EXTRAJUDICIAL CONSUMER PRESSURE: AN EFFECTIVE IMPEDIMENT TO UNETHICAL BUSINESS PRACTICES

Although recent efforts in consumer protection have centered upon additional legislative assistance, several direct extrajudicial and non-official forms of self-help can be successfully employed by a dissatisfied consumer. This comment explores the legal limits on such forms of action conducted either by an individual consumer or by an organized group, with a view toward providing a standard which will enable protestors to remain within the law yet be effective in their actions.

The American consumer who has experienced fraudulent, misleading, or simply unethical conduct[1] by a merchant with whom he has dealt has generally pursued one of two alternatives; initiation of a law suit or referral of the matter to a governmental

[1] Mercantile practices which come within the opprobrium of this comment include: contracts with waiver of defenses provisions or which grant the merchant power of attorney; contracts with confessed judgment clauses or which accelerate payments upon default; "balloon" payments; "open-end" installment contracts (see note 86 *infra*); hidden interest charges; "bait and switch" advertising (see note 37 *infra*); "lo-balling" (see note 37 *infra*); "chain-referral" selling (customer falsely told that he may cancel his indebtedness for goods by providing the names of potential customers); "free" prize schemes (see note 44 *infra*); "fear-sell" (see note 40 *infra*); fraudulent land sales; fraudulent home improvement plans; covert substitution of goods; false description of goods; false statement of contract terms; and generally any scheme which fosters the exchange of low quality for unwarranted high prices, or which is not responsive to the supply and demand of the marketplace but to the disparity in knowledge, finances or mobility of the "bargaining" parties. An appropriate standard would seem to be not *caveat emptor*, but bona fide and full disclosure of relevant facts on the part of both parties. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); D. CAPLOVITZ, THE POOR PAY MORE 28-29, 142-54 (1963); W. MAGNUSON & J. CARPER, THE DARK SIDE OF THE MARKETPLACE 3-26 (1968); Dole, *Consumer Class Actions Under the Uniform Deceptive Trade Practices Act*, 1968 DUKE L.J. 1101, 1134; Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 YALE L.J. 485, 486 (1967); Hester, *Deceptive Sales Practices and Form Contracts—Does the Consumer Have a Private Remedy?* 1968 DUKE L.J. 831, 833-35; Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 397-403 (1966); Comment, *Consumer Legislation and the Poor*, 76 YALE L.J. 745, 769 (1967); Note, *Installment Sales: Plight of the Low-Income Buyer*, 2 COLUM. J. L. & SOC. PROB. 1 (1966); notes 37, 40, 44 & 86 *infra* and accompanying text; *cf.* REVISED UNIFORM DECEPTIVE TRADE PRACTICES ACT §§ 2(a)(1), (9), (10) & (11).

agency. However, neither procedure has been particularly effective in preventing a recurrence of the objectionable behavior in identical or modified form, and both are plagued by serious inadequacies.

Seeking redress in the courts is expensive both in time and money, and the deterrent effect on mercantile fraud posed by potential legal action is presently negligible due to widespread consumer ignorance of existing legal remedies.[2] These deficiencies are particularly acute among impoverished and lower middle class consumers who traditionally have had little access to legal counsel[3] and therefore are probably less aware of available remedies than are wealthier consumers accustomed to retaining attorneys, and who are without sufficient resources to engage counsel or to pay the court costs which are assessed against the initiator of legal proceedings.[4] While the financial burdens of legal action have been

---

[2] *See* Sher, *The "Cooling-Off" Period in Door-to-Door Sales,* 15 U.C.L.A.L. Rev. 717, 736 (1968).

The Uniform Consumer Credit Code recently adopted by the National Conference of Commissioners on Uniform State Laws is believed to provide inadequate private consumer remedies to combat unethical mercantile practices. *See generally* James & Fragomen, *The Uniform Consumer Credit Code: Inadequate Remedies Under Article V and VI,* 57 Geo. L. J. 923 (1969); Harper, *The Uniform Consumer Credit Code: A Critical Analysis,* 44 N.Y.U.L. Rev. 53 (1969).

[3] *See* Caplovitz, *supra* note 1, at 175-78.

[4] Several writers have suggested that consumers may alleviate existing financial disadvantage by instituting a class action. *See, e.g.,* Dole, *Consumer Class Actions Under the Uniform Deceptive Trade Practices Act,* 1968 Duke L.J. 1101; Starrs, *The Consumer Class Action—Part I: Considerations of Equity,* 49 B.U.L. Rev. 211 (1969). Class actions also serve to heighten economic and psychological pressure on the merchant and to bar piecemeal settlements. Dole, *supra* at 1103.

Another means of minimizing the merchant's economic superiority would be to place the cost of a successful suit on the defendant-merchant. *See, e.g.,* Comment, *Consumer Legislation and the Poor,* 76 Yale L.J. 745, 787 (1967) (proposed unfair sales practices act). However, the hope of future compensation does not lessen the financial burden of simply initiating a law suit which is presently a substantial barrier to the low income consumer.

Although an attorney cannot provide a client with monetary assistance for living expenses or general expenses of pending litigation, he may advance to his client "court costs, witness fees, and expenses resulting from the conduct of the litigation itself." ABA Comm. on Professional Ethics, Opinions, No. 288 (1954); *See* ABA Canons of Professional Ethics Nos. 10 & 42. This still leaves the impoverished consumer dependent on the possible generosity of an attorney in order to effectively assert his available right, and he would be obligated to repay any advances. The new ABA Canons of Professional Ethics appear to recognize the need for cooperation with the indigent client. "Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action . . . ." ABA Canons of Professional Ethics No. 5, Ethical Consideration 5-8 (Final Draft, 1969) (effective Jan. 1, 1970).

removed to some extent for the *impoverished*[5] by legal aid programs supported by the local and state bars and government-sponsored neighborhood legal services,[6] nothing has been done to offset the detrimental effect on job security and income loss caused by court appearances.[7] Consequently, that segment of the public which is most susceptible to the shoddy business practice, whether it be due to lack of education, eeonomic necessity, a prevalence of marginal businessmen in low income areas,[8] or simply a disinterested attitude,[9] is least able to respond with legal action.[10] Moreover, regardless of his socio-economic grouping, the successful litigant in the common consumer fraud situation is likely to be discouraged by the size of his recovery, both before and after counsel extracts his fee, and the extensive delays attendant the legal process.[11] Where recovery is insubstantial,[12] the victorious consumer discovers that public vindication is often his sole satisfaction.

---

[5] *See* Note, *Neighborhood Law Offices: The New Wave in Legal Services for the Poor,* 80 HARV. L. REV. 805, 846-48 (1968); *cf.* OFFICE OF ECONOMIC OPPORTUNITY, GUIDELINES FOR LEGAL SERVICES PROGRAMS 19 (1966) (lawyers are furnished to those unable to "pay the fee of an attorney without jeopardizing their ability to have decent food, clothing, and shelter").

[6] *See* Note, *Beyond the Neighborhood Office—OEO's Special Grants in Legal Services,* 56 GEO. L.J. 742 (1968); 80 HARV. L. REV., *supra* note 5, at 805-13, 822-28, 833-36.

[7] 76 YALE L.J., *supra* note 4, at 785.

[8] *Cf.* CAPLOVITZ, *supra* note 1, at 12-20, 58-63.

[9] *Id.* at 171-72 ("apathy"); *see* 76 YALE L.J., *supra* note 4, 765 ("hopelessness").

[10] *See* CAPLOVITZ, *supra* note 1, at 14-15, 170-78; Hester, *supra* note 1; Viles, *The War on Poverty: What Can Lawyers (Being Human) Do?* 53 IOWA L. REV. 122, 132-33, 163, 165 (1967); Wall Street Journal, Nov. 12, 1968, at 1, col. 6. States one commentator: "[T]he various poverty programs can be viewed primarily as endeavors to make poor persons more equal consumers." Dole, *supra* note 4, at 1102.

Where the merchant initiates legal action to protect his interests, such as seeking recovery of unpaid installments, a consumer may be subjected to a default judgment without having had an opportunity to appear if he is the victim of "sewer service." "Sewer service" is the appellation given the practice of non-delivery of legal process by various process servers, who, instead of serving a legal document on its intended recipient, deposit the summons in a convenient sewer or trash can. Wright, *The Courts Have Failed the Poor,* N.Y. Times, Mar. 9, 1969, § 6 (magazine), at 104. Unfortunately, the practice appears to occur most frequently where lower income defendants are involved, partly perhaps, because ghetto residents may be harder to locate. B. Rubin, D. Caplovitz, E. Sparer & H. Rothwax, Default Judgments in Consumer Actions: The Survey of Defendants 1 (Sept. 1965) (reported in 1 LEGAL AID DIG. Jan. 10, 1966, at 7-8). The fact of missing or uncooperative parties has never justified knowingly inadequate service of process in the past, however, and there would appear to be no rationale for treating the ghetto resident any differently. As a means of alleviating the problem of "sewer serviee," it has been suggested that all states should require service by legal officers or certified mail. 2 COLUM. L.J. & SOC. PROB., *supra* note 1, at 11-12.

[11] Viles, *supra* note 10, at 163, 166-68; Wright, *supra* note 10, at 100; 114 U. PA. L. REV.,

State and federal agencies, on the other hand, are regrettably inefficient, saddled as they need be by time-consuming procedures,[13] and the statutory authority outlining the practice to be regulated by the appropriate agency has generally been interpreted to preclude the individual complainant from direct, civil recovery for the injury suffered.[14] Moreover, government agencies suffer from an unfortunate preoccupation with percentages. The individual complainant will probably be ignored unless his injury is part of a geographic or national phenomenon of significant danger to the general public and the agency determines that formal action is in the public interest.[15] Thus, he must ordinarily be content with the

---

supra note 1, at 409.

[12] Meager recovery may actually produce a negative effect since the unethical merchant may deem it economically expedient to continue the objectionable practice, cognizant of the fact that the danger of a significant adverse recovery is minimal while the opportunity for profit is substantial.

[13] One House Report indicated that it took three years or 1,080 litigation days to remove a false or misleading advertisement. H. REP. No. 1241, 87th Cong., 1st Sess., 2, 23 (1961). *See* Withrow, *The Inadequacies of Consumer Protection by Administrative Action*, in 1967 NEW YORK STATE BAR ASS'N ANTITRUST LAW SYMPOSIUM 58, 69-70 (CCH Trade Reg. Rep. ed. 1967).

[14] *See, e.g.*, FTC v. Klesner, 280 U.S. 19, 25, 30 (1929) (Federal Trade Commission Act does not provide private remedies for private wrongs).

Judicial reticence to find statutory sanction for a private action under broad, remedial statutes such as section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1964), has been criticized as unnecessarily restrictive and detrimental to the need for uniform legislation in the area of unfair competition, a subject of substantial public interest. Bunn, *The National Law of Unfair Competition*, 62 HARV. L. REV. 987 (1949). Such judicial hesitation seems particularly vulnerable in view of the broad jurisdictional base which courts have assigned to the Federal Trade Commission Act, *see* Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L. REV. 439, 454-57, 494 (1964), and the beneficial effect on unfair competition which potential damage suits could provide. Indeed, section 5 is a statement of substantive law rather than a directive for administrative regulation and could be readily interpreted to permit private suits in a manner comparable to implied civil remedies under the Securities Exchange Act of 1934. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Kardon v. National Gypsum Co., 73 F. Supp. 798, 802 (E.D. Pa. 1946), *modified on other issues*, 83 F. Supp. 613 (E.D. Pa. 1947); Note, *Fiduciary Suits Under Rule 10b-5*, 1968 DUKE L.J. 791, 792 n.9. *See generally* Note, *Implying Civil Remedies From Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963). Section 5 of the Federal Trade Commission Act reads: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, *are declared unlawful*." 15 U.S.C. § 45 (1964) (emphasis added).

[15] One commentator states that the list of referrals sent to federal regulatory agencies upon which no action is taken is "substantial." Perlin, *Consumer Protection—Inadequacies of Legislation as a Solution*, in 1967 NEW YORK STATE BAR ASS'N ANTITRUST LAW SYMPOSIUM 94, 101 (CCH Trade Reg. Rep. ed. 1967). Governmental preoccupation with

knowledge that he has reported the incident to the "proper authorities;" he does not even obtain the satisfaction of public vindication.

In view of the unsatisfactory nature of either legal or governmental action, it is suggested that a form of limited, direct, extrajudicial action by the disgruntled consumer, either in an individual capacity or as a member of a group, provides an acceptable alternative—both in terms of the minimal unsettling effect which extrajudicial consumer-merchant confrontations would have on our society and as a potential solution for the consumer's present impotence *vis-a-vis* this merchant. Direct action might provide swift private and public vindication and could result in remedial gestures by the offending merchant. Direct consumer action might also serve as a psychological release for an offended consumer's animosity and frustration,[16] which are often increased when reliance is placed on legal action or governmental intervention. Assuaging this frustration may have the beneficial side-effect of reducing any "riot impulse" cxisting among ghetto dwellers.[17]

Direct action must necessarily be limited, however, and existing law, particularly as developed in the areas of defamation, disparagement of product, interference with contractual relations, and antitrust, delineates those boundaries. This comment explores

requiring dire consequences before departmental inertia is overcome is demonstrated by a letter sent by the Federal Food and Drug Administration to an officer of the Better Business Bureau indicating that an investigation of a child's toy would not take place unless proof of death of a child from the item were submitted. *Id.* Commentator Perlin also asserted that this letter was consistent with correspondence from the Drug Administration acknowledging inquiries on the question of "glue sniffing." *Id.*

The dependence of governmental ageneies upon a national phenomenon and "mass," rather than individual, injury is apparently the consequence of time and resource factors rather than jurisdietional limitations in enabling legislation. *See* Millstein, *supra* note 14, at 454-57, 483-87, 494-95.

[16] "The right of an individual or group of individuals to protest in a peaceable manner against injustice or oppression, actual or merely fancied, is one to be cherished and not to be proscribed in any well-ordered society. It is an essential prerogative of free men living under democratic institutions. And it is salutary for the state, in that it serves as a safety valve in times of stress and strain." Julie Baking Co. v. Graymond, 152 Mise. 846, 847, 274 N.Y.S. 250, 251-52 (Sup. Ct. 1934).

[17] *See generally*, REP. OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 4, 81-82, 139-40 (1968) (Kerner Commission); J. HERSEY, THE ALGIERS MOTEL INCIDENT 29, 279-85 (Bantam Books ed. 1968); Dole, *supra* note 4, at 1102; Gellhorn, *The Law Schools and the Negro*, 1968 DUKE L.J. 1069, 1097; Hester, *supra* note 1.

the practical limits of direct consumer action in view of existing law, approaching the question from the viewpoint of the consumer by discerning the pressure a consumer may exert without fear of legal retaliation, and suggests possible techniques for applying that pressure, whether undertaken individually or as part of a spontaneous group, a loose confederation, a permanent body, or a national organization.

