

TRANSCRIPT: FIVE TRAIN WRECKS OF INFORMATION DISCLOSURE POLICY

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It would be hard to find a judge or legal academic more widely applauded for his intellect than Richard Posner of Chicago. So there was a little flurry of press interest a couple of years ago when Judge Posner remarked casually at a public appearance that he had recently been through a home mortgage refinance and did not read all the forms.¹ When the press got hold of this, it began asking other figures whether they choose to read or ignore the fine print. Before long, Chief Justice John Roberts was at a podium and someone asked him whether he bothers to read the fine print on computer click-through contracts before clicking “I approve.” The Chief Justice admitted that he does not.²

The theme of my talk is five train wrecks of information disclosure law. The first train wreck I will discuss, illustrated by the anecdotes above, consists of expensively drafted disclosure that the intended recipients are determined to skip.

I. WRONG PLACE, WRONG TIME

Lengthy financial disclosures, though a source of welcome fees to lawyers, are seldom effective when presented at the last minute in a time-pressured setting such as a mortgage closing. I have never heard of anyone getting up and walking away from the table without refinancing their mortgage because they discovered and objected to something in the fine print. The original rationale for mortgage disclosures was that more

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1. Debra Cassens Weiss, *Judge Posner Admits He Didn’t Read Boilerplate for Home Equity Loan*, A.B.A. J. (June 23, 2010, 7:37 AM), http://www.abajournal.com/news/article/judge_posner_admits_he_didnt_read_boilerplate_for_home_equity_loan/.

2. Debra Cassens Weiss, *Chief Justice Roberts Admits He Doesn’t Read the Computer Fine Print*, A.B.A. J. (Oct. 20, 2010, 6:17 AM), http://www.abajournal.com/news/article/chief_justice_roberts_admits_he_doesnt_read_the_computer_fine_print/.

disclosure would keep people out of bad mortgages.³ I pause for a laugh there, because it so obviously flopped in that primary objective, as we know from the Crash of 2008 and its aftermath. Because of this, consumer finance regulators are rethinking the whole issue of mortgage disclosures; this is one of the topics that the new Consumer Financial Protection Bureau is looking at.⁴

There is a whole literature on how disclosure fails, which includes a couple of very interesting survey articles in the last couple of years. Two years ago in the *University of Pennsylvania Law Review*, Omri Ben-Shahar of the University of Chicago and Carl Schneider of the University of Michigan wrote a piece called *The Failure of Mandated Disclosure*, a remarkable catalog of the many ways mandated disclosure can fail.⁵ Last year, in the *Journal of Public Policy and Marketing*, published by the American Marketing Association, Kesten Green of the University of South Australia and J. Scott Armstrong of the Wharton School had a shorter but no less interesting article summing up fifteen or twenty empirical studies of whether mandatory disclosure programs met their objectives. Green and Armstrong concluded that these disclosure programs always fell short (although by how much they fell short varied from case to case).⁶ Some of my examples in the pages ahead are drawn from these articles.

3. See Dee Pridgen, *Putting Some Teeth in TILA: From Disclosure to Substantive Regulation in the Mortgage Reform and Anti-Predatory Lending Act*, 24 LOY. CONSUMER L. REV. 615, 616 (2012) (“Disclosure was considered the perfect form of consumer protection because it supported the free market by providing consumers with informed choices without banning any particular credit offering.”).

4. See CFPB Mortgage Disclosure Team, *Know Before You Owe: Preparing to Finalize the New Mortgage Disclosure Forms*, CONSUMER FIN. PROT. BUREAU (Nov. 22, 2013), <http://www.consumerfinance.gov/blog/category/mortgage-disclosure/> (describing the Agency’s mission of simplifying mortgage disclosure and its methods of researching the optimal amount of information to disclose in home mortgage lending). The Dodd-Frank Wall Street Reform and Consumer Protection Act established the Consumer Financial Protection Bureau (CFPB) in 2010. Pub. L. No. 111-203, § 1011(a), 124 Stat. 1376, 1964 (codified at 12 U.S.C. § 5491 (2012)). One of the CFPB’s mandates is to “ensur[e] that . . . outdated, unnecessary, or unduly burdensome regulations are regularly identified and addressed in order to reduce unwarranted regulatory burdens.” 12 U.S.C. § 5511(b), (b)(3).

