HEINONLINE

Citation: 1973 Wis. L. Rev. 400 1973

Content downloaded/printed from
HeinOnline (http://heinonline.org)
Thu Aug 28 11:15:50 2014

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at http://heinonline.org/HOL/License

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0043-650X

THE FUNCTIONS OF DISCLOSURE REGULATION IN CONSUMER TRANSACTIONS†

WILLIAM C. WHITFORD*

One of the oldest and most prevalent methods of regulating consumer transactions has been to require the seller[1] to disclose to his consumer buyer various types of information about their contractual transaction.[2] The contract law doctrine ascribing voidability to a contract if its terms are too vague (whatever *too* vague is) can be viewed as an indirect form of such regulation.[3] The common law of misrepresentation and public law concerning deceptive advertising, although usually concerned with preventing the dissemination of misleading information, at times have been interpreted to re-

---

† Financial support in the preparation of this article has been provided by the Institute for Research on Poverty, University of Wisconsin, from funds made available by the Office of Economic Opportunity, pursuant to the Economic Opportunity Act of 1964. I have received valuable research assistance from Mr. Scott Herrick, third-year student at the University of Wisconsin Law School, and Mr. Robert Heidt, J.D., 1972, University of Wisconsin. I am grateful for helpful comments on earlier drafts of this article from Professors Paul Brest, Richard Danzig, Richard Markovits, and William Warren. all of Stanford Law School. The sole responsibility for views expressed and any errors is mine.

* Professor of Law, University of Wisconsin. Visiting Professor of Law, Stanford University, 1972-1973. LL.B., 1964, Yale University.

1. The term "seller" is used in this article to denote the professional party to a consumer transaction. It includes, therefore, not only the seller of goods and services but also the lender or provider of credit.

2. In this article I shall use the term "disclosure regulation" to describe this type of regulation. By disclosure regulation, I mean only regulation which *requires* the disclosure of information about a prospective transaction. The term does not include regulation prohibiting the dissemination of false or misleading information about a proposed transaction. *Cf.* note 191 *infra* and accompanying text.

This article discusses only disclosure regulation of consumer transactions. The term "'consumer transaction" has no accepted definition, of course. Regulation of the sale of securities can certainly be viewed as consumer protection regulation, and an excellent example of the use of disclosure as a regulatory technique. And the mushrooming regulation of franchising, where disclosure is also heavily relied upon, is often viewed as consumer protection legislation. *See, e.g.*, CAL. CORP. CODE § 31000 *et seq.* (West Supp. 1972). In this article, however, I have in mind principally transactions in which goods, services, or credit are purchased "primarily for personal, family or household purposes," to borrow from the definition of "consumer goods" in UNIFORM COMMERCIAL CODE § 9-109(1).

3. *See, e.g.*, Klimek v. Perisich, 231 Ore. 71, 371 P.2d 956 (1962). Another excellent example of a common law effort to induce disclosure is the so-called "ticket" cases, in which the courts have consistently held that a limitation-of-liability clause does not become part of the contract unless the seller provides notice of the term, in a manner that ought to bring it to the attention of the consumer. *E.g.*, Jones v. Great Northern Ry., 68 Mont. 231, 217 P. 673 (1923).

quire the disclosure of contractual information.[4] With the growth of consumer protection as an important regulatory concern in the last decade or two, there has been an increasing incidence of disclosure regulation. The retail installment sales acts enacted in numerous states emphasize disclosure of information deemed relevant to many or most consumer buyers.[5] The Uniform Commercial Code, in what few efforts it makes to regulate consumer transactions, generally stresses disclosure regulation.[6] In the 1960's the pace at which disclosure regulation was enacted increased, with the best known enactments being the truth-in-lending[7] and truth-in-packaging legislation.[8] And proposals abound for various new types of disclosure regulation—for disclosure of information pertaining to product safety,[9] for more complete labeling of products,[10] and so forth.

A recent state enactment and a bill which was nearly enacted by the recently adjourned Ninety-second Congress illustrate the important position disclosure regulation still occupies in the regulation of consumer transactions. The Wisconsin Consumer Act[11] was enacted in the spring of 1972 and became effective on March 1, 1973. A comprehensive regulation of consumer credit transactions, the Act is basically a compromise between the Uniform Consumer

4. *See, e.g.*, J.B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir. 1967); Obde v. Schlemeyer, 56 Wash. 2d 449, 353 P.2d 672 (1960).

5. *See* B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 95-100 (1965).

6. *E.g.*, UNIFORM COMMERCIAL CODE § 2-316(2). *See also id.* § 2-302, Comment 1; Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967).

7. Consumer Credit Protection Act, 15 U.S.C. §§ 1601 *et seq.* (1970). Only the first subchapter of this Act, sections 1601-65, concerns consumer credit cost disclosure and is known as the Truth in Lending Act. Henceforth this subchapter will be referred to as "truth-in-lending."

8. Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451-61 (1970). *Cf.* Hart, *Can Federal Legislation Affecting Consumers' Economic Interests Be Enacted?*, 64 MICH. L. REV. 1255 (1966). Some of the history of the application of this legislation can be found in P. KEETON & M. SHAPO, PRODUCTS AND THE CONSUMER: DECEPTIVE PRACTICES 295-97 (1972) and sources cited therein.

9. Probably the most recent enactment of disclosure regulation was the Motor Vehicle Information and Cost Savings Act, Pub. L. No. 92-513 (U.S. CODE CONG. & AD. NEWS, 92D CONG., 2D SESS., at 1110 [1972]). Title II of the Act requires the Secretary of Transportation to compile information about damage suceptibility, repair costs, and insurance premiums for the various automobile makes and models and then to supply it to consumers in various ways.

10. *See* notes 132-34 *infra* and accompanying text.

11. Ch. 239, § 38, [1971] Wis. Laws 688 (codified at WIS. STAT. chs. 421-27 [1971]). The Act and its legislative history are discussed in considerable detail elsewhere in this issue. Crandall, *The Wisconsin Consumer Act: Wisconsin Consumer Credit Laws Before and After*, 1973 WIS. L. REV. 334. For further discussion see Eisenberg & Howard, *Warning From Wisconsin: New Regulatory Laws For Collection of Consumer Debts*, 77 COM. L.J. 246 (1972).

Credit Code[12] and the National Consumer Act.[13] Many of the Act's provisions substantively regulate contractual terms—that is, certain contractual arrangements in consumer credit transactions are prohibited, no matter how conspicuously the seller informs the prospective buyer of the arrangement.[14] In a number of important instances, however, the Wisconsin Consumer Act relies, sometimes rather innovatively, on required disclosure as a technique for regulating consumer credit transactions. Examples of the Act's disclosure requirements will be given later in this article.

The proposed federal legislation would have regulated warranties accompanying the sale of consumer products affecting interstate commerce.[15] The bill was nearly enacted in the past Congress[16] and similar legislation stands a good chance of passage in the present Congress. Compulsory disclosure was the principal regulatory technique proposed in the bill.[17] The bill would have

---

12. The Uniform Consumer Credit Code was first promulgated by the National Conference of Commissioners on Uniform State Laws in 1968. By the end of 1972, it had been enacted in six states. 1 CCH CONSUMER CREDIT GUIDE ¶ 4770 (1973). It has been introduced in most other states but has failed to be enacted. *Id.* at ¶ 4771. Although the National Conference has not officially withdrawn the Act, it is known that a committee of the Conference is preparing substantial revisions to the original Act. A revised version of the Act may be promulgated within a year or two.

13. NATIONAL CONSUMER ACT (First Final Draft). This proposed statute was drafted by the National Consumer Law Center, then associated with Boston College Law School. Yet to be enacted in any state, it was drafted primarily as an alternative to the Uniform Consumer Credit Code, which many consumer spokesmen have criticized as too protective of merchant and lender interests. *See, e.g.*, CONSUMER RESEARCH FOUNDATION, CONSUMER VIEWPOINTS: A CRITIQUE OF THE UNIFORM CONSUMER CREDIT CODE (R. Elbrecht ed. 1969).

14. For example, in many consumer credit transactions the seller or lender may take an enforceable security interest only in certain property —primarily the property the purchase of which is being financed. WIS. STAT. § 422.417 (1971).

15. S. 986, 96th Cong., 1st Sess. (1971). As enacted by the Senate, sales under $5 were excluded from the bill's most important provisions. *Id.* § 101(2). The bill also contained unrelated provisions expanding the Federal Trade Commission's powers.

16. The bill passed the Senate on November 8, 1971. It was never reported by the House Interstate and Foreign Commerce Committee. *See* 30 CONG. Q. WEEKLY REP. 2711 (Oct. 21, 1972). Most of the opposition to the bill stemmed from its provisions concerning the Federal Trade Commission's powers and not from the provisions pertaining directly to product warranties. *See, e.g.*, S. REP. No. 92-269, 92d Cong., 1st Sess. 56-63 (1971) (separate views of Mr. Cook).

17. This bill is an excellent example of the continued vitality of disclosure regulation. Bills regulating product warranties have been regularly introduced in the past several Congresses. The earlier bills relied quite substantially on direct substantive regulation of terms. S. 2726, 90th Cong., 1st Sess. (1967); S. 2727, 90th Cong., 1st Sess. (1967). For a discussion of these bills see Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 WIS. L. REV. 1006,

established substantive standards for a comprehensive warranty, or in the bill's terms a "full warranty."[18] Only warranties complying with these federal standards could have been described to consumers as "full warranties."[19] Other warranties would have had to be "designated in such manner so as to indicate clearly and conspicuously the limited scope of the coverage afforded."[20] Further examples of the bill's use of disclosure as a regulatory technique will be given throughout this article.

The continued reliance on disclosure as an important technique for regulating consumer transactions is contrary to the advice of many commentators, who have argued that although not positively harmful, such regulation is typically almost useless.[21] The concern of these critics has not been principally with the difficulty in obtaining seller compliance with disclosure regulation, but rather with the alleged lack of effect either on consumer behavior or on the substance of transactions. They correctly point out that the proponents of disclosure regulation typically presume that conspicuous and comprehensible disclosure will cause many consumers to change their buying behavior so as either to refrain from buying particular products or services that they otherwise would have bought, or to shop more carefully among competing products or services. Once this effect takes hold, many proponents of disclosure regulation seem to presume, sellers will be forced to compete with regard to the disclosed aspects of the transactions they offer, with the result that all or nearly all consumer transactions will become "fairer," or more "proconsumer."[22] Critics argue this scenario

---

1072-75 (1968). By the 91st Congress, however, those provisions had been mostly deleted and reliance placed almost entirely on disclosure regulation. S. 3074, 91st Cong., 1st Sess. (1969). That bill, which was essentially identical to the bill introduced in the 92d Congress, also passed the Senate, only to die in the House without coming to a floor vote.

18. To qualify for a "full warranty," the seller or manufacturer must undertake *inter alia*: "(1) to repair or replace any malfunctioning or defective . . . consumer product; (2) within a reasonable time; and (3) without charge." S. 986, 92d Cong., 1st Sess. § 104(a)(1)-(3) (1971).

19. *Id.* § 104.

20. *Id.* § 103(2). *Id.* § 109 would have authorized the Federal Trade Commission to establish rules for the standardized designation of limited warranties.

In addition to providing for this technique of standardizing warranty designations, the bill would have required each written warranty itself to contain a "simple and readily understandable" explanation of the various terms of the warranty. *Id.* § 102.

21. Jordan & Warren, *Disclosure of Finance Charges: A Rationale,* 64 MICH. L. REV. 1285, 1320-22 (1966); Kripke, *Gesture and Reality in Consumer Credit Reform,* 44 N.Y.U.L. REV. 1, 1-11 (1969); Note, *Consumer Legislation and the Poor,* 76 YALE L.J. 745 (1967); *cf.* Travers, *Forward,* 17 KAN. L. REV. 551 (1969); Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition,* 31 U. PITT. L. REV. 349 (1970).

22. It is, of course, impossible to prove that the legislative purpose of all disclosure regulation is consistent with the statements in the text. See text preceding note 24 *infra.* I believe the statements to be correct never-

rarely if ever takes place because the disclosed information either is not learned by consumers, or if it is, it is not used by them in reaching purchase decisions. The critics uniformly contend that this description of the effects of disclosure applies particularly to the response of low income consumers to disclosure regulation. But many critics also argue or assume that middle and upper class consumers react in a substantially similar way.[23]

In one sense this article is an attempted evaluation of the criticism of disclosure regulation made by the aforementioned commentators. More specifically, I will identify possible purposes of disclosure regulation, including the goal of inducing consumers to become more careful shoppers. Using both theory and existing data on impact, I will evaluate to what extent disclosure does or may be able to achieve these purposes at acceptable costs. And I will discuss ways in which disclosure regulation might be formulated so as to fulfill its potentially achievable purposes better than it generally has in the past.

It is necessary to make two preliminary points about the purposes of disclosure regulation. The commentators who criticize disclosure regulation as essentially useless assume that such regulation is intended to have impact on consumer behavior. Disclosure regulation might be justified even if it were primarily intended only to induce sellers to actually disclose the required information. Perhaps we would have a more just society if relations between consumer and merchant appeared more honest, even if there is no change in consumer behavior or the content of transactions. However, because my principle concern in this article is whether disclosure regulation can be a regulatory tool for adjusting the balance of power or advantage between merchant and consumer, I will share the assumption of the commentators that disclosure regulation is intended to have impact on consumer behavior.

Even given this assumption, it is useful to distinguish between two different types of impacts on consumer behavior that disclosure regulation might be intended to have. I have indicated that commentators usually assume that an important purpose in requiring disclosure is to affect the purchasing decisions of consumers. Much disclosure regulation does in fact purport to have this purpose. Where it does, since such regulation must necessarily require disclosure before the transaction is concluded, it will be called precon-

theless. That they are correct for truth-in-lending is quite evident. *See* Truth in Lending Act § 102, 15 U.S.C. § 1601 (1970); Note, *Truth in Lending: The Impossible Dream,* 22 W. RES. L. REV. 89 (1970). The proposed federal warranties legislation indicated that disclosure was to be required "[i]n order to . . . improve competition in the marketing of consumer products . . . ." S. 986, 92d Cong., 1st Sess. § 102(a) (1971).

23. *E.g.,* Note, *Consumer Legislation and the Poor, supra* note 21, at 767. In an earlier article, I also advanced this argument with regard to some types of disclosure regulation. Whitford, *supra* note 17, at 1097.

tract disclosure regulation. Disclosure regulation can be designed to affect a very different kind of consumer behavior—the many ways in which the consumer adjusts to a transaction after it is concluded. For example, product warranties are usually conditioned on the prompt return of a malfunctioning product to the seller and frequently on maintaining the product in a reasonable or specified manner. Providing a consumer with information about these requirements can assist him in planning his postcontract activities so as to protect these rights.[24] Where disclosure regulation is intended to affect behavior occurring subsequent to the conclusion of the contract, it will be called postcontract disclosure regulation.[25]

The distinction between precontract and postcontract disclosure regulation is crucial to much of the analysis in this article, particularly to determining how the manner and timing of required disclosure might be formulated so as to better fulfill the purpose of these different types of disclosure regulation. Subsequent discussion will therefore be organized on the basis of this conceptual distinction.

I. PRECONTRACT DISCLOSURE REGULATION

A. *Empirical Evaluation—Impact of Truth in Lending*

Before discussing the potential purposes of precontract disclosure regulation, it is useful first to summarize the information available about the impact of truth-in-lending, the outstanding recent example of precontract disclosure regulation. There are several reasons why truth-in-lending provides a good subject for studying the potential impact of precontract disclosure regulation on consumer buying behavior. First, the proponents of truth-in-lending clearly stated that they intended the legislation to affect credit purchasing decisions.[26] The two most important figures that must be disclosed

24. Of course, such information might also affect some consumers' purchasing decisions and regulation requiring disclosure of this information could be intended to affect both purchasing decisions and decisions pertaining to postcontract activities. I would consider legislation having this dual purpose to be both precontract and postcontract disclosure regulation.

25. I have borrowed this term, as well as "precontract disclosure regulation" from Curran, *Legislative Controls As a Response to Consumer Credit Problems*, 8 B.C. IND. & COM. L. REV. 409 (1967).

26. It has been suggested that perhaps truth-in-lending is intended only to have primary effects—that is, to induce compliance—without any intent to affect consumer behavior at all. *See* R. Pullen, The Impact of Truth in Lending Legislation: The Massachusetts Experience 5-6 (Research Rep. No. 43 to Federal Reserve Bank of Boston, Oct. 1968). The congressional declaration of purpose quite clearly negates this suggestion, however. Truth in Lending Act § 102, 15 U.S.C. § 1601 (1970). So do the many statements of Senator Paul Douglas, the principal proponent of truth-in-lending during the long battle to secure its enactment. *E.g., Hearings on S, 750 Before a Subcomm. of the Senate Comm. on Banking and Currency,* 88th Cong., 1st Sess., pt. 1, at 2 (1963) (statement of Sen. Douglas).

as a result of truth-in-lending are the "finance charge" and the "annual percentage rate."[27] The finance charge is supposed to enable consumers to consider more intelligently the economic advantage of paying cash rather than borrowing to make a purchase. Requiring disclosure of the annual percentage rate means that all sellers must disclose an interest rate calculated according to the same arithmetic formula, thereby enabling consumers to compare more easily the interest rates offered by different lending institutions. Second, the formula for determining the annual percentage rate yields a figure that is considerably higher both than was indicated by the formulas previously used by most lenders in stating interest rates and than was commonly assumed by consumers to be the level of interest rates before truth-in-lending.[28] Truth-in-lending, therefore, provides consumers with price information that previously was unknown to most of them. Since consumers are generally assumed to be more sensitive in their shopping behavior to price terms than to most other terms, it appears this legislation should affect consumer purchasing behavior if precontract disclosure regulation can ever have such impact. Third, a number of empirical studies—more than concern any other recent example of disclosure regulation—have attempted to assess the impact on consumers of the disclosures required by truth-in-lending.[29] Finally, there is reliable evidence that the vast majority of lenders had substantially complied with truth-in-lending disclosure requirements within several months after the legislation first became effective on July 1, 1969.[30] Thus any failure of truth-in-lending to affect

27. These terms are defined in Truth in Lending Act §§ 106-07, 15 U.S.C. §§ 1605-06 (1970). When disclosure is required, these terms must be printed more conspicuously than surrounding terminology. Federal Reserve Bd. (FRB) Reg. Z, 12 C.F.R. § 226.6 (1972). For other information that must be disclosed in consumer credit transactions see Truth in Lending Act §§ 127-29, 15 U.S.C. §§ 1637-39 (1970).

28. G. KATONA ET AL., 1969 SURVEY OF CONSUMER FINANCES 18-20 (1970) [hereinafter cited as KATONA]; W. MORS, CONSUMER CREDIT FINANCE CHARGES: RATE INFORMATION AND QUOTATION (1965). The congressional hearings on truth-in-lending that extended over the 10 years preceding its enactment also contain voluminous support for these statements. *See, e.g., Hearings on S. 2755 Before a Subcomm. of the Senate Comm. on Banking and Currency,* 86th Cong., 2d Sess. 583 (1960) (statement of Richard L.D. Morse); *Hearings on S. 750 Before a Subcomm. of the Senate Comm. on Banking and Currency,* 88th Cong., 1st Sess., pt. 1, at 1485 (1963).

29. The report of the National Commission on Consumer Finance did not become available until after I completed this article. NAT'L COMM'N ON CONSUMER FIN., CONSUMER CREDIT IN THE UNITED STATES, in CCH INSTAL. CREDIT GUIDE, Issue No. 215, Jan. 15, 1973 [hereinafter cited as COMMISSION REPORT]. Chapter 10 of the report, *id.* at 169-91, contains an evaluation of the impact of truth-in-lending. Publishing deadlines have prevented me from discussing that evaluation in the text. The Commission's evaluation is based, however, on the same studies that I discuss subsequently in the text. Wherever the Commission's assessment of these studies differs significantly from mine, I have tried so to indicate in the footnotes.

30. The most important evidence of substantial lender compliance with truth-in-lending are two Federal Trade Commission surveys measur-

consumer buying behavior cannot readily be explained on the ground that disclosure is simply not being made.

For truth-in-lending to have direct impact on individual consumer purchase decisions, the required disclosures must first cause more consumers to be aware of the annual percentage rates and/or finance charges proposed. This awareness must then cause these consumers either to shop comparatively for lower annual percentage rates and/or finance charges when purchasing credit, or to weigh more carefully the alternative of paying cash rather than buying on credit.

1. INTEREST RATE AWARENESS

There have been several efforts to determine the impact of truth-in-lending on consumer knowledge of interest rates, but very few

ing compliance by a sample of retail merchants operating in urban areas. Federal Trade Comm'n, Report on Surveys of Creditor Compliance With the Truth in Lending Act (April 1971) [hereinafter cited as Compliance Survey]. The surveys essentially measured compliance as of March and April 1970, approximately 9 months after truth-in-lending became effective. In all categories of merchants surveyed, over 80% were in full or substantial compliance with truth-in-lending. Moreover, because merchants with high sales volume were the most likely to be in compliance, an even higher percentage of credit transactions were accompanied by full or substantial disclosure of the information required by truth-in-lending. The survey considered a merchant to be in substantial compliance if he disclosed the most important information required by truth-in-lending: the annual percentage rate and the total finance charge. The methodology of the surveys permitted only compliance with disclosure terminology to be measured reliably, so use of these terms with some reasonable figure, whether or not accurate, was considered substantial compliance.

There are sufficient methodological problems with the compliance surveys to prevent interpretation of their results as a precise measure of the level of compliance. For example, the surveys measured compliance only among retail merchants. Federal Trade Commission officials have stated in private interviews with me, however, that they believe compliance is even more substantial among other types of lending institutions subject to Commission enforcement of truth-in-lending, such as loan companies. The survey also measured compliance only by merchants in urban areas. Little information is available on the level of compliance in rural areas and small towns. And there is no concrete information available on compliance by lending institutions not subject to Commission enforcement. *See* Truth in Lending Act § 108, 15 U.S.C. § 1607 (1970).

