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STRUCTURING CONSUMER PROTECTION LEGISLATION TO MAXIMIZE EFFECTIVENESS†

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Consumer protection legislation has burgeoned over the past fifteen years. Much of the literature that has considered the effectiveness of this legislation has emphasized its limited impact. Two principal reasons tend to be given for the limited effect. Some commentators have emphasized the limited ability of law to affect consumer transactions because of the influence on those transactions of other economic and social forces.[1] Other commentators, drawing on theories of political economy, argue that most consumer protection legislation was not intended by its drafters and promoters to have much impact on transactions. According to this view the purpose of enacting the legislation is largely symbolic. Symbolic legislation is designed to appear to help consumers, in order to legitimize the current political and economic system, while simultaneously failing to alter significantly the power and economic relations between merchants and consumers.[2]

There is, beyond doubt, a good deal of validity to the views described above. In this article, however, I make the assumption, no doubt also valid, that consumer protection legislation has some effects. The purpose of the article is to propose hypotheses about the relationships between these effects and both the structure of consumer protection legislation and the sanctions for its violation.[3] By structure of legislation I mean a number of details

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1. *See* Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115 (1979), for a good example of this approach.

2. Professor Murray Edelman is a leading advocate of this viewpoint. *See, e.g.*, J. M. EDELMAN, THE SYMBOLIC USES OF POLITICS (1964).

3. These hypotheses take account of available published information, but unfortunately reliable, empirical information is often unavailable about the effects of consumer

about the legislation which can be varied without significantly altering the manifest or stated purpose of the legislation. Sanctions for violation can also often be varied without altering the stated purpose of the legislation.

Establishing the scope of this article requires that two definitional issues be resolved initially. One issue concerns the distinction between manifest and latent purposes. Legislation can have many purposes and some of the less visible, or more latent, purposes may in fact have had the greatest influence on the drafters of the legislation. For example, if a latent purpose is that legislation be merely symbolic—that is, to appear to benefit consumers without doing so in fact—presumably there would be an effort to structure the legislation so as to minimize impact. Because latent purposes are nearly impossible to discover empirically, however, I will ignore them here.[4] The structure of legislation will be considered consistent with its purposes if the structure is consistent with the legislation's stated purposes.

The other definitional issue to be addressed preliminarily concerns what I mean by the effects of legislation. In this article I will be primarily concerned with the extent of compliance with legislation. Compliance is the effect that is most readily ascertained. An attempt to ascertain all effects of legislation would necessarily become mired in factual uncertainty. For example, with respect to legislation requiring automobiles to be manufactured to particular safety standards, it would be necessary to estimate not only compliance by manufacturers but also the effects of the legislation on the level of foreign imports, on the price of cars, on the level of petroleum imports, and what have you.

I. The Structure of Legislation

A. Legislation Without Meaningful Standards

Some legislation considered to be protective of consumer in-

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protection legislation. Often, therefore, I have relied on personal impressions about the effects of legislation gained over several years of teaching and researching consumer protection issues. It needs to be emphasized that this article only hypothesizes relationships between the structure of legislation and its effects. It goes without saying that further empirical research on the effects of legislation is sorely needed.

4. Anytime consumer protection legislation is ineffective, a latent legislative purpose that the legislation be merely symbolic could be inferred. If such a purpose is inferred, there is no way the structure of the legislation can be altered to increase effectiveness consistent with the purposes of the legislation. I avoid this conundrum by considering only the manifest purposes of legislation.

terests is essentially admonitory, providing no meaningful standards by which to assess the propriety of a consumer transaction. A good example is the unconscionability provision in Article 2 of the Uniform Commercial Code.[5] With respect to such statutes the question of compliance is almost meaningless. With this one type of legislation, therefore, to inquire at all about the effects of legislation, one has to look to effects other than compliance.

It is a fair conclusion that vague, admonitory legislation usually has little impact on the general character of merchant-consumer transactions. Certainly that would be an appropriate conclusion respecting the unconscionability provision. It is possible to argue, of course, that almost anything is unconscionable. But it has proven very difficult to obtain a judicial precedent about the meaning of unconscionability that has a substantial impact on a large number of transactions. This is partly because the unconsionability section, in its only really clear message, provides that a court must consider all the surrounding circumstances before deciding whether a contract provision or practice is unconscionable.[6] As a result it is nearly always possible to distinguish any precedent on the ground that some circumstance or another is different.[7] Furthermore, in litigation to establish a principle of potential general application in unconscionability cases, a merchant stands to be affected in many transactions, while a consumer litigant will be benefited in only one or a few. Merchants can generally justify greater expenditures on the litigation than the consumers, therefore, which probably causes decisions to be more favorable to merchant interests than they would be if each side invested equally in the litigation. For the same reason a merchant can more easily justify the expense of circumventing any undesirable precedent that is established by attempting to distinguish it in future cases.[8]

Though vague, standardless legislation is not likely to have significant effect on the great mass of transactions, it can have a conclusive, yet often unrecognized, effect on the outcome of particular litigation. Because there is always some argument that a

5. U.C.C. § 2-302 (1978).

6. U.C.C. § 2-302(2) (1978).

7. Arthur Leff developed this line of argument in his typically erudite and convincing way. Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1969).

8. *See* Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

transaction is unconscionable, it is virtually always possible for a plaintiff to impose some risk of losing a lawsuit on a defendant by raising an issue of unconscionability. More important, since nearly everything is relevant to a determination of unconscionability, interjecting the issue into a lawsuit may make available an opportunity for extensive discovery, with all the expense that can impose on the defendant. A consumer plaintiff, however, usually must make a considerable investment in legal resources to seek extensive discovery. As a consequence, this litigational ploy tends not to be used, except where legal resources are inexpensive or costless to the plaintiff, such as when the consumer is entitled to legal aid of some type.[9] Moreover, jurisdictions vary in the availability of extensive discovery in small actions; others have restricted discovery in unconscionability actions where the consumer is unable, prediscovery, to make a prima facie showing of unconscionability.[10] Where the discovery ploy is available and used, a common outcome is a settlement in which the merchant agrees to satisfy all or most of the particular consumer's claim, but in a way that does not establish a precedent for other claims,[11] and the consumer withdraws all discovery requests.

In sum, vague admonitory legislation is probably mostly symbolic in its effects, having little impact on the general situation of consumers. It can provide a useful tool for obtaining a favorable litigation result by a consumer with access to low cost legal services. Ironically, the more vague the legislation the more useful it may be in this respect, since increasing vagueness may increase the kinds of information reachable on discovery. There are already many vague principles available to consumer litigants,[12] however, so that any additional legislation of this type may not have even the limited marginal impact of enhancing the individual consumer's litigation position.

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9. Another situation in which conditions are ripe for interjecting an unconscionability claim into litigation is when the consumer personally possesses the necessary legal skills. The consumer's direct costs for interjecting the claim *pro se* will be low, though in particular cases the opportunity costs will be high because of the time needed to develop an unconscionability theory.

10. *E.g.*, Patterson v. Walker-Thomas Furniture Co., 277 A.2d 111 (D.C. 1971).