Contrary to what may be the popular notion, the ensuing discussion indicates that the protection given the merchant under common law does not severely confine the wronged consumer.[18] Indeed, a close reading of primarily older cases and a realistic conjecture of the predilection of modern courts suggest that consumers who have been legitimately harmed may effectively dramatize their injury without fear of legal reprisal, at least where they act without malice to redress honest grievances and to promote a fair and open marketplace.[19] Of course, there is a caveat which holds true for all of the legal stumbling blocks confronting the aroused consumer: the more paralyzing the consumer tactic in terms of its debilitating effect on the merchant's business, and thus the more pressure brought to bear on the merchant for remedial action on his part, the greater the likelihood that a court will be willing to find an improper motive or mode of action and grant an injunction or damages to the merchant. This is not to say that the consumer's extrajudicial efforts will be sanctioned only so long as they are unsuccessful. There is sufficient latitude under existing law to exert effective pressure on an offending merchant, short of putting him out of business, which in all probability will induce him to settle the outstanding claim and, hopefully, to alter his business practices. Indeed, where the publicized practice is particularly heinous, judicial permissiveness will probably expand accordingly, particularly if the consumer can satisfy the court that he acts not to rid the marketplace of the offending merchant but to "encourage" him to adopt fair and honest market practices. Moreover, the very initiation of consumer action, particularly

---

[18] See notes 36-76, 104-26 *infra* and accompanying text.

[19] This comment generally assumes that the consumer has been the victim of an opprobrious mercantile practice. See note 1 *supra*. Therefore the problem for the consumer is basically one of guarding against an overreaction in his choice and application of tactics, avoiding an overstatement of the merchant's conduct, and of displaying an acceptable motivation.

where it garners public support, may result in the application of sufficient pressure from outside sourccs such as government agencies, news media, chambers of commerce, or better business organizations,[20] to cause the merchant to upgrade his business practices while discouraging him from initiating legal action against the participating consumers.

EDUCATING FELLOW CONSUMERS

Publication of the alleged grievance is one response to questionable merchant practices readily available to individual and group alike. In its simplest form, but not without potentially damaging consequences to a local merchant, publication transpires in private conversation. This method might be especially efficient in lower income groups where the information can be passed through social workers or neighborhood legal clinics,[21] and particularly efficacious in rural communities where the potential consuming public is so circumscribed that a detrimental business reputation can be financially disastrous. In urban areas where there is a ready and ever-changing supply of consumers and a greatcr number of persons must be influenced in order to affect a merchant's business, larger audiences can bc reached by supplanting personal conversations with the distribution of printed matter and with speeches to formal organizations or informal gatherings. The resources of the various news media may be utilized through "letters to the editor," advertisements,[22] editorials, the promise of an

[20] There are a number of voluntary business organizations, such as the approximately 122 independent, non-profit Better Business Bureaus, which are designed to improve "the morals of the marketplace" by composing market standards, policing advertising, and exposing unsafe methods or products. Barnum, *Consumer Protection and the Anti-trust Laws—Protection by Voluntary Joint Action*, 1967 NEW YORK STATE BAR ASS'N ANTITRUST LAW SYMPOSIUM 12, 13, 17, 23 (CCH Trade Reg. Rep. ed. 1967). Unfortunately, self-regulation by merchants has not had a noticeably salutary effect on market standards. *See* 114 U. PA. L. REV., *supra* note 1, at 397, 404-09.

[21] *But cf.* 80 HARV. L. REV., *supra* note 5, at 820-22 (use of lay workers to educate the poor as to OEO legal services).

[22] The freedom of the press to refuse to print an advertisement submitted to it, *see, e.g.*, Schuck v. Carroll Daily Herald, 215 Iowa 1276, 247 N.W. 813 (1933); J.I. Gordon, Inc. v. Worcester Telegram Publishing Co., 343 Mass. 142, 177 N.E.2d 586 (1961), may present a substantial barrier to a consumer's choice of this method if the offending merchant is a significant advertiser in the publication in question, thereby placing the publisher under economic compulsion to refuse the consumer's derogatory advertisement. Nevertheless, it has been urged that the first amendment necessarily incorporates a constitutional right of access

"expose," or a public announcement in support of the cause by an "irate" public official. The individual crusader, without resources or connections, can probably be equally effective simply by setting up the proverbial soap box in front of the merchant's store, or by using "demonstrative evidence" to publicize his plight. Thus persons have painted white elephants on their automobiles,[23] placed lemons on signs in front of their homes,[24] and in the future one might expect to see firewood piled in front of a furniture store or a man dressed in a barrel pacing in front of a home improvement firm. However, even where the tactics suggested above are employed solely to educate the public, they pose some dangers to the participants in the form of legal retaliation.

Defamation

Due to the relatively lighter burden on the plaintiff than on the defendant and the free rein given the jury in awarding damages,[25] probably the most precarious pitfall for the consumer is a suit for defamation. An action for defamation of the person or business will lie if the consumer's derogatory comment on the product or business reflects on the character of the plaintiff so as to imply a general want of integrity,[26] or if it imputes conduct inconsistent with proper performance of the business or trade.[27] Thus, epithets

to the press. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1649, 1656, 1666-69, 1678 (1967). "A realistic view of the first amendment requires recognition that a right of expression is somewhat thin if it can be exercised only at the sufferance of the managers of mass communications." *Id.* at 1648. While the author admits that commercial advertising may not require the same access to the press as does political advertising, *id.* at 1668, it is certainly arguable that an advertisement by a consumer exposing a reprehensible merchant practice is not a commercial but a political advertisement. See note 165 *infra*. To sustain this position, however, the consumer might have to establish that he acted primarily to advise others and to remove the objectionable practice rather than to recover his financial loss. See notes 168-206 *infra* and accompanying text. *See also* Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931.

[23] *See, e.g.*, Carter v. Knapp Motor Co., 243 Ala. 600, 11 So. 2d 383 (1943) (However, court granted injunction prohibiting defendant from displaying white elephant on automobile).

[24] *See, e.g.*, Lawrence v. Atwood, 295 S.W.2d 298 (Tex. Civ. App. 1956).

[25] See notes 33-34 *infra* and accompanying text.

[26] L. GREEN, W. PEDRICK, J. RAHL, W. THODE, C. HAWKINS & A. SMITH, TORTS 969 (1968) [hereinafter cited as GREEN]; F. HARPER & F. JAMES, TORTS § 5.2, at 358, § 5.12, at 385-86 (1956) [hereinafter cited as HARPER & JAMES]; S. OPPENHEIM, UNFAIR TRADE PRACTICES 322 (2d ed. 1965); W. PROSSER, TORTS § 106, at 762 & nn.9, 11, 763 (1965) [hereinafter cited as PROSSER]; Comment, *The Law of Commercial Disparagement: Defamation's Impotent Ally*, 63 YALE L.J. 65, 71 (1953).

[27] PROSSER § 107, at 776.

such as "crook," "slippery," or "liar,"[28] and accusations that a merchant sells adulterated food[29] have been held actionable since they imply fraud or dishonesty. However, merely belittling the quality of goods has generally been held not to be defamatory.[30]

Under common law a false statement touching one's trade or business was slander *per se*, since it involved interference with one's very livelihood, and damages were presumed.[31] That presumption is maintained in modern defamation actions, and the actual size of the recovery may be quite substantial since the general standard given—those damages reasonably foreseeable or which were the normal consequence of the defamation[32]—is broad enough to encompass all business losses proximately caused by the slanderous comment.[33] In addition, where "malice" can be demonstrated, punitive damages may be awarded.[34] Where the irate consumer engages in numerous conversations or utilizes the mass media to communicate defamatory remarks, he also risks compounding the eventual damage recovery because of multiple publication.[35]

---

[28] Pendolpho v. Bank of Benson, 273 F. 48 (9th Cir. 1921) ("crook"); Peterson v. Western Union Tel. Co., 65 Minn. 18, 67 N.W. 646 (1896) ("slippery"); Smith v. Lyons, 142 La. 975, 77 So. 896 (1918) ("liar"); Paxton v. Woodward, 31 Mont. 195, 78 P. 215 (1904) (same); HARPER & JAMES § 5.2, at 357.

[29] *See, e.g.*, Mowry v. Raabe, 89 Cal. 606, 27 P. 157 (1891); PROSSER § 107, at 776.

[30] 63 YALE L.J., *supra* note 26, at 71, 72; *see, e.g.*, Dooling v. Budget Publishing Co., 144 Mass. 258, 10 N.E. 809 (1887); Bosi v. New York Herald Co., 33 Misc. 622, 68 N.Y.S. 898 (Sup. Ct. 1901).

[31] PROSSER § 107, at 776.

[32] *Id.* at 780.

[33] *E.g.*, Proto v. Bridgeport Herald Corp., 136 Conn. 557, 72 A.2d 820 (1950).

[34] *E.g.*, Conrad v. Dillingham, 23 Ariz. 596, 206 P. 166 (1922); Cotton v. Fisheries Products Co., 181 N.C. 151, 106 S.E. 487 (1921). In the context of this comment (see note 19 *supra*) it is unlikely that punitive damages would be assessed against a defendant-consumer since he persumably would only be guilty of overreacting to or exaggerating the merchant's unethical conduct. However, if in addition to uttering false statements the consumer acted vindictively and with the intention of destroying the merchant's business, punitive damages might properly be awarded.

[35] The minority American position, which is known as the English "multiple publication" rule, treats each copy of a newspaper which reaches the hands of a third party as a separate publication of the defamatory statement, giving rise to a distinct cause of action. *See* Brunswick v. Harmer, 117 Eng. Rep. 75 (Q.B. 1849); Leflar, *The Single Publication Rule*, 25 ROCKY MT. L. REV. 263-65 (1953); Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 960-62 (1953). The rule has been criticized because of the multiplicity of suits to which a defendant may be subjected for an essentially single tortious act and because of the consequent stockpiling of damage recoveries, and has been replaced in most American jurisdictions by the "single publication" rule. The latter treats a complete printing of a newspaper as a single publication permitting only a single cause of action, although the

Furthermore, while damages are presumed, a jury is likely to be influenced by the extent of the audience in ascertaining those damages and in determining whether malice was present. Thus, there would seem to be little difference in the potential liability for defamation between a single speech to a large audience or an advertisement in a local newspaper of limited circulation and numerous informal conversations.

However, despite the potential liability, the defenses available against a defamation suit would appear adquate to shield the careful, bona fide complainant. Since one mistake does not constitute a behavior pattern, an accusation of a single act of impropriety is insufficient to support a suit for defamation, unless special damages are present or the act imputes a general want of integrity or habitual conduct.[36] Thus, a consumer subjected to a "bait and switch" maneuver[37] could safely disclose that he had been induced into the store by an advertisement promising a most advantageous price on a "like new" washing machine, only to be confronted by a six-year-old wringer model and a salesman

---

plaintiff can demonstrate the broad distribution of the writing when proving damages. See Leflar, *supra*, at 268-70; Prosser, *supra*, at 962-65. Unfortunately, courts have been reluctant to extend the "single publication" rule beyond state lines; thus the entry into another state may give rise to distinct causes of action. *See, e.g.*, O'Reilly v. Curtis Publishing Co., 31 F. Supp. 364 (D. Mass. 1940). *But see* Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir.), *cert. denied*, 334 U.S. 838 (1948).

At least seven jurisdictions apply the "multiple publication" rule or a variation thereof, such as a new cause of action in every *forum* in which there is publication. Harmann v. American News Co., 69 F. Supp. 736, 738 (W.D. Wis. 1947), *aff'd*, 171 F.2d 581 (7th Cir. 1948); Holden v. American News Co., 52 F. Supp. 24, 32 (E.D. Wash. 1943); Gallegos v. Union-Tribune Publishing Co., 195 Cal. App. 2d 791, 797, 16 Cal. Rptr. 185, 189 (1961); Firstamerica Dev. Corp. v. Daytona Beach News-Journal Corp., 196 So. 2d 97 (Fla. 1966); Louisville Press Co. v. Tennelly, 105 Ky. 365, 370, 49 S.W. 15, 16 (1899); Staub v. Van Beuthuysen, 36 La. Ann. 467, 469 (1884); Renfro Drug Co. v. Lawson, 138 Tex. 434, 443, 160 S.W.2d 246, 251 (1942).

[36] HARPER & JAMES § 5.12, at 385; PROSSER § 107, at 775-77.

[37] In its simplest form, the "bait and switch" scheme consists of an advertisement of a product which the merchant does not intend to sell or has in very limited numbers, but which serves as a lure to the prospective purchaser. The buyer's interest is then transferred to another product, generally higher priced or with a higher profit margin, as soon as the buyer enters the store or the seller the buyer's home. *See* W. MAGNUSON & J. CARPER, *supra* note 1, at 9-12; see note 1 *supra* and text following.

A comparable tactic is "lo-balling." The merchant, often an appliance or car repairman, advertises his services at a bargain price as a calculated means of enticing the consumer to utilize those services. Once in possession of the appliance or automobile, the merchant is free to exact high prices for unnecessary repairs. *Id.* at 12-13; see note 1 *supra.*

offering a "deal" on a brand new washer-dryer combination. However, if the consumer's statements were inaccurate, and if he also suggested that the incident was not the first in his experience with the plaintiff, or perhaps even if he merely added a comment to the effect that "I'm not surprised," he would risk liability for defamation. A simple factual description of the events which transpired, free of personal vindictives or innuendoes, is thus the essence of the "single act" defense.

The defense of provocation is also available to the consumer, although it would rarely seem to apply. For example, should the merchant defame the consumer for failure to make payment, the latter could counter with a defamatory statement of a comparable order.[38] However, the defense is designed to permit a person to defend and clear his own reputation and not to license indiscriminate defamation. Thus, the retort must be relevant to the offense charged and be made in good faith.[39] In the example above, the consumer might incorrectly publish that the merchant habitually over-charged on his bills and remain within the provocation privilege, but if the consumer falsely alleges that the merchant induced purchases by employing a "fear-sell" technique,[40] he would presumably be beyond the perimeters of the defense.

Of probably greater utility and protection than the above are the other privilege defenses. The consumer could validly claim that his remarks were absolutely privileged when the plaintiff-merchant had given his consent to the publication, as where publication occurs during an arbitration agreed to by the parties or where the merchant dares the consumer to publicize the issue, convinced that no one will believe the accusations. A qualified privilege exists where a person making a defamatory comment can demonstrate either that he was attempting to safeguard the interests of another

---

[38] HARPER & JAMES § 5.17, at 401.

[39] *Id.*; PROSSER § 110, at 805-06; *cf.* Kemart Corp. v. Printing Arts Research Laboratories, Inc., 146 F. Supp. 21 (S.D. Cal. 1956) (defendant's charge of patent infringement in response to plaintiff's public denial of infringement was privileged where made in good faith and reasonable belief).