One can argue whether the compliance surveys should produce concern about the extent of noncompliance with truth-in-lending or satisfaction with the remarkable degree of compliance achieved in a very short time. It seems clear, however, that in a very short period of time a sufficiently high level of compliance was achieved to permit observation of possible behavior modification by consumers. Moreover, although no survey of compliance has been made since 1970, responsible officials uniformly believe that since then the level of compliance has, if anything, increased. *See* Board of Governors of the Federal Reserve System, Annual Report to Congress for the Year 1971, at 1 (1972) [hereinafter cited as 1971 Annual Report].

to determine the effect of the legislation on finance charge awareness.[31] The best known of the efforts to determine the degree of annual prcentage rate awareness are two surveys commissioned by the Federal Reserve Board, one conducted just before the Truth in Lending Act became effective, and the other 15 months after its

---

31. It is sensible, of course, to concentrate on determining awareness of annual percentage rates, since it is this information that best facilitates comparative shopping. Finance charges can feasibly be compared only if the amount financed (price less downpayment) and period of repayment are the same. On the other hand, information about the finance charge can importantly aid the decision whether to pay cash or credit, since it provides the consumer with easily understood information about the cost of credit. *See* Jordan & Warren, *supra* note 21.

In one survey, conducted 15 months after the effective date of truth-in-lending, respondents were asked to estimate the finance charge on a hypothetical purchase of a consumer durable. The purpose was to determine knowledge of prevailing charges. The results indicated a consistent tendency to overestimate finance charges. Because no similar survey was taken before truth-in-lending, it cannot be determined certainly to what extent truth-in-lending contributed to this tendency. However, a striking number of respondents who accurately estimated the annual percentage rate for the hypothetical credit purchase predicted a finance charge of roughly twice that indicated by their annual percentage rate estimate. The obvious inference is that many respondents were estimating the finance charge by simply multiplying the amount financed by the annual percentage rate. This would be an appropriate calculation if interest rates were quoted on an "add-on" basis, as they commonly were before truth-in-lending, but the calculation yields a finance charge roughly twice the proper amount if the annual percentage rate is used and the loan is repaid in periodic installments. G. Day & W. Brandt, A Study of Consumer Credit Decisions: Implications for Present and Prospective Legislation, pt. IV, at 21-27 (Stanford University 1972). [This monograph is expected to be published soon as a supplementary study accompanying the final report of the National Commission on Consumer Finance. Citations in this article are to a prepublication manuscript]. Many of the findings of the study are discussed in COMMISSION REPORT, *supra* note 29, at 175-83. *See* T. Deutscher, Credit Legislation Two Years Out: Awareness Changes and Behavioral Effects of Differential Awareness Levels, pt. III, at 14-18. [This monograph is expected to be published soon as a supplementary study accompanying the final report of the National Commission on Consumer Finance. Citations in this article are to a prepublication manuscript.] Some of the findings of this study are discussed in COMMISSION REPORT, *supra* note 29, at 180.

The conclusion suggested by this survey is that, at least in the short run, truth-in-lending causes many consumers to overestimate finance charges. It should be noted, however, that the survey was based on a hypothetical purchase. In real life, consumers would receive disclosures of both the annual percentage rate and the finance charge, and this disclosure, if seen and understood before a purchase is concluded, may prevent some consumers from making an overestimate of finance charges. Indeed, in the same survey, respondents were asked to estimate the finance charge on past purchases and apparently they could do so with about the same frequency as they could recall accurately the annual percentage rate. The validity of this data is doubtful, however, since the report on the survey indicated that most respondents would estimate finance charges only after the interviewer probed or asked them to consult their records. G. Day & W. Brandt, *supra*, pt. IV, at 29-32.

effective date.[32] In each survey the respondents were asked if they had entered into certain types of credit transactions within a specified time period preceding the interview, and, if so, what annual percentage rate they had agreed to pay.[33] Both surveys consisted primarily of two independent probability samples, one taken from poverty areas in metropolitan centers and the other from the universe of telephone subscribers outside defined poverty areas.[34]

The Federal Reserve Board's analysis of the results of these surveys compared the number of respondents to each survey who indicated they did not know what annual percentage rate they were paying. That comparison indicated that the percentage of "don't know" responses declined in the second survey for each transaction type.[35] This trend occurred for nearly all income and education levels, although there was a sharper reduction in "don't know" responses at higher income levels than at lower ones.[36] In both

32. For a description of the surveys see Board of Governors of the Federal Reserve System, Annual Report to Congress on Truth in Lending for the Year 1969, appendix B (1970) [hereinafter cited as 1969 Annual Report]; Board of Governors of the Federal Reserve System, Annual port to Congress on Truth in Lending for the Year 1970, appendix B (1971) [hereinafter the 1970 Annual Report]. The surveys are also described in Shay & Schober, Consumer Awareness of Annual Percentage Rates of Charge in Consumer Installment Credit: Before and After Truth in Lending Became Effective, at 10-19 (1971). [This monograph will be published soon as a supplementary study accompanying the final report of the National Commission on Consumer Finance. Citations in this article are to a prepublication manuscript.] Some of the findings of this study are discussed in COMMISSION REPORT, *supra* note 29, at 175-83.

33. In both surveys respondents holding open end retail charge accounts or bank credit cards were asked what interest would be charged if they did not pay within the "free ride" period, whether or not such an interest charge had in fact been imposed in any preceding period. Under truth-in-lending, disclosure in open end transactions is required at the time the overriding credit agreement is first consummated. Truth in Lending Act § 127(a), 15 U.S.C. § 1637(a) (1970).

34. *See* authorities cited note 32 *supra*. In the second survey there was in addition a third sample of 5,000 household heads from both poverty and nonpoverty areas. This sample was used solely to obtain more respondents who had entered home mortgage and home improvement credit transactions. Shay & Schober, *supra* note 32, at 15.

35. The following table was constructed from data presented in 1970 Annual Report, *supra* note 32, at appendix B.

PERCENTAGE OF "DON'T KNOW" RESPONSES

TYPE OF TRANSACTION	BEFORE TRUTH IN LENDING (1969 SURVEY)	FIFTEEN MONTHS LATER (1970 SURVEY)
First Mortgage Loans	26.7	12.7
Home Improvement Loans	35.0	27.3
New Automobile Loans	26.6	21.4
Used Automobile Loans	40.4	33.8
Appliance and Furniture Loans	57.7	41.6
Personal Loans	42.6	27.8
Open End Retail Charge Accounts	48.1	32.2

36. The following table was constructed from data presented in the 1970 Annual Report, *supra* note 32, at appendix B. First mortgage and

surveys the percentage of "don't know" responses was inversely related to both income and educational level.[37] The Federal Reserve Board analysis of the surveys also noted that in both surveys many respondents stated unrealistically low annual percentage rates. Since no effort was made to determine what rates the respondents were in fact paying, it was not possible to determine how many respondents accurately reported their rates. In the second survey there was a general increase in the size of rates reported, however, and the Federal Reserve Board considered this increase further evidence that truth-in-lending had induced a greater awareness of annual percentage rates by credit buyers.[38]

A study commissioned by the National Commission on Consumer Finance has analyzed the Federal Reserve Board data in a different way in an effort to take better account of the very low rates frequently reported by respondents to the surveys.[39] The study estimated a range within which annual percentage rates in each transaction type would most likely fall.[40] On the basis of these estimates, the study classified most of the responses to each survey as clearly indicating "unawareness," either because the re-

---

home improvement loans are excluded because the data is not available in the same income groupings, respondents in higher income groupings appeared to have higher awareness levels for these transaction types as well.

PERCENTAGE OF REDUCTION IN "DON'T KNOW" RESPONSES FROM 1969 TO 1970 FRB SURVEY

TYPE OF TRANSACTION	HOUSEHOLD INCOME			
	LESS THAN $5,000	$5,000-$8,000	$8,000-$10,000	MORE THAN $10,000
New Automobile Loans	-3.4*	24.5	21	15.5
Used Automobile Loans	10.2	5.8	-1.5*	32.5
Appliance and Furniture Loans	12.6	12	17.1	54
Personal Loans	22	15.9	21	46.6
Retail Charge Accounts	11.6	24	32	34.3

* There was actually an increase in "don't know" responses in these categories

The table suggests a very clear association between income and rate of reduction in "don't know" responses, at least at the highest and lowest income levels. The number of responses in some categories is quite small and may account for aberrations in the overall trend that can be observed in the middle-income categories.

37. This conclusion is evident from the tables presented in 1970 Annual Report, *supra* note 32, at appendix B.

38. *Id.* at 8-13.

39. Shay & Schober, *supra* note 32.

40. For a description of how these estimates were made see *id.* at 22-25. Estimates were based on data collected in the Federal Trade Commission's survey of creditor compliance with truth-in-lending. *See* note 31 *supra*. First mortgage transactions were excluded from the analysis made in this study. In making the estimates the authors were generous in their setting of ranges of awareness. Thus, purchasers of new automobiles were considered aware if they indicated they were paying 8% interest or above; purchasers of furniture and appliances were considered aware if they responded 12% or above.

spondent indicated he did not know what annual percentage rate he paid or because he gave a percentage that was improbably low. The remaining responses were classified as indicating awareness, although all that truly could be said about these responses is that probably they approximate the annual percentage rate paid.

Analyzed in this manner, the level of rate awareness for installment credit transactions rose from 14.5 percent in the first survey to 38.3 percent in the second survey.[41] The results for retail revolving credit indicated a similar degree of improvement in awareness, although the general level of awareness was much higher in each survey (35.2 percent and 55.5 percent).[42] Consistent with the findings of the Federal Reserve Board, both the absolute level of annual percentage rate awareness and the degree of improvement correlated directly with education and income.[43] The most dramatic differences of this nature occurred when respondents involved in installment credit transactions were classified according to those who lived in poverty areas and elsewhere—a classification not appearing in the Federal Reserve Board's analysis. The level of awareness of respondents in poverty areas was only 9.7 percent and 16.1 percent in the two surveys.[44] Thus, both the level of awareness and the rate of increase in awareness was substantially lower for residents of poverty areas than for those living elsewhere.[45]

---

41. Shay & Schober, *supra* note 32, at 28. Installment credit transactions are ones in which the debtor agrees to pay a predetermined number of payments of a predetermined amount in order to discharge the debt.

42. *Id.* The increase in awareness for holders of bank credit cards—like retail revolving credit, an open end credit plan—was even more substantial: 26.6% to 63.4%. *Id.*

43. *Id.* at 33-36. The percentage decrease in unawareness from the 1969 to the 1970 survey for all closed end (installment) transactions combined was as follows:

PERCENTAGE DECREASE IN UNAWARENESS

HOUSEHOLD INCOME	PERCENTAGE DECREASE
Less than $5,000	18.6
$5,000-$8,000	17.1
$8,000-$10,000	24.9
More than $10,000	37.2

Id. at 35. *Compare* the above table *with* table, *supra* note 36.

44. Shay & Schober, *supra* note 32, at 38. The rate of increase for poverty areas was also less, as awareness increased in nonpoverty areas from 14.7% to 41.3%. *Id.* However, if account is taken of a number of other variables which appear to explain much of the differential in level of interest rate awareness, residence in a poverty area or elsewhere disappears as an important explanation for the differential in awareness among subgroups in the population. These other variables are income, education, race, and knowledge of the existence of the truth-in-lending law. *Id.* at 59-76.

The data for poverty areas is based on the special survey of urban poverty centers. *See id.* at 36-37; text accompanying note 34 *supra.*

45. The awareness data for installment credit transactions was also classified by transaction type. Except for used car transactions, where the rate of increase was low, there was not substantial variance in the

Although there have been several other attempts to measure the level of annual percentage rate awareness,[46] I am aware of only one other study which compared levels of awareness both before and after the effective date of truth-in-lending. This study, conducted at the University of Michigan, also cured one of the major difficulties with the Federal Reserve Board surveys by determining awareness through a comparison of the actual rate paid by the respondent with the rate reported in the interview.[47] The results showed that, although the percentage of respondents who reported their rates with complete accuracy remained very low, reported rates tended to be closer to actual rates after truth-in-lending than before the law.[48]

A possible interpretation of the Michigan results is that truth-in-lending has been effective in improving consumer awareness of the general level of prevailing annual percentage rates, but that the legislation has done little to improve consumers' knowledge of the specific rates they are paying. This interpretation would be consistent with the findings of the Federal Reserve Board surveys. Even the analysis made by the National Commission on Consumer Finance classified a respondent as "aware" whenever the reported rate was in the general range of probable rates, and consequently all that can certainly be concluded from their analysis is that there has been improvement in consumer knowledge of prevailing rates. So interpreted, the degree of improvement in awareness of prevailing annual percentage rates indicated by the Michigan surveys was generally less than that suggested by the Federal Reserve Board surveys.[49] This result is somewhat remarkable because the Michigan surveys interviewed only persons who borrowed at least $500 to finance purchase of an automobile.[50] Because of the size of the transaction and the open competition between banks and fi-

rate of increase in awareness for different transaction types. Shay and Schober, *supra* note 32, at 31-32.

46. *See* G. Day & W. Brandt, *supra* note 31, at pt. IV; Comment, *The Impact of Truth in Lending on Automobile Financing—An Empirical Study*, 4 U. CAL. DAVIS L. REV. 179 (1971).

47. Mandell, *Consumer Perception of Incurred Interest Rates: An Empirical Test of the Efficacy of the Truth-in-Lending Law*, 26 J. FINANCE 1143 (1971). The actual rate paid by the respondent was calculated from information provided by the respondent about number and amount of payments, amount loaned, and so forth. Some effort was made to insure against response error in obtaining this data. *Id.* at 1145-46. The data was obtained from the annual surveys of consumer finances conducted by the Institute for Social Research at the University of Michigan. *See, e.g.*, KATONA, *supra* note 28. It is not indicated when the surveys were made, but the report of the study seems to be written on the assumption that the purchases about which the data pertains were made continuously over periods of several months before and after the effective date of truth-in-lending.

48. Mandell, *supra* note 47, at 1147-48.

49. *Id.*

50. *Id.* at 1145.

nance companies for automobile installment credit business, it was commonly assumed even before truth-in-lending that automobile purchasers were more likely to engage in comparative shopping for credit than were other credit purchasers of goods and services.[51] A second interesting finding of the Michigan surveys was that neither before nor after truth-in-lending did the level of rate awareness depend on income. The size of the amount borrowed proved to be a much more important predictor of awareness.[52] The number of respondents in low income levels was so small in the Michigan surveys, however, that it is doubtful any conclusions about the relationship between low income and rate awareness should be drawn.[53]

There are a number of reasons why the results of these surveys are not fully reliable measures of the effect of truth-in-lending on consumer awareness of annual percentage rates at the time they enter into credit transactions. In addition to the methodological problems already mentioned,[54] none of the surveys test whether the source of heightened rate awareness was solely due to truth-in-lending. It is quite possible, for example, that as a result of the increased visibility of consumer issues in newspapers and legislatures some or all of the increase in annual percentage rate awareness would have occurred even if truth-in-lending regulation had not existed. Most importantly, however, the surveys did not measure rate awareness at the time the transaction was concluded—the important time if truth-in-lending is to have direct impact on buying behavior. Rather, the surveys measured recall of the annual percentage rate that the respondents agreed to pay some time prior to the interview. It is impossible to know whether measuring recall rather than knowledge at the time the transaction was concluded yielded a higher or lower estimate of rate awareness.[55] It is

51. *See, e.g.*, Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445 (1968).

52. Mandell, *supra* note 47, at 1148-53.

53. In the below $5,000 income bracket, there were 18 respondents who had concluded contracts before truth-in-lending and 14 who had done so after the Act. *Id.* at 1149.

54. None of the surveys discussed in the text attempted to measure the effect of truth-in-lending on the rate awareness of persons who had not made credit purchases since the Act. It is possible that truth-in-lending had its most substantial impact by impressing many consumers with the high cost of consumer credit and accordingly inducing a greater percentage of cash purchases. *See* note 58 *infra* and accompanying text. If this effect occurred, one would expect to find the greatest increase in interest rate awareness among a group of consumers who did not make credit purchases. Other studies have shown, however, that even after truth-in-lending the level of rate awareness has not been a significant determinant of the decision to use credit rather than to pay cash. *See* note 76 *infra* and accompanying text.

55. On the one hand, it is probable that many consumers who were unaware of the annual percentage rate at the time they entered into the transaction later became aware while paying a bill or looking over papers

possible that during the time between the two surveys the size of the difference, if any, between the number of consumers who could recall rates accurately and the number who had accurate knowledge when the transaction was concluded remained unchanged. On this assumption, measuring the increase in recall would be an appropriate surrogate for measuring increase in knowledge at the time a transaction was concluded. However, comparability of the two surveys is compromised by the fact that the period of recall was not the same. In the first survey, for most transaction types, inquiry about annual percentage rate awareness was made only if the respondent had concluded a transaction within the previous year. For home improvement and home mortgage credit transactions inquiry was made if the respondent had entered into a transaction within 3 and 5 years of the survey respectively. In the second survey the same questions were asked in all cases as to credit transactions consummated since the effective date of truth-in-lending—that is, over a period of about 15 months preceding the interview.[56]

Despite the difficulties in interpreting their significance, the surveys pretty clearly suggest that in the first year or so of truth-in-lending there was only modest improvement in consumer awareness of prevailing annual percentage rates. It is more difficult to measure improvement in consumer knowledge of specific annual percentage rates at the time a transaction is concluded, but the available evidence implies that any improvement has also been at best modest. Moreover, any improvement in awareness has been concentrated in upper income groups.

A question that remains is whether further improvement in rate awareness has occurred or can be expected. Since lender compliance with the disclosure requirements was already quite substantial, only a small increase in awareness can be expected due to increased compliance.[57] Furthermore, it was in the first year that truth-in-lending could be expected to have had its greatest "shock"

---

connected with the transaction. On the other hand, it is also reasonable to assume that some persons who were aware of the rate at the time they entered a credit transaction forgot it by the time they responded to the surveys.

56. Shay & Schober, *supra* note 32, at 14, 18.

57. *See* note 30 *supra*. It is interesting to note that the compliance survey found compliance by used car dealers to be "very poor." Compliance Survey, *supra* note 30, at 13. The Federal Reserve Board surveys also indicated that the rate of increase in awareness for used car buyers was less than for other transaction types. *See* note 45 *supra*. Perhaps, therefore, increased compliance can yield substantial increases in awareness by used car buyers. On the other hand, the compliance survey found compliance by new car dealers to be "almost flawless," Compliance Survey, *supra* note 30, at 13, yet the level of unawareness for new car buyers in the 1970 Federal Reserve Board survey was still 57%. Shay & Schober, *supra* note 32, at 32.

effect, since it was then that consumers were first provided information suggesting that interest rates were sharply higher than most consumers previously assumed.[58] For several reasons significant improvement in future consumer awareness is nevertheless possible, and perhaps should be expected.

First, at least until recently, one of the loopholes in truth-in-lending has been that the annual percentage rate needed to be disclosed only in the written contract. Many creditors quickly learned they could legally quote orally interest rates calculated according to some other formula—for example, discount or add-on—yielding a lower figure than does the annual percentage rate formula.[59] Probably, these oral quotations were often what consumers remembered when responding to the various surveys. The Federal Trade Commission has now indicated that it will consider it a violation of section 5 of the Federal Trade Commission Act[60] to quote orally interest rates calculated according to any formula other than one required by truth-in-lending.[61] It is also possible that legislation to similar effect will be introduced.[61a] If either of these avenues is successful in halting the oral quotation of interest rates not determined according to the annual percentage rate formula, further improvement in consumer awareness could result.

Second, it seems to be a common assumption that there will be continuing increases in rate awareness as more consumers experience several credit transactions in which truth-in-lending disclosures are made.[62] Consumers, of course, were experiencing credit transactions before the advent of truth-in-lending. The disclosures

---

58. Many creditors apparently feared that truth-in-lending would have this "shock" effect and in the short run induce a much lower level of credit buying. Indeed, one of the principal arguments against enactment of truth-in-lending was that such an effect would cause a reduction in the level of consumer durable purchases, thereby triggering a recession. *Hearings on S. 2755 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 86th Cong., 1st Sess. 803, 809 (1960) (statement of George Katona). *See also* note 28 *supra* and accompanying text.

59. G. Day & W. Brandt, *supra* note 31, pt. IV, at 3; Comment, *The Impact of Truth in Lending on Automobile Financing—An Empirical Study*, *supra* note 46, at 199-202.

60. 15 U.S.C. § 45 (1970).

61. FTC Consumer Credit Policy Statement No. 5, Nov. 22, 1971, 4 CCH CONSUMER CREDIT GUIDE ¶ 30,750. I am aware of no Federal Trade Commission enforcement proceeding initiated to implement this policy statement. The policy statement is in sharp contrast to the Federal Reserve Board's interpretation of the current requirements of the Truth in Lending Act. FRB Letter No. 137, Oct. 10, 1969, 4 CCH CONSUMER CREDIT GUIDE ¶ 30,482; FRB Letter No. 407, Sept. 22, 1970, 4 CCH CONSUMER CREDIT GUIDE ¶ 30,590.

61a. The National Commission on Consumer Finance so recommends. COMMISSION REPORT, *supra* note 29, at 189.

62. *Id.* at 180; Comment, *The Impact of Truth in Lending on Automobile Financing—An Empirical Study, supra* note 46, at 193; Note, *Truth in Lending: The Impossible Dream, supra* note 22, at 107-08.

required by truth-in-lending are sufficiently complicated, however, that intuitively it seems possible that practice in reading the disclosures will enhance future understanding of them by at least some consumers.