11. For example, the merchant might agree that the merchandise delivered was shoddy, but for idiosyncratic reasons—such as mishandling by the delivery person.

Evidence that the unconscionability provision can be and is being used in this way has been gained from conversations with legal aid lawyers having sizeable consumer caseloads.

12. In addition to unconscionability, the common law doctrines of fraud and duress are often thought to be malleable enough to afford a remedy in virtually any situation.

B. *The Importance of Being Specific*

My first proposition respecting the structure of consumer protection legislation is that as the conduct prescribed or proscribed is defined with greater specificity, there will tend to be a greater effect on the voluntary behavior of tbose regulated. By voluntary behavior I mean action which is not compelled by injunction or similar legal process, even though the action might be motivated in part by fear of legal sanction if it were not taken.

Stated more intuitively, tbis proposition asserts that if legislation directs merchants to do something particular, many will do it, almost regardless of the provisions for sanctioning violations. Compliance will result from such motives as a general belief in law abidingness and a fear of bad publicity.[13] On the other hand, standardless legislation is unlikely to have much effect on voluntary behavior, because merchants are likely to give themselves the benefit of the doubt in deciding whether their existing practices violate a vague standard, such as unconscionability.

Debt collection is regulated in Wisconsin by a set of rules that can be used to illustrate this proposition. The Wisconsin Consumer Act, which became effective in 1973, contains the following provision pertaining to the harassment of debtors by frequent telephone calls:

> [A] debt collector shall not . . . [c]ommunicate with the customer or a person related to him with such frequency or at such unusual hours or in such a manner as can reasonably be expected to threaten or harass the customer.[14]

The federal Fair Debt Collection Practices Act, which became effective in 1978, contains a similar provision:

> [A] debt collector may not communicate with a consumer in connection with the collection of any debt . . . at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer.[15]

The federal Act goes on, however, to provide:

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13. It has also recently been argued that private litigation by a consumer alleging violation of a specific legislative prohibition is cheaper and more likely successful than litigation alleging violation of a vague prohibition. Pettit, *Representing Consumer Defendants in Debt Collection Actions: The Disclosure Defense Game*, 59 TEX. L. REV. 225, 288-89 (1981). Fear of sanction, therefore, may be another reason specific legislation is more likely to have concrete effects on merchant behavior.

14. WIS. STAT. § 427.104(1)(g) (1979-80).

15. 15 U.S.C. § 1692c(a)(1) (Supp. IV 1980).

> In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antimeridian and before 9 o'clock postmeridian, local time at the consumer's location.[16]

The proposition asserted above predicts tbat the more specific federal legislation has more substantial immediate effect on the voluntary behavior of debt collectors than the state legislation, even though the sanctions for violation of the state legislation are more severe than the sanctions for violation of the federal legislation.[17] This difference in impact would be obtained even though the manifest or stated purpose of the two enactments is essentially the same.[18] The difference in the enactments lies in what I have called their structure.

One implication of this proposition is that a statute should contain many specific propositions. At the same time, however, a statute ought to attempt to state its ostensible purpose in generalized terms—as both statutes discussed above have done—since it is highly likely that circumstances will arise that are unforeseen or so idiosyncratic as to be unworthy of specific legislative provision.[19] As a general rule, therefore, statutes should state

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16. *Id.*

17. The strongest remedial provision in the state legislation provides that damages "shall include damages caused by emotional distress or mental anguish with or without accompanying physical injury." WIS. STAT. § 427.105(1) (1979-80). The federal Act has no counterpart provision. Otherwise the two enactments are similar in their provisions setting sanctions for violation.

18. It is the general impression of persons in the debt collection business in Wisconsin with whom I have discussed this matter that the two Acts have the differential impact on behavior I predict. It has not been practical to test the proposition empirically, however. An empirical test of the impact of the two Acts could be based on the different scopes of the two statutes. The Wisconsin Consumer Act applies to virtually all forms of debt collection, while the Fair Debt Collection Practices Act applies principally only to persons, other than attorneys, collecting debts on behalf of another (mostly collection agents). *Compare* WIS. STAT. § 427.103(3) (1979-80) *with* 15 U.S.C. § 1692a(6) (Supp. IV 1980). The proposition could be tested by contrasting the collection behavior of collection agents in Wisconsin with tbat of large institutions doing a good deal of collecting on their own behalf, such as banks, both in Wisconsin and elsewhere. The proposition would predict a variance in the bebavior between collection agents and the large institutions, with the former much less likely to telephone outside the specified hours. It would also predict little variance in the collection behavior of large institutions in Wisconsin and elsewhere, even though the non-Wisconsin institutions might not be governed by any collection practices legislation at all. Difficulties in obtaining reliable information about collection behavior render this research design impractical, however. Debt collectors are not likely to reveal voluntarily information indicating behavior that might be regarded as harassing. Any other ways of acquiring information—for example, from consumers themselves—are difficult and expensive.

19. Suppose, for example, to the knowledge of the collector a debtor works at night

their principal purposes in general terms, followed by a number of specific applications.

A second implication of the proposition is that a generalized statement of purpose is likely to have more impact in the long run if the legislation provides a relatively easy way to specify its application in particular circumstances. Although a legislature can always amend legislation to specify its application, consumer protection legislation rarely receives such attentiveness from legislatures. Provision for rulemaking is normally desirable, therefore.[20] It is worth noting that the Fair Debt Collection Practices Act, discussed above, specifically prohibits rulemaking by the administrative agencies charged with enforcement responsibility.[21] The proposition asserted here implies that this provision, if it has any effect at all, can only inhibit the overall impact of the Act.

C. *The Effects of Cost on Compliance*

My second proposition, almost tautological, is that where costs of compliance to the regulated merchant decrease, compliance tends to increase. Costs of compliance consist of two types: (1) direct costs—the costs of adjusting business practices to conform to the regulation; and (2) opportunity costs—the benefits of non-compliance, other than saved direct costs, that are foregone by compliance. An example of an opportunity cost would be profits from extra sales that are lost as a result of compliance with some regulation.

One implication of this proposition for the structure of consumer protection legislation is that effectiveness can be increased by minimizing the direct costs of compliance, to the extent possible consistent with the manifest purposes of the legislation. The proposition also implies that there will tend to be high compliance with regulation that has little impact on the economic position of consumers, for the opportunity costs of compliance with such regulation are likely to be low. There are numerous examples of the latter implication. For example, there

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and sleeps in the daytime. Under federal legislation, only the general provisions could be used to sanction the collector for telephoning at 11 A.M.

20. An alternative to rulemaking, perhaps as effective for these purposes, is provided in the Federal Trade Commission Act. That Act subjects a merchant to financial penalties for "knowing violation of case law"—that is, engaging in an act or practice with actual knowledge that in another case it had been determined unlawful in similar circumstances. 15 U.S.C. § 45(m)(1)(B) (1976).

21. 15 U.S.C. § 1692(1)(d) (Supp. IV 1980).

is high compliance with legislation requiring health warnings on cigarette packages.[22] While no doubt there are several reasons for the high compliance level, one reason probably is that the warnings do not deter cigarette consumption, and hence there is a low opportunity cost to compliance.