5. See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 665–72 (surveying failures of mandated disclosure, including three “paradigmatic” failures of mandated disclosure: mortgage disclosures, informed consent disclosures, and contract boilerplate disclosures).

6. Kesten C. Green & J. Scott Armstrong, *Evidence on the Effects of Mandatory Disclaimers in Advertising*, 31 J. OF PUB. POL’Y AND MARKETING 293, 295–98, 302 (2012).

II. TMI

The second train wreck, which has come up earlier in this symposium,⁷ is what Professor Heminway called the “TMI”—Too Much Information—disclosure:⁸ the overgrown disclosure, symbolized by the *drug package insert*. If you have gotten birth control pills or another medication taken by millions of persons with complicated effects on the body, you may have unfolded (and then unfolded, and then unfolded again) the package insert that comes with the medicine. The tragedy of this train wreck, unlike the first, is that many people actually do want to read these kinds of disclosures, because some of the information is genuinely important, non-obvious, and relevant to decisions they may need to make. Typically the inserts started out shorter. Then the drug company lawyers got word that someone had sued claiming failure to warn over a certain kind of heart attack (which is so rare that you have never heard of it before) and that someone else had claimed failure to warn over some other rare side effect. While the suits may have advanced other liability theories as well, failure to warn would usually be in there. With very little cost of expanding the warning aside from the ink it takes to add the language, and with no one to object, the warnings grew and grew, round after round, to the point where some drug companies now warn of imaginary side effects, which their own scientists believe their drugs have never caused.⁹ Even so, these warnings might still assist in defeating some failure to warn lawsuit in the future.

The tragedy from this, of course, is that an optimal warning from a medical point of view might be much shorter. It might get three or four major points across that many users really do need to know if they are using this drug. Today, if we are lucky, those three or four warnings may be at or near the top of the massive block of text, but we cannot count on that.¹⁰

7. Joan McLeod Heminway, *Investor and Market Protection in the Crowdfunding Era: Disclosing to and for the “Crowd”*, YOUTUBE (Oct. 23, 2013), <http://www.youtube.com/watch?v=keLYqCQ4SDk>.

8. See Joan McLeod Heminway, *The SEC’s New Line-Item Disclosure Rules for Asset-Backed Securities: MOTS or TMI?*, 35 HAMLIN L. REV. 385, 388 (suggesting that new Dodd-Frank financial disclosure regulations might require the disclosure of too much information (“TMI”), and would therefore be harmful overregulation).

9. Cf. Press Release, Indiana University School of Medicine, Information Overload in Drug Side Effect Labeling (May 24, 2011), available at <http://communications.medicine.iu.edu/newsroom/stories/2011/information-overload-in-drug-side-effect-labeling/> (“Having a high number of side effects on a drug’s label should not suggest that the drug is unsafe. In fact, much of this labeling has less to do with true toxicity than with protecting manufacturers from potential lawsuits.” (internal quotation marks omitted)).

10. But see *The FDA Announces New Prescription Drug Information*, U.S. FOOD AND DRUG ADMIN., <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/LawsActsandRules/>

They might be buried further down. And users never try to read the whole insert, or if they do they don't get very far before they give up.

You might think that this problem only happens in areas like pharmaceuticals or pesticides, where disclosure is driven more by attempts to beat high-stakes tort litigation. However, as Ben-Shahar and Schneider point out in their article, you find the same gradual overgrowth in areas that are not so litigation-driven; they cite examples such as university institutional review boards (IRBs).¹¹ Under applicable federal regulations, academics who want to do research involving human subjects have to clear the proposed information gathering with their institution's IRB and develop approved forms for informed consent.¹² Almost everyone in the process agrees the forms are too long, and yet they continue to grow.¹³ And there is apparently a measurable rate at which they grow: one and a half pages per decade.¹⁴ It seems that when the IRB program started out roughly thirty years ago, many of the informed consents were a third- to a half-page long; now, the very same sorts of research will have a four-and-a-half page consent.¹⁵

