

# The Denialists' Deck of Cards: An Illustrated Taxonomy of Rhetoric Used to Frustrate Consumer Protection Efforts

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February 9, 2007

*Politics is the shadow cast on society by Big Business. --John Dewey*

## Introduction

It is well known that businesses spend billions of dollars on lobbyists to affect legislation. They also spend untold millions on public policy groups that spread doubt about the need for any type of reform. Chief among these groups are the American Enterprise Institute, the Competitive Enterprise Institute, the Manhattan Institute, and the Cato Institute, but many other similar groups exist that focus on specific issues. Giveupblog.com has described these groups as "denialists."<sup>2</sup> Denialists use rhetorical techniques and predictable tactics to erect barriers to debate and consideration of any type of reform, regardless of the facts. He has identified five general tactics used by denialists: "conspiracy, selectivity, the fake expert, impossible expectations, and metaphor."

In my work on consumer protection, I have begun to recognize patterns in denialists' advocacy techniques. Whether the topic is tobacco, food and drug safety, or privacy legislation, these groups employ the same rhetorical devices to delay and stop consumer reform. In this brief article, I build upon Giveupblog.com's definition of denialists and provide a taxonomy of arguments used in denialism. It is illustrated as a deck of playing cards to make it more interesting and to emphasize that denialists are engaged in a predictable game to "do little and delay." Where possible, I have provided a real example of the denialism described in the footnotes. Many of the arguments do not have examples, this is because I have heard many of these arguments in private negotiations, and they are unlikely to appear in print.

Most of these arguments can be cogent in certain contexts. Sometimes the industry is correct on the facts and issues, and the denialism serves a good purpose. In others, the arguments do not. For instance, competition is a very strong force for reform, but appeals to this force are often false because a certain market isn't actually competitive, or because the problem is too nuanced or important to just be left to the market.

The point of listing denialists' arguments in this fashion is to show the rhetorical progression of groups that are not seeking a dialogue but rather an outcome. As such, this taxonomy is extremely cynical, but it is a reflection of and reaction to how poor the public policy debates in Washington have become.

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<sup>1</sup> This is a work done in my personal time, and is not affiliated with the Samuelson Clinic or any other University of California institution.

<sup>2</sup> *Denialists*, Give Up Blog (Sept. 19, 2006), available at <http://www.giveupblog.com/2006/09/denialists.html>.

This taxonomy provides a roadmap for consumer advocates to understand the resistance they will face with almost any form of consumer reform. I hope to expand it to include retorts to each argument in the future.

## First Hand: "No Problem"

*Doubt is our product since it is the best means of competing with the "body of fact" that exists in the mind of the general public. It is also the means of establishing a controversy...with the general public the consensus is that cigarettes are in some way harmful to the health. If we are successful in establishing a controversy at the public level, then there is an opportunity to put across the real facts about smoking and health. –A 1969 Tobacco Industry strategy document<sup>3</sup>*

Public policy debates on consumer protection and the environment almost always start with the "no problem" theme. The argument emphasizes that whatever consumer reform being debated is unnecessary.<sup>4</sup> This is because there is no problem.



"No problem" is the chorus of a denalist argument. The skilled denalist, even after engaging in a debate for an extended period of time, will never concede that a problem exists.

One should get used to hearing it if on the consumer protection side, and one should practice saying it if on the industry side. "A solution in search of a problem" is a typical 2 of Clubs saying.\*

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<sup>3</sup> Brown & Williamson, Smoking and Health Proposal (1969), available at <http://tobaccodocuments.org/landman/332506.html>

<sup>4</sup> An example from the network neutrality debate: "The proponents of network neutrality regulations have yet to show there's a problem," says Brian Dietz, a spokesman for the National Cable and Telecommunications Association. "It's truly a solution in search of a problem." Grant Gross, *Advocates push for network neutrality policy*, Network World, Apr. 5, 2004.