Another example where low opportunity costs may explain high levels of compliance concerns the Truth in Lending Act.[23] It is commonly reported that there is a high level of substantial compliance with that legislation.[24] Later in this article I will suggest that some of the sanctions for violation of this Act are an important factor in this high level of compliance. It is generally recognized, however, that there are few opportunity costs to compliance with Truth in Lending, as the various required disclosures have proved to have little impact on consumer buying behavior.[25] These low opportunity costs may partly explain the high level of compliance with this legislation.[26]

One corollary of the proposition concerning costs of compliance is that usually larger firms will have a higher level of compliance since they can realize the economies of scale that typically exist with respect to the direct costs of compliance. Compliance typically involves some investment—for example, in legal resources for redrafting a standard form contract—and as the number of transactions affected by this investment increase, the cost per transaction will be less. Consistent with this reasoning it is the common experience of administrators of consumer protection legislation that small firms have the highest levels of non-compliance.

II. Sanctions for Violation

One way to induce compliance with legislation is to provide sanctions for non-compliance. Potential sanctions can be divided

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22. 15 U.S.C. § 1333 (1976).

23. 15 U.S.C. §§ 1601-1665 (1976).

24. This has been the consistent message of the Federal Reserve Board's Annual Report on the Truth in Lending Act. *See, e.g.*, Board of Governors of the Federal Reserve System, Annual Report to Congress on Truth in Lending for the Year 1978 10 (1978). *But see* Landers, *Some Reflections on Truth in Lending*, 1977 U. Ill. L. F. 669, 676-83.

25. *See* Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 Wis. L. Rev. 400, 405-20.

26. It must be recognized, however, that the direct costs of compliance with Truth in Lending are sometimes substantial, as the complexities of the legislation can make difficult the drafting of a complying disclosure form. *See* Landers & Rohner, *Functional Analysis of Truth in Lending*, 26 U.C.L.A. L. Rev. 711 (1979).

into three categories: private, hybrid, and public. Private sanctions are those initiated by an individual harmed by non-compliance and provide mostly for compensation to the extent of the harm. Hybrid remedies, as I use the term, are also initiated by individuals, but they are designed to fulfill a private attorney general theory of enforcement. They provide benefits which go well beyond compensation for any harm to the initiator of the sanction, commonly benefiting directly the entire class of consumers the legislation is designed to protect. Public sanctions are initiated by public agency. Typically, but not always, they are prospective remedies, seeking to prevent future statutory violations.

A. *Private Remedies*

Most, though not all, consumer protection statutes establish a cause of action for compensatory damages in favor of a consumer injured by non-compliance with the statutes. Compensation for the injured person is one purpose for extending such remedies. Private remedies are often seen as a technique for inducing compliance as well. Where the costs of compliance to merchants are less than the projected claims for compensatory damages caused by non-compliance, the availability of private actions for damages will provide an economic incentive to merchants to comply.

Experience has shown indisputably that consumers simply do not utilize private compensatory remedies with sufficient frequency to provide any meaningful incentive for compliance with the vast majority of consumer protection legislation.[27] In the literature two reasons are commonly given for the low level of consumer utilization of private compensatory remedies. First, it

27. Exclusive reliance on private compensatory remedies is sometimes seen as an ideal strategy for obtaining compliance, because this strategy provides merchants a choice between compliance and non-compliance together with payment of damages to those injured. Merchants could be expected to choose the latter course of action where the costs of compliance exceed the likely losses to consumers resulting from non-compliance. Non-compliance in this situation would be regarded as socially desirable by the dominant utilitarian value systems in vogue today as tending to maximize resource allocation efficiency. In a sense, the availability of a non-compliance option can be seen as a useful check against excesses in the consumer protection legislation. *See generally* Stigler, *The Optimal Enforcement of Law,* 78 J. Pol. Econ. 526 (1970).

The low level of utilization of private remedies by consumers means that, even in terms of neo-classical value systems, exclusive reliance on private compensatory remedies cannot be seen as an ideal sanctioning scheme. So many of the injuries caused by non-compliance go uncompensated, because unclaimed, that such sanctioning schemes provide excessive incentives for non-compliance.

is argued that consumers are typically unaware of their legal rights and remedies. Consequently they do not take whatever steps are necessary to initiate an available remedy, such as contacting a lawyer.[28] Second, it is widely asserted that, because violation of consumer protection legislation rarely visits extensive injury of a tangible, provable nature on any consumer, the amount of damages available under compensatory remedies is usually insufficient to render it economical for a consumer to initiate legal action for a purely compensatory remedy.[29] The costs of initiating legal action are typically significant, because for most consumers it is a practical necessity to hire an attorney in order to claim successfully a compensatory remedy.

Statutes fixing product quality standards are one potential major exception to this general conclusion that private compensatory remedies have little effect on levels of compliance. Although many statutes in tbis area do not provide for private compensatory remedies,[30] and there is little evidence of significant consumer use of private statutory remedies even where they do exist,[31] the common law of products liability may provide a significant incentive to comply with the standards fixed in the product quality legislation. Any product violating a statutory quality standard is likely to be considered defective in a products liability lawsuit. Since product liability lawsuits are initiated with regularity, a manufacturer choosing non-compliance as a course of action faces the prospect of claims for substantial damages if the non-complying product feature can cause serious personal injury.

Two qualifications must be made to the suggestion that the availability of private compensatory remedies under the common law of products liability significantly induces compliance with legislation establishing product quality standards. First, although there is a good deal of products liability litigation, prod-

28. *See* Macaulay, *supra* note 1, *passim.*

29. *See, e.g.,* Pettit, *supra* note 13, at 280-81; Note, *Private Enforcement Under the Fair Debt Collection Practices Act,* 28 CASE W. RES. L. REV. 710, 716-20 (1978).

30. *E.g.,* Federal Hazardous Substances Act, 15 U.S.C. §§ 1261-1274 (1976 & Supp. IV 1980); Poison Prevention Packaging Act of 1970, 15 U.S.C. §§ 1471-1476 (1976); Flammable Fabrics Act, 15 U.S.C. §§ 1191-1204 (1976 & Supp. IV 1980).

31. The Consumer Product Safety Act establishes a right of action for compensatory damages and permits a court, in its discretion, to award attorney and expert witness fees to the consumer. 15 U.S.C. § 2072 (Supp. IV 1980). The annual reports of the Consumer Product Safety Commission regularly discuss efforts to achieve compliance with Commission rules and orders, but the reports never mention the exercise of private remedies.

ucts liability claimants are not distributed randomly throughout the population. Specifically, a disproportionate number of product liability claims arise from injuries at the workplace. Commonly, the plaintiff first contacts an attorney in order to present a workmen's compensation claim and the situation is only later defined, by the attorney, as raising a products liability claim. Consumers injured in the home are much less likely to present a products liability claim.[32] As a consequence, products liability law may provide a lesser incentive to compliance with product quality legislation affecting products not used in the workplace than might first be assumed.