The same problem arises with Health Insurance Portability and Accountability Act (HIPAA) disclosures. Under HIPAA, nurses not infrequently will "consent you" (yes, "consent" has become a transitive verb) just before you are wheeled in for the surgery. And again, I have never heard of anyone objecting to HIPAA authorization. Studies of

ucm188665.htm (last visited Mar. 4, 2014) (unveiling new and improved package insert regulations intended to optimize package insert disclosure). The FDA announced:

In January 2006, the Food and Drug Administration unveiled a major revision to the format of prescription drug information, commonly called the package insert. To manage the risks of medication use and to reduce medical errors, the newly designed package insert will provide the most up-to-date information in an easy-to-read format that draws physician and patient attention to the most important pieces of drug information before a product is prescribed.

Id.

11. Ben-Shahar & Schneider, *supra* note 5, at 688.

12. *See id.* (describing IRB regulators' "unreviewable discretion"); *see also* David Hyman, *Institutional Review Boards: Is This The Least Worst We Can Do?*, 101 NW. U. L. REV. 749, 751 (2007) ("The regulations specify a wide range of information that must be provided to study participants, including a statement that the study involves research, and a description of the procedures, expected duration, and reasonably foreseeable risks to the subject."); ZACHARY M. SCHRAG, *ETHICAL IMPERIALISM: INSTITUTIONAL REVIEW BOARDS AND THE SOCIAL SCIENCES, 1965–2009* (2010).

13. Ben-Shahar & Schneider, *supra* note 5, at 688.

14. *Id.*

15. *Id.*

HIPAA privacy disclosures have found that they, too, are unreasonably long and complicated.¹⁶

Food labeling is one area that, at first glance at least, has not fallen into this particular pit. The federal “Nutrition Facts” box is widely cited in the literature as a rare example of effective disclosure.¹⁷ The question I would ask is: Is this because the food regulators have been more sensible, or is it because we are just earlier in the process of food-labeling regulation? Perhaps, after we pack in a few dozen more disclosure requirements for things like, for example, production location for traceability and animal confinement standards and GMO and allergenic content and antibiotic use, future roasting chickens will come bell-tagged with little package inserts you can take home and unfold to find a 3,000 word essay like the ones with your pharmaceuticals.¹⁸

III. REVERSE PSYCHOLOGY

Train wreck number three comes about when consumers do not share the values that regulators would like them to. One disturbing story along these lines comes from the Petrified Forest National Park. There had been an ongoing problem of visitor thefts of the unique substance, and so the National Park Service put up signs strictly advising people not to take any petrified wood with them because it is precious and rare. Later investigation showed that the thefts nearly tripled once the public had been educated that petrified wood was something worth stealing.¹⁹

Marketers understand this perfectly. Publishers in the old days would try to get their books banned in Boston, because if that happened the book

16. *See id.* at 674–75; Fred H. Cate, *Principles for Protecting Privacy*, 22 *CATO J.* 33, 38 (2002).

Because the terms contained in those documents are not optional—individuals must accede to them if they want the requested service or product—and because most consumers are so focused on the ultimate goal (being treated . . .), they rarely take time to consider what they are being told.

Id.

17. *Cf.* Ben-Shahar & Schneider, *supra* note 5, at 675 (“Many of our colleagues informally report personal satisfaction with mandated nutrition labeling, and there are indications that some forms of nutrition labeling do some good.”).

18. *See* *Am. Meat Inst. v. USDA*, No. 13-CV-1033, 2013 WL 4830778, at *8–9 (D.C. Cir. Sept. 11, 2013) (declining to issue a preliminary injunction to prevent USDA’s country of origin labeling regulations for meat from going into effect).