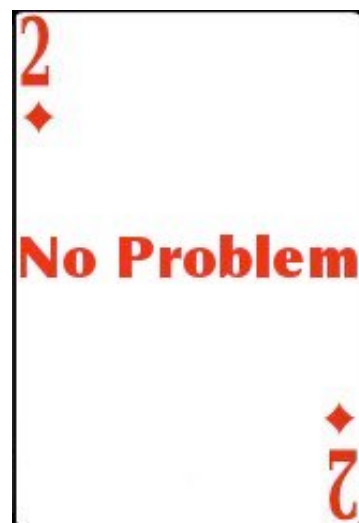
Another example from the genetic discrimination debate: The health insurance group denounces the genetic discrimination bill as "a solution in search of a problem." According to HIAA President Dr. Donald Young, "health insurers do not currently use genetic information in determining coverage or in setting premiums, nor do they plan to do so in the future." Ira Carnahan, *Gene Policy*, Forbes.com, Oct. 22, 2003.

\* The playing cards used in this paper are David Bellot's SVG Cards, released under the GNU Public License and available at <http://david.bellot.free.fr/svg-cards/>

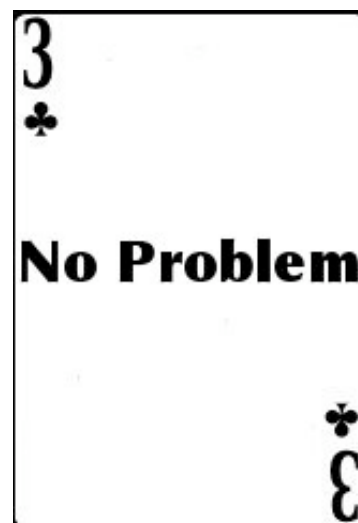


Next, to the extent that something bad has happened, the denialists will blame it on "bad apples."<sup>5</sup> Therefore, "no problem."

Watch for this important technique—a spokesperson from a trade group will make some guarantee that an industry won't engage in some practice. This promise is illusory and cannot be enforced. Accordingly, it allows the industry to promise never to do what the bad apples are doing, while really not promising anything.



Whatever problem that doesn't exist is a mere inconvenience! Therefore, no problem!



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<sup>5</sup> A company executive responding to a lawsuit brought by the DC Attorney General based upon 2,000 complaints from consumers that they didn't receive rebates: "We respectfully disagree with the Attorney General's assertion....," Greg S. Cole, senior vice president and corporate treasurer (of InPhonic), said in a written statement. "Any time you're dealing with millions of customers, as we are, there are going to be occasional concerns." Annys Shin, *D.C. Sues InPhonic Over Rebate Restrictions*, Washington Post, Jun. 9, 2006.

A variation on the "bad apples" argument is to say that the proposal should not proceed because bad apples won't comply: "The irony is that do-not-call lists are not going to stop the bad apples in the industry," [Lou] Mastria [of the Direct Marketing Association] said. "They are not going to use the lists. The states would be better off targeting illegitimate telemarketing firms for enforcement." *Direct Marketers Grappling with Proliferation of State No-Call Laws*, BNA Privacy & Security Law Report, Sept. 23, 2002. Of course Mastria was wrong—the do-not-call lists cut back so much on telemarketing that even fraudsters have a more difficult time making sales.



At this point, the denialist's problem is getting difficult to ignore. Here, the denialists switch tactics and deny that the problem that doesn't exist causes harm.<sup>6</sup> No harm, therefore no problem.

Denalists' definition of harm typically is elusive. They won't acknowledge harm until blood is spilled, but when that happens, it can always be blamed on a "bad apple."



At this point, the denialist engages in delay. The problem that doesn't exist, and the harms that do not occur will continue not occur in the future, if we just wait.<sup>7</sup>

A great "wait and see" tactic is to "shift the goal posts." The denialist does by stating, "we don't know that there is a problem until X is demonstrated." The denialist will set unrealistic expectations for X, and if X is shown, it can easily be changed to Y.<sup>8</sup>

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<sup>6</sup> An example concerning digital video recorders and their ability to monitor every second of viewing behavior (combined with the 2 of Clubs!): But the Information Technology Association of America...opposes television privacy proposals. "We're not quite sure there really is a harm that needs to be addressed," said Mark Uncapher...of the ITAA. Uncapher said most digital video recorder-makers have strict internal privacy policies, and called the scenarios..."phantom" privacy problems. Lisa Friedman, *But Who's Watching Tivo? Congress Concerned About Makers Selling Private Information*, The Daily News of Los Angeles, Dec. 1, 2003.