Second, though much is made in the theoretical literature about the kinds of impacts products liability has on product design and manufacturing quality control procedures, there is a dearth of empirical evidence specifically validating such a link.[33] Given the amount of products liability litigation and the size of judgments, it would be highly surprising if there were no impact at all, particularly with respect to products that present a substantial risk of costly injury. It is likely, however, that the impact is different from that which would be predicted if manufacturers' decision-making effectively maximized firm profits. Decision-making by many manufacturers is simply not well organized or efficient. More important, decision-making in many corporations is likely to be systematically biased in favor of the self interests of decision-makers (managers), where they diverge from the best interests of the firm. There is not yet a well-developed theory about how the potential conflict of interest between corporate managers and their firms affects particular decisions. It is possible, however, that the career interests of corporate managers are heavily influenced by the short-term profitability of the operations under their control, causing them to favor short-run gain, such as avoidance of extra manufacturing costs, over long-term loss, such as extra liability or higher insurance premiums in the future.[34] If so, products liability deci-

32. For one study showing the very low frequency of products liability claims arising from household injuries connected with use of consumer products, see Republic Research, Inc., *Claims and Recovery for Product Injury Under the Common Law*, in III SUPPLEMENTAL STUDIES TO THE FINAL REPORT: PRODUCT SAFETY: LAW & ADMINISTRATION 237 (Legal Taskforce of the National Commission on Product Safety, ed. 1970).

33. For one effort to test the existence of a link, see Whitford, *Products Liability*, in III SUPPLEMENTAL STUDIES TO THE FINAL REPORT: PRODUCT SAFETY: LAW & ADMINISTRATION 221 (Legal Taskforce of the National Commission on Product Safety, ed. 1970).

34. *See generally* O. WILLIAMSON, THE ECONOMICS OF DISCRETIONARY BEHAVIOR: MANAGERIAL OBJECTIVES IN A THEORY OF THE FIRM (1964). For a suggestion that account-

sions will have a lesser impact in promoting manufacturer investments in product safety than is commonly supposed.

Outside the product quality area private compensatory remedies, without more, have not provided significant incentives for compliance with consumer protection laws. A common legislative response has been to couple a right to a private compensatory remedy with rights to some additional compensation as well. Most commonly the statutes provide for the recovery by a victorious consumer litigant of a modest amount of punitive damages, typically between $100 and $1,000, and of reasonable attorney fees.[35] Sometimes the statute explicitly states that the reasonableness of the consumer's attorney fees should be ascertained with reference to the difficulty of the matters at issue and the time devoted to them, and not solely with reference to the amount of damages claimed.[36]

Allowance of these extra recoveries can be justified solely from the perspective of compensation to the injured consumer. As noted above, attorney fees are often a practical necessity if a claim is to be successfully litigated. And tbe limited punitive damages, often called exemplary damages, can be viewed as rough compensation for tbe time and energy the consumer must personally devote to any matter that is litigated, as well as compensation for the mental anguish that commonly accompanies consumer injury.

Whatever the legislative intent, one effect of the extra recoveries is to make a lawsuit more financially attractive to the injured consumer.[37] The availability of these extra recoveries has

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ing practices can also introduce a systematic bias favoring short-term gain over long-term loss, see McNeil & Miller, *The Profitability of Consumer Protection: Warranty Policy in the Auto Industry*, 20 AD. SCI. Q. 407 (1980).

Another factor blunting the impact of products liability litigation on manufacturing processes in the inability of the insurance industry to discriminate very clearly between different degrees of risk in setting products liability rates. *See* Denenberg, *Products Liability Insurance: Its Impact on Safety and Its Implications for the Consumer*, in III SUPPLEMENTAL STUDIES TO THE FINAL REPORT; PRODUCT SAFETY: LAW & ADMINISTRATION 247 (Legal Taskforce of the National Commission on Product Safety, ed. 1970).

35. *E.g.*, 15 U.S.C. § 1692K (Supp. IV 1980) (Fair Debt Collection Practices Act). Sometimes these statutes permit recovery of the limited punitive damages in addition to provable actual damages. Other times the punitive damages are allowed only in lieu of actual damages.

36. *E.g.*, WIS. STAT. § 425.308(2) (1979-80) (one of the consumer's remedies under the Wisconsin Consumer Act).

37. Inducing compliance by stimulating private litigation is often considered a purpose for authorizing exemplary damages. *See generally* Pettit, *supra* note 13; Rice, *Exemplary Damages in Consumer Transactions*, 55 IOWA L. REV. 307 (1969). At the time of the enactment of Truth in Lending, many believed that private litigation, stimulated by

not usually stimulated sufficient extra claims for compensatory remedies to have a significant impact on compliance, however. A common explantion for this lack of effect is that merely providing the extra recoveries does nothing to inform consumers of their enhanced litigational position. Consequently, most consumers still fail to take the steps necessary to initiate a claim, such as contacting an attorney. Furthermore, it is reported there is a widespread belief among attorneys that courts will not really award attorney fees commensurate with the time and effort involved where the amount in controversy is small.[38] As a consequence attorneys themselves, believing it is not possible to make money representing consumers, have not made extensive efforts to inform consumers of their rights in an effort to stimulate legal business.[39]

These conclusions about the usual ineffectiveness of allowing exemplary damages and attorney fees must be qualified somewhat when discussing experience under the Truth in Lending Act. Some commentators have concluded that the right of action for individual damages, which under the Act includes the right to exemplary damages and reasonable attorney fees,[40] has not been a significant factor in inducing compliance.[41] Other commentators, however, have noted the reasonably high incidence of litigation under the Truth in Lending Act, as well as the recovery of substantial fees by a number of victorious consumer attorneys. These commentators point out that it often is reasonably easy to use the Truth in Lending Act to establish a defense to an existing debt. A cause of action under Truth in Lending does not require development of difficult factual issues, the disclosure form and the written contract often being the only evidence needed. These commentators believe that creditors may make greater efforts to comply with the Act in order to avoid a Truth-in-Lending based defense to a debt, which the

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the availability of exemplary damages and attorney fees to the victorious consumer, would become the principal means of enforcement. *See* Landers, *Some Reflections on Truth in Lending*, 1977 U. ILL. L. F. 669, 686 n.41.

38. This belief is not supported by judicial decision; such authority as exists tends to go in the opposite direction. *E.g.*, Welmaker v. W.T. Grant Co., 365 F. Supp. 531 (N.D. Ga. 1973); Ljapya v. M.L.S.C. Properties, 353 F. Supp. 866 (N.D. Cal. 1973).

39. The most extensive account of the workings of these statutes is Macaulay, *supra* note 1.

40. 15 U.S.C. § 1640(a)(3) (1976).