The plausibility of assuming that for this reason rate awareness will increase over time has been significantly diminished by a recent study. It compared levels of awareness of the same group of consumers at two points in time, both substantially after the effective date of truth-in-lending.[63] The study found very little improvement in the ability of consumers to recall the annual percentage rates they paid on credit purchases concluded within comparable periods before the interview.[64] There was a significant increase in awareness of prevailing rates, as measured by responses to a question asking what rates the respondents would expect to pay in a hypothetical credit purchase.[65] There were also, however, a number of respondents who indicated awareness of prevailing rates at the time of the first interview but who had lost that awareness by the time of the second interview.[66] This "forgetting" factor suggests at some point an equilibrium awareness point will be reached—when the number of new "learners" are balanced by "forgetters"—and the study estimated that at equilibrium there would still be a very sizeable percentage of unaware consumers.[67] Perhaps even more importantly, the "learners" about prevailing rates between the first and second interviews were no more likely than nonlearners to have had an experience in credit buying since the first interview.[68] Demographic variables, particularly high in-

63. T. Deutscher, *supra* note 31. The first survey is the same one reported in G. Day & W. Brandt, *supra* note 31. Deutscher reinterviewed a portion of the Day and Brandt sample approximately 9 months later.

64. T. Deutscher, *supra* note 31, pt. III, at 2. Actually, in the second survey the period over which respondents were asked to recall purchases was only about 9 months, whereas for the first survey the recall period was about 12 months. *Id.* pt. III, at 4-5. If it is assumed that recall would tend to be more accurate the closer the interview was to the actual purchase, for this reason alone greater awareness should have been expected in the second survey. The fact that it was not found, therefore, substantially undercuts the hypothesis that experience will enhance understanding. It may suggest a contrary hypothesis that as disclosures under truth-in-lending come to be accepted as a normal part of credit transaction, and as truth-in-lending receives less publicity from the news media, there will be a reduction in rate awareness.

65. *Id.* pt. III, at 3, 7-8.

66. *Id.* pt. III, at 14-16.

67. *Id.* pt. III, at 20-26. Based on the data collected in the surveys, the study estimated the equilibrium point for awareness of prevailing rates (as measured by what annual percentage rate respondents would expect to pay in a hypothetical credit purchase) was 50%, a point the study estimated was reached in June 1971.

68. *Id.* pt. IV, at 4-12. G. Day & W. Brandt, *supra* note 31, who surveyed annual percentage rate awareness at a single point in time, found credit experience over a long term to be an important determinant both of ability to recall the rate paid on an actual transaction and of knowledge

come and education, were the only variables tested that were significantly associated with "learning."[69] Although this study cannot be considered conclusive due to a number of methodological considerations,[70] it strongly suggests that time and experience in credit buying will not themselves yield a significant increase in consumer awareness of annual percentage rates, particularly among those groups of consumers which presently are most substantially unaware.

Finally, rate awareness may increase over time because some factor other than disclosure, such as the increased visibility of consumer issues or drastically expanded consumer education programs, causes consumers to become more interested in the terms of their transactions. Alternatively, truth-in-lending might be amended to provide for new techniques of disseminating rate information and these new techniques may cause greater awareness.

2. COMPARATIVE INTEREST RATE SHOPPING

The ultimate goal of truth-in-lending is not simply to increase the level of annual percentage rate awareness, but rather to produce a greater degree of cost-effective comparative shopping for interest rates, and perhaps as well to affect decisions whether to enter credit transactions at all.[71] Yet there has been much less effort to determine empirically the impact of truth-in-lending on credit shopping behavior. The most substantial effort is a study conducted at Stanford based on a survey taken at about the same time as the second Federal Reserve Board survey.[72] The respondents to the survey were asked not only about their awareness of annual percentage rates but also to report on their shopping activity preceding a significant purchase of an automobile or major appliance made within a year of the interview. Probably the most important finding of the study was that, although a significant number of major purchases are made on credit, there is little credit shopping behavior of any kind. Most consumers apparently prefer to

---

of prevailing rates as measured by what rates would be anticipated in a hypothetical transaction. *Id.* pt. IV, at 15-17, 18-21. A possible conclusion suggested by these studies, therefore, is that credit experience enhances rate awareness but that experience with credit transactions in which there were truth-in-lending disclosures enhances awareness no more than credit experience in any other circumstance.

It should be noted that T. Deutscher, *supra* note 31, found that "forgetting" was negatively correlated with credit experience—that is, of the group of respondents who indicated awareness of prevailing rates in the first survey, those who had made a credit purchase between the interviews were less likely to have lost that awareness at the time of the second interview. *Id.* pt. IV, at 4-8, 12-14.

69. T. Deutscher, *supra* note 31, pt. IV, at 8-12.

70. Methodological problems with the study are discussed in *id.* pt. II.

71. *See* note 26 *supra*.

72. G. Day & W. Brandt, *supra* note 31.

spend whatever time they devote to comparison shopping to searching for the product rather than for credit.[73] The study was unable to determine conclusively whether truth-in-lending helped stimulate whatever credit shopping behavior was found or aided credit shoppers in reaching more intelligent and cost-effective credit decisions. Because of a low degree of correlation between awareness of prevailing rates and credit shopping behavior, however, the study suggested that truth-in-lending had an "at best modest" effect on stimulating credit shopping behavior.[74]

Among its other interesting findings, the Stanford study found that in the purchase of durables significant credit shopping among different types of credit sources, to the extent it exists at all, is apparently concentrated among upper and middle income groups. Lower income consumers appear much more likely to finance through the retailer and not even consider independent financing from a bank or other lending institution that generally offers lower rates.[75] The Stanford study was also able to conclude, with considerable certainty, that annual percentage rate awareness had almost no impact on the decision to use credit. Situational variables, such as availability of cash resources and need for the item purchased, almost completely accounted for variations in behavior with regard to paying cash.[76]

The Stanford study is partly corraborated by a study of the effect of state-enacted rate disclosure regulation that became effective in Massachusetts more than two years before federal truth-in-

73. *Id.* pt. III, at 31-35, pt. V, at 7-8.

74. *Id.* pt. V, at 18. Awareness of prevailing rates was measured by a question asking what rates respondents would expect to pay in a hypothetical credit purchase.

Deutscher was able to confirm this finding in his study, described in part at notes 63-70 *supra* and accompanying text. Respondents who had made a significant credit purchase between the first and second interviews were asked about the shopping behavior preceding the purchase. Respondents who demonstrated awareness of prevailing rates in the first interview tended to engage in somewhat greater credit shopping activity than those who exhibited unawareness, but the differences were not substantial. T. Deutscher, *supra* note 31, at pt. V.

75. G. Day & W. Brandt, *supra* note 31, pt. VI, at 15-17. This result is consistent with the findings of Juster and Shay. They tested the reactions of a group of consumers to a series of hypothetical credit purchase situations and concluded that the only ones who would use interest rate information in making credit purchasing decisions are those whose credit rating permitted them to borrow from low-rate lenders, such as banks. Consumers who can only borrow from more expensive lenders, they concluded, want and use information about the size of the downpayment and of the monthly payment. F. Juster & R. Shay, Consumer Sensitivity to Finance Rates: An Empirical and Analytical Investigation (Nat'l Bur. of Econ. Research, Occasional Paper No. 88 [1968]), *discussed* in W. Mors, *supra* note 28, at 46-52.

76. G. Day & W. Brandt, *supra* note 31, pt. V, at 18-22. Deutscher's study reconfirmed this conclusion. T. Deutscher, *supra* note 31, pt. V, at 18-21.

lending became effective. The study was based on over 60 interviews with businessmen, conducted 6 to 8 months after the effective date of the Massachusetts legislation. The very clear conclusion from the interviews was that, in the opinion of businessmen, the Massachusetts regulation had almost no immediate impact on the level of comparison credit shopping by consumers of any economic class.[77]

Neither the Stanford nor Massachusetts studies can conclusively prove that in the long run truth-in-lending will have only minor impact on credit shopping behavior. In addition to other difficulties,[78] both studies were made shortly after disclosure legislation became effective. Even though it seems likely consumers will remain largely ignorant of the particular rates they are charged, it is possible that rate disclosure will substantially increase consumer awareness of prevailing annual percentage rates. If it does, consumers may become more sensitive to aberrational rates, particularly high ones, and react accordingly in their credit buying, even though they do not undertake comparative shopping on a regular basis.

Nevertheless, it is the opinion of nearly all businessmen with whom I have discussed the matter that even though there has been effective compliance with truth-in-lending for over 3 years, there has been little effect on credit shopping behavior. And this conclusion is consistent with the implications of a number of earlier studies on consumers' sensitivity, in their shopping behavior, to interest rate information. These studies suggest that before truth-in-lending a large percentage of consumers of all income classes were aware in a general way of which lending insitutions offered the lowest interest rates. Some consumers were influenced by this knowledge in making credit buying decisions, particularly where a large amount was to be borrowed. But large numbers of consumers obtained credit at high rates even though they knew that they might be able to obtain a lower rate from another lending institution.[79] Given this general knowledge of interest rate

---

77. R. Pullen, *supra* note 26. The same conclusion about the effect of the Massachusetts legislation was reached by a separate survey, limited to large department stores offering revolving charge plans. Note, *A Survey of Experience Under the Massachusetts Retail Installment Sales Act,* 9 B.C. IND. & COMM. L. REV. 1020 (1968).

78. In the Stanford study the response rate was only 46%. Furthermore, only California consumers, who are known to be more active credit users than Americans generally, were interviewed. Although there is some reason to believe these factors did not distort the representativeness of the sample, that possibility cannot be completely discounted. *See* G. Day & W. Brandt, *supra* note 31, at pt. II.

79. *E.g.,* White & Munger, *Consumer Sensitivity to Interest Rates: An Empirical Study of New-Car Buyers and Auto Loans,* 69 MICH. L. REV. 1207 (1971); *Hearings on S. 750 Before a Subcomm. of the Senate Comm. on Banking and Currency,* 88th Cong., 2d Sess., pt. 1, at 1485, 1489 (1963)

differentials, it is difficult to see how the more specific rate information provided by truth-in-lending, even if learned, could affect credit shopping behavior.

There are obviously too few studies to permit any final conclusions to be drawn about the impact of truth-in-lending. Nevertheless, the evidence presently available suggests that any success truth-in-lending will have inducing credit shopping for lower interest rates will be modest and concentrated among higher income groups. In other words, our experience with truth-in-lending appears largely, although not completely, to be consistent with the criticisms of disclosure regulation discussed in the introduction. And, as indicated earlier, if truth-in-lending has only modest impact on consumer buying behavior, then one would expect most other disclosure regulation to have at best modest impact as well. What evidence exists about the impact of other disclosure regulation generally supports this expectation. Thus, a survey of new car buyers I conducted several years ago suggested that few buyers were aware or understood the disclaimer of implied warranties contained in all new automobile warranties,[80] yet these disclaimers uniformly contained bold print as required by section 2-316(2) of the Uniform Commercial Code.

B. *Theoretical Evaluation*

1. EXPLANATIONS FOR THE TRUTH-IN-LENDING EXPERIENCE

A variety of possible explanations have been offered for the limited impact of truth-in-lending on consumer buying behavior. Some of the explanations relate directly to the lack of impact on the lower economic classes. It has been suggested, for example, that many poor have few outlets for credit available to them. Even if these poor comparatively shopped for credit, in many instances the only choice that would be available to them would be either to obtain credit from whoever offered it or to do without the often necessary goods or services the credit would purchase. Un-

(statement of George Katona); *see* Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint, supra* note 51, at 460-66.

Federal Trade Commission enforcement officials have indicated to me in interviews that they receive very few complaints from businessmen that a competitor is not in compliance. If credit shopping behavior were widespread, there would presumably be a competitive advantage in understating the annual percentage rate, and in other areas of Federal Trade Commission authority it is not uncommon for a businessman to complain of a competitor's unlawful practices. Moreover, the compliance survey does indicate that there is still some degree of noncompliance. *See* note 30 *supra*. Thus, the lack of complaints from businessmen may constitute independent evidence that truth-in-lending has little impact on credit shopping behavior.

80. Whitford, *Strict Products Liability and the Automobile Industry: Much Ado About Nothing*, 1968 WIS. L. REV. 83, 143-50.

less the latter is perceived as a realistic alternative, there is little incentive for these persons even to become aware of interest rates or total finance charges.[81]

---

81. *E.g.*, Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U.L. REV. 1, 1-13 (1969); Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 745-54 (1967); *see* F. Juster & R. Shay, *supra* note 75.

Another explanation directed especially at truth-in-lending's lack of impact on the poor relies on the lack of mobility of many low-income persons. The poor apparently are much more likely than consumers generally to restrict their shopping to the immediate neighborhood, and consequently they may not consider credit sources elsewhere which potentially would be available to them. *See* D. CAPLOVITZ, THE POOR PAY MORE (2d ed. 1967); FEDERAL TRADE COMM'N, ECONOMIC REPORT ON FOOD CHAIN SELLING PRACTICES IN THE DISTRICT OF COLUMBIA AND SAN FRANCISCO (1969).

Still a further explanation offered for the lack of impact of truth-in-lending on the poor is based on the practice of many merchants of "burying" finance charges in the cash price. "Burying" finance charges occurs when the merchant represents that he has no or very low finance charges, yet his cash price is far above the relevant market price. Such a merchant, of course, makes nearly all his sales on credit and is essentially uninterested in competing for the cash customer. Consequently, merchants burying finance charges tend to be ones catering to low income consumers. Moreover, since available evidence indicates that on the whole consumers are more likely to shop for the product than for credit—*see* note 73 *supra* and accompanying text—such a merchant has probably decided to concentrate on consumers who do not shop at all and on that small group of low income consumers who do shop for low cost credit terms. In connection with this latter group it is interesting to recall the suggestion that truth-in-lending is causing those consumers who are acquiring awareness of prevailing annual percentage rates to overestimate finance charges. *See* note 31 *supra*. Thus, truth-in-lending may be having the unintended effect of making the burying of finance charges a more effective pricing policy competitively.

The Federal Reserve Board, which issues regulations under truth-in-lending, has made the Act applicable to any extension of credit "which, pursuant to an agreement, is or may be payable in more than four installments," thereby extending the Act to any creditor who buries his finance charges. FRB Reg. Z, 12 C.F.R. § 226.2(k) (1971). This more-than-four-installments regulation does not require such a creditor to disclose a finance charge or an annual percentage rate other than zero, but does subject him to other provisions of the Act, and in particular to its provisions concerning credit advertising. *See* Warren & Larmore, *Truth in Lending: Problems of Coverage*, 24 STAN. L. REV. 793, 816-21 (1972). The validity of the more-than-four-installments regulation was recently upheld. Mourning v. Family Publications Serv., Inc., 93 S. Ct. 1652 (1973).

Probably the only effective way under current law to eliminate the practice of burying credit charges is to consider the practice "unfair or deceptive" under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1970). In one case a few years ago, the FTC staff made just such a contention. The merchant involved did business in an urban ghetto and buried his credit charges in cash prices that were about 500% above his cost. Moreover, he had a very rigid credit enforcement policy, generally suing his credit customers as soon as their payments fell behind. Finally, he advertised his credit as being available on "easy" terms—apparently a reference to the lack of a finance charge as such. The Commission refused to hold that burying credit charges in the cash price was in itself deceptive, but it did clearly hold that it was misleading to ad-

Another suggested explanation for the limited impact of truth-in-lending, and one that is most interesting for purposes of evaluating disclosure regulation generally, is that most consumers are not motivated to shop comparatively for the lowest interest rate, at least with regard to all but their largest credit transactions.[82] A variety of possible reasons have been advanced for this lack of motivation. If the amount borrowed is not large, often the amount to be saved by obtaining the lowest available interest rate is not sufficient to justify the inconvenience and costs of comparative shopping.[83] Many consumers apparently prefer to use an established or other source of credit known to be available, perhaps in order to avoid the anxieties of asking for credit from an unfamiliar institution—for example, a bank, which frequently will offer the lowest available interest rate.[84] Even when some comparative shopping for credit occurs, consumers—particularly low income consumers—are apparently more concerned with the size of the required downpayment and monthly payments than with interest rates.[85] No doubt there are also many other reasons for a lack of

vertise that terms were "easy," or perhaps to advertise anything about them except that they were harsh, if the cash price was very high and obviously included credit charges. Leon A. Tashof, [1967-70 Transfer Binder] TRADE REG. REP. ¶ 18,606, at 20,941 (FTC 1968). If the Commission decision had stood, it might have constituted a fairly significant deterrent to the practice of burying credit charges in cash prices, for once such a practice was engaged in, the merchant would be foreclosed from saying almost anything good about his credit terms. Unfortunately, on appeal the Commission order was affirmed by the court of appeals on a narrower ground—that it was misleading to argue that credit terms were "easy" when the merchant maintained a very rigorous debt enforcement policy. The court expressed no opinion on the Commission's rationale concerning the excessiveness of the cash price. Tashof v. FTC, 437 F.2d 707 (D.C. Cir. 1970). The Federal Trade Commission has made little effort to follow up the *Tashof* decision.

82. This explanation is frequently offered not only for the apparent failure of truth-in-lending to stimulate comparative credit shopping, but also as an explanation of earlier studies indicating that before truth-in-lending consumers frequently did not comparatively shop even though aware of differentials in available interest rates. *See, e.g.*, White & Munger, *supra* note 79; *Hearings on S. 2755 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 86th Cong., 1st Sess. 806-08 (1960).

83. This will particularly be the case if the amount of time the consumer can devote to comparative shopping is relatively fixed because of other claims on his time. In such circumstances many consumers apparently decide, no doubt quite reasonably, that greater savings will probably be realized by devoting all available shopping time to the product selection decision rather than the credit selection decision. *See* note 73 *supra* and accompanying text.

84. White & Munger, *supra* note 79; *see* D. CAPLOVITZ, *supra* note 81.

85. Thus, one of the studies discussed previously found that although there was a substantial degree of unawareness of annual percentage rates, there was near perfect awareness of the size of monthly payments. G. Day & W. Brandt, *supra* note 31, pt. IV, at 32. This conclusion is also clearly indicated by the study by Juster and Shay. *See* note 75 *supra*.

motivation to shop comparatively for low interest rates.

2. GENERALIZING FROM THE TRUTH-IN-LENDING EXPERIENCE

For the purpose of evaluating disclosure regulation, the important lesson from truth-in-lending is not so much the reasons as the fact that consumers often base credit purchase decisions on factors other than the annual interest rate. If precontract disclosure regulation is intended to affect consumer purchase decisions, it must be drafted on the basis of some model of factors considered by consumers in making purchase decisions (or at least that would be considered if the needed information were available). Obviously it would be impossible to require conspicuous disclosure of all information that is in some way connected with the transaction. By presuming some model or models of the mixture of wants that consumers maximize through their purchasing decisions, it is possible to determine what information is most needed to reach purchasing decisions consistent with those models. Disclosure regulation can then be employed to provide consumers with that information when it is not otherwise available.

a. Models of consumer decisionmaking and disclosure

The models of consumer decisionmaking on which precontract disclosure regulation may be based could be either predictive or normative models. A predictive model is one which attempts to describe actual behavior. Precontract disclosure regulation based on such a model would have as its purpose providing information, not otherwise easily available, that is needed by a substantial proportion of consumers if they are to fulfill existing buying motivations and which therefore they would put to immediate use in making buying decisions. A normative model makes no pretentions of describing reality but rather describes the manner in which somebody—usually the formulator of the model—believes people should behave. Precontract disclosure regulation based on this type of model would have purposes other than providing consumers with information they need to fulfill existing motivations. Most likely, a major purpose would be to help persuade consumers to base purchasing decisions on the normative model, whatever their existing inclinations might be.

There are conflicting indications as to whether precontract disclosure regulation is typically based on predictive or normative models. If decisions about what information should be subject to compulsory disclosure are based on predictive models, efforts should be made to determine empirically the actual buying motivations or actions of at least a plurality of consumers. Surveys measuring such motivations are often undertaken by business in order to plan marketing strategies.[86] Rarely, however, do they play an

86. *See* E. DICHTER, HANDBOOK OF CONSUMER MOTIVATIONS (1964); V. PACKARD, THE HIDDEN PERSUADERS (1958).

important role in the formulation of disclosure regulation. Indeed, truth-in-lending was enacted despite the existence at the time of a considerable amount of evidence indicating that, with the possible exception of automobile loans and home mortgages, information about annual percentage rates was unlikely to affect the credit shopping behavior of the vast majority of consumers, particularly low-income consumers.[87]

Yet, with remarkable consistency precontract disclosure information almost inevitably concerns price, quantity, warranty, or similar terms. It is very difficult to describe a single concept or model of buying behavior which points solely to this cluster of considerations as useful in making purchasing decisions. Almost any model based on maximization of economic gain would provide for weighing considerations of shopping convenience in making purchase decisions, yet information about shopping convenience is rarely, if ever, subject to compulsory precontract disclosure.[88] In a rough layman's sense, it might be said that disclosure regulation typically pertains to a cluster of considerations that need to be weighed in determining the "best buy" for one's money. Henceforth, for convenience, this cluster of considerations will be called the "best buy

87. *See, e.g.*, Jordan & Warren, *supra* note 21, at 1299-1304; Kripke, *supra* note 81, at 1-13. It should be noted that it was not even clear that annual percentage rate disclosure would have impact on shopping for automobile and home mortgage credit. Although it was assumed consumers were more disposed to shop for this type of credit than other types, even prior to truth-in-lending there was evidence of substantial consumer awareness about what credit sources offered the lowest rates. This information alone should have been sufficient to induce considerable credit shopping behavior to the extent consumers were motivated to shop. *See, e.g.*, Kripke, *supra* note 81. Of course, there was also considerable evidence prior to truth-in-lending of consumer unawareness of the actual level of annual percentage rates. Perhaps Congress believed that, where there were pre-existing motivations to shop for credit, truth-in-lending would facilitate more careful and intelligent credit shopping by standardizing the basis of interest rate quotations. *See* note 100 *infra*.

88. The usual maximization models provide, of course, for a consumer to weigh any consideration which in fact is consistent with his own value set. *Cf.* Leff, *The Cultural and Social Impact of Society on American Advertising*, 1970 LAW & SOCIAL ORDER 397, 400-01. In the text I am referring to an imprecise version of a maximization model which would provide only for purchasing decisions that enhance the consumer's economic net worth. But even such a model fails to explain why the type of information subjected to compulsory precontract disclosure is so limited.