<sup>7</sup> In the California RFID debate, industry lobbyists argued against setting security and privacy standards, and instead suggested that a "study committee" be formed. This committee would produce a non-binding report with recommendations, some time in the future.

<sup>8</sup> In the climate change debate, denialists claimed that we did not have enough historical information to make determinations about global temperatures. In 1998, Michael Mann's research allowed scientists to view 1,000 years of temperature data. That wasn't enough for the denialists. New advances enable a far deeper knowledge of global temperature, but with each new advance, denialists say it does not go far enough.

## Second Hand: Consumer Education Solves the Problem that Doesn't Exist



Denialist rhetoric switches at this point. While continuing to deny that there is a problem, they will argue that if it exists, it benefits the economy, and if consumers really care, they will become educated and avoid it. Therefore, no problem.

Denialists can endorse consumer education because they know individuals are busy and that most won't pay attention to it.



Given that there is consumer education, any attempt to limit the practices in questions threaten consumer freedom.<sup>9</sup> Denialists will assume that people are perfectly rational and in possession of all relevant information. Thus, individuals choose the problem being addressed, and to limit it frustrates consumer freedom, because they like the problem or harm at issue.



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<sup>9</sup> The "Center for Consumer Freedom" responded to a government report emphasizing the costs of obesity with such arguments: "The full-page newspaper ads shout "Hype" at readers, warning them that they have 'been force-fed a steady diet of obesity myths by the 'food police,' trial lawyers, and even our own government.' The sponsor, the Center for Consumer Freedom, is a 'nonprofit organization dedicated to protecting consumer choices and promoting common sense,' the ad notes. It is funded by the restaurant and packaged foods interests. Melanie Warner, *Striking Back at the Food Police*, New York Times, Jun. 12, 2005.



Because individuals have choice, and because they want what they have chosen, there's no problem.

But sometimes it is not plausible to say that individuals want what is made available to them. At this point, the denialist will say that individuals don't really know what they want. Consumers may complain and say there is a problem, but they really want what the denialist has to offer.<sup>10</sup>



Delay always benefits the denialist. At this point, any number of delay tactics can be employed to wait and see whether consumer education will solve the problem that doesn't exist.

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<sup>10</sup> Qwest once argued that the government should not restrict the sale of phone records because it was paternalistic, and because individuals don't know that they really want their records sold so that they can receive more advertising: "the government cannot depress the communication of lawful speech to potentially interested persons in order to protect uneducated, inattentive adults."

### Third Hand: Competition is Magic

*The spectacle manifests itself as an enormous positivity, out of reach and beyond dispute. All it says is: "Everything that appears is good; whatever is good will appear." – Guy Debord, The Society of the Spectacle*



A denialist does not soft pedal competition. It is a religious term. It is frequently employed, because any market can be described as competitive, regardless of the facts or the myriad factors that practically limit choice.

Competition solves all problems. Period. If competition doesn't solve the problem at issue, then it isn't a problem, or people really like the problem (4 of Spades, 5 of Hearts).

Because competition is magic, there are no problems to solve. And those that may exist will be solved, eventually. The denialist will say: "give competition a chance" or "sometimes a competitive marketing takes time to reform" (3 of Spades, 5 of Spades).



The denialist will argue that the intervention will stifle innovation. Typical 6 of Hearts arguments include "this is just a tool," and "you're banning technology."

Next is the 6 of Diamonds, a somewhat contradictory but still widely-used argument—that technology "can't be regulated." Of course, any technology can (just look at standard setting organizations), but this exercise isn't about being cogent, it's about stopping whatever intervention the denialist opposes.







One can always employ the "we can't handle new regulations" argument.

Alternatively, the denialist will argue that they are already highly regulated, and thus no new interventions are needed.<sup>11</sup>



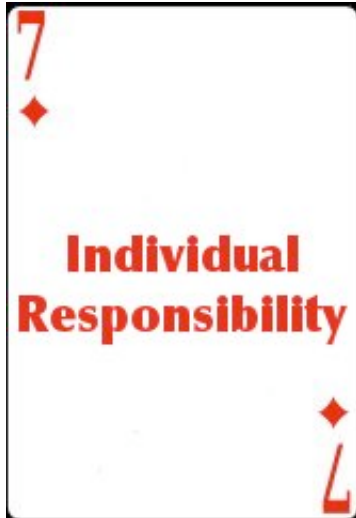
This is a popular variation of the 6 of Spades. When used, denialists often inflate the size of their industry and of their number of employees.<sup>12</sup>

This argument, while appealing, is almost always false. This is because while regulation may constrain an industry, it often creates new jobs in different fields that are unforeseen.