41. Note, *Private Enforcement Under the Fair Debt Collection Practices Act*, 28 CASE RES. L. REV. 710, 720 (1978); Note, *Recent Developments in Truth-in-Lending Class Actions and Proposed Alternatives*, 27 STAN. L. REV. 101, 104 (1974).

consumer disputes or has not paid for some reason unrelated to the Truth in Lending Act.[42]

This ambiguous assessment of the effects of private remedies on compliance under the Truth in Lending Act suggests that a strategy of inducing individual claims for damages through financial incentive, although usually ineffective, is not necessarily so. Historically, attorneys have not welcomed consumer claims,[43] but perhaps a strategy of offering fees to attorneys that are commensurate with their efforts can change this attitude. If enough consumer claims are stimulated as a result, at least some effect in inducing compliance can be expected. Precisely such thinking led to the establishment in 1970 of a government funded program in the State of Washington which had as one purpose teaching attorneys about their ability to collect reasonable fees, from merchants, by taking on meritorious consumer claims under a local consumer protection statute. For undetermined reasons the program met with only limited success in increasing the bar's receptivity to consumer claims.[44] Certainly the unfamiliarity of the local bar with the substance of consumer protection legislation could have deterred active solicitation of consumer claims.[45] Professor Pettit has recently emphasized the importance of being able to prove Truth-in-Lending defenses with relative ease in generating a substantial volume of litigation under that Act.[46] Perhaps when litigation is

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42. Pettit, *supra* note 13, at 294-95; Landers, *supra* note 37, at 676-86. It is worth noting that the incidence of litigation under Truth in Lending has apparently increased over time, perhaps as lawyers become more familiar with the statute and gain confidence in their ability to earn reasonable fees under it. *See Qui Tam and Federal Reserve Board Procedures, Hearings on S. 3008 Before the Subcomm. on Consumer Affairs of the Senate Comm. on Banking, Housing and Urban Affairs,* 94th Cong., 2d Sess. 2 (1976) (opening statement of Senator Biden).

43. *See* Mayhew & Reiss, *The Social Organization of Legal Contacts,* 34 AM. SOC. REV. 309 (1969).

44. My information on this program, which was funded by the Office of Economic Opportunity, comes from correspondence with the Consumer Protection and Antitrust Division of the Office of the Attorney General, State of Washington. The statute which established the right to collect a consumer's attorney fees from a merchant found to have violated a consumer protection statute is WASH. REV. CODE § 19.86.090 (1978).

45. Macaulay has advanced this explanation for the lack of litigation under consumer statutes. Macaulay, *supra* note 1, at 146-47. The State of Washington program discussed in the text anticipated this problem and established a procedure, through the Office of the Attorney General, by which private attorneys could get technical assistance without charge on substantive law questions. Apparently this was not enough to guarantee the experiment's success, however.

46. Pettit, *supra* note 13. Professor Pettit's article is specially insightful in discussing the practical aspects of Truth-in-Lending litigation, including the dynamics of settlement negotiations.

likely to be factually complex, exemplary damages and attorney fees alone are insufficient to induce enough litigation to provide substantial incentive for compliance. On the other hand, an ever increasing supply of lawyers may ultimately generate enough economic need for new legal business to induce members of the bar to master the substance of consumer protection legislation and attempt to generate reasonable fees by taking all types of consumer claims, where exemplary damages and attorney fees are available.

A very different approach to stimulating claims for compensatory remedies, so that such claims can have an effect in inducing compliance, has been to lower the costs of asserting such claims, rather than enhancing the rewards for successfully asserting them. Costs could be lowered the most by estahlishing institutions for entertaining claims where it is not a practical necessity for the consumer to have an attorney. Small claims courts were established with this idea in mind, and it is well known today that they have not succeeded in attracting any significant amount of consumer claims.[47]

In the past ten to fifteen years there have been extensive efforts to establish viable informal consumer complaint mediation and arbitration systems, in the hope of achieving what small claims courts have not. A variety of such systems has heen established, some within particular business corporations,[48] some by trade associations affiliated with business interests,[49] and others by diverse government agencies.[50] Both the purposes and procedures of these different programs vary widely.[51] Most com-

47. *See* Yngvesson & Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC'Y REV. 219 (1975).

48. *See* Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 WIS. L. REV. 1006, 1023-24.

49. The consumer complaint activities of Better Business Bureaus, sponsored by Chambers of Commerce, are the best known examples of sucb systems.

50. *See* Steele, *Fraud, Dispute, and the Consumer: Responding to Consumer Complaints*, 123 U. PA. L. REV. 1107 (1975); Whitford & Kimball, *Why Process Consumer Complaints? A Case Study of the Office of the Commissioner of Insurance of Wisconsin*, 1974 WIS. L. REV. 639.

51. A number of programs that are receptive to consumer complaints make no effort to resolve particular disputes. Rather they treat complaints as data about trade practices. In these programs a significant number of consumer complaints of a similar nature is considered suggestive of a possible abusive practice requiring some type of public remedy. A field investigation is likely to ensue if resources permit. A number of programs combine this approach to complaints—that is, treating complaints as data about practices—with an attempt to resolve disputes through mediation. *See* Bernstine, *Prosecutorial Discretion in Consumer Protection Divisions of Selected State Attorney General Offices*, 20 HOW. L.J. 247 (1977).

monly, the program limits its efforts to establishing communication between the consumer and merchant, hoping to resolve disputes that result from misunderstandings.[52] Some programs have the capacity to resolve disputes where the parties cannot come readily to some settlement. To have such capacity the program must be able to devote considerable attention to the particular details of a dispute. Where such capacity exists, it has been reported that individual consumers complain with considerable frequency,[53] with undetermined effects on the merchant's incentives to comply.

In summary, there is very little evidence that private compensatory remedies have ever had substantial impact in inducing compliance, with the possible exception of legislation fixing product quality standards. It is nonetheless appropriate that consumer protection legislation provide such remedies, for if nothing else they can offer a means of obtaining compensation for injury by the occasional consumer who asserts a claim. There also remains a possibility that in the future coupling private compensatory remedies with a right to attorney fees for the successful consumer claimant will have some effect in inducing compliance, though heretofore this approach has apparently had little effect. Finally, the establishment of informal dispute settling mechanisms to which the consumer can practically resort *pro se,* desirable in any event for a number of reasons, may abet the ability of private compensatory remedies to play some role in inducing compliance.[54]

B. Hybrid Remedies

As I use the term in this article, hybrid remedies are initiated by an individual, but the relief obtainable is defined by the needs of the public, rather than by the harm visited on the plaintiff by non-compliance with the consumer protection legislation. These remedies are designed to implement the private at-

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52. *See, e.g.,* Whitford & Kimball, *supra* note 50.

53. For such a program to be successful in resolving contested disputes, it may be necessary that the program have some kind of leverage over the merchants, in order to insure their participation. This leverage is often the power to initiate public remedy proceedings against the merchant where an abusive practice is suspected. *See* Steele, *supra* note 50.

54. For a generally favorable view of the desirability of establishing informal dispute settling mechanisms as a means of encouraging compliance, see FEDERAL TRADE COMMISSION OFFICE OF POLICY PLANNING, POST-PURCHASE CONSUMER REMEDIES 92-106 (1980).

torneys general theory of enforcement. One hybrid remedy is an injunction. Another is punitive damages. The most prevalent hybrid remedy is the class action, an action initiated by one or a few consumers but in which damages are measured by the harm caused to a large group of consumers to whom the recovery is distributed.