It is arguable that precontract disclosure regulation is based on a traditional maximization model, with the information subjected to compulsory disclosure limited to attributes, such as price and quality, that are easily measured and stated in a standardized manner so as to permit comparative shopping. Although there may be some merit to this explanation, I doubt that it is sufficient explanation for the uniformity in the type of information subject to compulsory disclosure. For further discussion see note 123 *infra*.

model" of buying motivations, even though the lack of a precise concept of buying behavior pointing solely to these considerations makes the use of the term "model" somewhat inappropriate.

The points just discussed suggest that precontract disclosure regulation is based on a normative model. There are also indications, however, that it typically is based on a predictive model. Certainly, the rhetoric accompanying the enactment of most precontract disclosure regulation, particularly truth-in-lending, and the manner in which such regulation is evaluated by commentators,[89] so suggest. The most persuasive indication, however, is the manner in which most precontract disclosure regulation provides for dissemination of the information to be disclosed. The manner of disclosure is typically such as to negate any possible objective of persuading consumers to use the information. Rather the information is typically disclosed in such a manner that it is likely to be noticed only by consumers who have a strong desire for the information and practically conduct a search for it sometime before becoming legally committed to the transaction.[90] Frequently, for example, the language used in the disclosure is comprehensible to most consumers, if ever, only after considerable study. Thus, the Uniform Commercial Code requires a disclaimer of the implied warranty of merchantability to use the word "merchantability."[91] Empirical research has demonstrated that even if their attention is drawn to it, many consumers cannot understand a warranty disclaimer provision written in a manner almost compelled by this Code provision.[92]

The best evidence that the usual manner of disclosure implies use of a predictive model, however, is that precontract disclosure is most often required only in the written document called the contract.[93] Sellers have long known that it is precisely in the con-

89. I refer, of course, to the fact that commentators deem it irrelevant to ask if consumers want the information disclosed. *See* notes 21-23 *supra* and accompanying text.

90. *See* notes 91-96 *infra* and accompanying text.

91. UNIFORM COMMERCIAL CODE § 2-316(2). If a seller wishes to disclaim all implied warranties, he can use a common phrase such as "with all faults." *Id.* § 2-316(3).

92. Whitford, *supra* note 80, at 146-47. Requiring the use of technical language may also be one of the difficulties of truth-in-lending, since the Act forces disclosure of a complicated set of arithmetical calculations.

93. There are several possible explanations for the tendency to fix the place of disclosure as the contract. Providing a valid contract must be in writing, which is typically the case under the various state retail installment sales acts, *see* B. CURRAN, *supra* note 5, at 95, disclosure in the contract guarantees that the disclosure is available to the consumer *before* he legally commits himself. The tendency to require disclosure in the contract itself may also stem from the basic contract law principle, underlying the parol evidence rule, that where there is a writing, the terms of the party's relationship are more or less those stated in the contract. *Cf.* UNIFORM COMMERCIAL CODE § 2-202. As a result of this principle, a seller

tract, and only in the contract, that information consumers are *not* supposed to notice is to be put. Admittedly, sellers have often buried unfavorable information in small type. But the use of large, bold type, commonly required by disclosure regulations, will rarely communicate information prior to the signing of the contract unless the consumer is searching for the information and has reason to expect it to be in the contract. In nearly all consumer transactions—and to a very great extent in all contractual transactions—the effective agreement, an oral one, is made before the buyer ever sees the written contract. To the parties, the signing of the written contract is usually only a ritual, roughly equivalent to a handshake. The written contract is likely to be read carefully enough to be understood at some time subsequent to its signing, if at all.[94] Even in the rare case in which a consumer actually reads the contract before signing, it must be remembered that he usually views himself as already morally committed. If he comes across information in the written contract which ordinarily would persuade him not to sign, it puts him in a conflict situation and one which, in accordance with the theory of cognitive dissonance, he may resolve by discounting the disclosed information.[95] Certainly in this situation, unless the information pertains to a buying desire valued very highly by the consumer, he is likely to be receptive to a conflict-resolving suggestion by a salesman that the disclosed information is not really significant and is only included because the law so requires.[96]

Given the conflicting indications about the essential purpose of most precontract disclosure regulation, probably the most reasonable resolution, and the one in my judgment most commentators implicitly make, is to presume that the regulation is intended to be based on a predictive model—that the intent is to provide consumers with information that they will use without further urging—and that the usual decision to base such regulation on what I have denominated the best buy model reflects a "seat of

desiring to impose a particular obligation on a consumer must ordinarily include the provision in the contract in some way. Thus, for example, the obligation to pay interest must be stated in some way, even if not as an annual percentage rate. It does not necessarily follow that the required clear and conspicuous disclosure of that provision also must be made in the contract. Nevertheless, this contract law notion may be partly responsible for the tendency to require disclosure in the contract itself.

94. *See* Curran, *supra* note 25, at 424; Jordan & Warren, *supra* note 21, at 1320.

95. The dissonance can arise not only because the consumer sees himself as morally committed, but also because the information disclosed may tend to convince him that his decision to enter into the transaction was an unwise one, a conclusion he may be reluctant to reach. *See also* Friedman, *Using Simulation Techniques to Predict the Behavioral Effects of New Laws: The Case of Truth-in-Lending Legislation and the Consumer,* 54 J. APPLIED PSYCHOLOGY 297 (1970).

96. *See* R. Pullen, *supra* note 26, at 7-8.

the pants" judgment about the actual buying motivations of large numbers of consumers. Given this assumption about purpose, there are several evident explanations for why precontract disclosure regulation so rarely has had the intended effects on shopping behavior. The most obvious explanation is that the best buy model is a complete description of the buying motivations of few, if any, consumers. For example, considerations of convenience in shopping obviously affect purchasing decisions very substantially. The existence of so much advertising encouraging the purchase of various products or services in order to satisfy assorted psychological needs (such as status and sexual attractiveness) is also strong evidence that at least advertisers believe consumers make purchases for reasons that are essentially inconsistent with the best buy model. A considerable body of social science research about consumer buying motivations suggests that the use of such advertising themes is very effective.[97] Moreover, before precontract disclosure regulation based on a best buy model can actually have impact on purchasing behavior, it is necessary either that a decision not to buy a good or service be practical (*e.g.*, to pay cash rather than arrange for credit), or that the market offer significant choices to which information disclosed pertains (*e.g.*, that choices as to interest rate level are available). In the case of truth-in-lending, it has already been suggested that even after the legislation became effective, neither of these choices was effectively available to many consumers, particularly low-income consumers.[98]

It is, of course, true that with respect to much precontract disclosure regulation practical choices are available to which the disclosed information relates. Moreover, the buying behavior of a consumer in any particular purchase is the product of a mix of several different motivations. Most consumers undoubtedly weigh to some extent the considerations indicated by the best buy model in most purchasing situations, and some consumers probably often weigh them heavily. For these reasons, one might expect most precontract disclosure regulation to have measurable impact on shopping behavior, and in a few instances, when by happenstance the information disclosed is weighed heavily by large numbers of consumers, it might be expected to have substantial impact. Before reaching that conclusion, however, it is necessary to consider the theoretical implications of the fact that disclosure regulation will have impact only when the information disclosed was not readily available prior to regulation.

b. Implications of the lack of voluntary disclosure

According to economic theory, excluding collusion, choices in a

97. *E.g.*, CONSUMER BEHAVIOR (J. Engel ed. 1968); T. ROBERTSON, CONSUMER BEHAVIOR (1970).
98. *See* note 81 *supra* and accompanying text.

fully competitive market can usually be expected to develop with regard to any factors on which significant numbers of consumers will base their purchase decisions. The principal situation in which choices will not develop is where the costs of developing the choices exceed the competitive benefits the developers are likely to gain. Thus, the fewer the number of consumers whose purchasing behavior will be affected substantially by the development of the choices, the less likely it is that the choices will be developed. Assuming the existence of relevant choices, voluntary disclosure of information about them can also usually be expected, since it will be to the advantage of various sellers to point out that their product or service has attributes that make it appear more advantageous to many consumers than the product or service of their competitiors. The principal situation in which voluntary disclosure of such information would not occur is where the number of consumers whose purchasing decisions will be affected by the information is sufficiently small as not to justify the costs of disclosure.[99] Since the costs of voluntary disclosure are relatively small, the fact that disclosure of choices is required indicates that the disclosed information will affect few purchasing decisions.[100]

---

99. *See* Stigler, *The Economics of Information,* 69 J. POL. ECON. 213 (1961). It is interesting to note in this connection that before truth-in-lending there was considerable advertising of downpayment and monthly payment terms. The available evidence indicates that large numbers of consumers were and still are basing credit purchasing decisions on this information. *See* note 85 *supra* and accompanying text.

100. There are some exceptions to this analysis concerning the implications of the lack of voluntary disclosure information in competitive markets, two of which are important enough to be mentioned. First, disclosure regulation can compel revelation of information that would tend to cause many consumers not to buy a product at all. No seller of the product will have an incentive to disclose that kind of information. However, if technologically feasible, some sellers can usually be expected to develop product innovations which tend to make the product less undesirable to consumers. If these sellers then urge purchase of their product because it is less undesirable, they will likely disclose much of the information that would be subject to compulsory disclosure. Thus, even before health warnings were required on packages and in advertising, some cigarette sellers voluntarily advertised the relatively low nicotine and tar content of their product. Moreover, often in this situation there will be some elasticity in the demand for the product in question and for a potential substitute product that does not possess the negative attribute. Consequently, depending in part on the extent of the elasticity in demand, sellers of the substitute product will have an incentive to disclose voluntarily the negative information. Nevertheless, in competitive markets there may be some situations in which compulsory disclosure of information, not otherwise readily available, may tend to discourage any purchase of a product.

The second exception concerns the fact that in some situations in which there is a good deal of voluntary disclosure, the information is not stated in a standardized manner and therefore does not facilitate comparative shopping. Before truth-in-lending, for example, interest rate information was generally available before purchase, but interest rates

It is commonplace that many markets in consumer products or services in this country are quite oligopolistic, and that in these markets the competitive processes just described will not always occur. Rather the major sellers will sometimes reach parallel, although perhaps independent, decisions not to compete with regard to various factors, including at times those indicated by the best buy model. When there are only a few major sellers in a market, often each can be expected to keep informed as to the others' activities, and thereby, to the extent each seller can feasibly do so, adjust his affairs so that no one seller obtains a competitive advantage with regard to a factor valued highly by large numbers of consumers. Consequently, all sellers will be reluctant to introduce product innovations or price reductions, since they have reason to believe that if detected, their competitors will simply match the innovation or reduction, yielding little or no competitive advantage to the initiating seller.[101] Where sellers reach such parallel decisions not to compete, for similar reasons, they very likely will also reach parallel decisions to withhold information that is needed if a purchasing decision is to be based on the best buy model. Such information, if truthful, would not indicate that any single seller offers a superior (according to the best buy model) or cheaper product or service, and it may convince some consumers not to purchase the product or service at all. In such situations, therefore,

---

were calculated in so many different ways they were not comparable. Even in this situation, if a seller would benefit substantially from increased comparative shopping, he would have an incentive to compile and disclose comparable information about the terms offered by all or a large number of sellers in the industry. Since the compilation and disclosure of such information can be more expensive than ordinary disclosure, however, greater expected impact on buying behavior would be needed to induce voluntary disclosure than if no standardization problem existed.

There can be other situations, of course, in which it is costly for the sellers to compile or disclose information, and in these situations also compulsory disclosure may have greater effect. In this connection it is interesting to note that in the recently enacted Motor Vehicle Information and Cost Savings Act, Pub. L. No. 92-513 (U.S. CODE CONG. & AD. NEWS, 92D CONG., 2D SESS., at 1110 [1972]), the burden of compiling information to be disclosed was placed on the Secretary of Transportation in part because it was considered unfair to impose those costs on automobile manufacturers and dealers. *See* note 9 *supra*.

101. Moreover, detection of product innovation or price reduction should generally be easier in consumer markets than in markets where buyers regularly purchase large quantities. In the former markets, information about the innovation or reduction can be communicated efficiently to buyers only in manners, such as media advertising, that make difficult or impossible concealment of the information from competing sellers. In the latter markets, communication techniques which facilitate concealment, such as personal contact, are more feasible. Consequently, in consumer product industries with oligopolistic structures, one should expect to find more readily the parallel decisions not to develop choices or to withhold information that are discussed in the text.

precontract disclosure regulation can often be expected to have significant effects.[102] Thus, I would not be surprised if regulation requiring disclosure of known medical facts about the effectiveness of different analgesics would induce many consumers not to buy these products at all.[103] By stimulating such effects, it might cause the manufacturers of analgesics to begin to compete as to many of the factors indicated by the best buy model, in an effort to keep as many customers as possible.

Although all markets are to some extent oligopolistic, it would be unrealistic to assume therefore, that uniformly basing disclosure regulation on a best buy model will inevitably produce substantial impact. As markets become less oligopolistic, the pressures that cause noncompetitive behavior become less effective, since it becomes more difficult for each seller to keep informed about and to respond to the actions of competitors. Consequently, it is more likely both that choices will develop in the market place and that there will be voluntary disclosure of information if it would be used by sufficiently large numbers of consumers. In the relatively competitive consumer credit market,[104] for example, even before truth-in-lending there were choices available as to level of interest rates. One might have expected many credit sellers voluntarily to disclose interest rates on a standardized basis if large numbers of consumers would have used the information. When these competitive considerations are combined with the fact that disclosure regulation based on the best buy model will often provide only some of the considerations consumers weigh in making purchase decisions, and frequently the less important ones, it seems clear that for theoretical reasons disclosure regulation making available information previously difficult to obtain can be expected very often to have limited impact on buying behavior.

C. *Some Conclusions About the Desirability of Traditional Precontract Disclosure*

In essence, what I have suggested so far is that, if it is assumed

102. I am not aware of any empirical studies about the effects of disclosure regulation in oligopolistic markets that would test this hypothesis. One possible reason for the lack of empirical evidence about the effects of disclosure regulation in oligopolistic markets could be that such regulation is rarely enacted precisely because it can be expected to have substantial effects on buying behavior. *See* notes 121-22 *infra* and accompanying text.

103. The Federal Trade Commission's complaints against the makers of a number of leading brand name analgesics are particularly interesting in this regard. American Home Prod. Corp., 3 TRADE REG. REP. ¶¶ 19,962 (FTC April 19, 1972) (proposed complaints); 20,263 (FTC Feb. 23, 1973) (complaints issued). *See also* Motor Vehicle Information and Cost Savings Act, Pub. L. No. 92-513 (U.S. CODE CONG. & AD. NEWS, 92D CONG., 2D SESS., at 1110 [1972]), discussed in note 9 *supra*.

104. *See* Kripke, *supra* note 81, at 3-5.

that the purpose of precontract disclosure regulation is to provide consumers with information that without further prompting they will use in making purchase decisions, then both empirical observations of the effects of such regulation—as illustrated by the earlier discussion of truth-in-lending—and theoretical considerations indicate precontract disclosure regulation, based on the best buy model, in most instances will have little impact on consumer buying behavior. It must be emphasized that this conclusion is only a tentative one. Most of the empirical evidence concerns only one example of precontract disclosure regulation—truth-in-lending—and not even that evidence is conclusive. Moreover, my theoretical analysis has suggested several situations in which substantial impact is at least possible. Nevertheless, on the available evidence, the criticisms of disclosure regulation discussed in the introduction appear sound, both empirically and theoretically.

It does not follow from this conclusion, however, that traditional precontract disclosure should be abandoned as a regulatory technique, if the alternative is no disclosure regulation at all. My previous analysis has suggested such regulation may sometimes have very useful impact in highly oligopolistic markets. Even in relatively competitive markets, the benefits to society of compulsory disclosure can exceed its costs even though there is no voluntary disclosure because the private benefits of such disclosure to an individual seller are less than his costs. The societal benefits of compulsory disclosure may not always be limited to savings realized by consumers who use the information. Changing the shopping behavior of only a very small number of consumers can sometimes have impact on the substantive content of a much larger number of transactions. If one assumes a competitive market and a product or contractual term that is highly standardized and not susceptible to differentiation to meet the desires of different sets of consumers, then changing the behavior of only a marginal group of consumers may set off a competition for that group and in the process produce changes in the content of the transactions of a very large number of consumers.[105] Thus, because "interest rate" is a term which is difficult for a seller to differentiate according to the buying motivations of his customers, some expected this "marginal buyer" effect to take hold under truth-in-lending and lead to a competitive re-

105. It does not necessarily follow from the goals heretofore ascribed to disclosure regulation that this "marginal buyer" effect on the content of consumer transactions is desirable public policy; these goals prescribe only that in making purchase decisions consumers be enabled to act on whatever motivations they hold. But I am confident that many, probably most, proponents of disclosure regulation would welcome a change in the terms of large numbers of consumer transactions that make those terms more favorable, in terms of the factors indicated by the best buy model, to consumers, whether or not most consumers place sufficient value on that change to affect their shopping behavior when choices are available. *Cf.* notes 123-25 *infra* and accompanying text.

duction in interest rates. However, no such effect is yet observable.[106]

Not only may the benefits of compulsory disclosure exceed those of voluntary disclosure,[107] but it is at least possible for the costs of compulsory disclosure to be less than the costs of voluntary disclosure. If only one or a few sellers are trying to disclose previously unavailable information, they may be forced to use relatively expensive communication techniques, such as media advertising, in order to reach consumers with whom they do not ordinarily come into contact. Traditional disclosure regulation, however, by providing for disclosure only in the contract, rarely requires sellers to expend more than is necessary to hire a lawyer to draft a few additional forms.[108] And since all sellers must disclose, inclusion in the contract will make the information available to most consumers who might use it.[109]

If disclosure is compulsory, there must be added to the cost side of the cost-benefit equation the expenditures for enforcement. Experience with truth-in-lending has demonstrated, however, that it is feasible to achieve a high degree of compliance with traditional disclosure regulation without significant expenditures for enforcement. The basic strategy for achieving compliance at low cost is as follows. Since disclosure is made by standardized form, public enforcement officials can effectively determine compliance in a large number of transactions by checking the forms used in a single transaction. Of course, there are often so many different sellers subject to the disclosure regulation that checking even one form for each seller can be a tremendous task. This problem is eased

106. The National Commission on Consumer Finance seems to argue that truth-in-lending has had such an effect in other than low-income markets, but offers no data at all to support such a conclusion. COMMISSION REPORT, *supra* note 29, at 176-79.

107. I have discussed only the effects of disclosure regulation on consumer buying behavior, and through such effects on the content of consumer transactions. Precontract disclosure regulation can also have possibly desirable effects other than on shopping behavior. For example, compelling sellers to disclose certain information can often aid in the enforcement of other laws regulating the substantive content of consumer transactions. Thus, truth-in-lending probably made it easier for consumers to detect violations of the usury laws and by so doing may have made private remedies a more efficient tool for enforcing those laws.

108. *See* notes 91-96 *supra* and accompanying text. Of course, there are exceptions. It may, for example be difficult for the seller to compile the information that must be disclosed. In the recently enacted Motor Vehicle Information and Cost Savings Act the burden of compiling information to be disclosed was placed on the Secretary of Transportation in part because it was considered unfair to impose those costs on automobile manufacturers and dealers. *See* note 9 *supra*.

109. There may be some consumers who do not purchase the product at all but who would if the disclosed information were available to them. Disclosure in the contract will not necessarily convey the information to them, of course.

substantially, however, by providing legislatively that any consumer party to a transaction in which a required disclosure has not been made is entitled to a minimum amount of damages, irrespective of proof of actual loss. Because disclosure is inevitably made by standard form, once damages are standardized in this manner, violation of a disclosure regulation presents a situation in which a class action is frequently appropriate. All issues, even the damages issues, are often standardized for the entire class. Since the potential liability of the nondisclosing seller in a class action is often enormous, the threat of a class action can provide an effective deterrent to intentional or careless violation of disclosure regulation.

As I indicated, truth-in-lending demonstrates the efficacy of this low-cost enforcement strategy. A high level of compliance with truth-in-lending was apparently achieved in less than one year.[110] Yet this degree of compliance was achieved with the expenditure of relatively few government resources for enforcement. The Federal Trade Commission has principal enforcement responsibility and has never assigned many personnel to monitoring compliance. The few Commission personnel who have worked on truth-in-lending enforcement[111] have devoted their energies mostly to helping businesses who wished to comply to understand the requirements of truth-in-lending.[112]

The Federal Trade Commission did bring a few highly visible actions shortly after the legislation became effective, apparently in the hope of misleading merchants into believing that noncompliance would be routinely prosecuted.[113] And it still does bring enough actions to insure that the trade journals note the Commission's enforcement efforts relatively consistently.[114] It seems highly doubtful, however, that the level of compliance should be attributed to these occasional threats of prosecution by the Commission. The outcome of a Commission proceeding is only a cease-and-desist order,[115] and in any event it is obvious to all but the most casual

110. *See* note 30 *supra.*

111. For the Federal Trade Commission's enforcement powers see Truth in Lending Act § 108(c), 15 U.S.C. § 1607(c) (1970).

112. For a discussion of the Commission's enforcement activities see Federal Trade Comm'n, Report to the Board of Governors of the Federal Reserve System on Enforcement of the Truth in Lending Act (Oct. 1970).

113. *E.g.,* Chrysler Corp., 4 CCH CONSUMER CREDIT GUIDE ¶ 99,857 (FTC Nov. 7, 1969) (proposed complaint).

114. Local Fin. Corp., 1 CCH CONSUMER CREDIT GUIDE 908 (FTC June 20, 1972) (proposed complaint); Derby Constr., Inc., 1 CCH CONSUMER CREDIT GUIDE 882 (FTC Nov. 13, 1972) (consent order). Both proceedings are noted in BNA ANTITRUST & TRADE REG. REP., Oct. 3, 1972, at A-19.

115. *See* Truth in Lending Act § 108(c), 15 U.S.C. § 1607(c) (1970). Section 112 of the Act, 15 U.S.C. § 1611 (1970), also provides for criminal penalties for wilfull violation of its disclosure requirements, but very few criminal prosecutions have been initiated. *See Report of the Attorney General to the Congress of the United States on the Enforcement of Title*

observer that the Commission is not going to expand its staff sufficiently to initiate many enforcement actions.