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<sup>11</sup> The American Bankers Association on why financial institutions should not have to comply with new security rules, despite having massive security problems: The association told lawmakers that because banks are already tightly regulated, "banking institutions, their parent companies and their affiliates" should be exempt from "all the provisions" of the Data Accountability and Trust Act.

<sup>12</sup> The best recent example of this occurred in the debate surrounding adoption of the federal Do-Not-Call Telemarketing Registry. The telemarketing industry claimed that they employed 6 million Americans, and had \$668 billion in sales. *FTC Defends Plan For 'Do Not Call' Telemarketing List*, Washington Post, Jan. 23, 2002. But the economic census showed that telemarketing only accounted for 500,000 jobs and \$8 billion in sales. Industry Statistics Sampler: NAICS 561422 Telemarketing bureaus, US Census, 1997, available at <http://www.census.gov/epcd/ec97/industry/E561422.HTM>. Despite the creation of the Registry, the telemarketing industry still claims absurdly high figures for employment and sales.



These should sound familiar. A denalist will say that individuals should be responsible for addressing a problem (paired with the 4 of Clubs or the 6 of Clubs), but in other contexts, the industry needs immunity from lawsuits and the like.<sup>13</sup>



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<sup>13</sup> Many technology companies have sought and obtained immunity for failure of anti-terrorism technologies. "The unintended consequence of even a single failure in a well-intended system or device we might provide could result in significant legal exposure that could financially ruin a company,' Northrop Grumman president Ronald D. Sugar said in congressional testimony..." D. Ian Hopper, *Tech Cos. Push Terror Legislation*, Associated Press, Jul. 10, 2002.

## Fourth Hand: Spread Confusion

If the public debate on an issue has proceeded this far, the denialist is in trouble. It is time to become more aggressive by attempting to confuse everyone involved in the process.



The "red herring" argument is a frequently-employed and efficacious tool to confuse everyone. A red herring is a specious argument—one that sounds cogent, but isn't really responsive to the issue.



If the denialist doesn't like what the federal government is doing, he says that it is a state issue.<sup>14</sup>

Of course, if the states are active, the denialist claims that it is a federal issue,<sup>15</sup> and that state action will create a "patchwork" of conflicting requirements. The "patchwork" argument is also an effective tool to broaden opposition to a measure.<sup>16</sup>



<sup>14</sup> In the 1970s, a variety of industries attacked the Federal Trade Commission because it took an aggressive stance on a number of consumer protection issues. The specter of deregulation was raised, supported by the idea that the federal agency was usurping state authority.

<sup>15</sup> In the 1990s, after federal regulatory agencies took weaker stances on consumer protection issues than state authorities, the industry switched its argument: now, states were the problem, and there were making appeals to the value of "uniformity" and preemption of state law.

<sup>16</sup> The broader the measure, the more industries will oppose it. For instance, industry groups said they opposed Senator Hollings' privacy bill (S. 2201) because it would have only regulated online businesses: "Technology companies have been working diligently for years to protect consumer data collected online," said Robert Holleyman, president of the Business Software Alliance. "Singling these companies out for additional regulation and liability will not promote these efforts, and may hinder the growth of electronic commerce."



With "duh," the denialist deliberately misunderstands and misinterprets others' questions or proposals. One is sometimes amazed at how smart an industry lobbyist can be until they're asked a question they don't want to answer.<sup>17</sup>

With nit picking, the denialist finds one problem with a fact asserted or the proposal for reform, and then harps on the problem incessantly.



A variation on the 8 of Clubs is "muddying the waters." This is where the denialist brings forth any information, whether specious or not, to confuse the issues.