[40] The "fear sell" is produced by the consumer's ignorance of the authority and identity of public inspectors. Thus a plumber pays a personal visit posing as a local health inspector, inspects the plumbing, warns the owner that he is subject to a fine if the plumbing is not replaced, and then agrees to replace the "defective" plumbing for an appropriate fee. W. MAGNUSON & J. CARPER, *supra* note 1, at 21-23; Hester, *supra* note 1, at 833. See note 1 *supra*.

unable to protect himself or that there was a common interest between the commentator and the recipient.[41] The first is generally limited to situations where the publisher has a legal or moral duty to protect another.[42] However, the privilege has been applied to the warning of a present or prospective employer of the misconduct or bad character of an employee[43] and thus should also be available when a victim of a "free" prize scheme[44] acts in good faith and with a reasonable belief in his accusation to warn a prospective consumer of the device. Although evidence that the neighbor solicited the publisher's advice would strengthen this position, the privilege has not yet been applied in this manner, and the consumer's intervention might be deemed officious intermeddling. The second limited defense, that of "common interest," confers both individual and group immunity[45] and has been utilized to protect members of various formal organizations.[46] Thus, it might be particularly useful where the defendant consumer is a member of a consumer organization and makes the defamatory statement to other members in the course of the organization's regular proceedings. It should be noted, however, that the privilege is tightly limited and may be lost if the defamation exceeds the group's interest,[47] if communicated to non-members,[48] or if made in

[41] *E.g.*, Willenbucher v. McCormick, 229 F. Supp. 659, 663-65 (D. Colo. 1964); Browning v. Gomez, 332 S.W.2d 588 (Tex. Civ. App. 1960). *See generally* Iverson v. Frandsen, 237 F.2d 898 (10th Cir. 1956); Fairbanks Publishing Co. v. Francisco, 390 P.2d 784, 793 (Alaska 1964); Terry v. Hubbell, 22 Conn. Supp. 248, 167 A.2d 919 (Super. Ct. 1960); Montgomery v. Philadelphia, 392 Pa. 178, 140 A.2d 100 (1958); Lathan v. Journal Co., 30 Wis. 2d 146, 140 N.W.2d 417 (1966).

[42] *E.g.*, Ridgeway v. Safeway Stores, Inc., 139 F. Supp. 290 (E.D. Va. 1948); Schlaf v. State Farm Mut. Auto Ins. Co., 15 Ill. App. 2d 194, 145 N.E.2d 791 (1957).

[43] PROSSER § 110, at 807-08 & nn.97-98.

[44] Under the "free" prize scheme, the "winner" receives one item supposedly free, but must agree to purchase other items at a stated price which, when examined, reimburses the donor for both the initial "free" item and the subsequent ones. For an example of this scheme see Hester, *supra* note 1, at 834-35.

[45] GREEN 1188-89.

[46] *See, e.g.*, Bereman v. Power Publishing Co., 93 Colo. 581, 27 P.2d 749 (1933) (labor union paper); Peterson v. Cleaver, 105 Neb. 438, 181 N.W. 187 (1920) (fraternal association); Slocinski v. Radwan, 83 N.H. 501, 144 A. 787 (1929) (church); Herndon v. Melton, 249 N.C. 217, 105 S.E.2d 531 (1958) (church).

[47] *See* Willenbucher v. McCormick, 229 F. Supp. 659, 663 (D. Colo. 1964); PROSSER § 110, at 811. Presumably, a consumer organization's statement of purpose would be relevant in determining whether the group's interest had been exceeded.

[48] PROSSER § 110, at 811.

bad faith.[49] The protection afforded by the common interest defense would presumably permit a local or national consumer organization to exchange freely among members information on mercantile practices and to plan educational and pressure campaigns against offending merchants. Where the group is less clearly delineated, as where neighbors meet to discuss merchant behavior, its members may have difficulty in persuading a court that they fall within the common interest defenses, particularly if some persons in attendance when a defamatory statement is made elect not to participate further or indicate that they were ignorant of the meeting's purpose prior to its inception. Arguably, however, courts should not restrict the privilege to formal organizations. The rationale generally stated in justification of the privilege—that it is an extension of the privilege of self-protection[50]—would appear to be broad enough to warrant extension of the privilege to persons congregating in good faith to redress real or imagined market grievances. Indeed, the proper analysis would seem to require courts to search for a common interest and evidence of good faith, rather than a formal organizational structure. This is not to say, however, that the common interest privilege should apply to indiscriminate publication of defamatory remarks by consumers to persons not within their common interest "group," be it temporary or permanent.

Legal immunity may also be conferred for an honest expression of opinion on matters of legitimate public interest. Known as the "fair comment" privilege, it applies most frequently to criticism of public officials or art forms.[51] While the underlying facts must be emphasized in the opinion expressed,[52] a bona fide public purpose,

---

[49] GREEN 1188-89. The authors of this casebook define the "common interest" privilege as "[a] communication made in good faith on any subject in which the person communicating has an interest, or in reference to which he has a duty . . . if made to a person having a corresponding interest or duty, even though it contains matter which without this privilege would be actionable." *Id.* at 1188. However, the cases cited by the authors in support of their definition suggest a narrower application of the privilege. Thus communications between members of formal groups are protected (see note 41 *supra*) but a letter from one shareholder to another about plaintiff's defrauding of the corporation is not. Chambers v. Leiser, 43 Wash. 285, 86 P. 627 (1906), nor are telegrams between shareholders concerning fitness of a corporate director, Ashcroft v. Hammond, 197 N.Y. 488, 90 N.E. 1117 (1910).

[50] GREEN 1188; see note 39 *supra* and accompanying text.

[51] *See, e.g.,* Beauharnais v. Pittsburgh Courier Publishing Co., 243 F.2d 705 (7th Cir. 1957); Julian v. American Business Consultants, Inc., 2 N.Y.2d 1, 137 N.E.2d 1, 155 N.Y.S.2d 1 (1956).

[52] HARPER & JAMES § 5.28, at 456.

as contrasted with a desire to harm the plaintiff, is of paramount importance, since the privilege is grounded in the public's need to be informed on public issues and the constitutional protection given free speech.[53] Arguably, therefore, a good faith attempt to expose a pernicious mercantile practice ought to fall within the ambit of the privilege, particularly since the free and accurate exchange of information is thought to be an essential ingredient of competition in a free market system.

While it is true that extending the fair comment privilege to economic interests might provide a ready avenue of abuse, the privilege which is abused will be lost as a defense. Thus, where malice, unreasonable communication or unreasonable belief in the statement is demonstrated, the privilege is avoided and the burden of proving a lack of abuse is placed on the party asserting the defense.[54] Moreover, the merchant can always utilize the public forum to rebut the derogatory remarks. Therefore, there would appear to be sufficient procedural safeguards to justify broadening the scope of the fair comment privilege to include good faith expressions of opinion by consumers where those opinions are

[53] Julian v. American Business Consultants, Inc., 2 N.Y.2d 1, 7-11, 137 N.E.2d 1, 5-8, 155 N.Y.S.2d 1, 7-9 (1956).

Although the modern developments by the Supreme Court concerning the right to privacy and first amendment rights have generally involved "public officials" or "public figures," they do evince a desire to avoid the constriction of comments on issues of interest to the public. *See* Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Garrison v. Louisiana, 379 U.S. 64 (1964); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Furthermore, in stating the holding of Time, Inc. v. Hill, 385 U.S. 374 (1967) Mr. Justice Brennan described the New York privacy statute as being without power "to redress false reports of *matters of public interest* in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." *Id.* at 387-88 (emphasis added). Such a standard might well protect some false comments on a merchant's practices, even without a finding that he was a "public figure." The issue is far from clear, however, since Justice Brennan expressly distinguished this statutory privacy action from one sounding in libel. "Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved." *Id.* at 391.

[54] PROSSER § 110, at 822. As a general rule once the defendant demonstrates that he is protected by a qualified privilege the burden is on the plaintiff to establish abuse of that privilege. *See, e.g.*, Willenbucher v. McCormick, 229 F. Supp. 659, 663-65 (D. Colo. 1964); Bakhshandeh v. American Cyanamid Co., 211 F. Supp. 803, 808 (S.D.N.Y. 1962); Hogan v. New York Times Co., 211 F. Supp. 99, 108-09 (D. Conn. 1962); Flannery v. Allyn, 47 Ill. App. 2d 308, 319, 198 N.E.2d 563, 568 (1964). *Contra*, Arvey Corp. v. Peterson, 178 F. Supp. 132, 137 (E.D. Pa. 1959) (applying Pennsylvania law).

accompanied by a factual recitation of the dispute.[55] The latter requirement would permit the merchant publicly to refute the charges, relating his own version without having to resort to meaningless and inflammatory invective. As is true of the common interest privilege, however, the courts have not yet interpreted fair comment to include consumer comment.

One case which can be read to lend support to an expanded application of the fair comment privilege is *Dempsky v. Double.*[56] In the midst of an official investigation concerning the misuse of public property, a private individual wrote a letter to the county controller charging that a county employee had used a county vehicle in the remodeling of his home. A copy of the letter was also sent to the League of Women Voters. The employee lost nis job for the violation alleged in the complaining letter and brought a libel action. Finding that the writer had acted upon proper occasion and motive, in an appropriate manner and on reasonable and probable cause, the Supreme Court of Pennsylvania affirmed the trial court's grant of a compulsory nonsuit.[57] Perhaps even more significantly, the court was also satisfied that the letter to the League of Women Voters was not actionable. Since the letter had been sent to a group interested in good government and was intended to serve the "public welfare" rather than a private motive, the court was of the opinion that it was conditionally privileged.[58] The League of Women Voters' claim to good government would appear to be no more substantial than that of any one citizen of the county in question. Thus, if it is permissible to communicate with persons other than an alleged wrongdoer's immediate superiors or perhaps the proper elected officials, it would seem logical to sanction county-wide publication rather than to limit the privilege to a self-appointed body which may or may not act to represent the local citizenry. So read, *Dempsky* would seem to sanction consumer comment where made in a reasonable manner,[59] without malice, and in the public interest.[60]

---

[55] *See* Dempsky v. Double, 386 Pa. 542, 126 A.2d 915 (1956).

[56] 386 Pa. 542, 126 A.2d 915 (1956).

[57] *Id.* at 547-48, 126 A.2d at 917-18.

[58] *Id. See* GREEN 1244-45. *But see* Flotz v. Moore McCormack Lines, Inc., 189 F.2d 537 (2d Cir. 1951) (false statements maliciously made to F.B.I. held actionable).

[59] If, for example, a merchant used newspaper advertisements to implement a "bait and switch" routine, see note 37 *supra*, a reasonable response by a victimized consumer would appear to be the placing of his own counter-advertisement as close to the merchant's

Despite the significance of these limited defenses, the primary protection for the wronged consumer against a defamation action is truth, which provides a complete defense in all but eleven jurisdictions.[61] Thus, if broad, emotional words are avoided and if the consumer honestly relates the events which transpired rather than his opinions or conclusions concerning the plaintiff's character, liability may be avoided.[62] Candor is essential since the defendant is liable for any false innuendoes or imputations created by his speech or actions. For this reason, a person using "demonstrative evidence"[63] to gain attention should also carry a sign explaining fully the events which prompted his demonstration, and a speaker should forsake invective for fact. Since the burden of proving truth lies with the defendant,[64] offending advertisements or contracts and shoddy merchandise should be preserved for presentation at trial. As a practical matter, however, the

advertisement as possible, setting forth in factual terms exactly what is misleading about the merchant's advertisement and the events which transpired when he responded to the merchant's advertisement. Nevertheless, where the local newspaper is economically dependent on merchant advertisements such as the one in question the consumer may have difficulty in securing acceptance and publication of his "anti-ad." See note 22 *supra.*

[60] The Supreme Court cases of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and Time, Inc. v. Hill, 385 U.S. 374 (1967), which emphasized the fair comment exception to defamation and privacy actions where a legitimate public interest or a newsworthy event was involved, would appear to support an expanded area for protected consumer comment. The basis of those opinions, the importance of the first amendment guarantee of free speech, is also central to consumer comment, and the public's interest in an open and just marketplace is certainly a legitimate public concern. *But cf.* Dietemann v. Time, Inc., 284 F. Supp. 925 (C.D. Cal. 1968) ("quack" doctor exposed by national magazine did not thereby become public figure; damages for invasion of privacy awarded).

[61] HARPER & JAMES § 5.20, at 415. The defendant need not prove literal truth, but only that his statement was "substantially true." PROSSER § 111, at 825. Of the eleven jurisdictions in which truth is not a complete defense, six require publication for justifiable ends, two require that publication be made for "public information," and three demand good motives in addition to truth. HARPER & JAMES § 5.20, at 416 n.6. *See also* GREEN 1178-79; PROSSER § 109, at 795.

[62] *See* PROSSER § 111, at 825-26. Use of analogy from misrepresentation cases might allow the defendant to introduce evidence of complaints from other consumers similarly situated, as justification for the opinion expressed. *See generally* C. MCCORMICK, EVIDENCE § 164 (1954).

[63] See text accompanying notes 23-24 *supra.*

[64] *E.g.*, Borg v. Boas, 231 F.2d 788, 792 (9th Cir. 1956); Lipman v. Brisbane Elementary School Dist., 55 Cal. 2d 224, 233, 359 P.2d 465, 469 (1961); Fowler v. Donnelly, 225 Ore. 287, 292, 358 P.2d 485, 488 (1960); *see* Perry v. Hearst Corp., 334 F.2d 800 (1st Cir. 1964) (truth is an affirmative defense).

sympathies of the jury are likely to be with the defendant, and where it is the defendant's word against the merchant's, the merchant's action will probably fail.

A strong non-legal safeguard which may also operate to insulate the consumer from a defamation action is the merchant's desire to avoid unfavorable publicity. Thus, where the consumer merely engages in private conversations or simply speaks to a group of consumers who, in turn, seek to pressure a merchant by conferring directly with him, a jury would properly be skeptical of a claim of significant injury to the merchant's reputation precipitated by the speaker's false statement. However, the greater the audience and the more substantial the economic threat the consumer poses, the more likely and the more justifiable a defamation action becomes.

Disparagement

The courts have often confused disparagement or "trade libel" with defamation of a business or of an individual.[65] As it is generally defined today, however, commercial disparagement encompasses all *false* statements about the *quality* of a *product or service intended* to cause financial harm *and* which have that result.[66] Thus, where the goods or services of the merchant are attacked, rather than his personal integrity, an action for disparagement, not defamation, properly lies.

The elements of disparagement are more rigorous than those of defamation. Not only must the plaintiff prove the falsity of the defendant's charge by demonstrating the quality of the goods disparaged, but he must also show that there was no applicable privilege, that actual financial loss resulted, that the loss was caused by the false utterance, and that "malice"[67] or "bad faith"

[65] GREEN 967-70; PROSSER § 122, at 939-40; *Developments in the Law—Competitive Torts*, 77 HARV. L. REV. 888, 893 (1964); 63 YALE L.J., *supra* note 26, at 70-72, 74, 97; *cf.* Steward v. World-Wide Auto. Corp., 20 Misc. 2d 188, 189 N.Y.S.2d 540 (Sup. Ct. 1959) (plaintiff uncertain as to how to frame cause of action).