19. *See* Green & Armstrong, *supra* note 6, at 295 (“When the sign was in place, the theft rate was nearly three times higher than when it was not.”).

would sell better in the rest of the country.²⁰ In the present day, film producers who slap “Warning, Violent Content” labels on their products have found viewership rising.²¹

This phenomenon surfaces particularly in areas involving “sin”—where someone is morally disapproving of choices you might make. For example, a study has found that people rate dietary supplements as more effective when the labels warn that the supplement may be damaging to human health.²² Consumers figure, “That must be one of the good ones.” People are more interested in consuming it because of the safety warning. Similarly, around the time phosphates were banned in detergents, some marketing studies showed that after people found out phosphates were environmentally damaging, they began giving detergents containing them better cleaning ratings.²³

This effect turns up particularly often in the area of food and drink, which is so intertwined in Americans’ minds with the concept of sin. Alcohol marketers, for example, would love warn their customers about the high proof of their liquor.²⁴ Bars would love to post a “warning” along the lines of, “Hey, watch out for our special drink of the day, it will really knock you out.” The Bureau of Alcohol, Tobacco and Firearms (ATF) and state regulators know this perfectly well, which is why they tend to forbid or closely regulate that type of “cautionary” advertising. Everyone knows the game.

Will this surface in newer areas of food regulation? I believe I may have spotted an instance. After the first laws requiring calorie-count posting in restaurants were implemented, studies were soon done to investigate whether these disclosures led as intended to reduced calorie consumption. The results were a mixed bag.²⁵ For some demographics, it seemed to be working exactly as intended; people were walking out of the restaurant

20. See *Banned in Boston*, HARV. CRIMSON (Mar. 20, 1931), <http://www.thecrimson.com/article/1931/3/20/banned-in-boston-pthe-appearance-this/> (“It is true that the words ‘Banned in Boston’ on the jacket of a novel will increase its sales tremendously . . .”).

21. Cf. Green & Armstrong, *supra* note 6, at 297–98 (paraphrasing a study that showed that participants were more likely to watch a made-for-TV movie when it had a violent content warning than when it did not).

22. *Id.* at 297–98.

23. *Id.* at 295.

24. Cf. *id.* at 297 (“In a laboratory experiment, 155 participants exposed to an advertisement (picture of a bottle or can of alcoholic beverage) with the U.S. Surgeon General’s warning displayed underneath rated the benefits as greater and the risks as lower than those who were given the advertisement without the warning.”).

25. Brian Elbel et al., *Calorie Labeling and Food Choices: A First Look at the Effects on Low-Income People in New York City*, 28 HEALTH AFF. W1110, W1111 (2009), <http://content.healthaffairs.org/content/28/6/w1110.full.pdf+html>.

having had a lower calorie meal.²⁶ On the other hand, for some groups of young men it appeared that accurate calorie labeling actually caused them to zoom in on higher calorie products.²⁷ (“Hey, I’ve never tried that—if it has that many calories maybe it’s good.”) Now better informed in the search for what they wanted, they were walking off with a higher calorie intake.

IV. OBSOLETE DISCLOSURE

The fourth train wreck I was going to use—until I changed my mind, as I’ll explain in a minute—is the legal notices that run in the back pages of newspapers. Certain legal steps, especially those that might cut off or impair the rights of absent persons, require that you publish in a newspaper of general circulation a surprisingly expensive ad,²⁸ which no one will read. Well, it is not quite fair to say that no one reads it; certain lawyers and agencies do comb through those columns. Yet, were we to devise a requirement of this sort today on a clean slate, it would be pretty obvious that our first choice would be the internet, which is much cheaper to publish on, reaches persons who do not happen to have access to a certain newspaper published at a certain place and time, and most relevantly, can be searched at no cost. Newspaper legal notices are a prime example of disclosure that may have had a very good rationale when it started, but sits forgotten as technologies and legal needs change. I decided at length, however, against using that example because I like newspapers. I write articles that appear in them, for which they pay me. At this point in the game legal notices are the only things keeping many newspapers from going under, and far be it from me to want that to happen. So instead, I am going to turn to an example from intellectual property law, that of patent marking statutes.

The requirement that patented goods be stamped with a marking number derives from a nineteenth century law²⁹ that might have made perfect sense in its day as a way to reduce the cost of ascertaining

26. *See id.* (summarizing study that showed that Subway customers ate an average of fifty-two fewer calories per meal when Subway voluntarily posted calorie counts, and another that menu labeling was effective only when coupled with a daily calorie recommendation).

27. *See id.* (summarizing study that found “some evidence” that men ordered more calories when New York City restaurants began posting calorie counts).

