to define it, reserving to themselves the liberty to deal with it in whatever form it may present itself. It is better not to define the term, lest the craft of men should find ways of committing fraud which might evade such definition. A. M. Jur 2d Fraud & deceit, 1 at 18 Cf. James D. Jeffries, Protection for consumers Against Unfair And Deceptive Business Mar. Law Review, Vol. 57 No.4 1974 at 595. Following definition of deception has been given by the members of the Federal Trade Commission of USA:}}\textit{

1. An advertisement is deceptive; if it makes a false claim about any material fact;
2. If it produces an inaccurate belief about any material fact in (some) consumers;
3. If it leaves (some) consumers with inaccurate beliefs about any material fact;
4. If it fails to disclose the information that would be optional under the circumstances. See Howard Beales, Richard Craswell and Steven & Salop; The Efficient Regulation of Consumer Information, the Journal of Law and Economics Vol. XXIV (Dec., 1981) at 496.}

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interpreted to cover misleading statements. In other words, these
two terms were considered synonymous. But in Australia a
conduct will be proscribed if it is either misleading or decep-
tive. Thus suggesting the independent requirements for a prac-
tice to be declared misleading or deceptive. Nevertheless it is
difficult to see any distinction between misleading conduct and
deceptive conduct and it will rarely if ever, be necessary to
draw any such distinction.

To deceive implies to cause to believe what is false, to
lead into error. It means to believe that a thing is true
which is false and which the person practising the deceit knows
or believes to be false. In United States, courts have not
shown unanimity in laying down principles to measure deceptive-
ness in advertisements. One view is that the likelihood or pro-
pensity of deception is the criteria by which advertisement is
measured and in the statement of Basis and purpose for the

78. In Chrysler Crop v. FTC 561 F 2d 357 363 (DC Cir 1977) it was
held that an advertisement may be deceptive if it has a tend-
ancy and capacity to convey misleading interpretation; In FTC
v. Sterling Drug, Inc, 317 F 2d 669, 674(2d Cir 1963) capacity
to deceive was defined in terms of a likelihood or fair prob-
ability that the reader will be misled.

79. Section 52 runs as follows:
A Corporation shall not in trade or commerce engage in
conduct that is misleading or deceptive or is likely to
mislead or deceive.

80. Taperrell, vermusch and Harland, Trade Practices and


82. R.C.London & Globe Financial Corp. Ltd (1903) 1 Ch 728 at 732;
See also weitmann & Katies Ltd (1977) 29 F LR 336; 2 TPC 329.

83. Beneficial Corp. v. FTC 542 F.2d 611 (3rd Cir. 1976).
mine the nature of an advertisement and in the statement of Basis and purpose for the Funeral Industry Practices Rule defined deception as a practice with the tendency or capacity to deceive a substantial segment of the purchasing public in some material respect. The cigarette Rule was issued in 1964 and Funeral Practice Rule was issued in 1982 but even then there has not been a general trend towards the adoption of the likelihood standard. In some cases the phrasing "tendency or capacity" and "likelihood" have been used interchangeable, thus suggesting that these words are synonymous. The word "likelihood" connotes a higher standard of Proof than either "tendency or capacity".

There is a difference of degree of probability of deception.


84a. American Home Products Corp. v. FTC, 695 F 2d 681, 687 (3rd Cir 1982) (misrepresentations are condemned if they possess a tendency to deceive); Chrysler corp. v. FTC, 561 f. 2d 357, 363 (D.C Cir. 1977) (the advertisement had a tendency and capacity to mislead consumers); Mackenzie v. United States, 423 US 827 (1975) (the commission has the expertise to determine whether advertisements have the capacity to deceive or mislead the public); FTC v. Colgate - Palmolive Co. 380 US 374, 391 - 92 (1965) (nor was it necessary for the commission to conduct a survey of the viewing public before it could determine that the commercial had a tendency to mislead).


Similarly courts failed to come in agreement on the question as to whose intelligence should determine the nature of advertisement. One view is that the FTC possessed a mandate to protect the unwary and foolish members of the buying public as well as the diligent\textsuperscript{87}, other view is that the commission may not inject novel meanings into advertisements and then strike them down as unsupported. Advertisements must be judged by the impression they make on reasonable members of the public\textsuperscript{88}.

Due to the lack of consistency in the deception elements propounded from time to time, the FTC Chairman Miller mooted a proposal that Congress should amend section 5 to include statutory definition of deception. Congress, however, requested that the FTC should compile a written report outlining the current status of deception enforcement. The commission's response to this request was the 1983 policy statement, which was received with considerable controversy. The commissioners differed on the elements of deception and they used different terminology while attempting to describe it. The majority commissioners defined deceptive advertisement as an act or practice by which consumers if acting reasonably would likely to be misled to their detriment by a material representation. According to the minority commissioners the following elements must be present to justify a

\textsuperscript{87} Holmes FTC Regulation of Unfair or Deceptive Advertising: Current Status of the Law 30 DE Paul L Rev 555 (1981).