The classic work on disparagement is Smith, *Disparagement of Property*, 13 COLUM. L. REV. 13, 121 (1913).

[66] *See, e.g.*, Maytag Co. v. Meadows Mfg. Co., 45 F.2d 299 (7th Cir. 1930); Brentwood Pharmacy, Inc. v. Sheppard, 229 N.Y.S.2d 511 (Sup. Ct. 1962) (oral statement during picketing that drugstore was scene of abortion); 77 HARV. L. REV., *supra* note 65.

[67] Commentators disagree as to the need for a showing of malice. *Compare* GREEN 968, *and* PROSSER § 122, at 944-45 *with* HARPER & JAMES § 6.1, at 479, 481. *See also* 63 YALE L.J., *supra* note 26, at 78-79.

was present.[68] Conversely, the defendant may avoid liability either by demonstrating a qualified privilege comparable to those available under defamation, by establishing truth, or by satisfying the court that the plaintiff had failed to prove the falsity of defendant's statement. The qualified privilege, which arises from a lack of malice and a right to protect oneself or others, may be lost if publication is excessive, if the defendant knows the statement is false, or, obviously, if malice is present,[69] but apparently sincere belief in the truth of the assertion, however unfounded, is sufficient to sustain the privilege.[70] Moreover, although disparagement may result by implication,[71] expressions of opinion are not generally actionable.[72]

Modern decisions are divided as to the particularity required to prove special damages, but the general trend is to demand at least proof of a specific overall decline in sales following the trade libel.[73] Upon making this proof, the plaintiff can recover for lost sales, any loss to present marketability, the reasonable expenses incurred in vindicating the product, and, where the product is unique, the decrease in market value.[74] However, the plaintiff must demonstrate actual economic injury, not merely mental suffering or future loss, and recovery is presently denied for loss of good will, due to its speculative nature.[75]

---

[68] *See* Diapulse Corp. v. Birtcher Corp., 362 F.2d 736 (2d Cir. 1966); GREEN 968, 971-72; S. OPPENHEIM, *supra* note 26, at 322; PROSSER § 122, at 943-47; 63 YALE L.J., *supra* note 26, at 75. *See generally* Smith, *supra* note 65, at 121.

One writer would remove the truth defense as to competing merchants. Wolff, *Unfair Competition by Truthful Disparagement*, 47 YALE L.J. 1304, 1320 (1938).

The Restatement of Torts would impose liability in some circumstances for expressions of opinion not held by the publisher. RESTATEMENT OF TORTS § 627 (1938). *See* S. OPPENHEIM, *supra*, at 323-24. It must be remembered, however, that this view was formulated in a business context to restrict unfavorable comments by a competing merchant as to the quality of goods of a competitor.

[69] *See, e.g.*, Sinclair Ref. Co. v. Jones Super Serv. Station, 188 Ark. 1075, 70 S.W.2d 562 (1934); Frega v. Northern N.J. Mortgage Ass'n, 51 N.J. Super. 331, 143 A.2d 885 (1958); Olsen v. Kidman, 120 Utah 443, 235 P.2d 510 (1951); PROSSER § 122, at 945, 948.

[70] PROSSER § 122, at 947-48. *But see* 77 HARV. L. REV., *supra* note 65, at 893-95 (reasonable belief in truth not a defense).

[71] PROSSER § 122, at 942; 63 YALE L.J., *supra* note 26, at 65, 75.

[72] S. OPPENHEIM, *supra* note 26, at 323; *cf.* Wolff, *supra* note 68, at 1335.

[73] GREEN 971-72; PROSSER § 122, at 946-47. *See* Note, *Trade Libel and its Special Damage Requirement*, 17 HASTINGS L.J. 394 (1965); Comment, *Trade Disparagement and the "Special Damage" Quagmire*, 18 U. CHI. L. REV. 114 (1950).

[74] 63 YALE L.J., *supra* note 26, at 96.

[75] *See, e.g.*, Fowler v. Curtis Publishing Co., 182 F.2d 377 (D.C. Cir. 1950); Brown v. Barnes, 133 Colo. 411, 296 P.2d 739 (1956); Trachtenberg Bros. v. Henrietta Stein, Inc., 64

In short, an action for disparagement carries an onerous burden for the plaintiff, and consequently, it does not pose as serious a threat to the complaining consumer as does a defamation action. For example, were a consumer publicly to berate the shoddy furniture sold by a merchant without referring to the merchant himself, his honest and unemotional opinion as to the general quality of the goods would not appear to be subject to an action for disparagement. Should a jury find that the goods were actually of the quality represented by the merchant, the complainant would be protected either by a qualified privilege or by having couched his comments in terms of an opinion. Furthermore, if both of these fail to immunize the consumer, the merchant still faces the difficult task of proving causation and actual economic injury. Once damages are shown, however, the jury will have less flexibility than in a defamation suit, and, therefore, the sincerity and good intentions of the consumer will not be effective in lessening the size of the verdict.[76]

Interference With Economic Relations

In an action for interference with contractual relations, designated a *prima facie* tort, the defendant's motive frequently determines liability.[77] Because the tort only circumscribes intentional interference with an existing contract known or reasonably evident to the defendant,[78] an impersonal or disinterested motive will probably protect the defendant, whereas the courts disagree as to a defendant who is admittedly pursuing selfish ends.[79]

N.Y.S.2d 565 (Sup. Ct. 1946); 63 YALE L.J., *supra* note 26, at 90-91; 77 HARV. L. REV., *supra* note 65, at 899-902.

[76] Lack of malice and bona fides will still be important in sustaining the qualified privilege, however.

[77] HARPER & JAMES § 6.12, at 515; PROSSER § 123, at 951; *cf.* Steward v. World-Wide Auto. Corp., 20 Misc. 2d 188, 189 N.Y.S.2d 540, 548-55 (Sup. Ct. 1959).

[78] GREEN 877; 77 HARV. L. REV., *supra* note 65, at 960-61. As defined by Green, a *prima facie* tort is an "*intentional injury, without just cause or excuse,* to trade or other profitable relation enjoyed by the victim." GREEN at 995. *See also* Annot., 16 A.L.R.3d 1191 (1967).

As a general rule, liability for *negligent* interference with contractual relations does not exist; nonetheless, in a few instances policy considerations have justified recovery. *See* HARPER & JAMES § 6.10. Prosser suggests that negligent conduct is actionable under an action for interference with prospective advantage, see notes 93-98 *infra* and accompanying text, if a special relationship exists. PROSSER § 124, at 976-77; *citing* Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821, *cert. denied*, 368 U.S. 987 (1962) (negligent drafting of will), *and* Ward v. Arnold, 52 Wash. 2d 581, 328 P.2d 164 (1958).

[79] PROSSER § 123, at 966, 968. Actual damage must have been sustained, and the fact that the plaintiff has successfully litigated a separate action against the breaching party is

Unlike actions for defamation or disparagement, the consumer cannot rely on the truth of his statement as a complete defense.[80] The consumer can, of course, show that there was no existing contract between the merchant and a third party or that the consumer acted for altruistic reasons, the latter being an application of the privilege concept and requiring the court to balance the competing interests.[81] The pertinent factors in any such balancing process have long been established: the position of the parties; the grounds for the breach; the means employed to procure the breach; the relation of the defendant to the breaching party; and the defendant's motive.[82]

Virtually all the cases in this area involve competing merchants;[83] yet, if it is proper to weigh the respective interests of merchants, then the same process would seem appropriate between a merchant and a noncompeting consumer. The public interest in exposing fraudulent or misleading business practices in order for the public to avoid them and in order to purify the marketplace should be argued to the court in asserting the privilege and

irrelevant. *See* HARPER & JAMES § 6.5, at 490-91; Carpenter, *Interference with Contract Relations*, 41 HARV. L. REV. 728, 732 (1928). The size of the award has been computed under one of three methods: normal contract damages determined by the contract breached; tort damages computed as in a normal negligence recovery; or an intentional tort recovery, including unforeseen expenses, mental suffering, damage to reputation, and punitive damages. PROSSER § 123, at 972; Note, *Interference With Contractual Relations: A Common Measure of Damages*, 7 SANTA CLARA LAW. 140 (1966). Since the cause of action is designed to protect the interest of the plaintiff in seeing that his contractual relationships are secure, and not to compensate him for loss of his bargains, the intentional tort recovery would seem the more appropriate method. 7 SANTA CLARA LAW., *supra* at 147. However, if the courts accept this method, the *prima facie* tort will pose a greater threat to a disgruntled consumer.

[80] *See* HARPER & JAMES § 6.5, at 490; 77 HARV. L. REV., *supra* note 65, at 960. But see note 98 *infra* and accompanying text noting that truth is a defense to an action for interference with prospective advantage.

[81] HARPER & JAMES § 6.12, at 514-17; PROSSER § 123, at 951; Bohlen, *Incomplete Privilege to Inflict Intentional Invasions of Property and Personality*, 39 HARV. L. REV. 307, 314-24 (1926); Carpenter, *supra* note 79, at 745-46, 763.

[82] Mogul Steamship Co. v. McGregor, Gow & Co., 23 Q.B.D. 598, 618 (1889). *See* HARPER & JAMES § 6.6, at 493; Comment, *Inducing Breach of Contract: Hereln of Contracts Terminable at Will*, 56 NW. U.L. REV. 391-95 (1961); Note, *Torts: Interference with Contractual Relations: Limitations on the Lumley v. Gye Doctrine*, 17 CORNELL L. REV. 509 (1932); 40 COLUM. L. REV. 1094 (1940).

[83] *E.g.*, Westinghouse Elec. & Mfg. Co. v. Diamond State Fibre Co., 268 F. 121 (D. Del. 1920); Automobile Ins. Co. v. Guaranty Securities Corp., 240 F. 222 (S.D.N.Y. 1917); Friedberg v. McClary, 173 Ky. 579, 191 S.W. 300 (1917); Knickerboeker Ice Co. v. Gardiner Dairy Co., 107 Md. 559, 69 A. 405 (1908).

probably should be considered superior to the interest of the merchant, absent evidence of consumer malice or evidence that the merchant represented a compelling interest beyond his own economie self-interest. As in defamation, the burden of establishing a privilege falls on the defendant,[84] providing the necessary procedural safeguard to justify application of the privilege in this context.

A particularly compelling justification for the consumer's actions can be asserted where the contract breached upon inducement by the consumer was illegal or contrary to public policy.[85] Section 2-302 of the Uniform Commerical Code, which permits a court to refuse to enforce any contract deemed to be unconscionable, would appear to furnish strong support for denying recovery where the contract interfered with falls within the scope of that section. To do otherwise would be to give practical effect to a contract deemed to be against public policy. Thus, where one consumer induces another to break existing installment contracts with an appliance dealer, the fact that those agreements were "open-end" installment contracts[86] might privilege the interferor's actions since such a contract has been held to be unconscionable.[87] However, where the contract in question is not illegal or unconscionable on its face, or has not been so held previously, the interferor may be faced with an evidentiary problem if the contracting consumer is not a party to the suit by the merchant.[88]

---

[84] HARPER & JAMES § 6.12, at 514; *see* Carpenter, *supra* note 79, at 745-62.

[85] *See* GREEN 878. *But cf.* Union Circulation Co. v. Hardel Publishers Serv. Inc., 6 Misc. 2d 340, 164 N.Y.S.2d 435 (Sup. Ct. 1957), in which the court stated that the fact that a contract was voidable or unenforceable did not entitle a third party to induce its breach. 6 Misc.2d at 344, 164 N.Y.S.2d at 438; *see* PROSSER § 123, at 955-56. Nevertheless, the court indicated that an induced breach of a *void* contract was not actionable, 6 Misc. 2d at 343, 164 N.Y.S.2d at 438, and hinted that if an unconscionable clause rendered the entire contract void no action could lie. *Id.* at 343-44, 164 N.Y.S.2d at 439.

[86] An "open-end" installment contract is one in which final payment on any one item purchased under such a contract eannot occur until installments due on all other items similarly purchased are paid, title remaining in the seller until then. Thus, if the consumer purchased a radio, a television set and a boat (either at one time or in sequence) under such a contract, although the radio cost only twenty-five dollars, until the boat and television were paid for the radio would not be credited in full even though more than twenty-five dollars had heen paid in installments up to that point. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). In the *Williams* case the consumer-plaintiff was even more at the mercy of the merchant since upon default of an installment the merchant could repossess all the items.

[87] Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), *noted in* 51 CORNELL L.Q. 768 (1966); 54 GEO. L.J. 703 (1966); 79 HARV. L. REV. 1299 (1966).

[88] Presumably, the contracting party could serve as witness for the defendant to introduce

In view of the importance of the defendant's intent in a contract interference suit, the victim of a hidden confessed judgment contract, for example, could presumably urge others to refuse to continue doing business with the merchant without danger of liability if he did so out of an honest desire to advise the public, rather than to damage the plaintiff.[89] Moreover, additional protection might be realized if the consumer clearly stated that he was not urging his listeners or readers to break existing contracts with the plaintiff but only to reconsider future business dealings.

Despite these general principles, however, it may be that a court should not permit uncontrolled consumer action if the failure to sustain an action for interference would restrict the freedom of speech of the merchant or that of his customers. Such a situation might arise, for example, where a consumer induces others to sever relations with a publisher because of political disagreement with the activities or sympathies of the publisher or some of his customers. It is clear that allowance of a state cause of action may violate the protections of the first amendment,[90] but it does not necessarily follow that the disallowance of a claim is subject to the same constitutional infirmity.[91] Instead of pursuing such a constitutional argument, it is suggested that the better approach would be for the court to recognize, in the process of the normal balancing technique described above,[92] the importance of the merchant's free speech rights and the consumer's attempted curtailment of those rights.

The preceding discussion also applies to the tort of interference with prospective advantage, there being no valid action absent intentional interference by the defendant or unless special circumstances exist.[93] The only additional qualification is that the

---

the terms of the contract or to authenticate the written document, to the extent that a variation exists from what the plaintiff asserted. *See* C. McCORMICK, *supra* note 62, §§ 187-89.

[89] *See* HARPER & JAMES § 6.11, at 513, § 6.12.

[90] *E.g.*, Time, Inc. v. Hill, 385 U.S. 374 (1967).

[91] In Associated Press v. United States, 326 U.S. 1, 20 (1945), it was stated:

> Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom . . . . Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.

In that case, however, the defendants in a Sherman Act prosecution were asserting the first amendment as a defense, and the use of the Court's language to sustain an interference action is questionable.

[92] See note 82 *supra* and accompanying text.