Absent special statutory authorization, consumers cannot ordinarily sue to enjoin non-compliance with consumer protection legislation. Continuation of the non-compliance will not usually cause the individual plaintiff irreparable injury, since the plaintiff, being aware of the merchant's conduct, can typically avoid harm simply by avoiding transactions with the merchant. On general principles, therefore, any individual consumer with sufficient awareness to initiate a claim will lack standing to seek an injunction. Sometimes an individual consumer can seek injunctive remedies by suing as a representative plaintiff in a class action. In this context injunctive remedies may lie since many members of the class will be unaware of the merchant's non-compliance. But there are many practical barriers to the initiation of class action litigation, as will be more fully discussed shortly.

The only statute of which I am aware that has specially authorized an individual consumer to sue for an injunction is the Consumer Product Safety Act.[55] There are no reported cases in which a consumer has initiated such a suit, and no available information about unreported claims. If this means, as I suspect, that the provision has had little impact on compliance, probably one reason lies in the fact that there is little other than altruism to motivate a consumer to initiate such a claim.[56]

Punitive damages, other than the exemplary damages noted in the previous section, are rarely authorized for violation of consumer legislation. One of the few exceptions is contained in the Truth in Lending Act. Under this Act whenever a lender takes a security interest in real estate that is the horrower's residence, the borrower has a three day "cooling off" period in which to rescind the transaction without liability.[57] The lender is required by the Act to provide the borrower with extensive no-

55. 15 U.S.C. § 2072 (1976).

56. Ironically, it has been held that a competitor—who might truly benefit from an injunction—is not permitted to initiate an injunctive action under this provision. Plaskolite Inc. v. Baxt Industries, 486 F. Supp. 213 (N.D. Ga. 1980).

57. 15 U.S.C. § 1635 (1976). First lien, purchase money security interests are exempted from the right of rescission.

tice of this rescission right[58] and is subject to a punitive remedy for failure to do so. Specifically, if this notice is not timely given, the three day period does not start running until the notice is given.[59] Consequently, where the required notice is not given, the borrower can rescind the transaction long after it has commenced and the borrower has received credit, without any showing that the borrower was harmed or misled by the non-disclosures. The punitive nature of this remedy is indicated by holdings that the borrower is without obligation to pay interest, even for the potentially extensive period that credit was in fact extended.[60]

This Truth-in-Lending section is generally believed to have had substantial impact in insuring that appropriate disclosures are promptly made where a security interest is taken.[61] This impact no doubt derives from both the substantial burden that rescission long after a loan is made can impose on merchants and the incentives to consumers to invoke the remedy because of the windfall recoveries to be gained. The failure to provide remedies of this nature more frequently in consumer protection legislation probably stems in part from a fear that the availability of windfall recoveries will stimulate too much litigation. Particularly

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58. 12 C.F.R. § 226.9(b)(1980).

59. 15 U.S.C. § 1635(f)(Supp. IV 1980). The right of rescission in most cases expires three years after consummation of the transaction whether or not the required disclosures are made.

Recent legislation amended this section, effective April 1, 1982, in a way that will limit somewhat the availability of this remedy. 15 U.S.C. § 1602 (1976 & Supp. IV 1980). For a discussion of this legislation see Pettit, *supra* note 13, at 272 & n.88.

60. *See* Sosa v. Fite, 498 F.2d 114 (5th Cir. 1974); French v. Wilson, 446 F. Supp. 216 (D.R.I. 1978).

The remedy provided by the Truth in Lending Act, which I have here characterized as punitive, should be distinguished from the usual three day cooling off period, now provided by consumer protection legislation in a variety of circumstances. *See, e.g.*, FTC Regulations on Cooling-Off Period for Door-to-Door Sales, 16 C.F.R. § 429.1 (1980). The usual right of rescission cannot be considered a punitive recovery. It exists as a matter of right and is not conditional on a violation of the underlying legislation by the merchant. Furthermore, it does not typically provide the consumer a windfall recovery in the form of extensive use without charge of the property of the merchant. The right of rescission discussed in the text, on the other hand, comes into existence only if the merchant fails to make required disclosures, and it can provide the borrower free use of the creditor's money for up to three years.

61. Though this conclusion about impact is widely shared by those familiar with the area, I know of no empirical evidence validating it. Perhaps some inference can be drawn from the extensive consideration given to this provision of Truth in Lending in trade publications. *See, e.g.*, 1 CONSUMER CRED. GUIDE (CCH) ¶¶ 1800-1880R (Aug. 10, 1981). It is worth noting that even the limited three day right of recission available where proper notices have been given is credited with discouraging the taking of security interests in real estate altogether.

troublesome are the risks of a strike suit—litigation designed to pressure a defendant to agree to a small settlement in order to avoid the costs of protracted litigation and the possibility of a much larger judgment later, even though there is not a substantial argument that the defendant has violated the legislation. The pressure on the defendant to settle a strike suit increases when legislation defines the substantive obligation in vague and ambiguous terms, since the defendant then can not be certain that the litigation, if pursued to final judgment, will lead to denial of punitive damages.[62] Consequently, substantial punitive damages are probably appropriate, if at all, only where the substantive obligation is stated with considerable specificity.

The most successful of the hybrid remedies in inducing compliance has been the class action. Class action procedure is designed to permit efficient adjudication of a large number of small claims raising a number of identical issues by providing for a single determination of those common issues. Since merchants typically establish routine ways for dealing with consumers, class actions are often thought to be ideally suited for consumer transactions; if the rights of one consumer are violated, it is likely the rights of others are violated in the same ways. In fact, however, class actions have proven to be not useful in most consumer situations. In most situations there are some issues for which it is not possible to make a common determination of the rights of all consumers affected by the merchant practice. Damages typically present an issue of this nature, since they so often depend on the actual injury incurred by the consumer. It is technically permissible to maintain a class action even though not all issues can be determined in a common way,[63] but the necessity of making individual determinations on even some issues typically prevents the class action from achieving the economy in legal costs that is its main attraction.[64]

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62. An analogous problem arose with exemplary damages under the Truth in Lending Act. Certain provisions of Truth in Lending were previously drafted in such a way that it was often difficult to determine what compliance required. In such circumstances even the modest exemplary damages recoverable under that Act were considered unfair. *See* Pettit, *supra* note 13. Recently the Truth in Lending Act was amended to limit the availability of exemplary damages to situations where the violation is considered serious and in any event the requirements for compliance are clear. Pub. L. No. 96-221, § 615(b), 94 Stat. 181 (1980) (current version at 15 U.S.C. § 1640(a) (Supp. IV 1980)).

63. FED. R. CIV. P. 23(b)(3) requires only that "questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members." (emphasis added).

64. *See, e.g.*, City of Detroit v. Grimmel Corp., 356 F. Supp. 1380, 1388-89 (S.D.N.Y. 1932), *modified on other grounds*, 495 F.2d 448 (2d Cir. 1934); Boskes v.

A second major difficulty in maintaining consumer class actions in most jurisdictions is a procedural rule requiring the person initiating the action—called the representative plaintiff—to finance the mailing of a notice of the class action suit to all locatable members of the consumer class.[65] If the class action succeeds, the cost of this notice can be assessed to the defendant, but frequently the cost of the mailing is so great that no representative plaintiff can or will undertake the expense pending the outcome of the litigation.