A variation on the 9 of Clubs is "poisoning the well," using any pretense to attack the other side for reasons unrelated to the issue at hand.<sup>18</sup>



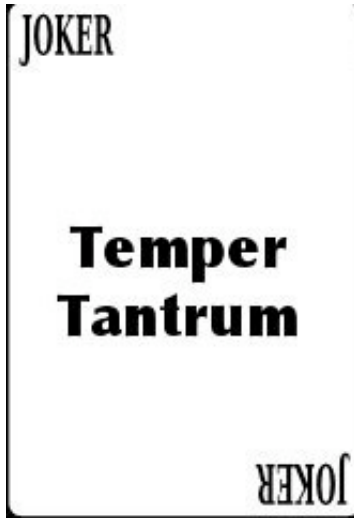
<sup>17</sup> In the Hewlett-Packard pretexting scandal, this exchange between Rep. Eshoo and Fred Adler, a company investigator, is an excellent "duh" moment: "ESHOO: ...If you say no, then I'll accept your answer. ADLER: OK. ESHOO: You said no? ADLER: No in regard to what? ESHOO: Well, you know what, you have to be smart to play dumb. So I think I've been pretty direct about my questions. I asked you if rusing has been used. And you asked me to define it. I give it to you, and then..." House Hearing on the Hewlett-Packard Pretexting Scandal, CQ Transcriptions, Sept. 28, 2006.

<sup>18</sup> In defending Channel One, Abramoff lobbyist Dennis Stephens proposed that Peter Farrara pen an oped for Grover Norquist that "hammered the 'anti-technology' crowd:" "When I talked with Peter this morning, he was planning to draft a press release hammering the "anti technology" crowd per Jeff B's request and will also be distributing Grover's nice piece on Channel One. A nice balance, a positive piece on the good guys and a hit piece on the bad guys. Sound good?" Senate Finance Committee Minority Report on Jack Abramoff (2005), available at <http://www.senate.gov/~finance/press/Bpress/2005press/prb101206.pdf>



The 9 of Spades is different than previous confusion tactics. Remember that most legislative staffers handle many different issues, and often are not expert in any one of them. This tactic leverages incomplete information to promote confusion.

Here, the denialist simply does not offer information, or allows others to hold misconceptions if it benefits the denialist. In technology and consumer protection, this usually occurs where an industry can fix a problem, but does not want to, and so its advocates don't mention their capabilities or practices.



At this point, the consumer advocate has proceeded far along the path of moving some type of proposal. It's time to sacrifice a high-value card—the joker. The denialist throws a temper tantrum. This may sound distasteful, but it actually works.

## Fifth Hand: The False Expert and Growing Petulance

The denialist is in serious trouble at this point. It is time to devote serious resources to fighting the proposal being debated.



The denialist should have a fake consumer group at this point. It will pay off with fake research and fake experts that provide a patina of legitimacy to the denialist's points.<sup>19</sup>

The 10 of Hearts is the first showing of petulance. Yes, believe it or not, petulance is widely used by denialists, and at this point in the debate, they become sophisticated, nuanced entities that need more understanding before the proposal advances.



Not only do you not understand the delicate denialist, you are proposing that the denialist be subject to bureaucrats! ("Bureaucrats" is always said with a sneer.) Buzz phrases here focus on denigrating Washington.

At this point, the denialist must propose "self regulation" to deal with the problem that doesn't exist. The cool thing about self regulation is that it cannot be enforced, and once the non-existent problem blows over, the denialist can simply scrap it!<sup>20</sup>



<sup>19</sup> Elizabeth Warren on Georgetown University's "Credit Research Center:" "I make only a simple empirical observation: As far as I can tell, the Credit Research Center, funded by the credit industry, has never produced a single piece of work at odds with a credit industry position on any subject, while it has produced multiple papers that support the industry's call for more pro-creditor, anti-debtor legislation - always in the name of independent, academic research."

<sup>20</sup> In the runup to passage of bank privacy legislation, data brokers created a group called the "Individual Reference Services Group" that promptly disappeared after the legislation passed.



The stakes are now high—go on the offensive, and call the consumer advocate a ninny.<sup>21</sup>

Petulance will continue to grow in intensity. One common tactic at this point is to admit to the behavior in question, and like a teenager, say "we'll we've always done this," and therefore we should be able to continue to do so.



Two related arguments—the denialist will say that the regulation won't work. And they won't help in finding a way to come to a reasonable solution.

Finally, continuing in the teenager theme, the denialist will argue that they won't comply, even if directed to by law. Rule of law be damned!