It seems much more probable that the crucial factor in the high level of compliance with truth-in-lending has been the private remedies (minimum recovery is $100) afforded a consumer entering a transaction in which the required disclosure is not made.[116] A large number of class actions have been filed against noncompliant merchants for recovery of these private damages.[117] Because of the large damages involved, these suits have prompted a great deal of concern by the credit industry.[118] Indeed, the Federal Trade

---

I of the Consumer Credit Protection Act of 1968 for the Calendar Year 1971, Jan. 10, 1972, in 4 CCH CONSUMER CREDIT GUIDE ¶ 99,248. Of course, many merchants have undoubtedly complied because of a commitment to obey the law or because they perceive no reason to take *any* risk of prosecution, given the low direct costs of compliance and the evident lack of impact of truth-in-lending on buying behavior.

116. Truth in Lending Act § 130(a)(1), 15 U.S.C. § 1640(a)(1) (1970). A victorious consumer litigant is also entitled to court costs and reasonable attorney fees. Truth in Lending Act § 130(a)(2), 15 U.S.C. § 1640(a)(2) (1970).

117. These actions can be brought in federal court, irrespective of the amount in controversy. Truth in Lending Act § 130(e), 15 U.S.C. § 1640(e) (1970). *See generally* Snyder v. Harris, 394 U.S. 332 (1969). For an excellent discussion of the requirements for a valid class action under the Federal Rules of Civil Procedure see Travers & Landers, *The Consumer Class Action,* 18 KAN. L. REV. 811 (1970). The Board of Governors of the Federal Reserve System has been able to locate at least 49 class actions alleging violation of truth-in-lending. 1971 ANNUAL REPORT, *supra* note 30, at 9.

118. *See, e.g.,* BNA ANTITRUST & TRADE REG. REP., March 14, 1972, at B-1.

I do not mean to suggest that providing for enforcement through this deterrence technique is entirely costless. The magnitude of the deterrence may cause sellers to expend resources to avoid mistakes in disclosure that far exceed the harm that would result from the mistakes that are avoided. *Cf.* Posner, *A Theory of Negligence*, 1 J. LEGAL STUDIES 29 (1972). And when the inevitable mistake occurs, the cost to the seller, and in the long run through him to consumers generally, will far exceed the harm caused. Section 130(c) of the Truth in Lending Act, 15 U.S.C. § 1640(c) (1970), tries to ameliorate this difficulty by providing that a creditor whose noncompliance is due to bona fide error is exempted from the private remedies provisions. Recently, it was held that this exemption applied to just clerical errors, such as miscalculations of the annual percentage rate, and not to "errors of law" of the type that are likely to be made systematically on a large number of forms. Ratner v. Chemical Bank New York Trust Co., 329 F. Supp. 270 (S.D.N.Y. 1971).

Apparently because the exemption for the bona fide error was not considered adequate to avoid the resource misallocation effects that can result from the availability of high punitive recoveries, legislation was passed in the Senate during the last session of Congress that would have restricted recovery in a truth-in-lending class action to $100,000 for the entire class. S. 652, 92d Cong., 2d Sess. § 208 (1972). As passed in the Senate, the bill is printed in 118 CONG. REC. 6926 (daily ed. April 27, 1972). The bill was not reported for floor action in the House. 30 CONG. Q. WEEKLY REV. 2711 (Oct. 21, 1972).

Probably for similar reasons, a number of recent decisions have held

Commission itself has assigned an increasing enforcement role to private actions, particularly the class action.[119] Thus, one FTC enforcement official reported to me that currently he has considerable success in obtaining voluntary compliance by indicating to the merchant that he viewed his function as helping the merchant avoid the potential liability of a class action.

D. Discovering New Purposes for Disclosure Regulation

Continued use of precontract disclosure regulation as it is now typically formulated can be justified, even if applied to relatively competitive industries, on the ground that its benefits may marginally exceed its costs. However, such regulation would be a more useful tool of consumer protection if it could be formulated in different ways, or perhaps assigned different purposes, that would provide it greater potential impact. There are essentially two basic approaches in this regard. Disclosure of information about factors other than those indicated by the best buy model could be required, or regulation based on the best buy model could be assigned purposes, at least theoretically capable of significant fulfillment, other than those indicated by the assumption that it is based on a predictive model.

Of these two possibilities, the first seems less promising. If large numbers of consumers would use the information required to be disclosed, in most instances there should be no need for the regulation. Sellers most capable of satisfying the desires of consumers with regard to the aspect to be disclosed could be expected voluntarily to provide the information. Nor would basing disclosure regulation on models of consumer behavior other than the best buy model appear consistent with an intuitive sense about what are proper subjects for compulsory disclosure. Thus, assuming the information is readily available and easily described, I doubt that

that under the Federal Rules of Civil Procedure class actions may not be maintained for alleged truth-in-lending violations. These decisions do not point to any lack of commonality in the questions of law and fact, and indeed there is none. Rather they seem to reason from the inequity of a judgment for millions of dollars for a highly technical violation of truth-in-lending to the conclusion that a truth-in-lending class action fails to satisfy the requirement of FED. R. CIV. P. 23(b)(3) that, in order to be maintainable, a class action must be "superior to other available methods for fair and efficient adjudication of the controversy." *E.g.*, Ratner v. Chemical Bank New York Trust Co., BNA ANTITRUST & TRADE REG. REP., Feb. 22, 1972, at E-1 (S.D.N.Y. 1972); Rogers v. Coburn Fin. Corp., BNA ANTITRUST & TRADE REG. REP., Feb. 22, 1972, at A-14 (N.D. Ga. 1972). *Contra, e.g.*, La Mar v. H&B Novelty & Loan Co., BNA ANTITRUST & TRADE REG. REP., Feb. 1, 1972, at A-2 (D. Ore. 1972); Joseph v. Norman's Health Club, Inc., 336 F. Supp. 307 (E.D. Mo. 1971). Since there is a conflict in the decisions, a merchant violating truth-in-lending still faces a substantial threat of a valid class action.

119. *See, e.g.*, BNA ANTITRUST & TRADE REG. REP., May 16, 1972, at A-12 (statement of Commissioner Jones).

many persons would seriously consider enacting a law requiring disclosure of general attitudes in the population towards owners of expensive, prestige automobiles, even if there is reliable evidence that many consumers are acting on mistaken assumptions about such attitudes when making automobile purchase decisions.[120]

It is more fruitful, I believe, to inquire whether precontract disclosure regulation based on the best buy model can have purposes other than those indicated by an assumption that it is based on a predictive model. For one thing, it seems highly likely that many of the participants in the drafting of such regulation know or sense how unrealistic it is in most instances to assume regulation based on the best buy model provides information large numbers of consumers will use without further prompting. Since precontract disclosure regulation nevertheless is almost inevitably based on the best buy model, it is reasonable to assume that, implicitly at least, many of the drafters of disclosure regulation have other than the usually assumed purposes in mind.

One possible alternative explanation of purpose is that, despite appearances to the contrary, precontract disclosure regulation is enacted precisely because it is expected to have little impact on consumer purchasing decisions. According to this explanation, the enactment of precontract disclosure regulation is intended primarily to satisfy a strong, but transitory, political demand for legislation benefiting consumers. Because the political demand is transitory, if consumers are to gain anything, their spokesmen may be forced to seek legislation which will have little impact and therefore does not produce strong opposition. The result is frequently disclosure regulation based on the best buy model, which satisfies the political demand for consumer legislation because it appears and is represented to be proconsumer and because the ordinary citizen simply has neither the sophistication nor the information needed to realize that the legislation will have little impact.[121]

Undoubtedly political considerations such as these have played an important role in determining the content and obtaining the

---

120. In buying expensive, prestige automobiles, some consumers no doubt are more interested subjectively in acquiring a personal belief that others have certain attitudes towards them than in actually stimulating those attitudes in others. *See* Leff, *supra* note 88. These consumers can satisfy their buying motivations without any factual information about attitudes, although concrete information about attitudes could affect their beliefs about prevailing attitudes and thereby affect shopping behavior. I assume, however, that many purchasers of prestige automobiles are principally interested in stimulating attitudes in others as a means of achieving still other external goals, and these buyers have a legitimate "need" for factual information about attitudes if they are to maximize satisfaction of their buying motivations.

121. For a fuller explanation of this theory of political action see J. EDELMAN, POLITICS AS SYMBOLIC ACTION (1971); J. EDELMAN, THE SYMBOLIC USES OF POLITICS (1964). *Cf.* Kripke, *supra* note 81.

enactment of much precontract disclosure regulation. However, I think there is reason to believe that the explanation is not sufficient to explain the existence and content of all such regulation.[122] In any event this article is not concerned so much with what purposes precontract disclosure regulation has in fact as with determining whether such regulation can be formulated in ways that will have substantial impact on consumer transactions.

The most plausible remaining alternative explanation for use of the best buy model in formulating precontract disclosure regulation[123] is to assume that the drafters are using a normative rather

122. Thus, proposals for disclosure regulation have often generated fierce opposition from seller interests. *See* Hart, *supra* note 8.

123. There are, of course, a number of other possible explanations, none of them very plausible to me. For example, it might be argued that the drafters intend not so much to induce change in consumer buying motivations as to favor those already motivated to follow the best buy model by providing them the information they need. This explanation is also essentially a normative one; it necessitates a judgment to use the apparatus of the state to favor certain buying motivations over others. And the ultimate result sought remains increased comparative shopping according to factors indicated by the best buy model. It differs from the normative explanation in the text, however, in that there is no desire to change existing purchasing motivations.

A second possible explanation for the consistent decision to disclose factors indicated by the best buy model is that other attributes of a product or service about which consumers may want to know are often hard to measure (*e.g.*, the degree to which use of different toothpastes will enhance sexual attractiveness). Such information simply may not be available, perhaps because the product quality is essentially not measurable. Alternatively, the information may be sufficiently complex that it is difficult to convey meaningfully through disclosure. This latter explanation may be especially applicable to the failure to compel disclosure of information pertaining to shopping convenience. Although there may be some merit in this type of explanation, I doubt that it fully accounts for the consistency in the type of information made subject to compulsory disclosure. It fails, for example, to take account of the intuitive sense about what are proper subjects for disclosure that I discussed earlier. *See* note 120 *supra* and accompanying text.

My analysis of the inadequacies of predictive models as a basis for disclosure regulation mostly assumes that any such regulation necessarily provides for disclosure in the written contract, or in some similarly inadequate but inexpensive manner. It is possible, of course, that such disclosure regulation has little impact on shopping behavior not because many consumers do not in some sense "want" the information disclosed but because the costs to them of discovering the information—in terms, for example, of shopping time, since it is necessary to visit each place of business to obtain the information about each seller—exceed whatever value they place on use of the information. On this assumption it follows that if disclosure regulation provided for disclosure in manners that permitted many consumers to obtain and use the information at little cost to themselves, the regulation would have substantial impact because in some sense it would make available information consumers "want." Such regulation could be said to be based on a predictive model.

The principal operational implication of this mode of analysis—that the main reform needed in most present-day disclosure regulation is in the

than a predictive model; that such regulation reflects a belief that consumers should make purchasing decisions in accordance with the best buy model, whether or not they are naturally inclined to do so. Thus, in the case of truth-in-lending, the decision to place primary emphasis on the annual interest rate and total finance charge reflected not so much a prediction that consumers *would* make substantial use of this information in making buying decisions as a belief that they *should* make use of this information.

The view that disclosure regulation is based on normative models has a number of substantial implications. Most importantly, it means that disclosure regulation, perhaps in conjunction with some other regulation, is intended somehow to encourage or persuade more consumers than otherwise would be inclined to do so to make purchasing decisions on the favored bases. No longer is it assumed, as it would be if predictive models were being used, that large numbers of consumers will use, without further prompting, the information disclosed in making their shopping decisions. Secondly, while disclosure regulation has generally been characterized as a regulating approach that is consistent with freedom of contract values,[124] use of normative models for the purposes I have described requires a governmental judgment as to what kinds of considerations should be weighed by a consumer when deciding whether to enter into a transaction. There is a perpetual debate about the wisdom of the government making such judgments, and any effort to resolve that debate is beyond both the scope of this article and the competence of its author. It should be noted, however, that attributing the purposes I have described to disclosure regulation would not make such regulation unique. Substantive

---

manner in which disclosure is required—is strikingly similar to the operational implications I shall develop subsequently of my contention that disclosure regulation is more reasonably viewed as based on normative models. I prefer my view of the basis of disclosure regulation for several reasons. For me, it "rings truer" in an intuitive sense. It makes easier the justification of disclosure regulation on a cost-benefit basis even though the market does not induce voluntary disclosure of the information. *Compare* notes 105-19 *supra* and accompanying text *with* note 129 *infra* and accompanying text. And it avoids the necessity of explaining how disclosure regulation could be based on predictive models when few, if any, empirical studies on what information consumers "want" typically precede enactment of the regulation. *See* notes 86-88 *supra* and accompanying text. On the other hand, to the extent the type of disclosure regulation I discuss subsequently could be based on predictive models, it would avoid the need to meet the arguments about the appropriateness of government making the decisions that are required by normatively based disclosure regulation. These arguments are noted in the next paragraph of the text.

124. The argument, of course, is that disclosure regulation in no way controls the substantive content of contracts. Rather it is designed to insure only that the assumption underlying freedom-of-contract values —that the parties have consented to the substantive terms—is a practical reality. *See generally* Murray, *Unconscionability: Unconscionability,* 31 U. PITT. L. REV. 1 (1969).

regulation of the terms of consumer transactions (*e.g.*, regulation of the terms of insurance policies) is usually designed to insure that transactions are, in terms of the best buy model, more in the interests of the consumer than predictably they otherwise would be. And government-sponsored consumer education programs typically try to persuade consumers to act more consistently with the best buy model. Moreover, disclosure regulation based on the best buy model is still more consistent with freedom-of-contract values than most alternative forms of consumer protection regulation; disclosure regulation seeks only to persuade rather than to compel purchases according to a predetermined model.[125]

It is, of course, impossible to prove that disclosure regulation is typically based on a normative view of how consumers should behave, although I believe such is often the case. For purposes of this article, however, the important point is that it is the most plausible explanation for use of the best buy model that also indicates precontract disclosure regulation, at least implicitly, is intended to have more than marginal impact on consumer buying behavior. Consequently, for the balance of this discussion of precontract disclosure regulation, it will be assumed that such regulation in effect, although rarely explicitly, is intended to induce or persuade consumers to weigh the information disclosed more heavily in their purchasing decisions than they otherwise are inclined to do.

E. Formulating Precontract Disclosure Regulation to Have Persuasive Impact

In this section I make the assumption that it is possible to persuade consumers to act in ways other than they would absent the persuasion. Given this assumption, normatively oriented disclosure regulation, unlike much regulation based on predictive models, has theoretical potential for significant impact on consumer buying behavior.[126] Before disclosure regulation can have this persuasive impact, however, in most instances the manner and timing of disclosure must be revised to reflect the goal of persuasion rather

125. Furthermore, since disclosure regulation leaves the ultimate determination of the terms of a transaction to the parties, it permits adaptation of those terms to the special circumstances facing one or both parties. Special circumstances can indicate that the terms of a contract should not follow the usual pattern for such contracts, even if it is to adhere to the best buy model. The provision of flexibility to adjust to special circumstances is often considered one of the principal benefits of freedom of contract.

126. *See generally* notes 99-104 *supra* and accompanying text. I assume, of course, that choices exist in the market with regard to the factors the normative disclosure regulation indicates should be weighed heavily in purchasing decisions, or at least will become available if the disclosure regulation successfully persuades large numbers of consumers. Except in highly oligopolistic markets concerning products for which the choice not to buy is impractical, this can be expected.

than the assumption that consumers will search for and then use without further urging the disclosed information.[127] I will discuss a range of disclosure techniques that might have persuasive impact and some of the considerations, both legal and practical, that must be taken into account before deciding to use any of them. Each of the techniques discussed will be based on an existing or proposed program for communicating information to consumers. Although rarely drawn upon in formulating disclosure regulation, there is, of course, considerable literature on the problems of mass persuasion. This section is not intended to be a comprehensive analysis of this literature. My main purpose is only to demonstrate that there are disclosure techniques which have not often been tried but which have the potential for substantial impact on buying behavior.

1. SOME GENERAL CONSIDERATIONS

In my discussion of possible persuasive disclosure techniques, it will often be assumed that the effectiveness of the technique can be evaluated without regard to the subject matter of the disclosure. This may be an oversimplification. One disclosure technique may be most effective in persuading consumers to use certain types of information in making purchase decisions, yet another technique may be most effective with respect to other types of information. Similarly, it is unlikely that the same disclosure technique will be most effective in bringing the information to the attention of all groups of consumers. In particular, it seems probable that communication techniques which most effectively persuade low-income urban consumers to use the information disclosed will often be different from communication techniques which best reach other economic classes, since considerable evidence suggests that the shopping behavior of the poor, and most importantly their procedures for obtaining information about buying choices, tend to be distinctive.[128] As a result, most disclosure regulation, if it is to serve the interests of all economic classes, should probably attempt persuasion through several different communication methods simultaneously.

Each proposed disclosure technique will raise cost-benefit effectiveness issues. At the present time it is not possible to resolve these issues with regard to any of the proposed disclosure techniques I will discuss.[129] Even assuming that the costs of disclosure

127. *See* notes 90-96 *supra* and accompanying text.

128. D. CAPLOVITZ, *supra* note 81; G. Day & W. Brandt, *supra* note 31, at pts. III, VI.

129. Sellers who offer goods or services on terms more advantageous with respect to the factors subject to compulsory disclosure than other sellers will have an incentive to persuade consumers to base purchasing decisions on those factors even in the absence of regulation. It does not follow, however, from the absence or limited nature of such voluntary persuasive efforts that the costs of substantial persuasive efforts through disclosure regulation necessarily exceed the benefits to be gained.

could be determined, calculation of the benefits is not possible until there is further empirical evidence about the persuasive impact of each disclosure technique. Moreover, even if it were possible to calculate the dollars saved by consumers persuaded to make the "best buy" as a result of disclosure, these savings would not necessarily be the sole measure of the benefits derived from the disclosure regulation. I have not articulated the reasons why government might decide consumers should make purchasing decisions on favored bases, but at least one reason might be a belief that somehow the "quality of life" will increase if consumers can be persuaded to behave more consistently with the best buy model. Such intangible benefits are, of course, almost impossible to quantify. Nevertheless, some of the disclosure techniques discussed will involve particularly large costs and consequently raise serious doubts about their cost-benefit effectiveness. I will note these more costly techniques as I go along.

There are three basic approaches to persuading consumers to make purchases on favored bases. Traditionally, disclosure regulation has relied on the seller to provide information to consumers, and heretofore in this article I have assumed disclosure regulation relies on this technique of communication. At the same time, however, other devices have been, and obviously could be, used to persuade or encourage consumers to make purchasing decisions on favored bases. Government could itself disclose the information and attempt to persuade consumers to use it, or alternatively arrange to subsidize some nonseller to do the same. Rather than providing consumers with information, government might attempt to structure the environment in which consumers make purchasing decisions so that any existing inclinations to act in accordance with the best buy model are more likely to be reflected in behavior. For example, formal consumer education classes could attempt to train consumers to act in accordance with the best buy model without providing information about any specific product. In the subsequent discussion I will first discuss possible techniques that

---

All the reasons why the social benefits of disclosure regulation based on predictive models can exceed its costs even though there is no voluntary disclosure are potentially applicable here as well. *See* notes 105-19 *supra* and accompanying text. In addition, as noted subsequently in the text, one of the anticipated benefits of normatively oriented disclosure regulation may be improvement in the "quality of life," yet this type of intangible benefit would not ordinarily be taken into account by an individual seller considering voluntary persuasive disclosure. Moreover, sellers voluntarily undertaking to persuade consumers to base purchasing decisions on factors other than those to which they are accustomed may not reap all the benefits that sellers as a class stand to gain from his endeavor. Many consumers who are persuaded may decide to buy from other sellers who also offer advantageous bargains, or who alter their bargains to be as advantageous once the persuasive endeavors approach success. This is sometimes called the "free rider" problem in economics.

rely on seller disclosure, then techniques that rely on communication of information by nonsellers, and finally techniques which focus principally on structuring the purchase decision environment.

2. SELLER DISCLOSURE

The basic strategy I propose for enhancing the persuasive impact of seller disclosure is to manipulate the manner and timing of disclosure so that it is as unlikely as possible that consumers will reach purchase decisions without first having the disclosed information brought to their attention. My strategy is based on the assumptions that nearly all consumers in making purchase decisions give some weight to the considerations indicated by the best buy model and that many consumers perceive behavior in accordance with the best buy model as generally regarded by others as the most desirable type of purchasing behavior. Consequently, if disclosure regulation can be formulated so as to bring the disclosed information to the conscious attention of most consumers before they make purchase decisions, rather than merely making it available in a manner in which it is almost certain to be ignored, I believe it is likely that the regulation will succeed in inducing a significant number of consumers to make the type of purchase decision that the regulation is intended to encourage.

Whatever methods are devised for disclosing information in a manner likely to bring it to the attention of consumers, sellers could be required to include also a statement to the effect that the government, or some agency of it, recommends that consumers consider this type of information before making a purchase decision.[130] Such a statement might help draw the attention of consumers to the information. And when a seller perceives a competitive advantage accruing to him if consumers base purchase decisions on the information disclosed, he may be able to use the government statement as a selling tool. When sellers consider the making of a required disclosure contrary to their interest, however, one can anticpate that they will endeavor to discount the importance of the disclosure and accompanying statement of government recommendation as much as possible. In these situations a statement about government recommendation may have little persuasive effect other than whatever utility it has in drawing consumers' attention to the disclosed information.