The Truth in Lending Act presents a situation in which class actions have greater potential viability than they do under most consumer legislation. The great advantage for class actions under the Truth in Lending Act is that all consumer rights are defined formally—that is, in a way unrelated to the actual understanding of or the actual injuries to participants in the transaction. Thus, under Truth in lending, violations are defined in terms of failure to include certain information on a form; it does not matter whether the failure misled any consumer. Since merchants inevitably use a standard form for disclosure, it follows that the liability issue will necessarily be common to all consumers receiving the form. Furthermore, under Truth in Lending any consumer with a cause of action is entitled to damages of at least $100, without proof of any actual injury.[66] This damages provision was originally intended as an exemplary recovery, designed to encourage individual litigation as a way of stimulating compliance.[67] It has made class actions more practically available by providing a method for assessing damages independent of the individual circumstances of each consumer's transaction. Finally, the cost of providing notice to the class can often be minimized in a Truth-in-Lending class action because the merchant defendants, being in the credit business, are likely to be sending monthly statements to most members of the class. Courts have sometimes been willing to order defendants to include the required notice in a monthly statement mailing, thereby greatly reducing the initial investment required of a rep-

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General Motors Corp., 59 F.R.D. 589 (N.D. Del. 1933).

65. For the federal rule, see Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). The decision is an interpretation of the Federal Rules of Civil Procedure and not a constitutional decision. Consequently states may be free to adopt a different procedure for financing notice to the class.

66. 15 U.S.C. § 1640(a)(2)(B) (Supp. IV 1980). This provision now limits a merchant's total liability in a class action to $500,000 or to one percent of its net worth, whichever is less. *See* note 71 *infra* and accompanying text.

67. *See* notes 41-42 *supra* and accompanying text.

resentative plaintiff in order to maintain a class action.[68]

Largely because of the many litigational advantages, a great number of class actions have been filed under the Truth in Lending Act. Originally only a small proportion of these class actions were actually certified as proper class actions.[69] Courts perceived an injustice in entering a class judgment against a merchant defendant for an enormous amount when the unlawful conduct consisted of an unintentional, technical omission on a disclosure form that caused few if any consumers actual injury. Faced with this sense of injustice, courts have been ingenious in finding technical obstacles to the maintenance of class actions.[70] More recently, Congress has responded to the problem by setting upper limits on recoveries in Truth-in-Lending class actions where damages are measured by formula rather than by actual injury.[71] Although only a small portion of the class actions initiated have led to class recoveries, it is widely accepted that the always very plausible threat of a class action has played an important role in encouraging merchants to comply with the Truth in Lending Act.[72] In this sense Truth in Lending has shown that the availability of a potentially maintainable class action can be an important tool in inducing compliance.

One reason for the filing of a substantial number of Truth-in-Lending class actions is the fees that an attorney for the representative plaintiff can earn if the suit is successful. Whereas in an individual action under Truth in Lending an attorney would very much want his or her fees based on the complexity of the suit and the time spent on it, in a class action it is in an attorney's interest to have fees based on size of the recovery, which is likely to be large if the suit is successful. Courts have considered

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68. *See* Katz v. Carte Blanche Corp., 53 F.R.D. 539 (W.D. Pa. 1971), *rev'd on other grounds*, 496 F.2d 747 (3rd Cir.), *cert. denied*, 419 U.S. 885 (1974).

69. *See* Note, *Class Actions Under the Truth in Lending Act*, 83 YALE L.J. 1410, 1412 (1974).

70. The leading case is Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412 (S.D.N.Y. 1972).

71. 15 U.S.C. § 1640(a)(2)(B) (Supp. IV 1980). The limit is $500,000 or one percent of the defendant's net worth, whichever is less. This amendment has created new technical problems in certifying a Truth-in-Lending class action. *See* LeValley & Walker, *Truth-in-Lending Class Actions Under Amended Section 130*, 24 KAN. L. REV. 471 (1976); Comment, *Truth in Lending and the Federal Class Action*, 22 VILL. L. REV. 418 (1977).

72. *See* Garwood, *Truth-in-Lending After Two Years*, 89 BANKING L.J. 3, 9 (1972); Garwood, *A Look at Truth in Lending Five Years Later*, 14 SANTA CLARA L. REV. 491, 511 (1974); Comment, *The 1974 Amendments to the Truth in Lending Act*, 53 N.C.L. Rev. 1259, 1262 (1975).

the size of the recovery in awarding attorney fees in class actions.[73] Aware of this, no doubt many attorneys have actively sought out potential representative plaintiffs. With class actions, as with individual litigation, the receptivity of the bar to this type of legal activity is most probably an important determinant of its incidence.[74]

In sum, under the Truth in Lending Act we have actual experience with a hybrid remedy playing an important role in encouraging compliance with consumer protection legislation by regulated merchants. Similar actual experience does not exist with respect to private remedies. It is not difficult to explain why hybrid remedies might be more effective than private litigation. Since hybrid remedies lead to much larger judgments than private remedies, a lower incidence of litigation will have a greater deterrent effect on merchants. In reaching a general conclusion about the utility of hybrid remedies, it would be useful if with respect to consumer protection legislation other than Truth in Lending there were experience with hybrid remedies inducing compliance, but to my knowledge there is not. This is especially unfortunate since, as argued earlier, there is reason to believe that a merchant faces low opportunity costs for complying with Truth in Lending. To some undetermined degree this fact must account for the reasonably high level of compliance with that legislation.

The explanation for our limited experience with hybrid remedies inducing compliance may lie in the fact that there are few statutes as ideally suited for maintaining class actions as the Truth in Lending Act. Though it is virtually always possible to provide for punitive damages consistently with the manifest purposes of consumer protection legislation, punitive damages hold out the possibility of windfall recoveries and the associated danger of strike suits. Class actions largely avoid these problems,[75] but their impracticality, unless virtually all issues can be litigated as common ones, has proved a major difficulty in relying on them as a technique for achieving compliance. Truth in

73. *See, e.g.*, Illinois v. Harper & Row Publishers, Inc., 55 F.R.D. 221 (N.D. Ill. 1972).

74. *See* note 43 *supra* and accompanying text. Concern has been expressed periodically that attorneys sometimes file "strike" suits under Truth in Lending. *See generally* Landers, *supra* note 37; text following note 61 *supra*.

75. The attorney for the class may stand to gain a significant amount, which accounts for the initiation of class action suits in many instances. *See* text accompanying note 73 *supra*.