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<sup>21</sup> One of Jack Abramoff's teammates, Dennis Stephens, proposed to attack Gary Ruskin of Commercial Alert because Ruskin's group was criticizing "Channel One:"

From: Dennis Stephens  
To: Chad Cowan  
Cc: Abramoff, Jack

"Have you guys ever looked into Gary Ruskin, a Nader protege who runs Commercial Alert (which is attacking Channel One, our client)...The guy is a weasel...Someone should consider doing an in depth piece on Ruskin and his Nader front groups. We should have lunch and review the options."

## Sixth Hand: The Gloves Come Off

If the denialist is on the brink of losing, a number of high stakes arguments can be made.



If there's a bear market, obviously there shouldn't be interventions in the market, right?

If there's a bull market, obviously there shouldn't be interventions in the market, right?



Sometimes the success of a consumer intervention will create "blowback," and allow the industry to not only win but also demand other concessions.<sup>22</sup>

One can always raise the specter of "big government." This is a high-risk card because big business loves big government.



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<sup>22</sup> The Federal Communications Commission experienced blowback when they ruled that "junk fax" senders had to document that they had consent from recipients of their messages. The junk faxers organized into a huge coalition (the deceptively-named "Fax Ban Coalition"), lobbied Congress, reversed the FCC's rule and actually make it easier to send junk faxes by having the "Junk Fax Protection Act" passed.





Although implausible, many denialists will argue that the proposal at issue will cause them to leave the country, and no longer do business in America.

Giving money to the leadership of the Senate and House is a great strategy, because no proposals will be considered at all if the leadership blocks them. The leadership is rarified; one only taps them in desperate situations.



"Can't be enforced" is a different argument than "it won't work." Here, the denialist is usually threatening to operate an offending practice overseas, or oddly enough, arguing that because a proposal doesn't give someone a right to sue, it isn't worth passing.

Of course, if the proposal gives one a right to sue, it is enforceable, and the denialist will complain of frivolous lawsuits.



This is a very powerful argument in the post-9/11 environment. It can be used to get things done quickly, as Verisign realized when it wanted to move a "root server" without following normal process. In Department of Commerce officials' emails, Verisign made pleas to declare an emergency to get their way: The company wants "to push us to declare some kind of national security threat and blow past the process," one e-mail said. The subject line of another message described the company's "request for immediate authority to effect address change."



The denialist can almost always argue that the proposal is unconstitutional. After all, businesses were afforded many civil rights before women achieved suffrage.

Almost any proposal can be styled as "Un-American." Typically this is bundled with wild, inaccurate claims about European regulations (i.e., you can't do business in Europe at all). You'll wonder if the denialist has even been to Europe!



A different, but similar argument, is that the proposal smacks of the paternalistic "command and control" of Communism.

And finally, perhaps industry's strongest card—"we'll lose money." Of course, this often isn't true. Proposals for reform create new opportunities, and many businesses have thrived under the very proposals they said would wreak havoc.<sup>23</sup>



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<sup>23</sup> "Wall Street...has greeted practically every important market regulation introduced in this century with howls of dismay and predictions of disaster. In 1934, the head of the New York Stock Exchange told Congress that if the Securities Exchange Act, which became the foundation of market regulation in the U.S., was made law there was a chance that stock trading in the U.S. would be "entirely destroyed." Needless to say, it wasn't. In 1975, when the S.E.C. abolished fixed commissions, the Street claimed that its business would be demolished. Instead, after transaction costs fell, trading volume shot up. And in 2000, when the S.E.C. required companies to disclose material information to all investors, rather than just to insiders, we were told that this would strangle the flow of information to the market and make stock prices swing wildly. But, as numerous academic studies have found, it has actually done the opposite..." James Surowiecki, *Over There*, New Yorker Magazine, Feb. 2, 2007.

## **Conclusion**

I hope the Denialists' Deck of Cards has been an entertaining critique of Washington policy groups' rhetoric. While a critic may see this work as cynical or ideological, bear in mind that it is a reaction to and a rejection of commonly-used techniques that remain effective in stifling legitimate proposals in consumer protection. Enumerating them in this fashion also can help consumer advocates frame the opposition that they receive.

I hope to expand upon it in the near future with retorts to these techniques.