[93] *E.g.*, Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821, *cert. denied*, 368

aborted contractual expectancy must have had some degree of certitude.[94] However, the certainty requirement would apparently not be met where a consumer urged his neighbors to discontinue purchasing their food from a particular merchant, except, perhaps, if that grocer were the only one in the locale and the listeners regularly did their shopping there. Even in the latter situation, the consumer could probably escape liability if he were unaware of the merchant's monopoly position since liability is not generally premised on mere negligent conduct, but, like contractual interference, is based on intentional or "malicious" behavior.[95] In fact, any purpose sufficient to create a privilege to intérfere with contractual relations, such as the protection of the interests of the public,[96] will also justify interference with relations which are merely prospective.[97] It is significant to note, moreover, that in an action for interference with prospective advantage, truth has been held to be a defense.[98]

Injunctive Relief

Equity has historically refused to enjoin publication of a libel[99] for two reasons: an injunction would ignore the defendant's right to a jury trial, and it would serve as an unconstitutional prior

U.S. 987 (1962) (negligent drafting of will); Ward v. Arnold, 52 Wash. 2d 581, 328 P.2d 164 (1958) (liability may be predicated on simple negligence); *see* HARPER & JAMES § 6.11, at 511-12; PROSSER § 124; note 78 *supra.*

[94] HARPER & JAMES § 6.11, at 512; PROSSER § 124, at 974-75.

[95] HARPER & JAMES §§ 6.10-6.11.

[96] *E.g.*, New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938) (action for injunction); McCann v. New York Stock Exchange, 107 F.2d 908 (2d Cir. 1939), *cert. denied*, 309 U.S. 684 (1940); Julie Baking Co. v. Graymond, 152 Misc. 846, 274 N.Y.S. 250 (Sup. Ct. 1934) (action for injunction); Chicago R.I. & P. Ry. Co. v. Armstrong, 30 Okla 134, 120 P. 952 (1911); Harris v. Thomas, 217 S.W. 1068 (Tex. Civ. App. 1920) (action for injunction); *see* PROSSER § 124, at 978. *Contra*, NAACP v. Webb's City, 152 So. 2d 179 (Fla. App. 1963); A. S. Beck Shoe Corp. v. Johnson, 153 Misc. 363, 274 N.Y.S. 946 (Sup. Ct. 1934); People v. Kopezak, 153 Misc. 187, 274 N.Y.S. 629 (Ct. Spec. Sess. 1934), *aff'd*, 266 N.Y. 565, 195 N.E. 202 (1935); (all actions for injunction).

[97] PROSSER § 124, at 978-79.

[98] McCann v. New York Stock Exchange, 107 F.2d 908 (2d Cir.), *cert. denied*, 309 U.S. 684 (1940). Apparently erroneously, the decision was based upon the truth defense in a defamation action, RESTATEMENT OF TORTS § 606 (1938). *See generally*, 77 HARV. L. REV., *supra* note 65, at 960-61.

[99] *See, e.g.*, Marlin Firearms Co. v. Shields, 171 N.Y. 384, 64 N.E. 163 (1902); GREEN 975-78; Wolff, *supra* note 68, at 1305; 63 YALE L.J., *supra* note 26, at 96. Commentators have been uniformly critical of the "rule." *See, e.g.*, Pound, *Equitable Relief Against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916); 63 YALE L.J., *supra*, at 100-03.

restraint on speech.[100] The same rule applies to disparagement, which is due in part to early judicial confusion mistaking disparagement for defamation.[101] Nevertheless, injunctions are frequently issued when the courts find an illegal act or an "entire course of conduct" against which equity may act, thus achieving the same result through characterization of the conduct as *action* rather than *speech*.[102] Theoretically, before an injunction will lie the petitioning party must establish that his remedy at law is inadequate, alleging continuous publication or the threat of renewal, insolvency, or unascertainable damages.[103] In practice, however, courts on occasion have required less.

Menard v. Houle[104] is one of the celebrated "lemon cases." The defendant in that case had indicated his dissatisfaction with a car purchased from plaintiff by motoring through the community with a lemon and a sign attached to his car. The sign proclaimed that the car was "no good," that the seller refused to repair it, and that anyone who purchased the model was a "sucker." To publicize his campaign further, this modern Don Quixote issued public statements describing the car as a "lemon" and charging that the plaintiff would not "make good." When the seller retaliated by seeking an injunction, the defendant demurred on the grounds that equity could not enjoin libel or slander. The Massachusetts Supreme Court affirmed the denial of defendant's demurrer, pointing to the "continuing course of *unjustified* and *wrongful* attack upon the plaintiff *motivated* by *actual malice*."[105] The court reasoned that it was enjoining wrongful "acts" rather than wrongful speech and therefore found inapplicable the general equity principle proscribing injunctive relief in defamation cases. It is important to note that the court concluded in its statement of the facts that the defendant *knew* his claims were *false* and that he

---

[100] Marlin Firearms Co. v. Shields, 171 N.Y. 384, 64 N.E. 163 (1902); Pound, *supra* note 99, at 654-57; 63 YALE L.J., *supra* note 26, at 96.

[101] 63 YALE L.J., *supra* note 26, at 97. See note 65 *supra* and accompanying text.

[102] *See, e.g.*, H.E. Allen Mfg. Co. v. Smith, 224 App. Div. 187, 229 N.Y.S. 692 (1928); Saxon Motor Sales, Inc. v. Torino, 166 Misc. 863, 2 N.Y.S.2d 885 (Sup. Ct. 1938); Pound, *supra* note 99, at 655; 63 YALE L.J., *supra* note 26, at 97-99. "[C]ourts have been able to pledge allegiance to the rule and then avoid its effect." 77 HARV. L. REV., *supra* note 65, at 903.

[103] 63 YALE L.J., *supra* note 26, at 99.

[104] 298 Mass. 546, 11 N.E.2d 436 (1937).

[105] *Id.* at 548, 11 N.E.2d at 437 (emphasis added).

acted *solely* to injure and extort money from the plaintiff.[106] Moreover, the cases cited as precedent by the court involved situations in which the respective defendants were guilty of actual malice.[107] It is these often inarticulated elements of falsity and bad faith which have created an inaccurate popular notion of the "lemon" cases. Realistically, they do not strait-jacket a consumer acting in good faith while attempting to publicize a valid claim. *McMorries v. Hudson Sales Corp.*,[108] for example, involved facts virtually identical to those in *Menard* with one major difference: there was no allegation that the public statements and writings of the defendant were false or made with malicious intent. In denying that an injunction could properly issue, the Texas Court of Civil Appeals distinguished *Menard* on that basis.[109] Concluding that no unlawful end was intended and that the actions were ends in themselves, the court based its denial on the first amendment. This view was carried even further by the same court in *Lawrence v. Atwood*,[110] where the purchaser erected in his front yard a large sign bearing a picture of a lemon. The sign equated the purchaser's house with the lemon and identified the plaintiff as the contractor. The contractor sought an injunction and damages for libel. The appellate court held that an injunction had been improperly granted by the trial court. Even though the defendant was charged with intentionally, maliciously, and continually publishing a libel, the court was impressed by the lack of any allegations of a conspiracy, coercion, or intimidation. In the court's view defamation alone did not confer equity jurisdiction.[111] No finding was entered as to the truth of defendant's statements or the existence of malice.

The disparagement-injunction cases follow a similar pattern.[112]

[106] *See* Singer v. Romerrick Realty Corp., 255 App. Div. 715, 5 N.Y.S.2d 607 (1938).

[107] 298 Mass. at 548, 11 N.E.2d at 437.

[108] 233 S.W.2d 938 (Tex. Civ. App. 1950).

[109] *Id.* at 941-42.

[110] 295 S.W.2d 298 (Tex. Civ. App. 1956); *accord*, Esskay Art Galleries v. Gibbs, 205 Ark. 1157, 172 S.W.2d 924 (1943).

[111] 295 S.W.2d at 300.

[112] Precedent for judicial willingness to grant an injunction where there is defamation or disparagement-"plus" may lie in the analogous treatment given older patent infringement cases by the courts. Pound, *supra* note 99, at 658-68; 75 U. PA. L. REV. 258 (1927). In Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69 (1873), an injunction against defendant's charges of patent infringement by the plaintiff was refused because it was

Where there is malice or falsity, the courts are more willing to find "libel plus" and grant an injunction. Thus, in *H.E. Allen Manufacturing Co. v. Smith*[113] the defendant printed several spurious documents purporting to be official government papers, and instructed salesmen to state falsely that plaintiff's competing product was subject to seizure by the United States Government. Noting that it was protecting the plaintiff's property interest in good will, the court awarded general tort damages for the actual loss suffered by the plaintiff and also deemed proper an injunction, presumably because of the illegal printing which supplemented the false accusations.[114] Similarly, in *Saxon Motor Sales, Inc. v. Torino*,[115] the defendant was enjoined from placing derogatory signs on a car purchased from the plaintiff. Noting the general proscription against an injunction in such instances, the court felt its action was justified due to the fact that the consumer's *"sole purpose"* was to injure the plaintiff's business.[116] In the court's view, the situation was analogous to interference with plaintiff's business by physical obstruction.[117] No finding was made as to whether the derogatory comments were accurate.

As the defamation and disparagement cases suggest, cantankerous consumers cannot safely assume that an injunction will never issue should they undertake to dramatize their objections

believed that no property right was involved and that equity was without jurisdiction. *Accord*, Baltimore Car-Wheel Co. v. Bemis, 29 F. 95 (C.C.D. Mass. 1886); Kidd v. Horry, 28 F. 773 (C.C.E.D. Pa. 1886). However, in Emack v. Kane, 34 F. 46 (C.C.N.D. Ill. 1888), the defendant was successfully enjoined because the infringement allegation was utilized as a form of intimidation, indicating that courts were free to discover equity jurisdiction where an improper purpose predominated. *See* Electric Renovating Co. v. Vacuum Co., 189 F. 754 (C.C.W.D. Pa. 1911); Adriance v. National Harrow Co., 121 F. 827 (2d Cir. 1903). *But see* Warren v. Landauer, 151 F. 130 (C.C.E.D. Wis. 1907) (no bad faith sbown); Kelly v. Yipsilanti Dress-Stay Co., 44 F. 19 (C.C.E.D. Mich. 1890) (purpose of communication was to prevent future law suits); 75 U. PA. L. REV. 258, 261 (1927) (without finding of falsity or bad faith granting of injunction created too chilling an effect on first amendment rights).

[113] 224 App. Div. 187, 229 N.Y.S. 692 (1928). The court treated the complaint as an action for libel, but it more properly presented a question of disparagement.

[114] The opinion is abbreviated and fails to articulate the court's reason for ignoring the general rule against the granting of an injunction in a defamation or disparagement action.

[115] 166 Misc. 863, 2 N.Y.S.2d 885 (Sup. Ct. 1938).

[116] *Id.* at 863, 2 N.Y.S.2d at 885; *accord*, Carter v. Knapp Motor Co., 243 Ala. 600, 11 So. 2d 383 (1943) (defendant's motive was to compel plaintiff to give him another car); Sherry v. Perkins, 147 Mass. 212, 17 N.E. 307 (1888) (entire scheme was to intimidate workmen).

[117] 166 Misc. at 863, 2 N.Y.S.2d at 885.

through "demonstrative evidence." Although it is hard to imagine a modern court enjoining a solitary consumer from driving with a sign and a lemon on his car, particularly where there is a vast disparity in market power between the car dealer and the consumer, commentators have uniformly criticized the no-injunction rule[118] and previous courts have been willing to find and enjoin wrongful "acts" used in conjunction with defamatory speech. Nevertheless, the likelihood of even "speech *plus*" being enjoined by a contemporary tribunal, especially where the statement is true or uttered in good faith for a nondestructive purpose, is minimal.[119] Indeed, in the absence of malice or falsity, precedent would not sanction injunctive relief in defamation or disparagement actions. Moreover, the protesting consumer is benefitted by the merchant's fear of creating an adverse public reaction and of further publicizing the consumer's derogatory allegations by seeking to enjoin the consumer's antics. Barring unusual circumstances, such as substantial market power in the consumer or highly defamatory remarks, the merchant's appropriate response would thus seem to be either to ignore the good faith consumer or to attempt to mollify him.

Injunctions have also been issued in contract interference cases, but these have involved special circumstances. In *Pratt Food Co. v. Bird*,[120] for example, the petitioner sought to restrain a state food commissioner from warning the public not to purchase the merchant's product. In affirming the denial of an injunction, the Michigan Supreme Court stated that an injunction might properly lie had there been a combination attempting to ruin the petitioner's business by intimidation or coercion, or had the food commissioner acted beyond his authority or without probable cause, but one would not lie under the facts before the court. Apparently, the good faith of the food commissioner and the veracity of his accusations

[118] See note 96 *supra*. "In substance the traditional doctrine puts anyone's business at the mercy of any insolvent malicious defamer who has sufficient imagination to lay out a skillful campaign of extortion." Pound, *supra* note 99, at 668. England has now adopted a contrary approach. 63 YALE L.J., *supra* note 26, at 97 n.189.

[119] *See* 77 HARV. L. REV., *supra* note 65, at 904. "Constitutional protection quite possibly should be given to the noncompetitive, individual disparager who paints signs on his car purely out of spite or protest, seeks no economic gain from his disparagement, and perhaps stands as close to the political commentator as to the disparaging competitor." *Id.*

[120] 148 Mich. 631, 112 N.W. 701 (1907).

were significant factors. More troublesome for the consumer, however, are cases such as *American Mercury, Inc. v. Chase*,[121] where an injunction was issued against members of a society which had threatened criminal prosecution of several publishers if the latter sold or distributed publications deemed obscene by members of the society. The court condemned the members' use of coercion, stating that the lack of a commercial motive did not justify their actions.[122] The case is probably exceptional, however, due to the threat of criminal prosecution[123] and the intricate involvement of the publisher's first amendment freedom.[124]

Where an injunction against derogatory comment is sought by a merchant who is attempting to enforce an unconscionable contract, or who has sold defective goods, the consumer might persuade the court to refuse the petition under the general equitable principle of "unclean hands."[125] Certainly, a court faced with the question should attempt to discern the veracity and purpose of the defendant's comments before issuing an injunction, unless circumstances such as the merchant's impending ruin demonstrate the desirability of an immediate temporary injunction.[126]

In summary, it would appear that consumers acting in good faith and not out of vengeance or a desire to ruin the merchant need not fear an action for defamation, disparagement, or contractual interference if they make truthful statements, or ones honestly believed and based on reasonable inferences, and utilize reasonable publication methods. For this reason, consumers should restrict themselves to an objective statement of the facts, avoiding the use of broad, inflammatory language. Nor is it likely that an injunction will issue if consumers employ reasonable demonstrative techniques for nondestructive purposes. Under existing law the characterization of "speech *plus*" can be avoided if malice and falsity are not present.

However, on the surface, this carefully worded counsel would appear unduly restrictive and could be interpreted as saying that if

---

[121] 13 F.2d 224 (D.C. Mass. 1926), *noted in* 75 U. PA. L. REV. 258 (1927).