130. What I am suggesting here is considerably different from government endorsement of a particular brand. The latter has been consistently rejected in the past, partly on the ground that the needs of consumers are so diverse that it is impossible for anybody to recommend any particular brand as best suited for everybody. *Cf.* Consumers Union of United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 807 (S.D.N.Y. 1969), *appeal dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971). I am proposing only that government urge consumers to consider some particular factor, such as interest rates, before making a purchase decision.

a. Separate statement requirement

Both the Wisconsin Consumer Act and the proposed federal warranties legislation contain provisions illustrating techniques of potentially more effective prepurchase communication. One technique is to require the seller to state important information in an instrument which is separate from the basic contract and which must be separately signed. Thus, the Wisconsin Consumer Act provides that before a cosigner becomes personally liable for the debt of another arising out of a consumer credit transaction, he must sign a separate statement in large type which states clearly and simply the obligations of a cosigner.[131] The apparent theory behind a separate statement requirement is that the signer's attention is more likely to be drawn to information in the separate statement than to information included in a written contract, since the contract contains so much information that many persons will be disinclined to read any of it. It is a theory, of course, that could be applied to any disclosure regulation. Even if this theory should prove empirically sound, however, the separate statement technique would still suffer from the infirmity that the statement will typically be presented to the consumer (or cosigner) only after the effective agreement—the oral agreement—is concluded. Thus, this technique represents, at best, a very modest effort at more effective prepurchase communication.

b. Product labeling

Somewhat related to providing disclosure in a document executed simultaneously with the contract is providing disclosure in product labeling or other point-of-sale material. This disclosure is potentially more effective in communicating information before the consumer has made his effective decision to purchase. At least as regards products sold in self-service stores, it permits the consumer to see the information while browsing. There is, of course, a great deal of compulsory labeling in this country now, some of which[132] is clearly designed to affect purchase decisions, such as the unit-cost or code-dating labeling of food products. Experience with health warnings on cigarette packages seems to suggest that labeling has much less impact on consumer buying behavior than media advertising.[133] Moreover, if too much information is put on the

131. WIS. STAT. § 422.305 (1971).

132. Much compulsory labeling is designed primarily to promote safe use of hazardous products after purchase. *E.g.*, 15 U.S.C. §§ 1261-74 (1970). Such regulation I would call postcontract disclosure regulation.

133. Changes in the rate of per capita cigarette consumption after the emergence and then disappearance of antismoking spot announcements on television are discussed in Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 587-90 (D.D.C. 1971) (Wright, J., dissenting), *aff'd mem.*, 405 U.S. 1000 (1972). Briefly, although compulsory health hazard labeling apparently had little effect on cigarette consumption, the antismoking television announcements seem to have had significant effect.

label, it will look like the fine print in a contract and undoubtedly be ignored by most consumers. On the whole, however, there is not now enough information to assess the impact of this type of disclosure.[134]

c. *Compulsory advertising*

Media advertising is the most obvious means of communicating effectively with consumers before they make their effective purchase decisions. Judging by the amount of resources they devote to it, sellers find advertising to be a very effective means for persuading consumers to act in desired ways. Traditionally, regulation of advertising in this country has not required the disclosure of specified information but rather has forbidden the disclosure of information considered false and misleading. Infrequently, the nondisclosure of a material fact in the course of an advertisement about a particular aspect of a product or service has been considered a violation of the false-and-misleading standard. On these occasions the advertiser has been required affirmatively to disclose the material fact if he continues advertising that particular aspect of his product or service.[135]

Some recent legislation has adopted an expanded but essentially similar approach to affirmative disclosure in advertising. For example, although the principal thrust of the proposed federal warranties legislation was to require disclosure of the warranty details in the written contract itself, the bill would have also authorized the Federal Trade Commission to establish rules determining "the manner and form in which information with respect to any written warranty shall be clearly and conspicuously presented or displayed when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing."[136] Similarly, truth-in-lending requires a lender or credit seller to include, among other things, the annual percentage rate in almost any advertising in which he states other terms of the credit arrangements he offers.[137]

One risk in using this technique for compelling disclosure in advertising is that the advertiser can avoid the duty to disclose simply by refraining from stating anything in its advertising about the aspect of the product or service to which the disclosure relates. Thus, it is widely conceded that at least the shortrun effect of the

134. It should be noted that several Western European countries have adopted rather extensive labeling programs (in England called a "teltag") and consequently comparative research might provide useful information about potential impact of labeling regulation. *See* Trade Descriptions Act 1968, c. 29, § 8; P. KEETON & R. SHAPO, PRODUCTS AND THE CONSUMER: DECEPTIVE PRACTICES 622-28 (1972).

135. *E.g.,* J.B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir. 1967).

136. S. 986, 92d Cong., 1st Sess. § 102(b) (1971).

137. Truth in Lending Act §§ 141-45, 15 U.S.C. §§ 1661-65 (1970).

truth-in-lending provisions concerning advertising has been to discourage the advertising of credit terms altogether, and thus to deprive most consumers of almost any pretransaction information about credit.[138]

The reasons that truth-in-lending's advertising provisions have had this effect are not clear. Some have suggested that advertisers fear consumers would be shocked by the size of the annual percentage rate, since, prior to truth-in-lending, interest rates tended to be quoted in manners which suggested a lower rate. Consequently, advertisers refrain from stating the annual percentage rate (and therefore from stating other credit terms as well) in order not to scare off potential customers.[139] Others have suggested that advertisers believe that advertising which contains a great amount of detail, as required by truth-in-lending, is not effective because the consumer essentially remembers nothing about the advertisement.[140] To the extent this latter possibility accounts for the lack of credit advertising, it could be overcome, of course, by structuring the advertising regulation so as not to require disclosure of so much detail. On the other hand, simplifying the information to be disclosed limits the amount of information that can be communicated and in that way can limit the ability of disclosure regulation to have the desired impact.

The possible explanation mentioned first for the reaction to truth-in-lending's credit advertising provisions suggests a more serious limitation on this technique of disclosure regulation, for disclosure regulation inevitably compels disclosure of information that at least many sellers consider unfavorable. Since all disclosure regulation relates just to certain aspects of a product or service, advertisers will usually find it feasible to redirect their advertising to aspects of their product or service other than those to which the disclosure regulation relates. Thus, I expect that much of the proposed regulation of warranty advertising would have been avoided by advertisers choosing not to discuss warranties in their advertising.

One way to overcome the risk that disclosure regulation pertaining to advertising will be avoided is to compel sellers to advertise

---

138. *E.g.*, 1970 Annual Report, *supra* note 32, at 23-24. This reduction in credit advertising has been a mixed blessing. While informative credit advertising has been sharply reduced, so has advertising, such as "no downpayment," which may tend to mislead consumers by implying that credit is inexpensive. *See* R. Pullen, *supra* note 26, at 21-24. For a discussion of the competitive impact of the reduction in credit advertising see *id.* at 24-29. Recently the Board of Governors of the Federal Reserve System indicated that "there are informal indications that the use of more specific [credit] advertising is increasing," although it did not identify what those indications are. 1971 Annual Report, *supra* note 30, at 17.

139. R. Pullen, *supra* note 26, at 23.

140. *Cf.* 1970 Annual Report, *supra* note 32, at 23-24.

certain information about their products. Compulsory media advertising of consumer products or services is largely unknown in this country. The proposed federal legislation on warranties took a step in this direction by providing that sellers issuing a "full" warranty "attempt in good faith to cause the disclosure of the duration of the warranty period . . . to the purchaser prior to the time of purchase through advertising, by providing point-of-sale materials, or by other reasonable means."[141] The provision, qualified as it was by the "attempt in good faith" and "other reasonable means" language, may not have actually required a seller to advertise very much, and in any event it applied only to sellers who offered comprehensive—in the terms of the bill, "full"—warranties.[142] Sellers offering partial or no warranties did not need to disclose that fact except in the written contract.

The Federal Trade Commission's current development of the "corrective advertising" remedy represents another, and perhaps more significant, step in the direction of compelling disclosure through advertising. The corrective advertising remedy has yet to be upheld in court. If it is sustained, it would permit the Commission to require advertisers found to have engaged in false and misleading advertising to include in future advertising a statement indicating that particular past advertising has been found to be false, or at least a statement contradicting earlier assertions that the Commission has found to be false and misleading. Perhaps both statements will be required.[143]

---

141. S. 986, 92d Cong., 1st Sess. § 103(a)(1) (1971).

142. *See id.* §§ 101(10)(a), 104(a). The National Commission on Consumer Finance considered and explicitly rejected a suggestion that creditors include their annual percentage rate in any advertising, whether or not it contained any other mention of credit terms. COMMISSION REPORT, *supra* note 29, at 188. Since nearly all creditors advertise to some extent, the suggestion in effect was for compulsory advertising.

143. For a discussion of the Commission's use of the corrective advertising remedy see Note, *"Corrective Advertising" Orders of the Federal Trade Commission,* 85 HARV. L. REV. 477 (1971). The Commission clearly asserted its power to use the remedy, although holding it inapplicable on the facts of the case, in Firestone Tire & Rubber Co., 3 TRADE REG. REP. ¶ 20,112 (FTC Sept. 22, 1972). The Commission has yet to apply the remedy in a contested case. Several consent orders have been entered, however, in which the advertiser agreed to place "corrective" advertisements. The text of these advertisements has often been stipulated in the order and uniformly they have provided for a much milder "confession of error" than was indicated by the proposed order contained in the complaint. *Compare, e.g.,* Ocean Spray Cranberries, Inc., 3 TRADE REG. REP. ¶ 19,981 (FTC March 2, 1972) (provisional consent order), *with* Ocean Spray Cranberries, Inc., 3 TRADE REG. REP. ¶ 19,477 (FTC Feb. 11, 1971) (proposed complaint).

Actually, as the proposed remedy has usually been formulated in complaints, it has not beeen technically a compulsory advertising requirement, since the advertiser has been given the option to stop advertising altogether. The Commission has made it very clear, however, that it considers the option illusory. To exercise the option, the advertiser must

Even if the Federal Trade Commission's authority to direct corrective advertsing is sustained, it will not provide a legal basis for directing compulsory advertising of all types. The Commission's primary rationale for corrective advertising is that it is needed to counteract the lingering effect of earlier deceptive advertising.[144] Under existing legislation, it seems inevitable that the courts, if they sustain the Commission at all, will restrict the Commission's power to compel advertising to situations indicated by the latter's rationale—that is, to where there has initially been deceptive advertising. Nevertheless, experience with the corrective advertising remedy may provide useful information on the ability of compulsory advertising to affect consumers' purchasing decisions.

It should be noted that even if compulsory advertising is found to be an effective way to "market" information to consumers, there are other problems that can hinder use. Probably the most important is cost. Unless, as generally with corrective advertising, compulsory advertising can be made part of advertising the seller would undertake in any event, it will significantly increase the seller's direct costs of compliance with disclosure regulation. In this connection it should be noted that disclosure regulation through media advertising is a costly communication technique in part because the disclosure will be addressed to many people who in no event would have purchased the good or service to which the disclosure relates.[145] Moreover, there is no assurance, absent truly massive advertising, that the disclosure will reach all consumers who are contemplating a purchase. Individual sellers typically use media advertising despite this inefficiency because it is the only practical way to communicate with prospective purchasers who will not otherwise frequent their place of business. By requiring point-of-sale disclosure by all sellers, however, disclosure regulation may be able to insure at much less cost that the information will reach

---

stop all advertising; he cannot avoid the confession of past deception simply by switching his advertising to other aspects of his product. The Commission clearly believes that today no major seller of goods or services can afford to cease advertising entirely. In the one case in which the Commission believed that the option not to advertise was a viable one, since the advertiser was a trade association promoting the general use of sugar, the Commission's proposed order did not allow the option. Sugar Association, Inc., 3 TRADE REG. REP. ¶ 19,857 (FTC Dec. 2, 1971) (proposed complaint).

144. *See* Firestone Tire & Rubber Co., 3 TRADE REG. REP. ¶ 20,112, at 22,083-85 (FTC Sept. 22, 1972). Other rationales offered include: (1) corrective advertising redresses any competitive imbalance caused by the illegal conduct of one company in the market-place to the detriment of companies which did not engage in similar illegal conduct; and (2) corrective advertising represents an attempt to deprive malefactors of the illegal fruit gained by their unlawful conduct. *See* Note, *"Corrective Advertising" Orders of the Federal Trade Commission, supra* note 143, at 493-95.

145. *See* Travers, *supra* note 21, at 556.

all or most consumers who should receive it. On the other hand, compulsory media advertising may be much more effective than point-of-sale disclosure in encouraging comparative shopping, because it reduces the search time needed by a consumer to acquire comparable information about a large number of competing products or services. The conclusions suggested that when disclosure regulation seeks primarily to induce comparative shopping, compulsory media advertising should be considered. But when the primary goal of the regulation is to discourage any consumption of the product or service, point-of-sale materials may generally be a more efficient technique of disclosure. This is providing—and this is a very important caveat—that techniques of disclosure regulation through point-of-sale materials can be developed that communicate information in fact and before most consumers make an effective decision to purchase.

d. Disclosure during preagreement negotiations

Everyday experience teaches us that effective agreement in the vast majority of consumer transactions is reached orally. It would seem logical, therefore, to require disclosure during these negotiations if at all possible. It may also be that such disclosure would be most effective if it were in an oral form. Sellers often seem to choose that form for the messages they believe are most likely to influence consumer decisionmaking.

There are problems with any requirement of disclosure during preagreement negotiations. Enforcement is likely to be difficult, since it may often require an assessment of the credibility of a seller's and a consumer's conflicting versions of their negotiations. Perhaps some technique for eavesdropping randomly on negotiations while in progress would effectively induce compliance, but there are many obvious objections to use of this enforcement technique.

Furthermore, a seller probably could lessen the impact of preagreement disclosures, particularly oral disclosures, by his tone of voice or by explaining away the significance of the disclosure. It would appear to be very difficult to devise standards for controlling these devices for evading the spirit of the disclosure regulation. Finally, it may prove difficult to define the time period during oral negotiations at which the disclosure should occur in order to insure that it occurs before effective agreement.

Although there are difficulties in enforcement, the potential advantages of requiring disclosure, perhaps orally, at the time of oral negotiations suggest the need for experimentation. Probably the most evident advantage is the timing of the disclosure. Such disclosure, coming before the effective agreement, avoids the difficulty of overcoming the consumer's prior commitment to the trans-

action, yet it comes not so early, as may be the case with much media advertising, that the consumer has forgotten the disclosed information by the time of the purchase decision. Research may also show that such disclosure is more likely than other forms to induce understanding and appreciation of the disclosed information, partly because there is an opportunity to ask questions about parts of the disclosure not understood, and partly because there may be a greater likelihood that the consumer's attention will be focused on the disclosure than it would be if the disclosure was made by media advertising.

Oral disclosure during preagreement negotiations may be a particularly effective technique for communicating information to low-income consumers. Many low-income persons in this country have substandard reading abilities. Moreover, there is some evidence that low-income consumers are more likely than other consumers to rely on personal relationships with sellers, instead of media advertising and other sources of information, in making purchase decisions.[146]

These latter considerations apparently have played an important role in the Federal Trade Commission's decision on a few occasions to require preagreement oral disclosures by merchants selling primarily to low-income consumers.[147] These decisions by the Federal Trade Commission are among the apparently very few instances in which disclosure during preagreement negotiations has been required.[148] Unfortunately, no effort has been made to determine the efficacy of these few examples, either in terms of ease of enforcement or of effect on consumer decisionmaking.

A survey of new car buyers that I conducted several years ago yielded some data relevant to determining whether consumers are

---

146. *See* D. CAPLOVITZ, *supra* note 81.

147. *E.g.*, Tashof v. FTC, 437 F.2d 707 (D.C. Cir. 1970). In its report on its pilot consumer protection program in the District of Columbia, out of which the *Tashof* case arose, the Federal Trade Commission explained that it began requiring oral as well as written disclosures "on the theory that most consumers, and especially low income consumers, will not be really aware of . . . written disclosure in a conditional sale contract, regardless of its conspicuousness." FEDERAL TRADE COMM'N REPORT ON THE DISTRICT OF COLUMBIA CONSUMER PROTECTION PROGRAM 10 (1967). The report makes no mention of the problem in enforcing oral disclosure requirements.

148. One area in which a preagreement disclosure requirement is becoming increasingly common is in the regulation of door-to-door sales. A number of states now require such sellers to identify their purpose upon initial contact with a prospective customer. *E.g.*, WIS. AD. CODE § AG 127.02 (1972).

Although not an example of disclosure during preagreement negotiations, the Federal Trade Commission's proposed trade regulation rule on door-to-door sales would require a seller to inform the buyer orally of his right to cancel the contract without liability within 3 days of signing the contract. 37 Fed. Reg. 22,934 (1972). The FTC has postponed the effective date of this rule pending the outcome of current litigation about whether the Commission possesses rulemaking power. *Id.* at 22,961.

more likely to learn through oral rather than written disclosure.[149] When a consumer buys a car, it is fairly common for the selling dealer to explain orally many of the conditions and limitations on the coverage of the express warranty to repair or replace defective parts. The explanation is typically made at the time the car is delivered to the consumer, which is after the consumer has signed a contract and committed himself to the purchase.[150] Consequently, my survey could not test the effectiveness of disclosure during preagreement negotiations on purchasing behavior.

On the basis of responses to questions testing understanding of the warranty 4 to 6 months after purchase, I was able to categorize most of the survey respondents as at that time understanding the warranty quite well, about average, or poorly.[151] The table below illustrates the warranty knowledge level for both respondents who had received an oral explanation and for those who had not. In constructing this table, I have eliminated those repondents who prior to the interview had experienced difficulty in obtaining a warranty repair to which, at least initially, they thought they were entitled, since that experience must often be an educational one in itself.[152]

149. The survey is described in Whitford, *supra* note 17, at 1010-13. The survey was conducted by the Wisconsin Survey Research Laboratory with funds provided by Consumers Union, Walter H. Meyer Institute of Law, and the University of Wisconsin Graduate School. Mr. Peter Wolfe has helped me with the data analysis that is discussed subsequently in the text.

150. The oral explanation is given in hopes that better understanding of the warranty will reduce the number of subsequent disputes about warranty coverage arising because of owner misunderstanding of the warranty provisions. *Id.* at 1049-51.

151. The results for the individual questions testing knowledge of specific warranty provisions are published in *id.* at 1055. In constructing an overall knowledge score for each respondent, I weighted the answers to the individual questions according to my own judgment as to the importance of the warranty provision. Answers to the question concerning clutch repairs were not weighted at all, since this question was not asked of all respondents. In some instances partial credit was given for an answer that revealed knowledge about a warranty provision that I considered important, even though the answer was incorrect in some particulars. Consequently, the overall knowledge score is essentially an arbitrary construct.

152. Primarily because the number of respondents to the survey was low, more refined controls, such as by income and educational achievement, proved infeasible. *See* note 154 *infra.* It should be noted that, although I have eliminated those respondents who experience difficulty in obtaining a warranty repair, many of the respondents included in the table had occasion to request a warranty repair and received it without difficulty. That experience as well may often have been an educational one. If those respondents are eliminated, although the remaining size of the sample becomes quite small, the distribution of knowledge levels among those who received and did not receive oral explanations remains about the same, as is illustrated by the following table:

WARRANTY KNOWLEDGE ACCORDING TO WHETHER RESPONDENT RECEIVED ORAL EXPLANATION—IN PERCENTAGE

	RECEIVED ORAL EXPLANATION	
	YES	NO
KNOWLEDGE LEVEL		
Low	25.0	31.9
Medium	52.3	52.1
High	22.7	16.0
	100.0 (n = 128)	100.0 (n = 94)

The differences in knowledge level illustrated in the table are not great, and certainly not great enough to be statistically significant.[153] Indeed, they tend to suggest that oral explanations have only a marginal affect on awareness. Moreover, basically because of the low number of respondents, it has not been possible to make meaningful determination whether oral explanation has a differential effect on consumers of differing levels of income and education.[154] Nevertheless, the results are consistent with a hypothesis that an oral explanation of warranty terms helps some con-

	RECEIVED ORAL EXPLANATION	
KNOWLEDGE LEVEL—IN PERCENTAGE	YES	NO
Low	23.9	30.8
Medium	53.5	57.7
High	22.5	11.5
	99.9 (n = 71)	100.0 (n = 52)

153. X^2 (Chi-Square) (2 d.f.) = 2.16, $p<.5$. For a discussion of the Chi-Square test of statistical significance see Whitford, *supra* note 17, at 1056 n.121.

154. Knowledge score did correlate significantly with level of educational achievement (X^2 [4 d.f.] = 26.23, $p<.005$), although not with size of personal income. Efforts were made to control for level of income and educational achievement to see if some income or education groups were benefited more by oral explanations than others, and one finding of statistical significance was discovered. High school graduates who received oral explanations were found to have significantly higher knowledge scores than those who did not. X^2 (2 d.f.) = 6.17, $p<.05$. No similar significant or near significant relationships between knowledge score and oral explanation were found for respondents with different levels of educational achievement, however, nor did controlling for level of income yield significant correlations between knowledge score and oral explanation. Consequently, it would be a mistake to attach too much importance to the isolated finding for high school graduates. Neither, of course, can the possibility that oral explanation has differing impact on knowledge score for different income and educational levels be discounted.

It should be noted the knowledge score correlated significantly with a number of factors besides education—for example, with self-evaluation of knowledge of the mechanical workings of an automobile. These other groups who performed well on the knowledge test received oral explanations with almost precisely the same frequency as the total sample population, however.

sumers learn and suggests the need for further research on the effectiveness of oral disclosure, particularly during preagreement negotiations.

In summary, there have been few attempts to require disclosure during oral negotiations preceding a sale, although commonsense assumptions about the processes by which many consumers reach purchase decisions suggest this could be an effective time for disclosure. Further research and experimentation with both oral and written disclosure at this time seems advisable.