\textsuperscript{88} In re Bristol - Myers v. FTC 102 FTC 21, 320 (1983); American Home Products Corp. v. FTC 98 FTC 136 (1981); In re Heinz W Kirchner 63 FTC 1282 (1963).
finding of deception: 1) a practice capable of misleading; (2) the practice must have impact upon a substantial number of consumers; and (3) the practice must be misleading with regard to material facts.  

While analysing the two opposite views on elements of deception, one finds common agreement on certain issues. Principally, both sides agreed that showing of actual loss to the consumer is not necessary. The split between the majority and minority was not one of actual versus potential deception but rather one of the degree of probability of deception employed as a standard.

The most controversial element of the majority's definition is to interpret an advertisement the way a prudent and reasonable man would. Although the minority opinion did not expressly endorse the foolish consumer standard which would have been the other extreme of the reasonable man's standard, it adopted "Substantial number" as a criterion which of course is not the same as a reasonable man's standard, nevertheless, is on the midway between the two extreme standards.

There was also difference of opinion on the proper interpretation of the materiality requirement. The minority objected to the majority's statement that a finding of materiality was synonymous with a finding of injury to the consumer. The minority

89. The test of the policy statement and accompanying dissents may be found at 45 Anti-trust & Trade Reg. Rep. (BRA) 689 (Oct. 27, 1983).
interpretation by contrast, simply stated that the misrepresentation must have been material to the consumer. Even so, the underlying analysis of the material requirement in the two statements appear quite similar.90.

The policy statement issued by the commission has no force of law. It can be ignored by the future commissioners and courts. Nevertheless, the FTC Commission in *Clifdale Associates, Inc*91 and *Thompson Medical Co, Inc*92 applied the standard set in the policy statement in order to reach a particular conclusion. In Clifdale Associates, the Administrative Law Judge applied the principle which had strong similarities with the minority opinion of policy statement. The commission rejected these observations by saying that "it is circular and inadequate to provide guidance on how a deception claim should be analysed and then proceeded to articulate its own standard for determining whether a practice is deceptive. This standard precisely echoed the definition that had been set forth in the 1983 policy statement. In *International Harvester*93 the respondent who was manufacturer of tractors failed to warn the consumers about the defect with the result the consumers were injured. The commission did not find the respondent guilty, not by invoking principles set in the policy state-


91. 103 FTC 110 (1984).
ment but by relying on cost-benefit analysis. It was held that the failure to warn about a latent safety hazard is a pure omission. The seller is not responsible for disseminating all information about its product which might be helpful to any given consumer, the implied warranty of fitness which arose upon the sale of a product was not violated by the failure to disclose each and every potential safety problem. The determinative factor was the degree of risk. The stringent requirement of disclosure would cause advertisements to be overrun with every conceivable disclosure about every aspect of a product.

The dissenting opinion stated that the undisclosed facts must be both material and necessary to correct a false expectation held by a substantial body of consumers. Thus the dissenting opinion retained traditional deception analysis, the majority went outside deception law altogether to create a separate doctrine for pure omission which is based on cost-benefit analysis.

In India, both the MRTPC and CBRA's did not find occasion to expound the phrases; "unfair method and unfair or deceptive trade practice". So independent grounds to attack a Trade practice as being unfair or deceptive have not been formulated. In fact these expressions have been used interchangeable. The principles relating to "unfairness" and "deceptiveness" evolved by the American courts can be a good guide for the MRTP Commission and redressel agencies. But it cannot be lost sight of that initially the American courts did not demand higher standard of proof as they are demanding at present for the reason, the consumer protection laws in American are now a century old. The
The awareness level of consumer rights has markedly increased there and consumers are not only conscious of their rights but are comparatively organised. On the other hand, consumer protection laws in India are recent in origin. The consumers are not only illiterate, unorganised, ignorant but they suffer in silence. In fact consumer movement has not yet blossomed and what ever consciousness is there, it has not percolated to grass root level. So it will not serve any purpose if American standards are blindly followed without taking into account the society for whose benefit laws are enacted. The following definitions are therefore, suggested for unfair and deceptive practices:

An unfair trade practice is a trade practice which causes substantial injury to consumers which is not outweighed by an offsetting consumer or competitive benefits that the practice produces.

Explanation: While determining as to whether injury to the consumers is substantial, regard shall be had to the value of the goods or services in question.

A deceptive trade practice is a trade practice which has a potential to mislead consumers of ordinary intelligence with regard to material facts.