[122] 13 F.2d at 225.

[123] *But cf.* 75 U. PA. L. REV. 258, 260-61 (1927). See discussion of blackmail in text accompanying notes 216-19 *infra*.

[124] See notes 90-92 *supra* and accompanying text.

[125] *But see* note 85 *supra*.

[126] *Cf.* 75 U. PA. L. REV. 258, 261 (1927).

the methods will prove effective they should not be employed. Indeed, in light of the paucity of modern consumer-merchant cases, due in part to the natural hesitancy on the part of merchants to initiate image-damaging lawsuits and the long-standing reluctance of consumers to adopt a combatant posture, it probably is overly cautious. Nevertheless, existing law presents a sufficiently flexible and predictable pattern so that an aroused consumer, armed with a legitimate grievance, may effectively dramatize his plight by exerting a degree of pressure compatible with a free society.

PICKETING AND BOYCOTTS

Although well-planned and controlled publication efforts may be both productive and relatively free of legal repercussions, direct action which exerts greater psychological and economic pressure on the merchant is likely to be more effective in securing remedial measures and in discouraging repetition of objectionable practices. For this reason, consumers should also consider the use of individual and joint picketing,[127] group boycotts,[128] lobbying, and threats of legal action. As in the situation of the older legal remedies, there are very few recent cases involving direct non-legal confrontations between consumers and merchants which require courts to balance the competing interests in a modern commercial framework. Any conclusions drawn, therefore, are necessarily tentative. Nevertheless, present consumer reticence to exert direct pressure on unethical merchants would appear to be needlessly circumspect.[129]

[127] In the spring of 1967, American housewives picketed supermarkets across the country, protesting high food prices. Though the campaign was short-lived and largely unsuccessful it was not without effect. "[T]he protests were a catalyst to an already growing business awareness of consumer dissatisfaction . . . ." E. PETERSON, REPORT OF PRESIDENT'S COMMITTEE ON CONSUMER INTERESTS 5 (1967).

[128] This comment makes no attempt to discuss the question of secondary boycotts, which courts generally have been quick to enjoin. Analogizing from labor cases, picketing of a supplier or distributor would be enjoined if it conveyed a plea to boycott the entire line of either. For this reason there must be a "product" which is being boycotted—a good or service. Uncertainty arises, however, if the supplier or distributor deals in one or a very few products. *See* Comment, *Secondary Consumer Picketing—The Product Boycott*, 19 Sw. L.J. 567, 575-78, 586-88 (1965).

[129] The paucity of modern consumer-merchant cases (see text accompanying notes 83 and 224, following note 173, and immediately preceding discussion of Picketing and Boycotts) is not the only barometer of consumer reluctance to exert direct pressure on a merchant. Replies to a questionnaire sent to consumer organizations throughout the country suggest a common apprehension of the legal consequences arising from a direct confrontation with unethical merchants. To be sure, almost all of the respondent organizations considered

Injunctive Relief

As indicated earlier, equity is not adverse to acting where there is evidence of "speech *plus.*"[130] Despite Supreme Court authority that industrial picketing is constitutionally protected[131] and congressional enactments sanctioning organized employee pressure,[132] labor picketing is not *per se* free speech.[133] Adopting a rationale comparable to that used in granting injunctive relief in defamation and disparagement cases,[134] courts have traditionally enjoined employee picketing whenever an illegal purpose or means could be detected.[135] An identical approach has been employed to enjoin

themselves more in the nature of educational or lobbying bodies than of pressure groups. Nevertheless, their responses conveyed an exaggerated fear of legal retaliation and uncertainty both as to their legal rights and as to effective means of direct action. Typical of the responses was one received from the Consumers' Cooperative Society located in Palo Alto, California: "I would say that consumers probably are inhibited in taking action because they do not know how to do it effectively. They don't know to whom to send the complaint, and they don't know what their legal rights are to apply pressure, or even to publicize comments critical of a specific, named business." Letter from Emil Sekerak to the *Duke Law Journal*, Dec. 10, 1968. The organizations were in general agreement that consumers should be permitted under the law to picket and boycott questionable merchants, and the one organization which had tried such methods stated that such tactics were the most effective means of "spot-lighting" merchant devices. Letter from Mrs. Faith Prior, Consumer Information Clearinghouse, University of Vermont, Burlington, Vermont, to the *Duke Law Journal*, Nov. 19, 1968. Unfortunately, the small number of responses received (eight replies to twenty-six inquiries) and the incomplete nature of some of the answers given precluded any meaningful statistical analysis of the activities, procedures, or philosophy of consumer organizations. Judging from the volume of printed matter forwarded with the replies, however, such organizations (whose names were obtained from CONSUMERS UNION OF THE UNITED STATES, CONSUMER PROTECTION (1966)), apparently concentrate most of their efforts on newsletters to members and informational and propaganda pamphlets.

[130] See notes 99-126 *supra* and accompanying text.

[131] Thornhill v. Alabama, 310 U.S. 88, 103-04 (1940); *cf.* Carpenters Local 213 v. Ritter's Cafe, 315 U.S. 722, 729-32 (1942) (Black, J., dissenting).

[132] *See* National Labor Relations Act § 7, 29 U.S.C. § 147 (1964).

[133] *See, e.g.*, Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 326 (1968) (Douglas, J., concurring) ("Picketing is free speech *plus*, the *plus* being physical activity that may implicate traffic and related matters. Hence the latter aspects may be regulated."); Building Service Local 262 v. Gazzam, 339 U.S. 532, 537 (1950); Bakery Drivers Local 802 v. Wohl, 315 U.S. 769, 775 (1942) (dicta). *See also* Cammarano v. United States, 358 U.S. 498 (1959); 19 Sw. L.J., *supra* note 128, at 580.

[134] *See* Julie Baking Co. v. Graymond, 152 Misc. 846, 274 N.Y.S. 250 (Sup. Ct. 1934). "I conceive that it is clear in reason and principle that picketing *not* accompanied 'by violence, threats or intimidation express or implied,' and having a lawful purpose, should *not* be enjoined." *Id.* at 847, 274 N.Y.S. at 251 (emphasis added). *See generally* notes 99-126 *supra* and accompanying text.

[135] *See, e.g.*, McMichael v. Atlanta Envelope Co., 151 Ga. 776, 108 S.E. 226 (1921) (physical coercion); Beck v. Railway Union, 118 Mich. 497, 77 N.W. 13 (1898) (intimidation

consumer picketing.[136] Similarly, whereas older opinions in labor cases often characterized primary boycotts as "conspiracies" and therefore wrongful,[137] modern courts search for extenuating circumstances such as intimidation or malice before enjoining labor or consumer boycotts.[138] Thus, if they elect peacefully and reasonably[139] to picket and boycott a department store assessing hidden and exhorbitant interest charges, consumers would appear to be insulated from injunctive interference, except to the extent that an unsympathetic court is able to discover an "illegal" purpose or evidence of intimidation. In short, it is the latitude of judicial discretion in these cases which may render group boycotts and picketing the most vulnerable of the various consumer tactics to legal retaliation.[140]

Nevertheless, an analysis of recent cases in analogous areas and an evaluation of the policies served by consumer pressure suggest that the broad discretion given the judiciary in picketing and boycott cases does not cripple the consumer. Indeed, an unfettered judiciary may be an advantage to the consumer, for where a court is required to exercise its discretion on a case-by-case basis, predecent carries limited weight. Presumably, therefore, consumers exerting pressure in a nonviolent fashion need only persuade the court of the legitimacy of their purpose in order to withstand a petition for equitable relief. Initially, it is significant that the judiciary's traditional hostility toward organized labor has

---

and falsity); Nann v. Raimist, 255 N.Y. 307, 174 N.E. 690 (1931) (physical coercion and intimidation).

[136] *See, e.g.*, Green v. Samuelson, 168 Md. 421, 178 A. 109 (1935); A.S. Beck Shoe Corp. v. Johnson, 153 Misc. 363, 274 N.Y.S. 946 (Sup. Ct. 1934).

[137] *See* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 2-5 (1930).

[138] *See, e.g.*, Vincent v. Operating Engineers Local 106, 207 F. Supp. 414 (N.D.N.Y. 1962); Steiner v. Local 128, Oil Workers, 19 Cal. 2d 676, 123 P.2d 20 (1942); NAACP v. Overstreet, 221 Ga. 16, 142 S.E.2d 816 (1965), *cert. denied*, 384 U.S. 118 (1966). *But cf.* NAACP v. Webb's City, Inc., 152 So. 2d 179 (Fla. Ct. App. 1963).

[139] Blocking the entrance to the merchant's place of business is probably unreasonable picketing. *See, e.g.*, Smith v. Grady, 411 F.2d 181 (5th Cir. 1969); Julie Baking Co. v. Graymond, 152 Misc. 846, 274 N.Y.S. 250 (Sup. Ct. 1934).

[140] A good example of the danger to a consumer posed by an unsympathetic court in light of the judiciary's virtually unbridled discretion in picketing and boycott cases is NAACP v. Webb's City, Inc., 152 So. 2d 179 (Fla. Ct. App. 1963). In that case the appellate court was able to affirm an injunction against picketing and a boycott by members of a racial minority against a merchant by labeling the actions "coercive picketing," and holding that the merchant's interest in commercial expectancies outweighed the defendants' social objectives. *Id.* at 183.

softened.[141] Courts have gradually permitted labor unions greater latitude of action before classifying their ends or means as illegal, perhaps in part because unions have diminished their reliance on physical coercion.[142] For example, in *Nann v. Raimist*[143] the court enjoined a union's picketing because of the use of violence, but did so in language which stressed the union's basic right to use demonstrative speech. The court stated that "if the defendant believes in good faith that the policy pursued by the plaintiff is hostile to the interests of organized labor . . . it has the privilege by the pressure of notoriety and persuasion to bring its own policy to triumph."[144] Apparently, this liberalization is not only in response to federal labor legislation outlining employee rights,[145] but also reflects an appreciation of both the first amendment issue involved and labor's need to organize in order to reduce the economic disparity between employer and employee.[146] Freedom of speech and economic inequality are also involved in consumer picketing and it is as likely, if not more likely,[147] that courts will adopt a similar stance toward consumer pressure.

Similar considerations were present in cases involving Negro boycotts.[148] In two cases arising in 1934,[149] which were novel at that time, Negroes picketing to obtain a higher percentage of Negro

---

[141] *Compare* Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284 (1957) *and* Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896) *with* Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

[142] *Compare* Central Metal Products Corp. v. O'Brien, 278 F. 827 (6th Cir. 1922); McMichael v. Atlanta Envelope Co., 151 Ga. 776, 108 S.E. 226 (1921) *and* Sherry v. Perkins, 147 Mass. 212, 17 N.E. 307 (1888) *with* Lesse v. Cooks, Waiters & Waitresses Local 31, 2 Cal. 2d 312, 41 P.2d 314 (1935).

[143] 255 N.Y. 307, 174 N.E. 690 (1931).

[144] *Id.* at 314, 174 N.E. at 693.

[145] *See* National Labor Relations Act §§ 7-8, 29 U.S.C. §§ 157-58 (1964).

[146] *See* Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). "We start from the premise that peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of the picketing, protected by the First Amendment." *Id.* at 313.

[147] As a practical matter, judges are likely to be quicker to embrace consumer pressure to remove reprehensible market tactics than they were to accept union activities simply because they can more readily identify with the wronged consumer than they can with the striking employee. *Cf.* Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1, 17-20 (1968).

[148] *See* Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705, 721-23 (1962).

[149] Green v. Samuelson, 168 Md. 421, 178 A. 109 (1935); A.S. Beek Shoe Corp. v. Johnson, 153 Misc. 363, 274 N.Y.S. 946 (Sup. Ct. 1934).

employment were enjoined, in one case due to the improper means employed[150] and in the other because the avowed purpose did not justify the means.[151] Both courts classified the dispute as "racial," denying that the rules applicable to a labor dispute were relevant.[152] However, in *New Negro Alliance v. Sanitary Grocery Co.,*[153] the United States Supreme Court disavowed separate treatment for racial picketing, at least in an employment context, holding that the anti-injunction provision of the Norris-LaGuardia Act[154] embraces more than disputes between trade associations and employers.[155] The Court's decision to treat racial disputes in the same manner as labor disputes, while suggesting that picketing for racial and economic equality is generally a "legal" purpose, still permits the courts to enjoin such actions where a wrongful specific purpose or an improper means is discovered.[156] Nevertheless, the Supreme Court's recognition of the historic economic inferiority of blacks in this country[157] and their correlative need to organize in order to educate the public and improve their standing[158] would seem to require courts to *balance* the needs of blacks against the community's interest in order.[159] This view has been endorsed by Chief Justice Traynor of California,[160] who argued that in the absence of a statute protecting Negroes from discrimination, it was not unreasonable for them to seek equality through economic power, and that the "peaceful mobilization of a group's economic power" should not be enjoined.[161] As he stated, "[i]f picketing does

150 Green v. Samuelson, 168 Md. 421, 178 A. 109 (1935).

151 A.S. Beck Shoe Corp. v. Johnson, 153 Misc. 363, 274 N.Y.S. 946 (Sup. Ct. 1934); 35 COLUM. L. REV. 121 (1935); 48 HARV. L. REV. 691 (1935); 83 U. PA. L. REV. 383 (1935).

152 Green v. Samuelson, 168 Md. 421, 429, 178 A. 109, 112-13 (1935); A.S. Beck Shoe Corp. v. Johnson, 153 Misc. 363, 368-69, 274 N.Y.S. 946, 952-53 (Sup. Ct. 1934).

153 303 U.S. 552 (1938).

154 Norris-LaGuardia Act §§ 1, 13, 29 U.S.C. §§ 101, 113 (1964).

155 303 U.S. at 560-61.

156 *See, e.g.,* Hughes v. Superior Court, 32 Cal. 2d 850, 198 P.2d 885 (1948); NAACP v. Overstreet, 221 Ga. 16, 142 S.E.2d 816 (1965).

157 *E.g.,* Brown v. Board of Educ., 347 U.S. 483 (1954).

158 *See, e.g.,* NAACP v. Button, 371 U.S. 415, 429 (1962); NAACP v. Alabama, 357 U.S. 449, 462-63 (1958).

159 *See, e.g.,* NAACP v. Button, 371 U.S. 415, 429-31, 439 (1962); NAACP v. Alabama, 357 U.S. 449, 462-63 (1958).