3. NONSELLER DISCLOSURE

a. *Consumer education*

Nonseller disclosure regulation can either directly provide consumers with product information and encourage them to use it or focus principally on persuading consumers to use information that is provided through seller disclosure. Consumer education is a technique that usually concentrates on the latter approach. Although consumer education seems to be everybody's ultimate solution to consumer problems, and programs of various types have existed for years, it is obvious that many more resources could be devoted to this effort. Moreover, disclosure regulation providing for seller disclosure can importantly aid in the success of consumer education programs by standardizing methods of reporting information (such as interest rates). This will make it easier for consumers to understand and to shop comparatively on the basis of that information.[155]

Furthermore, consumer education need not be limited to formal classes. Government and other nonseller agencies can prepare pamphlets, or public service announcements for use on the broadcast media, that encourage consumers to use particular purchase information. Newspapers and magazines frequently print articles of similar import. And, it should be noted, in connection with truth-in-lending the government has used all these avenues in seeking to promote use of information disclosed by sellers as a result of that legislation.[156]

b. *Advertising substantiation*

One of the most recent examples of a nonseller disclosure program that directly provides consumers with product information is the Federal Trade Commission's advertising substantiation pro-

155. *See* note 100 *supra*. The proposed federal warranties legislation would perform a similar function. *See* notes 18-20 *supra* and accompanying text.

156. *See* 1970 Annual Report, *supra* note 32, at 14-16. Of course, much more extensive use of these communication techniques is possible, and probably desirable.

gram.[157] Under this program, the Commission has required leading manufacturers in various industries to submit whatever technical documentation they have for various advertising claims selected by the Commission.[158] Many of the product claims for which documentation has been requested are claims that would be relevant to a consumer acting in accordance with the best buy model. The Commission has then made the submitted documentation available for public inspection at its regional offices.[159] Although the Commission regularly states it may initiate a proceeding for deceptive advertising in any instance in which the documentation fails to substantiate the advertising claim,[160] it is evident the program has other important purposes, one of which is to provide consumers with more product information.[161]

A major difficulty with this program has been that the information provided is usually technical and difficult to understand.[162] Furthermore, at the time of this writing, the Commission

157. For the Commission's formal announcement of this program, including a brief statement of purposes, see 36 Fed. Reg. 12,058 (1971). For a full report on the program, including an analysis of submissions by advertisers pursuant to the program, see STAFF OF THE BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMM'N, REPORT TO THE FEDERAL TRADE COMM'N ON THE AD SUBSTANTIATION PROGRAM (printed by the Senate Comm. on Commerce, 92d Cong., 2d Sess., 1972) [hereinafter cited as STAFF REPORT].

158. The automobile industry was the first one asked to substantiate its advertising. 3 TRADE REG. REP. ¶ 19,698 (FTC July 13, 1971). Since then various manufacturers in several other industries have been asked to submit documentation for selected advertising claims. *E.g.*, 3 TRADE REG. REP. ¶¶ 19,828 (FTC Oct. 14, 1971) (televisions and air conditioners); 19,879 (FTC Dec. 22, 1971) (dentifrices); 20,040 (FTC June 28, 1972) (soaps and other detergent products).

159. The Commission, of course, will refrain from publicizing trade secrets, but it reserves the right to make its own judgment whether substantiating material submitted contains trade secrets. *See* STAFF REPORT, *supra* note 157, at 15.

160. The first proposed complaints to arise out of the advertising substantiation program were announced October 12, 1972. Fedders Corp., 3 TRADE REG. REP. ¶ 20,120 (FTC Oct. 12, 1972) (proposed complaints). The proposed complaints are premised in part on the theory that whether or not the advertising claims were "deceptive," it was an "unfair" trade practice to make claims without having available adequate substantiating data prior to the making of the claims. *See* Pfizer, Inc., 3 TRADE REG. REP. ¶ 20,056 at 22,031-33 (FTC July 11, 1972). The Supreme Court recently upheld the authority of the Commission to prohibit "unfair" trade practices even though they are not "deceptive" in the traditional sense. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239-44 (1972).

161. *See* STAFF REPORT, *supra* note 157 *passim*. Chairman Kirkpatrick of the Commission consistently opposed a proposed Truth in Advertising Act, S. 1461, 92d Cong., 1st Sess. (1971), that would have required advertisers to provide substantiation for advertising claims to any individual who requested it. Kirkpatrick attributed similar purposes to the Commission's program and to the proposed act and felt that more time was needed to evaluate the Commission's own program. BNA ANTITRUST & TRADE REG. REP., May 16, 1972, at A-19.

162. The FTC staff mailed a questionnaire to 45 persons, mostly consumers or members of consumer-oriented groups, who sought access to the

has not devised ways to make the information easily available to consumers.[163] Even if these difficulties were overcome, however, information is provided only about product characteristics which the manufacturer chooses to advertise. Since manufacturers frequently choose to say nothing in their advertising about many product characteristics, there is no way this program can be designed to insure that consumers receive the same kind of information about all products of the same type. It is the latter type of information, of course, that best facilitates comparison shopping.

c. *Product information systems*

To promote better comparison shopping, there has been some discussion in recent years of establishing systems which would provide consumers, at their request, with easily understood comparative product information of various kinds. One of the many organizations associated with Ralph Nader reportedly has drafted plans for such a system. The product information would be stored on computers and provided to consumers, for a small fee to cover operational expenses, through computer outlets scattered throughout the country.[164] Systems such as these would extend the idea underlying *Consumer Reports* magazine by making product information more widely available than does that magazine. In a few places, private companies are now providing similar information, for a fee, to prospective new car purchasers.[165] There is no information available on the actual or potential impact of these programs on consumer buying behavior. I would hypothesize that these programs will have only modest impact until accompanied by

materials submitted by the automobile manufacturers. Only 13 responses were received and of this number, only one thought studying the submissions would be useful; the others agreed that the submissions were too technical to be understood by the layman. STAFF REPORT, *supra* note 157, at 11.

163. The Commission staff hopes that various groups will study the submissions and publish their conclusions in easily understood and widely distributed pamphlets. *Id.* at 12. Recently the Institute for Public Interest Representation at Georgetown University Law Center prepared a simplified analysis of the substantiating material concerning television sets, and the analysis was published by the Senate Committee on Commerce. SENATE COMM. ON COMMERCE, 92D CONG., 2D SESS., ADVERTISING FOR TELEVISION SETS: A PUBLIC INTEREST EVALUATION (Comm. Print 1972). It is not known how widely this report has been distributed.

164. I have never seen this information published but it has been reported to me in personal interviews with several reliable sources. A model for such a system is described in Baran, *Some Changes in Information Technology Affecting Marketing in the Year 2000,* in CHANGING MARKETING SYSTEMS: CONSUMER, CORPORATE AND GOVERNMENT INTERFACES 76 (R. Moyer ed. 1968).

165. The basic information provided is the cost of the new automobile to the dealer. This enables the prospective purchaser to estimate the lowest price he should be able to obtain. See OF CONSUMING INTEREST, April 5, 1972, at 5.

consumer education and other programs to encourage consumers to use the information.

d. Counteradvertising

Probably the best known proposal for nonseller disclosure is the effort by various "public interest" groups to use the Federal Communication Commission's "fairness" doctrine to require broadcasting stations to broadcast "counteradvertising" messages rebutting various claims made in broadcast product advertising. Recent efforts[166] to develop this technique of nonseller disclosure began with *Banzhaf v. FCC*,[167] in which the courts upheld a Federal Communications Commission determination that cigarette advertising raised a "controversial issue of public importance"—namely the desirability of cigarette smoking—and consequently that broadcasting stations carrying such advertising had a duty under the fairness doctrine to broadcast other views on the issue.

The result of *Banzhaf* was the appearance of many spot announcements ("counterads") pointing to the health hazards of smoking.[168]

---

166. The earliest application of the fairness doctrine to product advertising was in Sam Morris, 11 F.C.C. 197 (1946). Until Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969), however, there were few applications of the doctrine to commercial advertising. The fairness doctrine itself has no explicit statutory basis but has been developed by the FCC as a specification of the "public interest" standard. Editorializing by Broadcast Licensees, 13 F.C.C. 1246 (1949). The United States Supreme Court recently approved the fairness doctrine in a case not concerning product advertising. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). For further discussion of the doctrine see Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access,* 85 HARV. L. REV. 768 (1971); Comment, *And Now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising,* 60 CALIF. L. REV. 1416 (1972).

167. 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied,* 396 U.S. 842 (1969).

168. The Commission never explicitly compelled the broadcasting of spot announcements concerning the dangers of smoking, but the result of a series of FCC rulings following *Banzhaf* clearly induced broadcasters to choose that route to satisfy their fairness obligation. The FCC's original decision in the *Banzhaf* litigation had suggested that stations might accept an offer of the American Cancer Society to provide spot announcements. Television Station WCBS-TV, 8 F.C.C.2d 381, 382 (1967). On rehearing, the Commission indicated that although antismoking views are not entitled to "equal time" with cigarette commercials, the frequency of the appearance of cigarette commercials required "some regularity in the presentation on the other side of the issue." Television Station WCBS-TV, 9 F.C.C.2d 921, 941 (1967). A subsequent FCC decision established that a reasonable proportion of the antismoking presentations must be during prime time. National Broadcasting Co., 16 F.C.C.2d 956 (1969); *see* Comment, *And Now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising, supra* note 166, at 1439-40.

It is important, in terms of remedy, to distinguish the "fairness" concept from the "equal time" concept. Under the latter concept, which applies primarily to the political candidates, broadcasting stations are required to offer equal time to all candidates on the same basis (paid or

These counterads were apparently quite effective. Cigarette consumption declined, both absolutely and per capita, during the period the counterads were broadcast.[169] When Congress, with tobacco industry support, banned cigarette advertising effective January 1, 1971,[170] most counterads left the air, and cigarette consumption again began to increase.[171]

Since *Banzhaf*, there has been considerable litigation testing the limits of the fairness doctrine's applicability to product advertising.[172] In *Banzhaf* both the FCC and the courts indicated the fairness doctrine did not apply generally to product advertising but that cigarettes presented a unique case because of the overriding concern for public health. The lack of a substantial logical basis for that conclusion has stimulated a number of attempts to extend the doctrine to other products, some of them successful. Most significantly, in *Friends of the Earth v. FCC*,[173] a court of appeals extended the *Banzhaf* rationale to product commercials for high horsepower cars and high test gasolines. By so doing, the court established the possibility that nearly all product advertising on broadcast media will create counteradvertising responsibilities under the fairness doctrine. The only recognized test is whether the commercial takes a position on a "controversial issue of public importance"—whatever that means.[174]

Another important question for the future of counteradvertising is the issue of remedy. Although following *Banzhaf* the FCC in effect compelled the use of spot announcements as the medium for presenting contrasting views, more recently it has seemed to

---

free). Under the "fairness" concept, however, if one viewpoint is presented in a paid broadcast, the station is required to present the other viewpoint even though there are no paying sponsors for those viewpoints. Cullman Broadcasting Co., 40 F.C.C. 576 (1963). Traditionally, however, there has been no requirement that equal time be allotted to each viewpoint. *See* Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598, 606-08 (1964).

169. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 587-90 (D.D.C. 1971) (Wright, J., dissenting), *aff'd mem.*, 405 U.S. 1000 (1972).

170. Public Health Cigarette Smoking Act of 1969 § 6, 15 U.S.C. § 1335 (1970).

171. Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 589 & n.18 (D.D.C. 1971) (Wright, J., dissenting), *aff'd mem.*, 405 U.S. 1000 (1972).

172. *E.g.*, Retail Stores Employees Union, Local 880 v. FCC, 436 F.2d 248 (D.C. Cir. 1970). For the best account of litigation concerning this extension of the fairness doctrine see Comment, *And Now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising*, *supra* note 166.

173. 449 F.2d 1164 (D.C. Cir. 1971).

174. The court recognized the "thorny nature" of this problem, but left it to the Federal Communications Commission to resolve. *Id.* at 1170, 1171. The Commission has initiated a formal inquiry into this as well as other issues related to the fairness doctrine. Handling of Public Issues Under the Fairness Standard, 36 Fed. Reg. 11,825 (1971).

back away from that position.[175] And in *Friends of the Earth* the court suggested that even though the original advertisement raising the controversial issue was a spot commercial, the counterad need not necessarily be a spot commercial. The court strongly hinted that a few minutes devoted to the issue in the course of a documentary program might suffice, although it remanded the proceeding to the FCC for final determination of the manner in which the broadcaster should fulfill its "fairness" responsibility.

The future of counteradvertising as a disclosure technique remains unclear today. The counteradvertising concept has stimulated tremendous opposition in the advertising and broadcasting industries, as well as by the White House.[176] The reasons for their opposition are not altogether clear, but realistically it probably will retard the development of counteradvertising in the near future. Even if the concept of counteradvertising were to be fully developed, it would not, of course, be the complete answer to problems of precontract disclosure regulation. Under the FCC's fairness doctrine, the duty to present all sides of a controversial issue arises only after a station has broadcast one viewpoint. Counteradvertising might be avoided, therefore, by diverting advertising to print media, which is not subject to the Federal Communications Act and hence to the fairness doctrine.[177] Alternatively, depending in part on what types of advertising are ultimately determined to raise controversial issues of public importance, avoidance could be accomplished by broadcasting only innocuous advertising—for example, a jingle.[178] Because of the avoidance potential, it would be

175. *See* note 168 *supra*; National Broadcasting Co., 30 F.C.C.2d 643 (1971).

176. *See, e.g.*, N.Y. Times, March 29, 1972, at 87, col. 1; *id.*, May 16, 1972, at 67, col. 3. Much of the opposition has been directed at a Federal Trade Commission statement submitted in the Federal Communications Commission's inquiry into the fairness doctrine. *See* note 174 *supra*. The Federal Trade Commission statement supported a counteradvertising requirement in certain circumstances. N.Y. Times, Jan. 7, 1972, at 6, col. 3. A major reason for the opposition, of course, is the potential financial impact of counteradvertising on broadcasters. For a discussion of this impact see Comment, *And Now a Word Against Our Sponsor: Extending the FCC's Fairness Doctrine to Advertising*, *supra* note 166, at 1444-49.

177. Counterads can be expected to focus often on information relevant to the decision whether to buy a type of product at all, as in the cigarette case. Consequently, if one seller sponsors advertisements raising controversial issues about use of that product, counterads could frequently address themselves to issues pertaining to the purchase of all products of that type. Thus, in order to avoid counteradvertising entirely, all sellers would need to refrain from advertising on the broadcast media. A concerted decision not to advertise in the broadcast media may violate the antitrust laws. It may have been this consideration which prompted the tobacco industry not to oppose legislation prohibiting cigarette commercials on the broadcast media. *See* Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582, 588-89 (D.D.C. 1971) (Wright, J., dissenting), *aff'd mem.*, 405 U.S. 1000 (1972).

178. In Television Station WCBS-TV, 9 F.C.C.2d 921, 938-40 (1967), *aff'd*

a mistake to rely solely on counteradvertising as a technique of disclosure regulation, although it might be part of a comprehensive program of disclosure.

Moreover, viewed as disclosure regulation, counteradvertising differs from most other types in that governmental control of the content of the disclosure is not precise. A broadcasting station is only required to air a range of contrasting views. There is not even any assurance that counteradvertising will seek to persuade consumers to act consistently with the best buy model. To be sure, the FCC can regulate the content of the disclosures to some extent by determining whether there has been an adequate presentation of contrasting views.[179] But the FCC is not a body primarily concerned with or experienced in regulating the marketing of goods and services. It cannot be known what bearing this fact will have on the ultimate efficacy of counteradvertising as a disclosure technique, but there are obvious dangers that counteradvertising regulation will not be well coordinated with other government disclosure regulation.

e. *Summary*

As indicated by this discussion, there has been relatively little effort extended to date towards establishing programs of nonseller disclosure regulation. There is a particular lack of programs having as their principal purpose the provision of specific purchase information for all brands of a product in order to facilitate and encourage comparative shopping. Obviously some existing nonseller disclosure programs could be expanded and adapted to serve this latter purpose, and new ones could be established to serve this and other appropriate disclosure purposes.

4. COMPARISON OF SELLER AND NONSELLER DISCLOSURE

There is reason to believe such nonseller disclosure could be more effective and provide for fairer cost allocation than most seller disclosure programs. A principal advantage of nonseller disclosure is that the context in which the disclosure is made is not

---

sub nom., Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969), the FCC took the position that cigarette commercials inevitably raised controversial issues by suggesting that cigarette consumption was desirable and that it was not necessary to examine each cigarette commercial to determine if it gave rise to fairness obligations. If the Commission adheres to this approach, advertisers will not find it easy to avoid counteradvertising in the manner suggested in the text.

179. In practice, under the fairness doctrine the broadcaster has, and probably must, be given considerable discretion in determining which contrasting views to present. *See* Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598 (1964); *cf.* Republican Nat'l Comm., 25 F.C.C.2d 283 (1970), *rev'd sub nom,* Columbia Broadcasting Sys., Inc. v. FCC, 454 F.2d 1018 (D.C. Cir. 1971).

subject to the discretion of the seller. In many instances, of course, a seller will consider the making of a required disclosure contrary to his interests and be motivated to make it in a context which detracts from its impact on the consumer. Although legislation can prescribe the form of disclosure and thereby limit the seller's ability to detract from its effectiveness, some degree of discretion almost inevitably remains with the seller.[180] And for similar reasons it is probably not terribly useful to require sellers to accompany disclosure with prescribed statements explicitly encouraging consumers to use the information.[181] By providing for disclosure by a nonseller who is motivated to communicate information effectively, these problems can be mostly eliminated. Indeed, it is precisely this factor that accounts for the great interest in the counteradvertising concept.

Cost is the most significant among a number of disadvantages of extensive programs of nonseller disclosure. Disclosure by sellers generally imposes few direct costs on anybody, for usually the seller can satisfy the disclosure requirements by including the information in the course of communications he would normally direct at the consumer. A nonseller, however, usually must establish a new communications channel, and that can be expensive.[182] Indeed, the few efforts of the government to provide information directly to consumers have had little effect in large part because of the failure of the government to establish effective communication channels,[183] a failure that no doubt reflects in part a reluctance, perhaps justifiable, to make the necessary investment.

While nonseller disclosure will usually necessitate greater overall expenditures, it can permit an allocation of those costs in a more equitable manner than the costs of seller disclosure are often allocated. When sellers must absorb the initial costs of disclosure, they can be expected to pass on the costs to their customers if competitive conditions permit.[184] Assuming the disclosure regulation is normatively based, consumers who are persuaded by the disclosure not to purchase that type of product or service at all

---

180. *See* note 96 *supra* and accompanying text.

181. *See* text accompanying note 130 *supra*.

182. For an analysis of the ultimate incidence of the costs of existing programs of nonseller disclosure see note 190 *infra*.

183. *See* note 163 *supra* and accompanying text.

184. Even though all sellers of a particular product or service will usually be required to bear disclosure costs, it will not be feasible to raise the price if overall demand is especially price elastic, perhaps due to competition from substitute products or services not subject to the disclosure regulation. In such circumstances the seller will be required to absorb all or part of the disclosure costs, with a consequent reduction in profits. As a result, less investment can be anticipated in the affected industry, which may be an appropriate effect if the normative purpose of the disclosure regulation is to discourage use and development of the product or service.

will not bear any of the cost even though they have benefited from it, perhaps more than any other group of consumers. Similarly, consumers who are persuaded by seller disclosure to shop comparatively for products or services that are more advantageous in terms of the characteristics subject to compulsory disclosure will pay no greater proportion of the disclosure cost than purchasers of products or services of that type who are not persuaded. This is so even though the former group might be considered to have benefited from the disclosure more than the latter.[185]

In one sense, allocating some of the costs of disclosure to those who are unpersuaded is consistent with the purposes of normative disclosure regulation. The costs paid by those who make undesired purchases can be considered a disincentive to purchase in addition to the information disclosed. On the other hand, frequently the most important reason for adopting disclosure regulation rather than direct substantive regulation (such as prohibition of the sale of a product or service) is a recognition that some consumers will have appropriate reasons to purchase a product or service that for the most consumers would be considered an undesirable purchase.[186] It may be difficult to justify imposition of the disclosure costs on these consumers, since they benefit less than other consumers, or not at all, from disclosure, yet make buying decisions that are not socially disapproved. Furthermore, it is probably reasonable to expect even persuasive disclosure regulation to benefit middle and upper income consumers more than lower income consumers. Consequently, permitting the costs of disclosure to be borne ultimately by purchasers of the product or service can be seen as a form of regressive taxation.[187]

It needs to be emphasized that the total cost of many forms of seller disclosure is low. In these circumstances questions about the allocation of those costs are not really very important. But if compulsory advertising or other forms of seller disclosure that require substantial overall expenditures are used, then some measure for altering the usual incidence of these costs might be considered. Sellers could be reimbursed for disclosure costs out of general tax revenues. Alternatively, if nonseller disclosure was equal to or more efficient than seller disclosure in persuasive effectiveness and overall costs, a form of tax-supported nonseller disclosure

185. If the disclosure regulation is based on a predictive model, similar cost misallocations can occur. Presumably not all buyers of the product or service will use the disclosed information and others would have access to the information even without the regulation. Yet all buyers will be required to bear the costs of disclosure.

186. *See* note 125 *supra* and accompanying text.

187. Imposing the costs of disclosure initially on the seller can also increase the cost of entry into that market. Consequently, seller disclosure regulation can have some anticompetitive effects which may offset the procompetitive effects resulting from an increase in comparison shopping.

might be considered. Use of tax revenues to support disclosure could be justified on the grounds that the regulation is designed to achieve a public benefit—perhaps an enhancement of the quality of life.[188] If the disclosure regulation is designed to encourage competititon in oligopolistic markets,[189] a fairly compelling case can be made for public financial support.[190]

5. RESTRUCTURING THE CONSUMER ENVIRONMENT

There are wide varieties of ways in which the environment in which the consumer acts could be structured in the hope of enhancing the possibility that any existing inclinations favorable to the best buy model will be reflected in purchasing behavior. Consumer education programs, by essentially emphasizing that socially approved buying behavior requires utilization of the best buy model, probably perform this function. Another obvious strategy is to deter or limit the impact of communications to the consumer that are designed to persuade him to make purchase decisions on disfavored bases. Traditional prohibition of factually false advertising can be viewed as an example of this strategy.

188. *See* text following note 129 *supra*.

189. *See* notes 101-03 *supra* and accompanying text.