28. It can cost up to \$1,600 to publish a legal notice in Manhattan. *New York’s Irrational LLC Publication Requirements Hurt Business Owners and Benefit Special Interests*, EMINUTES, <http://eminutes.com/new-york%E2%80%99s-irrational-llc-publication-requirements-hurt-business-owners-and-benefit-special-interests> (last visited Feb. 11, 2014).

29. Patent Act of 1842, ch. 263, sec. 5, 5 Stat. 543, 544 (codified at 35 U.S.C. § 292 (2012)).

intellectual property rights. People wanted to know whether they were within their rights to copy a given design, yet getting to Washington, D.C. to do a search might have taken weeks in travel time alone.

This law made it punishable by \$500 per item to place a false patent number on a product.³⁰ Some dishonest manufacturers might stamp a fictitious number on a product purposefully, as a species of fraud, but the law also encompassed the more innocuous offense of simply leaving an expired patent number—and all patent numbers do expire—on a good still in production. That was to become more important as the law stood on the books long after most businesspeople had stopped paying close attention to it. The specified penalty of \$500 per item sold was also curiously invariant. It applied to a wrongly marked threshing machine or cotton gin, but it also applied to a wrongly marked throwaway cup.

And it was with a case involving throwaway plastic cups that the law came roaring back to business attention.³¹ A very large manufacturer of plastic cups, it turned out, had not changed its moldings to eliminate old numbers as old patents ran out. Along came a clever lawyer and said, “All right. For every mismarked cup you sold in the last 8 years, you owe \$500.” Pretty soon it was not just cups. Some craftsmen making antique reproductions—woodstoves, for example, where they are trying to create the old Vermont ambience—had followed the practice of exactly duplicating the 1859 stove, down to the patent number on it. Foolish of them! Some got sued over these replica toys, musical instruments, and other equipment aimed at the nostalgia market.³²

Well, Congress actually fixed the problem with this law³³ (a line you will not hear again today), but the whole episode shows again how, even as

30. The Patent Act of 1842 imposed a one-hundred-dollar penalty. *Id.* The penalty has been five hundred dollars since 1952. Pub. L. No. 82-593, 66, ch. 29, § 292(a), 66 Stat. 792, 814 (1952) (codified at 35 U.S.C. § 292 (2012)).

31. For an overview of the problem of false patent marking litigation, see Michael R. O’Neill, *False Patent Marking Claims: The New Threat to Business*, 22 INTELL. PROP. & TECH. L.J. 22, 22 (Aug. 2010). For the particularly ridiculous Solo cup litigation, in which the plaintiff argued (unsuccessfully, but for other reasons) that each individual falsely marked solo cup warranted a five hundred dollar fine, see *Pequignot v. Solo Cup Co.*, 608 F.3d 1356 (Fed. Cir. 2010).

32. See, e.g., *United Prod. Solutions Ltd. v. Tara Toy Corp.*, No. 5:10 CV01718, 2011 WL 3566849, at *6 (N.D. Ohio Aug. 12, 2011) (dismissing a lawsuit over falsely marked reproductions of the vintage “Wooly Willy” toy on procedural grounds).

33. See Pub. L. No. 112-29, § 16(b)(1), 125 Stat. 284, 329 (2011) (to be codified at 35 U.S.C. § 292(a)) (“Section 292(a) of title 25, United States, Code, [sic] is amended by adding at the end the following: ‘Only the United States may sue for the penalty authorized by this subsection.’”); Walter Olson, *Wham-O! There Go ‘Patent False Marking’ Suits*, CATO INST. (Oct. 20, 2011, 2:59 PM), <http://www.cato.org/blog/wham-o-there-go-patent-false-marking-suits>.

times and technologies change, outmoded warning systems may be left in place.