160 Hughes v. Superior Court, 32 Cal. 2d 850, 198 P.2d 885 (1948).

161 *Id.* at 868, 198 P.2d at 896 (Traynor, J., dissenting). *See* Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488 (1921) (Brandeis, J., dissenting); Hughes v. Superior Court, 32 Cal. 2d 850, 897, 198 P.2d 885, 894-95 (Carter, J., dissenting).

not contain substantial nonspeech elements and is primarily conducted to disseminate information, limitations that differentiate picketing from other forms of speech should not be invoked."[162] Moreover, recent court of appeals decisions indicate that organized Negro boycotts and related picketing of white merchants for the purpose of inducing nondiscriminatory hiring practices will be fully protected under the first amendment, so long as violence, threatened violence, or interference with traffic does not occur.[163] While the importance of the racial discrimination factor in these latter cases cannot be exaggerated, it seems clear that the blacks' need to enlist public support in their effort to minimize their economic inferiority was the central factor in those decisions.[164] These considerations involving first amendment rights and economic disparity also operate in labor disputes and consumer protests, and a balancing technique would seem to be equally applicable in those instances.[165]

At the very least, *New Negro Alliance* and the recent labor and civil rights cases would seemingly preclude the labeling of consumer picketing as illegal *per se* and the characterization of economic self-interest as an improper purpose. In addition, these cases suggest that the merchant-consumer "economic" gap is relevant to any finding of wrongful means,[166] and that a balancing of the interests of the merchant, the consumer and society in general is appropriate.[167] In justifying the reasonable use of group pressure,

[162] 32 Cal. 2d at 871, 198 P.2d at 897 (Traynor, J., dissenting).

[163] Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969); Smith v. Grady, 411 F.2d 181 (5th Cir. 1969).

[164] *See* 32 Cal. 2d at 868, 198 P.2d at 896 (Traynor, J., dissenting).

[165] The Supreme Court has indirectly acknowledged the significant and valid role which concerned consumers can play by coupling them with striking union workers and protesting minority groups and assuming that such groups have the *right* and the *legitimate need* to picket to dramatize their respective plights. "These figures [of the notable increase in the number of shopping centers in the United States] illustrate the substantial consequences for workers seeking to challenge substandard working conditions, consumers protesting shoddy or overpriced merchandise, and minority groups seeking nondiscriminatory hiring policies that a [decision enjoining picketing in a shopping center on the basis of property rights would have]." Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 324 (1968). See note 16 *supra*.

[166] This argument loses its appeal, of course, when the economic disparity is reversed, as where the defendant is wealthy and the merchant is insolvent. For this reason a continuously operating, self-sustaining body of consumers conducting a boycott might be more susceptible to an injunction than would a spontaneous organization of limited life.

[167] *See* NAACP v. Webb's City, Inc., 152 So. 2d 179 (Fla. Ct. App. 1963).

these cases have emphasized that the first amendment rights of the protestors are not to be ignored.[168] Freedom of speech in a commercial context arguably safeguards not only the public's interest in being apprised of unacceptable business practices and in the removing of such practices from the marketplace, but in theory at least, it also aids competition by fostering the exchange of free and accurate information.[169] By focusing attention on a reprehensible market tactic and emphasizing their role as one of public service,[170] consumers have ample ammunition to convince a court of the legitimacy of their purpose.

Antitrust Suits

Popular notions notwithstanding, economic restraints imposed by a non-competitor are not immune from the federal antitrust laws[171] and the use of pickets or boycotts may well precipitate a private antitrust suit.[172] In addition, a state or national consumer organization could conceivably be confronted by a government antitrust action if, for example, a widespread campaign against automobile manufacturers posed a substantial threat to interstate commerce and the nation's economy. As is true of injunctions, however, in the absence of extenuating circumstances courts today are not likely to curtail the activities of consumers acting in good

[168] Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 313-15; Machesky v. Bizzell, 414 F.2d 283 (5th Cir. 1969); Smith v. Grady, 411 F.2d 181 (5th Cir. 1969); Nann v. Raimist, 255 N.Y. 307, 317-19, 174 N.E. 690, 694-95 (1931). *See also* Bakery Drivers Local 802 v. Wohl, 315 U.S. 769 (1942); NAACP v. Overstreet, 221 Ga. 16, 142 S.E.2d 816 (1965).

[169] *Cf.* Millstein, *supra* note 14, at 462-65, 492. *But cf.* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942); *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027-38 (1967). "[T]he Constitution imposes no . . . restraint on government as respects purely commercial advertising." Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

[170] *See* Rosman v. Strictly Kosher Butchers Union, 164 Misc. 378, 298 N.Y.S. 343 (Sup. Ct. 1937). *But cf.* People v. Kopezak, 153 Misc. 187, 274 N.Y.S. 629 (Ct. Spec. Sess. 1934) (picketing of landlord by tenants not proper where complaint should have been filed with municipal authority).

[171] *See* Coons, *supra* note 148, at 754-55; Marcus, *Civil Rights and the Anti-trust Laws*, 18 U. CHI. L. REV. 171, 174 (1951).

[172] *See* Marcus, *supra* note 171, at 174; Comment, *Concerted Refusals to Deal with Non-business Consumers Under the Sherman Act*, 41 TEMP. L.Q. 311 (1968).

This comment does not consider the impact of state antitrust legislation other than in notes 176 and 214 *infra* and accompanying text.

faith and in the public interest,[173] primarily because of deference to the first amendment.[174] Unfortunately, as in other areas, there are few modern cases upon which to rely.

Individual refusals to deal generally are not proscribed by the antitrust laws,[175] and there would appear to be no apparent danger for the individual boycotter. Concerted refusals to deal, on the other hand, are *per se* violations of the Sherman Act when employed in a business context.[176] Indeed, it has been suggested that at least as to refusals to sell, only an ineffective boycott—"devoid of intent to injure, of coercive practices, and of dominant marketing position"—will be upheld.[177] Nevertheless, several writers have suggested that a "non-commercial" or "non-economic" purpose ought to be a defense to a Sherman Act prosecution,[178] and would include consumer boycotts, civil rights boycotts and obscene literature boycotts within the "non-commercial" category.[179] A

[173] 77 HARV. L. REV., *supra* note 65, at 931-32. "A strong presumption in favor of the legality of consumer boycotts seems justified because they are directed at the original source of consumer displeasure. Such a boycott pits the determination of the plaintiff to continue the activity whieh bas displeased the consumers against the intensity and extent of consumer feeling." *Id.* at 932.

[174] See notes 22, 60 & 168 *supra*. A problem created by group rather than individual pressure is that every member of a picketing "team" may not be motivated by the same goal, thus increasing the chances of a court ascertaining an illegitimate purpose and enjoining further activities on that basis. Coons, *supra* note 148, at 709.

[175] *See, e.g.*, United States v. Colgate, 250 U.S. 300 (1919). *But see* Albrecht v. Herald Co., 390 U.S. 145 (1968); United States v. General Motors Corp., 384 U.S. 127 (1966); United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

The only conceivable exception to this principle would be a consumer who, because of his wealth or position, possessed substantial market power and was utilizing that power to monopolize a market. *See* REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 134, 136-37 (1955); Fulda, *Individual Refusals to Deal: When Does Single-firm Conduct Become Vertical Restraint?* 30 LAW & CONTEMP. PROB. 590, 604-05 (1965). It is difficult to imagine a retail consumer who could hold such power, however.

[176] *See, e.g.*, Klor's, Ine. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914). *See also* S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS 533 (3d ed. 1968) [hereinafter cited as OPPENHEIM & WESTON]. *But see* Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 VA. L. REV. 1165, 1172-73 (1959) (rule of reason).

State antitrust legislation has been interpreted in the same manner. *See, e.g.*, Alexander's Dep't Stores, Inc. v. Ohrbach's, Inc., 269 App. Div. 321, 56 N.Y.S.2d 173 (1945).

[177] Note, *Refusals to Sell and Public Control of Competition*, 58 YALE L.J. 1121, 1140 (1949).

[178] OPPENHEIM & WESTON 530-31; Coons, *supra* note 148. *But see* Mareus, *supra* note 171, at 174.

[179] A "commercial" purpose is defined as one which is profit-inspired, while an

consumer boycott could apparently be "non-economic" also, as where public service is the primary motivation.[180]

Although precedent is minimal, it does lend support to the non-commercial exception postulated above. Nonprofit trade associations have been permitted to collect and disseminate statistics among members, excluding in the process non-members and "offenders," even though those excluded were also engaged in the common trade.[181] Industry efforts to eliminate deceptive advertising or fraudulent business practices have been recognized as an important aid to governmental regulation,[182] so long as the industry does not progress beyond exhortation and impose codes of ethics enforced by sanctions.[183] Such an approach necessitates the court's taking cognizance of the group's motivation. Finally, the accepted "representative government" doctrine established by the United States Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[184] not only indicates that consumers may freely unite in lobbying efforts without fear of antitrust prosecution but also lends credence to attempts to carve out of the

---

"economic" purpose reflects material self-interest not including the profit motive. Coons, *supra* note 148, at 712-13. Thus, a consumer who acts to recover money paid for defective goods would have an economic purpose but not a commercial purpose, and one who seeks only to educate the public to the danger posed by the merchant's practices would have neither an economic nor a commercial purpose.

[180] It is interesting to note that one is justified in refusing to deal with a false advertiser in a business context. OPPENHEIM & WESTON 507.

[181] *See* Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925). *But see* United States v. Container Corp., 393 U.S. 333 (1969) (voluntary exchange of price information without agreement to adhere held to be Sherman Act violation). *See also* Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936).

[182] *See* Cement Mfg. Protective Ass'n v. United States, 268 U.S. 588, 604 (1925); Hughes Tool Co. v. Motion Picture Ass'n, Inc., 66 F. Supp. 1006 (S.D.N.Y. 1946); *cf.* Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936); Deesen v. Professional Golfers Ass'n, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966).

[183] *See* Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941); *cf.* United States v. Insurance Bd., 188 F. Supp. 949 (N.D. Ohio 1960).

[184] 365 U.S. 127 (1961) (holding that joint lobbying by members of an industry did not violate the antitrust laws, despite the use of deeeption, since those laws are directed at trade restraints, not at political activity designed to influence governmental action). The decision has been followed and arguably extended, in several decisions, *e.g.*, United Mine Workers v. Pennington, 381 U.S. 657 (1965); George Benz & Sons v. Twin City Milk Producers Ass'n., Inc., 1969 Trade Cas. 87,445 (D. Minn. 1969); Trucking, Unlimited v. California Motor Transp. Co., 1967 Trade Cas. 84,739 (N.D. Cal. 1967), *appeal docketed*, No. 22,462 (9th Cir. Dec. 21, 1967), *noted in* 57 CALIF. L. REV. 518 (1969).

antitrust laws a special exception for groups motivated by factors other than a desire to maximize profits.[185]

The primary exponent of this "non-commercial" group action exception has been Professor Coons,[186] who, analyzing common law treatment of restraints of trade, asserts that the purpose of the restraining party has been one of the factors evaluated by the courts. Indeed, a lawful purpose sometimes justified a *prima facie* tort.[187] Summarizing cases involving privileged relationships, such as those concerned with disciplinary actions by religious groups and school authorities, Coons maintains that, assuming the existence of the requisite relationship, a reasonable purpose in conjunction with reasonable means allowed invocation of the relevant privilege.[188] He concludes that the common law has accepted the defendants' purpose—whether commercial, economic or non-economic—as an important factor in determining whether they were justified in restraining trade.[189] Turning to antitrust litigation, Professor Coons finds significance in the special privilege accorded lobbying groups by the *Noerr Motor* decision[190] and that given labor unions by modern courts, and he emphasizes that the courts employ a balancing technique out of regard for the unions' "non-commercial" motivation.[191] Acknowledging that the few Sherman Act cases involving defendants with a non-commercial purpose have not conferred immunity on such parties, he nevertheless suggests that purpose is a valid segment of the "rule of reason"[192] and that a "benevolent, non-economic purpose" may justify a reasonable restraint.[193] In Coons' view, antitrust liability should

[185] *See* Handler, *Recent Antitrust Developments*, 71 YALE L.J. 75 (1961); Walden, *More About Noerr—Lobbying, Antitrust and the Right to Petition*, 14 U.C.L.A.L. REV. 1211 (1967). "Presumably, a 'vicious' campaign to injure competition is beyond the reach of antitrust if it is executed by constitutionally guaranteed means, provided the Court is convinced on the facts of the particular case that the uninhibited exercise of the constitutional freedom is more important to society than the protection of industry from such destructive conduct." Handler, *supra* at 89-90.

[186] Coons, *supra* note 148.

[187] *Id.* at 713-15.

[188] *Id.* at 716-21.

[189] *Id.* at 725.

[190] *Id.* at 749-51, 754.

[191] *Id.* at 731-42, 752-53.

[192] *See* United States v. Standard Oil, 221 U.S. 1 (1911).

[193] Coons, *supra* note 148, at 749-51. *But see* Comment, *"Political" Blacklisting In the Motion Picture Industry: A Sherman Act Violation*, 74 YALE L.J. 567 (1965) (political blacklisting by producers not justified on social, moral, or political grounds).

depend upon a balancing of the effects of defendants' anti-competitive activities with the policy goals, other than free competition, which are furthered by the purpose being pursued.[194]

The few antitrust cases involving non-commercial purposes offer little guidance in assessing the validity of Coons' thesis. In fact, they even confirm that a "non-commercial" purpose will *not* automatically immunize a concerted refusal to deal. In *Council of Defense v. International Magazine Co.*,[195] the Council, a state body created to cooperate with the National Council of Defense, boycotted plaintiff's magazines as being "un-American" and exerted "patriotic coercion" on newsmen and readers, with the avowed intention of destroying plaintiff's business in New Mexico. An injunction was granted since the acts amounted to a "conspiracy to boycott."[196] In *Bratcher v. Akron Area Board of Realtors*,[197] the defendant-

---

[194] Coons, *supra* note 148, at 747.

[195] 267 F. 390 (8th Cir. 1920).