Lending has illustrated an important statutory technique for making class actions more viahle. In much consumer protection legislation it should be possible, consistent with the manifest purposes of the legislation, to provide a small exemplary damage as an alternative to actual harm as a measure of recovery, thereby making it possible to adjudicate the damages issue as a common issue.[76]

It may be more difficult to design legislation so that the question of violation is also standardized across a class of consumers, without doing violence to the manifest purpose of the legislation. Disclosure regulation, like Truth in Lending, defines wbat constitutes a statutory violation in ways naturally amenable to common determination in a class action. This results from the legislation's regulation of the contents of standardized forms given to many consumers. Legislation regulating product design has similar features, since manufacturers will produce many items according to a single design. Other legislation, particularly legislation concerning deceptive practices, presents difficulties, because of the tendency of merchants and consumers to act differently in the critical respects in each transaction that determine whether a violation has occurred.[77] Yet attempts to define the violation in ways that avoid the need for individual case by

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76. There are other possible ways to establish a damages award that avoids the need for an individualized determination of damages. Under the Carter administration the Justice Department recommended legislation that would have permitted a representative plaintiff to sue for the amount a merchant gained as a result of a wrongful practice. Any portion of the recovery that could not he distributed to affected consumers as compensatory damages would have escheated to the government. H.R. 5103, 96th Cong., 1st Sess. 1979); *see* Comment, *Manageability of Class Actions Under S.3475: Congress Confronts the Policy Choices Revealed in Rule 23(b)(3) Litigation,* 68 KY. L.J. 216 (1979-80). The Bill has been reintroduced in the current session but the position of the present administration is not known. H.R. 13, 97th Cong., 1st Sess. (1981).

77. The unusual facts of one well known case sustaining the availability of a class action in a deceptive practices situation tends to confirm the correctness of the text. In Vasquez v. Superior Court of San Joaquin County, 4 Cal. 3d 800, 484 P. 2d 964, 94 Cal. Rptr. 796 (1971); the California Supreme Court sustained a class action complaint alleging violations of the common law of misrepresentation in personal sales pitches because the complaint alleged that defendants' sales people memorized their pitches. If the latter allegation could be proved, the court held there was sufficient commonality to permit a class action. It must be an unusual situation, however, in which a plaintiff could establish a memorized sales pitch.

Where misrepresentations occur in media advertising, it may be possible to establish a substantive violation on a common basis. It would aid maintenance of class actions, however, if a statute established a right to damages without proof of actual damages or even of reliance on the misrepresentation. Otherwise these elements of the common law cause of action for misrepresentation could raise issues lacking commonality, perhaps inducing a court not to certify a class action and in any event making the litigation cumbersome.

case determination are likely to involve an altering of the manifest purpose of the statute.

A good example of this problem is presented by the fact situation involved in the case of *Kugler v. Romain.*[78] The Attorney General of New Jersey initiated the action under a statute authorizing that official to seek public remedies to protect consumers from fraud. The relief sought in the case included cancellation of all consumer contracts made by the merchant defendant and restoration of money paid under them. The litigational difficulty presented was that, while it was easy to show that the defendant made many misrepresentations in any sales presentation about which information was available, the specific misleading statements varied from transaction to transaction. Consequently, it was not possible to establish the existence of a specific misrepresentation in transactions involving consumers not before the court, a problem analogous to the difficulty of establishing commonality in a class action. The New Jersey Supreme Court avoided the problem by concluding that the price charged for the merchandise was unconscionably high and holding that unconscionability was the equivalent of fraud. Since the price charged was standardized across transactions, it then became possible to enter class relief. In the process, however, legislation directed at misrepresentation and fraud was interpreted to set a maximum markup at which merchandise of a particular market value could be sold, an interpretation that many would regard inconsistent with the manifest purposes of this legislation.

C. *Public Remedies*

Virtually all consumer protection legislation today provides for public remedies. This may be seen as representing a consensus that private remedies are inadequate in themselves to achieve compliance, a conclusion clearly ratified by our past experience. There is a wide range of public remedies that can be made available to an enforcement agency. Probably most common is some form of injunctive remedy, typically effectuated through an administrative cease and desist order. Other public remedies include criminal and civil penalties, and public actions to require merchants to compensate consumers for injury.[79]

It is very difficult to make any judgment about the relative effectiveness of these different remedies. Experience teaches

78. 58 N.J. 522, 279 A.2d 640 (1971).

79. *See* Bernstine, *supra* note 51.

that the commitment of the agency to enforcement of the legislation is far more important in determining levels of compliance than the enforcement powers of an enforcing agency. A good example of this proposition is our experience under the Flammable Fabrics Act, first enacted in 1953. For about twenty years the primary enforcement agency was the Federal Trade Commission. The consensus of the various studies of that commission that were conducted around 1970 was that there had been little public enforcement activity with respect to the Flammable Fabrics Act, and that as a result there was a low level of compliance.[80] In 1973 enforcement responsibility for the Act was transferred to the Consumer Product Safety Commission. Little change was made in the public remedies available to the enforcement agency, but there was a significant increase in enforcement activity. Reports indicate a considerably enhanced compliance level,[81] no doubt largely because of the increased enforcement activity.

As important as the character and commitment of the agency is, unfortunately I cannot prescribe any formula for selecting an enforcement agency that will use public remedies in a way that maximizes compliance. I have suggested earlier that it is commonly useful for an agency to have rulemaking power. Such power permits the agency to specify the obligations of the regulated class in as much detail as possible, thereby probably increasing the level of voluntary compliance.[82] Except in this respect, however, determination of the important characteristics of effective enforcement agencies must await other studies.

III. Conclusion

One important hypothesis of this essay is that increasing the specificity of legislation tends to yield greater effects in voluntary changes in behavior. Consistent with this hypothesis,

80. E. Cox, R. Fellmeth & J. Schultz, The Nader Report on the Federal Trade Commission (1969); ABA Commission to Study the FTC, Report (1969). *See also* Comment, *Dressed to Kill—The Flammable Fabrics Act of 1953—Twenty Years in Retrospect*, 4 Cum.-Sam. L. Rev. 358 (1973); Note, *Flammable Fabrics Act Protection: Fire Resistants v. Industry Resistance*, 39 Geo. Wash. L. Rev. 608 (1971).

81. This information comes principally from the Annual Reports of the Consumer Product Safety Commission. A slightly less sanguine view of current compliance levels is reported by the General Accounting Office. *See Compliance and Enforcement Efforts of the Consumer Product Safety Commission, Hearings on S. 3755 Before the Subcomm. for Consumers of the Senate Comm. on Commerce*, 94th Cong., 2nd Sess. 11-19 (1976) (statement of Gregory J. Ahart).

82. Notes 20-21 *supra* and accompanying text.

vague, standardless legislation, such as the unconscionability provision of the Uniform Commercial Code, is likely to have little direct effect on merchant behavior, though it may have other political effects, most likely of a symbolic nature.

Perhaps the most important hypothesis proposed is that private remedies play little role in achieving compliance, even when supplemented by exemplary damages, provision for recovery of attorney fees by the victorious consumer litigant, and the availability of informal dispute settlement mechanisms. What I bave called hybrid remedies may have greater potential to induce compliance, though there are many circumstances in which it is difficult to fashion an appropriate hybrid remedy. In most instances, however, it would seem that provision for public remedies is crucial to any effort to achieve compliance.

This conclusion is not inconsistent with the current popularity of deregulation proposals. This study says nothing about when the economic marketplace, policed only by general rules of contract law, performs inadequately enougb to justify corrective regulatory legislation. If corrective legislation is deemed desirable, however, this essay hypothesizes that privately initiated remedies should not be relied upon as tbe exclusive means of enforcement. The best available evidence indicates that what might be called the "legal marketplace" has been found wanting in our past.