V. DISCLOSURE THAT OPENS LEGAL FLOODGATES

The final train wreck to discuss is in California: Proposition 65, the toxics labeling requirement.³⁴ Proposition 65 was a voter initiative. As with so many other voter initiatives, the drafters did not feel much of a need to compromise with the community they intended to regulate. The resulting Proposition 65 provided that you could sue, and if successful collect legal fees from, anyone who sold products or provided services linked to cancer without placing suitable warning labels on them.³⁵

In the years since then, our understanding of what is carcinogenic has expanded to include hundreds of products. Brass knobs, which contain lead, can give you cancer.³⁶ Nearly all forms of combustion, browning and burning result in the formation of compounds that can give you cancer, which means that there has been litigation over grilled chicken³⁷ and roasted coffee.³⁸ Matches give off carbon monoxide, which, surprise, gives you cancer.³⁹ Garages are subject to the law because of car exhaust, and so on.

The Western District of Pennsylvania federal court had agreed with [Walter Olson and Cato's Center for Constitutional Studies'] position that the *qui tam* (bounty-hunter) provision of the false marking statute was unconstitutional; [T]he Federal Circuit heard argument on the issue [of whether the \$500 fine applied per mismarked item], but before it could rule the U.S. Congress resolved the controversy by wisely acting, as part of its patent reform bill, to do away with the whole cottage legal industry of bounty-hunting litigation over false patent marking.

Id.

34. Safe Drinking Water and Toxic Enforcement Act of 1986, Proposition 65, § 1, 1986 Cal. Stat. A-219, available at http://www.oehha.ca.gov/prop65/law/pdf_zip/Prop65Ballot1986.pdf. For additional information on Proposition 65 see Walter Olson, *Prop 65, OVERLAWYERED* (Jan. 31, 2014), <http://overlawyered.com/tag/prop-65/>; Anthony T. Caso, *Federalism & Separation of Powers: Bounty Hunters and the Public Interest—A Study of California Proposition 65*, 13 ENGAGE 30 (2012).

35. Harry J. Katrichis & Roger A. Keller, Jr., *Prop. 65: Putting California's Labeling Horse Back into the Federal Labeling Barn*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 19, 24 (2000).

36. See, e.g., Letter from Klamath Env'tl. Law Ctr. and Mateel Env'tl. Justice Found., to Prop. 65 Enforcement Coordinator (Sept. 15, 2010), available at <http://oag.ca.gov/system/files/prop65/notices/2010-00452.pdf> (alleging that Chili's use of brass in the door handles in its restaurants violated Prop. 65 because the handles contain lead).

37. E.g., *Physicians Comm. for Responsible Med. v. McDonald's Corp.*, 114 Cal. Rptr. 3d 414, 417–18 (Cal. Ct. App. 2010).

38. Anastasia Killian, *Prop 65 Has its Perks for Plaintiffs' Lawyers in Coffee Litigation*, FORBES: WASH. LEGAL FOUND. (Oct. 10, 2012, 12:44 PM), <http://www.forbes.com/sites/wlf/2012/10/10/prop-65-has-its-perks-for-plaintiffs-lawyers-in-coffee-litigation/>.

39. See, e.g., Letter from the Mackenzie Grp. and Consumer Def. Grp., to Nana Enters., Inc. (Oct. 2, 2003), available at <http://oag.ca.gov/system/files/prop65/notices/2003-00528.pdf> (alleging

At this point, to all but a small sector of the legal community, Proposition 65 is perceived as a racket. But the law is very difficult to reform through legislation because lawyers defend it tooth and nail; they are making millions of dollars each year filing suits over essentially innocuous products.

There is a connection here with the defeat of California Proposition 37, which would have required warning labels on food with genetically modified ingredients. It was not clear at the start whether grocery stores and similar retailers were going to come out against Proposition 37. What turned them into fierce opponents was that they saw similarities to Proposition 65 in the drafting and in the role of so-called citizen enforcement for infractions whether or not they were genuinely damaging to consumers. Their committed opposition helped sink the initiative.

CONCLUSION

My remarks here are meant to pertain to consumer disclosures made at the time of transaction. Results may differ in areas where disclosure is aimed at informing sophisticated parties, or at persons who can set aside considerable time to analyzing data before making decisions. But look at area after area of mandated disclosure, and you will find very disappointing results. It makes me wonder why, every time a new proposal of this sort comes up, so many people react as if the important thing were the intention of the disclosure, rather than its actual results. It's as if they can't help saying, "This time, it will be different."

recipient's use of matches at its hotels violated Prop. 65 because matches emit arsenic and carbon monoxide).