190. It should be noted that the two principal forms of nonseller disclosure that have actually been developed do not necessarily possess these cost allocation advantages. The Federal Trade Commission's advertising substantiation program imposes on the advertiser the often significant costs of gathering substantiating data and these costs presumably will be allocated in the same manner as the costs of seller disclosure. Presently there is very little dissemination of the substantiating data. Tax revenues could be used to support dissemination by the Commission itself. Current indications are, however, that the Commission will rely on nongovernmental "public interest" groups to disseminate the information. *See* note 163 *supra*. Still a third possibility would be for the Commission to sell the substantiating data to interested consumers, as one commercial firm already does. *See* STAFF REPORT, *supra* note 157, at 4. Charging the users of the information for the cost of dissemination is consistent with the goals of disclosure regulation based on predictive models, but it is not likely to yield wide enough dissemination to fulfill at all significantly the objectives of normatively based disclosure regulation.

The incidence of costs associated with counteradvertising is more complicated. Under the fairness doctrine, once one viewpoint on a controversial issue of public importance is presented, a broadcaster is required to present other views even though there are no paying sponsors for those views. *See* note 168 *supra*. The broadcaster can probably be expected to pass on much or most of these costs to advertisers. Perhaps the broadcasters will devise means to allocate the costs just to advertisers whose commercials create a duty to counteradvertise. If so, then those advertisers will have an extra incentive to avoid application of the fairness doctrine by diverting their advertising to the print media or by broadcasting advertisements—for example, jingles—that probably will not be interpreted as addressing controversial issues of public importance. To the extent sellers do not avoid counteradvertising costs in this manner, they presumably will be allocated in the same manner as the costs of seller disclosure. *See* notes 184-85 *supra* and accompanying text.

In this connection it is interesting to note the current speculations that the Federal Trade Commission will seek to enjoin much advertising that encourages purchasing decisions on the basis of various psychological needs, even though such advertising is not deceptive in any traditional sense.[191] Such advertising, of course, is essentially counterproductive to the goals presumed here for most precontract disclosure regulation. The implications of such an approach to advertising regulation are tremendous and well beyond the scope of this article. Suffice it to say here that, although such advertising regulation would be consistent with normative disclosure regulation prevailing notions about freedom of speech and freedom of contract would make it quite logical for government to adopt a policy of encouraging buying decisions on one basis while allowing others to encourage buying decisions on other bases.

Another common approach to inhibiting the impact of communications encouraging consumers to act in undesired ways is to provide for "cooling-off" periods after the conclusion of a transaction, during which a consumer can change his mind and cancel the transaction without liability. Both the federal Consumer Credit Protection Act (of which truth-in-lending is a part)[192] and several state enactments[193] already provide for "cooling-off" periods in a number of different types of transactions, typically transactions concluded away from the seller's principal place of business. Uniformly, the proffered justification for such legislation is that it will enable the consumer to reach a more "informed" purchase decision by giving him or her a longer period to contemplate its wisdom, and in particular by giving him or her time to contemplate while not being subjected to the blandishments of a salesman.[194] If one assumes that these blandishments more often than not encourage purchase decisions on other than the bases desired by most

191. *See* Comment, *Psychological Advertising: A New Area of FTC Regulation,* 1972 WIS. L. REV. 1097. Gerald Thain, currently head of the Division of National Advertising, Bureau of Competition, of the Federal Trade Commission, has been quoted as considering "unlawful advertising techniques which give the consumer a sense of involvement which cannot be achieved, such as ones that suggest assurance of social acceptance or appeal to the opposite sex, or ones that sell products to children by exploiting strongly held aspirations." OF CONSUMING INTEREST, April 25, 1971, at 3.

192. 15 U.S.C. § 1635 (1970).

193. The Wisconsin Consumer Act provides for a "cooling-off" period. WIS. STAT. §§ 423.201-.205 (1971). The Uniform Consumer Credit Code, now in effect in several states—see note 12 *supra*—also provides for one. UNIFORM CONSUMER CREDIT CODE § 2.501-.505. The Federal Trade Commission's proposed trade regulation rule on door-to-door sales, 37 Fed. Reg. 22,934 (1972), when and if it becomes effective, will impose a nationwide "cooling-off" period for door-to-door sales. *See also* note 148 *supra.*

194. *See* Sher, *The "Cooling-Off" Period in Door-to-Door Sales,* 15 U.C.L.A.L. REV. 717 (1968).

disclosure regulation—and at least for door-to-door sales there is some evidence that it does[195]—a "cooling-off" period could be expected to have desirable effects. Nearly all consumers give some weight in their purchase decisions to considerations indicated by the best buy model, and many will undoubtedly discount these considerations more than they otherwise would if a salesman is constantly emphasizing other factors. Moreover, if any relevant disclosure regulation provides for disclosure only in the written contract, a "cooling-off" period provides the consumer an opportunity to peruse the contract and absorb the disclosed information before he is irrevocably bound. In this sense, a "cooling-off" period can be part of a program to encourage use of information provided by seller disclosure.

It is very difficult to assess the impact of environment-creating efforts to influence consumer purchasing behavior. About the only evidence of which I am aware is one empirical study of the actual impact of a "cooling-off" period, which suggested it had little effect—at least if effect is measured by the number of cancellations that occur within the "cooling-off" period.[196] One of the reasons may be that "cooling-off" periods create a new disclosure regulation problem—informing consumers that they have a right to cancel within the specified period. Although nearly all legislation providing for "cooling-off" periods also provides for disclosure of the cancellation right, the apparently limited impact of such legislation may be attributable in important part to the manner in which such disclosure is required.[197]

II. POSTCONTRACT DISCLOSURE REGULATION

A. Purposes

In commentaries on compulsory disclosure as a technique of consumer protection regulation, little is ever said about the utility of disclosure in aiding the consumer in his postcontract activities.[198] After the contract is concluded, there is little, of course, that the consumer can do to insure that he gets the "best buy." But often there are actions he needs to take if he is to maximize his economic gain from the contract he entered. For example, frequently the contract requires the consumer to take certain actions in order to

195. *Id.* at 721-22; D. CAPLOVITZ, *supra* note 81, at ch. 2.

196. Comment, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618 (1969). It has been suggested that a "cooling-off" period could induce salesmen to recast their sales pitch to be less misleading so that prospective customers will not have so much reason to become quickly disillusioned with the transaction. If it does, then, of course, the number of cancellations would not be a good measure of impact. *See* Sher, *supra* note 194, at 734-35.

197. *See id.* at 760-63.

198. *But see* Curran, *supra* note 25, at 426.

preserve his contract rights—a product warranty may require the consumer to procure maintenance regularly for the product and keep receipts as evidence thereof.[199]

If the consumer is to structure his postcontract activities so as to maximize his gain from the contract, he will need information that is not always easily available. To take actions required by the contract to preserve contractual rights, for example, the consumer needs to be aware of the contents of the contract. Assuming it is determined that, as it is desirable to encourage consumers to consider the "best buy," so it is desirable to encourage consumers to consider maximizing their contractual gain, disclosure regulation is indicated as a means of providing the needed information and encouraging consumers to use or consider it. Both the Wisconsin Consumer Act and the proposed federal warranties legislation contain some innovative attempts to provide the consumer with useful information of this type. Rather than merely requiring the seller to provide the consumer with a copy of the contract,[200] they require disclosure which emphasizes provisions of the contract that are particularly important to consider if the consumer is to plan his postcontract actions to maximize his contractual benefits. Thus, the warranties legislation would have authorized the Federal Trade Commission to promulgate rules requiring the seller to provide the consumer with the following information:

> A statement of what the purchaser must do and expenses he must bear.
>
> Exceptions and exclusions from the terms of the warranty.
>
> The step-by-step procedure which the purchaser should take in order to obtain performance of any obligation under the warranty . . . .
>
> . . . .
>
> The period of time within which, after notice of malfunction or defect, the warrantor will under normal circumstances repair, replace, or otherwise perform any obligations under the warranty.[201]

A second purpose of postcontract disclosure regulation can be to provide information that can assist a consumer when a seller breaches a contract. A consumer usually needs to take a number of actions in this situation in order to maximize his contractual

199. *See, e.g.*, Whitford, *supra* note 17, at 1014-15.

200. This requirement was a common feature in state retail installment sales acts, and one of the purposes of the provision was precisely to aid postcontract decisions. *See* Curran, *supra* note 25, at 425. It should be noted that sellers are sometimes motivated to disclose information that can aid postcontract decisions even in the absence of a requirement that they do so. *See* note 150 *supra*.

201. S. 986, 92d Cong., 1st Sess. § 102(a)(5)-(7), (9) (1972). For a provision of the same type in the Wisconsin Consumer Act see WIS. STAT. §§ 425.104-.105 (1971).

gain. But unless he takes some initiative, he almost certainly will not receive his due under the contract. Studies have demonstrated that many consumers, and especially low-income consumers, will not undertake any effective action in such circumstances to protect their rights. The reasons for this lack of initiative vary, but in many instances an important contributor is lack of knowledge, either about effective courses of action or that a breach has occurred.[202]

Some consumers may believe that their only recourse upon breach is in court, but feel that without a lawyer, who cannot feasibly be retained in view of the amount in dispute, they would not stand a chance there. Today, however, consumers very commonly have effective avenues of redress other than a *pro se* appearance in court. There are now many statutes providing a victorious consumer litigant with punitive damages and attorney's fees, and if one of these statutes is applicable, it may be much more feasible for the consumer to retain an attorney.[203] Informal consumer complaint mediation services of various kinds may also be available.[204]

Commentators have rarely indicated that this type of information is an appropriate subject for disclosure regulation, yet it is the type of information that will not usually be provided by the seller absent compulsion.[205] The proposed federal warranties legislation, if enacted, would have become one of the rare examples of disclosure regulation of this type. It would have authorized the Federal Trade Commission to adopt rules requiring the inclusion in the written warranty of the following information:

---

202. D. CAPLOVITZ, *supra* note 81, at ch. 2.

203. *See* Rice, *Exemplary Damages in Private Consumer Actions,* 55 IOWA L. REV. 307 (1969).

204. A wide variety of state and local agencies now mediate consumer complaints. The offices of state attorneys general frequently provide this service. *See* NATIONAL ASS'N OF ATTORNEYS GENERAL, STUDY OF THE OFFICE OF ATTORNEY GENERAL § 6.6 (1971). Various specialized state agencies provide similar services. In Wisconsin, for example, the Office of the Commissioner of Insurance has long mediated complaints by insureds against insurance companies. *See, e.g.,* OFFICE OF THE COMM'R OF INSURANCE, 1971 WISCONSIN INSURANCE REPORT 80-82 (1971). For a discussion of consumer complaint mediation at the county and municipal level see CONSUMERS UNION, REPORT ON NEW CITY AND COUNTY CONSUMER PROTECTION AGENCIES (1972). Of course, various better business bureaus and industry trade associations have long provided consumer complaint mediation services. *See generally* Eovaldi & Gestrin, *Justice For Consumers: The Mechanisms of Redress,* 66 NW. U.L. REV. 281 (1971).

205. There are some exceptions, of course. Both Ford Motor Company and Chrysler Corporation are currently engaging in advertising campaigns which emphasize internal corporate procedures for resolving consumer complaints about automobile repairs, and in particular warranty repairs. Even these advertisements do not mention avenues of redress outside the corporate structure, however. For a description of the automobile manufacturers' procedures in 1967 for resolving consumer complaints see Whitford, *supra* note 17, at 1023-24.

> The availability of any informal dispute settlement procedure offered by the warrantor . . . .
>
> A recital that any purchaser who successfully pursues his legal remedies in court may recover the reasonable costs incurred, including reasonable attorneys' fees.[206]

A second reason many consumers do not take initiative upon breach may be that they are simply unaware that a breach has occurred, either out of sheer ignorance of their contractual rights or due to acceptance of the seller's convincing but wrongful explanation that there is a legal basis for his action or inaction. The indicated remedy, of course, is to provide the consumer with information about his contractual rights. For this purpose, however, rather than emphasizing contract provisions which require the consumer to take particular actions to preserve his contractual benefits, disclosure should emphasize those obligations which the seller is most likely to breach, which are the most difficult to understand, or which are most likely to seriously harm the consumer.

B. *Attractive Features of Postcontract Disclosure*

Although it has received scant attention from the commentators, in a number of important ways compulsory postcontract disclosure is an attractive type of regulation. The attractive features are best illustrated by comparing postcontract and precontract disclosure regulation. First, although there is an absence of relevant empirical evidence, I would anticipate that postcontract disclosure regulation is more likely to cause behavior change in consumers than is precontract disclosure regulation. In reaching a purchase decision, a consumer frequently balances a large and varied number of conflicting considerations, including desires for status, reassurance, shopping convenience, and to get the "best buy." Precontract disclosure regulation, designed to induce consumers to place primary emphasis on only some of these considerations, faces a substantial task of persuasion. In determining actions subsequent to the contract, however, I would hypothesize that for most consumers there are fewer considerations that conflict with a desire to maximize contractual gain.

A second advantage of postcontract disclosure regulation is a corollary of the first. Most precontract disclosure regulation neces-

206. S. 986, 92d Cong., 1st Sess. § 102(a)(10)-(11) (1971). Although a useful innovation, even more information could be included. For example, mention might be made of the many informal consumer complaint mediation facilities now provided by state and local governments, see note 204 *supra*, or the availability in many localities of small claims courts with simplified procedures to facilitate *pro se* appearances. Of course, small claims courts do not always provide fully adequate avenues of redress for consumers. *See, e.g.*, Note, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657 (1969).

sitates a policy determination to encourage consumers to behave according to particular norms. The making of such judgments runs counter to the deeply held beliefs of many that the government should not make such judgments. Postcontract disclosure regulation probably raises less severe ideological problems of this nature. As I have argued above, it seems plausible to assume that a model of maximizing one's economic gain after contract formation is a closer approximation of the goals of large numbers of consumers than is the best buy model of the goals of consumers in deciding what to purchase. Consequently, with postcontract disclosure regulation it is easier for the government to assume the posture of providing consumers information they want and will use. Moreover, postcontract disclosure regulation for the purposes I have previously discussed is supported not only by a norm of encouraging consumers to maximize their contractual gains but also by the norm of protecting expectations based on contract. The latter is a long-held value in this society, a commitment to which is not likely to produce controversy at an ideological level.

A third, and probably the most important, attractive feature of postcontract disclosure regulation is the ease with which the manner and timing of disclosure can be structured so as to be reasonably sure most consumers' attention will be drawn to the disclosed information before they make whatever decision the disclosure is supposed to affect. Precontract disclosure regulation must somehow draw the consumer's attention to the information before he makes his effective purchase decision, a task previous discussion has indicated is neither easy nor costless. But postcontract disclosure need not be made until after the contract is signed, when the consumer is less likely to be barraged by other distracting information. Indeed, postcontract disclosure made substantially after the contract is concluded may be the most effective, since it is likely to come closer in time to when the consumer actually needs the information.[207]

Moreover, if the disclosure is made after the transaction is concluded, it seems probable that nonseller disclosure will have fewer advantages over seller disclosure than it does when disclo-

207. Sometimes the formulators of disclosure regulation will want to disclose information for both precontract and postcontract purposes. For example, perhaps an effort should be made to inform consumers before purchase of the mileage and/or time limitations on product warranties so that they can better evaluate the warranty's worth. Certainly the consumer should have this information after purchase so that he can insure that all possible warranty claims are made within the applicable limits. In such situations it is tempting to devise one disclosure to serve both purposes. Since disclosure after the contract is generally a more efficient technique for achieving postcontract purposes, however, and can be provided at little cost, it ordinarily will be more desirable to provide for two disclosures.

sure is made before contract formation. Since the seller will not risk loss of a sale by revealing the information, he will be less motivated to minimize orally the importance of the information.[208] And, for reasons previously discussed, seller disclosure is generally less costly than nonseller disclosure.[209] Finally, if large numbers of consumers are receptive and interested in postcontract disclosure, as I have argued is likely, it may be possible to include substantial detail in postcontract disclosure without running as great a risk as with precontract disclosure of discouraging consumers from reading the information because it is too inconvenient or time consuming to do so.

The proposed federal warranties legislation provided an excellent illustration of the greater flexibility and efficiency in seller disclosure techniques that are available if the disclosures to be required are intended to affect postcontract activities. The many examples I have given of postcontract disclosure that would have been required by this legislation were to be contained in the "written warranty."[210] The legislation did not prescribe the time at which the written warranty was to be provided to the consumer, but presumably it would have been at or near the time of the signing of the underlying sales contract.[211] The making of the disclosure at this time, which typically will be after the effective oral agreement to purchase, probably would not have deprived the postcontract disclosure regulation of impact, however.[212] Most consumers can be expected to keep the sales contract and warranty, perhaps peruse it in their leisure time, and in any event have it available when and if the information is needed.

The Wisconsin Consumer Act also contains several illustrations of the flexibility in the time and manner of disclosure permitted by postcontract disclosure regulation. A good example is contained in the Act's provisions on third-party freedom from consumer defenses. The Act prohibits the taking of a negotiable instrument,

208. *See generally* notes 95-96, 180-81 *supra* and accompanying text.

209. *See* notes 182-83 *supra* and accompanying text.

210. S. 986, 92d Cong., 1st Sess. § 102(a) (1971).

211. The Federal Trade Commission would have been granted rule-making authority to prescribe the precise manner and timing of disclosure. *Id.* §§ 102(a), 109. If the bill had been enacted, the Commission would have been well advised to require disclosure of the postcontract information not only in the written warranty but also in the "Owner's Manual," since these manuals are customarily kept and read by new car buyers.

212. The proposed warranties legislation did not eschew precontract disclosure regulation entirely, of course. For this purpose, the legislation permitted the Federal Trade Commission to establish rules requiring the disclosure of much less detailed and simplified information in any advertising, labeling, or other effort to communicate with a prospective purchaser. *Id.* §§ 103(a)(1), 109. The legislation thus recognized the greater difficulty of effectively communicating detailed information prior to purchase and the inadvisability of providing for a single disclosure of information designed to affect both precontract and postcontract activities. *See* note 207 *supra.*

other than a check, in a consumer credit transaction,[213] but it does afford a limited effectiveness to clauses waiving consumer defenses against an assignee. In particular, certain assignees of the creditor are permitted to enforce the debt free of most defenses of which they do not receive notice within a 12-month period.[214] The 12-month period does not begin running until after the consumer receives both a written notification of assignment and a "clear and conspicuous" statement of the consequences of not notifying the assignee of any defenses within 12 months.[215] By requiring disclosure at this time the Act insures that the consumer receives needed postcontract information at a time close to when it will be needed.

III. CONCLUSIONS

The major purpose of this article has been to analyze the contention of several commentators that disclosure regulation is essentially useless, because it has little or no impact on consumer behavior, especially the behavior of low-income consumers. This contention needs analysis since much of the major new consumer legislation, such as the proposed federal warranties legislation and the Wisconsin Consumer Act, relies substantially on disclosure regulation. And there is indeed considerable evidence to support the contention of the critics of disclosure regulation; at least much existing precontract disclosure regulation, such as truth-in-lending, has had little impact on consumer purchasing behavior. When the purposes of precontract disclosure regulation are analyzed closely, however, this conclusion is hardly surprising. It seems evident that most precontract disclosure regulation is formulated not on the belief—or at least not on the reasonable belief—that a large number of consumers want the information that must be disclosed, but rather on the belief that most consumers should use the information in making purchase decisions. Precontract disclosure regulation, therefore, usually faces the task not only of providing consumers with information but also of persuading consumers to use that information. Yet the manner of disclosure typically required —inclusion of information in the written contract—obviously can have little if any persuasive impact, particularly since it is not likely to be brought to the attention of consumers until after they have effectively made the very purchase decision it is supposed to affect. There is a need, consequently, if precontract disclosure regulation is ever to achieve its purpose, to develop new techniques for communicating the disclosed information to consumers.

In developing new communication techniques it must be recognized that consumers vary in their receptivity to different modes of communication. Only rarely should disclosure regulation rely,

---

213. WIS. STAT. § 422.406 (1971).
214. *Id.* § 422.407.
215. *Id.* §§ 422.407(2), 422.409(2).

for persuasive impact, on a single communication technique. And since empirical evidence pretty clearly indicates that low-income consumers are less likely to learn from, or be persuaded by, traditional communication techniques, special attention should be given to the development of communication techniques that will have impact on their purchasing behavior.

A second major conclusion I have reached concerns postcontract disclosure regulation—regulation designed to affect decisions consumers make after they enter into a contract. Commentators have usually not discussed the utility of this type of disclosure regulation. I have hypothesized, however, that, although there is an absence of relevant empirical data, it seems probable that postcontract disclosure regulation has greater potential than precontract regulation for actually affecting consumer decisions. Furthermore, it appears that it will be less costly to devise effective methods of communicating information intended to affect postcontract decisions. I would urge, therefore, that in the future greater attention be given to the development of postcontract disclosure regulation.

I should not close before noting two important points. This article is not intended to be a comprehensive analysis of all problems or issues associated with disclosure regulation. Much more research and discussion is needed, especially with regard to the development of effective but practical techniques for communicating information subject to disclosure regulation. Moreover, many of the conclusions I have reached perhaps are more properly considered only suggestions or hypotheses, given the substantial lack of empirical information about the impact of different types of disclosure regulation. There is a particular lack of empirical information about the impact of postcontract disclosure regulation.

Second, the critics of disclosure regulation are certainly correct when they argue that many supporters of such regulation, and in particular the supporters (and even the opponents) of truth-in-lending,[216] have vastly exaggerated its potential impact. The critics may also be correct in contending that disclosure regulation alone is not sufficient to satisfy the demand or need for more extensive consumer protection. Yet it is evident I would be disappointed if disclosure regulation were abandoned, or not further developed, as a technique of consumer protection. The case has yet to be made that disclosure regulation can have no significant impact. And even if disclosure regulation is viewed as having normative objectives, as I have argued it should be, it does have significant advantages over the other principal approach of consumer protection legislation—regulation of the substantive terms of transactions. It necessitates a less complete interference with freedom of contract, with all that implies.

---

216. *See* Note, *Truth in Lending: The Impossible Dream, supra* note 22; note 58 *supra*.