[196] *Id.* at 412. Paramount Pictures, Inc. v. United Motion Picture Theatre Owners, 93 F.2d 714 (3d Cir. 1937), argues against a consumer exception to the federal antitrust laws, although the case arose in a business context. In granting an injunction against movie theater owners for boycotting movie distributors in order to obtain better prices, the Third Circuit stated: "Congress intended by the anti-trust acts to prevent all combinations and conspiracies, whether composed of employees, employers, producers, users, or *consumers*, from unreasonably restraining the free flow of interstate commerce." *Id.* at 719 (emphasis added). *But see* Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940): "The end sought [in passing the Sherman Act] was the prevention of restraints to free competition *in business and commercial transactions* which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury." *Id.* at 493 (emphasis added). See note 201 *infra* and accompanying text. If *Apex Hosiery* is correct in its statement of the congressional purpose intended in the passage of the Sherman Act, it would seem anomalous that consumers should be threatened by a statute passed for their market protection. At any rate, the broad language used in *Paramount Pictures* is eertainly not accurate today since unions and agricultural workers are virtually exempt from the antitrust laws. *See* I.P.C. Distributors, Inc. v. Moving Picture Operators Local 110, 132 F. Supp. 294, 299 (N.D. Ill. 1955) (union exempt if acting in its self-interest and in pursuit of legitimate objectives); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 294 (1955) (union activity exempt unless designed to fix prices, kinds or amount of products). Moreover, there is evidence that professional societies such as the American Medical Association and the American Bar Association may be afforded specialized treatment under the antitrust laws due to special features such as close state supervision. *See* AMA v. United States, 130 F.2d 233, 246-48 (D.C. Cir. 1942), *aff'd mem.*, 317 U.S. 519 (1943). *See also* United States v. Oregon State Medical Soc'y, 343 U.S. 326, 336 (1952); AMERICAN BAR FOUNDATION, RESEARCH MEMORANDUM SERIES, NO. 12, MINIMUM FEE SCHEDULES AND THE ANTI-TRUST LAWS: A PRELIMINARY ANALYSIS (1958); Note, *Medical Societies and Medical Service Plans—From the Law of Association to the*

realtors argued that group action to enforce racial discrimination was a "non-commercial" purpose and that the Sherman Act was not intended to be an instrument to overturn social inequities.[198] The court nevertheless held that the defendants' complaint presented a cause of action for unreasonable restraint of trade.[199] However, neither *Council of Defense* nor *Bratcher* precludes formulation of an exception for consumer action under extant antitrust law. *Council of Defense* can be distinguished on the basis of the defendant's destructive, anti-competitive purpose and the important aspect of censorship involved. Similarly, the defendants' discriminatory purpose in *Bratcher* was contrary to public policy as revealed by the Constitution and recent civil rights legislation. *Bratcher*, moreover, involved businessmen acting in their business capacities, creating greater likelihood of future market collusion than would an organization of consumers. Finally, the defendants in both cases were formal bodies of apparently indefinite duration and of demonstrated market power so that the possibility of a profound and lasting anti-competitive effect on market conditions was significantly greater than would be true of a localized, spontaneous combination of consumers who intend to disband when the objectionable practice was removed from the marketplace.[200]

Law of Antitrust, 22 U. CHI. L. REV. 694 (1955). *But see* AMA v. United States, 317 U.S. 519 (1943) (convictions of individual physicians under the Sherman Act affirmed; no finding as to whether physician's practice was a "trade" within Sherman Act); Marcus, *supra* note 171, at 184-203.

[197] 381 F.2d 723 (6th Cir. 1967); *see* 41 TEMP. L.Q., *supra* note 171; *cf.* United States v. Beaty, 288 F.2d 653 (6th Cir. 1961) (use of economic pressure to discourage Negro registration properly enjoined under Civil Rights Act of 1957; illegitimate purpose); Note, *Private Economic Coercion and the Civil Rights Act of 1957*, 71 YALE L.J. 537 (1962).

[198] 381 F.2d at 724. *But cf.* Marcus, *supra* note 171; Comment, *Application of the Sherman Act to Housing Segregation*, 63 YALE L.J. 1124 (1954). "[A] restraint which is concerned with, and generally understood as, a 'social' wrong should not be immune from the anti-trust laws if it has economic significance." Marcus, *supra* at 174.

[199] 381 F.2d at 724; *cf.* Grillo v. Board of Realtors, 91 N.J. Super. 202, 219 A.2d 635 (1966) (private common law action); 18 W. RES. L. REV. 321 (1966).

[200] *Council of Defense* and *Bratcher* do suggest, however, that consumer organizations which attain public acceptance and recognized economic power are susceptible to an injunction and possible liability for damages. Thus, consumer organizations should avoid restricting communication between businessmen as to their respective business practices or threatening retaliation if businessmen join a rival organization. Similarly, no attempt should be made to block individual members of the consumer organization from dealing with an offending merchant, either physically or through subtle coercion. *Cf.* Note, *Boycott of Doctor Excluded from County Medical Bureau*, 4 B.C. IND. & COM. L. REV. 223 (1962).

It would appear entirely consistent with the purpose of the Sherman Act to proscribe concerted refusals to deal by businessmen acting in a business context while simultaneously sanctioning identical efforts by consumers.[201] This is so not only because the act has been applied almost exclusively to businessmen in a commercial framework[202] and arguably was designed only to regulate concentrations of market power wielded by businessmen,[203] but also because, as suggested above, any anti-competitive effects accompanying consumer pressure are only *temporary* and do not forestall market entry by new competitors. Moreover, to the extent that fraudulent or misleading business practice is removed from the marketplace, competition is at least theoretically furthered, whereas the opposite is supposedly true where a competitor is removed by the concerted action of other merchants. Finally, permitting joint consumer action would serve to lessen the economic disparity

---

[201] *See* United States v. United States Trotting Ass'n, 1960 Trade Cas. 76,954 (S.D. Ohio 1960); Community Blood Bank, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,728 (FTC 1966) (3-2 DECISION), *rev'd*, 405 F.2d 1011 (8th Cir. 1969).

> Defendant's rules and regulations . . . are not such *commercial* boycotts as have been stricken down in previous cases as unlawful *per se*. 1960 Trade Cas. at 76,955 (emphasis added).

> The principle that boycotts are forbidden without inquiry into either competitive effects or possible justifications is sound. But, like all principles, there are limits beyond which it should not be pushed. The antitrust laws are concerned with the regulation of business behavior . . . and most boycott cases have involved such behavior.
>
> . . . .
>
> [T]hough there is precedent for applying the antitrust laws to boycotts growing out of other than commercial or competitive problems or conflicts, we should be cautious in assuming that the same *per se* rule of illegality that is applied to the more usual business boycott is applicable here.
>
> . . . .
>
> While we are on safe ground in assuming that the public policy of this country is opposed to permitting purely economic or business judgments to be delegated to private groups armed with the sanction of a concerted refusal to deal, we are on more tenuous ground in assuming a like public policy where professional and other noncommercial judgments and issues are concerned. Community Blood Bank, *supra* at 23,041-42 (Commissioner Elman, dissenting). *See also id.* at 23,050. (Commissioner Jones, concurring).

[202] *See* OPPENHEIM & WESTON 530 & n.37; Coons, *supra* note 148, at 726-29; *cf.* United States v. National Ass'n of Real Estate Bds.; 339 U.S. 485, 492 (1950) (emphasis placed on commercial activity for profit).

[203] *See* Apex Hosiery v. Leader, 310 U.S. 469, 489, 493 (1940). See notes 196 & 201 *supra.*

between consumers and merchants, moving closer to the market ideal of equality of bargaining power.[204]

Even those opposed to the Coons approach concede that the defendants' purpose does seem to have some effect on the outcome of antitrust litigation and that concerted action to *remove* a market restriction is more likely to be judicially approved than action to erect market barriers.[205] It is arguable, nevertheless, that the restraint on trade is no less harmful to the individual or to society when imposed for commendable reasons.[206] Assuming this to be so, the public's interest in a fair market and the free exchange of accurate market information, as well as the importance to our society of the guarantee of free speech, would seem to outweigh the potential harm to society, at least where the consumers act in good faith to inform other purchasers and to remove an objectionable practice rather than to destroy a particular merchant.

Should the "proper purpose" defense fail, a federal antitrust action might also be successfully resisted by resorting to the *de minimus* argument. Although interstate goods need not necessarily be involved, purely local restraints must create "interstate effects" before the federal antitrust laws become operative.[207] Thus, in *Konecky v. Jewish Press*[208] an editor of a weekly newspaper brought an action for conspiracy, alleging that the defendant's activities, which included a boycott, violated section 2 of the Sherman Act.[209] In affirming dismissal, the Eighth Circuit stated that a conspiracy

---

[204] *Cf.* I.P.C. Distributors, Inc. v. Moving Picture Machine Operators Local 110, 132 F. Supp. 294, 299 (N.D. Ill. 1955) (union can lose antitrust exemption if not acting in self-interest and in pursuit of legitimate objectives); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 306 (1955) (agricultural cooperatives exempted from antitrust laws to offset weakness in bargaining power of individual farmer).

[205] Marcus, *supra* note 171, at 215.

[206] *Id.* at 174-75; *see* Community Blood Bank, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,728 (FTC 1966), *rev'd*, 405 F.2d 1011 (8th Cir. 1969); Walden, *supra* note 185, at 1248. *But see* Community Blood Bank, *supra* at 23,041-42 (Commissioner Elman, dissenting); note 201 *supra*.

[207] REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 64 (1955); *see* Apex Hosiery Co. v. Leader, 310 U.S. 469, 485, 500-01 (1940) (must affect market prices); I.P.C. Distributors, Inc. v. Moving Picture Machine Operators Local 110, 132 F. Supp. 294, 298 (N.D. Ill. 1955) (defendant need not be in interstate commerce if his acts restrain interstate commerce).

[208] 288 F. 179 (8th Cir. 1923).

[209] 15 U.S.C. § 2 (1964). No evidence of defendant's purpose was presented since the action was dismissed on the pleadings. 288 F. at 182.

condemned by the Sherman Act was one in which the "direct intent and effect . . . is a restraint upon interstate commerce, and not one where the effect is *merely incidental.*"[210] Conceding that national circulation of plaintiff's newspaper constituted interstate commerce, the court nevertheless found that the effect on commerce of defendant's boycott and related activities was remote and incidental.[211] It is interesting to note that the court thought it "far-fetched" to discern an intent to monopolize on the basis of the defendant's multifarious activities.[212] Where the consumer boycott is confined to the locale of the offending merchant, therefore, the *de minimus* defense would seem to be available.[213] Actions under state antitrust laws would probably remain a limited threat, however.[214]

In summary, the more organized and economically powerful a group of consumers becomes, the greater the likelihood of a successful federal antitrust suit being brought against them. Accordingly, a spontaneous movement having a limited, but "proper," purpose and existence would be more appropriate for direct concerted action than would a formal and permanent consumer organization.[215] Nevertheless, the potent policy arguments which consumers can urge in persuading a court that joint efforts to remove an ignominious market practice is a *reasonable* restraint of trade, the potential viability of a consumer "non-commercial purpose" defense, and the realistic possibility that requisite "interstate effects" will not be present, suggest that a federal antitrust suit does not offer a serious threat to consumers.

Blackmail and Duress

Probably one of the most efficacious means of obtaining

---

[210] 288 F. at 181 (emphasis added).

[211] *Id.* at 181-82. The defendant also engaged in the circulation of false reports, the hiring of detectives to shadow the plaintiff, and the inducing of employees to join the conspiracy. *Id.* at 180.

[212] *Id.* at 182.

[213] *But cf.* Maryland v. Wirtz, 392 U.S. 183, 192-93 (1968). "[I]t is true that labor conditions in businesses having only a few employees engaged in commerce or production may not affect commerce very much or very often. . . . [However] [t]he contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest." *Id.*; Wickard v. Filburn, 317 U.S. 111 (1942).

[214] Not all states permit suits for private antitrust violations, *see* Flynn, *Criminal Sanctions Under State and Federal Antitrust Laws*, 45 TEX. L. REV. 1301, 1343-46 (1967), and there are few public actions brought under the state statutes, *id.* at 1306-07, 1310-11.

[215] See note 200 *supra* and accompanying text.

merchant redress is simply threatening a law suit, particularly where effected through the offices of an attorney. Where the consumer acts on a good faith belief in his claim, his only apparent legal pitfalls are the crimes of blackmail or extortion, or a possible tort liability for "duress," the misuse of legal procedure.[216]

To be guilty of common law blackmail or statutory extortion, one must threaten to accuse another of a crime or put the other in fear of injury to his person, property, or character.[217] For this reason the consumer would be free to threaten not only civil action but also to report the events to a regulatory agency or government official, except, perhaps, where the merchant's conduct constituted a crime properly within the prosecutorial powers of that agency or official.[218] Moreover, some courts have approved threats of criminal prosecution in order to obtain payment of a valid claim arising out of the offense charged.[219]

Where the consumer threatens civil action based on a bona fide claim, virtually all jurisdictions would presumably deny tort recovery for duress, even if the claim were subsequently

---

[216] *See generally* PROSSER §§ 114-15.

[217] *See* R. PERKINS. CRIMINAL LAW 324-27 (1957).

[218] Blackmail or extortion commonly occurs where the defendant threatens to disclose the crime of another to a public prosecutor. Nevertheless, the rationale which operates in that instance—that "[t]he law does not contemplate the use of criminal process as a means of collecting a debt"—would seem equally applicable where an agency official is charged with enforcing a regulatory statute, even though the actual prosecution is handled by a government prosecutor. People v. Beggs, 178 Cal. 79, 84, 172 P. 152, 154 (1918). *See generally* United States v. Pignatelli, 125 F.2d 643, 646 (2d Cir.), *cert. denied*, 316 U.S. 680 (1942); Lindenbaum v. State Bar, 26 Cal. 2d 565, 160 P.2d 9 (1945); State v. Phillips, 62 Idaho 656, 115 P.2d 418 (1941); People v. Fichtner, 281 App. Div. 159, 118 N.Y.S.2d 392 (1952), *aff'd mem.*, 305 N.Y. 864, 114 N.E.2d 212 (1953); *In re* Sherin, 27 S.D. 232, 130 N.W. 761, *modified*, 28 S.D. 420, 133 N.W. 701 (1911). Thus, if as a means of securing personal redress, a consumer threatens to report to the appropriate regulatory agency, a merchant who is in violation of a penal statute, he may assume some risk of prosecution for extortion or blackmail.

[219] In State v. Hammond, 80 Ind. 80 (1881) and similar cases it has been held that the crime of blackmail is *not* committed when a threat to accuse a debtor of a crime is made in order to induce the payment of money justly due. Under this theory a defrauded consumer, to induce compensation, could threaten a merchant with a prosecution if he were willing to assume the risk that he was rightfully due compensation. *See, e.g.*, Commonwealth v. Jones, 121 Mass. 57 (1876); State v. Ricks, 108 Miss. 7, 66 So. 281 (1914); State v. Barger, 111 Ohio St. 448, 145 N.E. 857 (1924); Mann v. State, 47 Ohio St. 556, 26 N.E. 226 (1890); State v. Burns, 161 Wash. 362, 370-73, 297 P. 212, 214-15 (1931); Annot., 135 A.L.R. 728, 735 (1941); R. PERKINS, *supra* note 217, at 326.

disproved.[220] In discussing duress in a contractual setting, several courts have maintained that threat of a suit is never wrong in a civil context;[221] however, the majority of jurisdictions and most commentators have agreed that immunity should be lifted where the claim is groundless or if the threatened party is seriously disadvantaged due to a substantial physical, economic, or mental disparity between the disputants.[222] Indeed, in most cases where relief is granted, there are extenuating circumstances, frequently involving undue harassment.[223]

---

[220] *See* Dalzell, *Duress by Economic Pressure II*, 20 N.C.L. REV. 341, 345-46 (1942); Comment, *Threat of Litigation as Duress*, 6 ARK. L. REV. 472, 479, 482 (1952).

Any conclusions reached as to tort recovery for duress are necessarily tentative, based as they need be almost entirely on contract cases involving duress. See note 220 *infra* and accompanying text. Nevertheless, courts have long maintained that it can scarcely be improper to threaten to do what one has a legal right to do, *see* Dawson, *Duress Through Civil Litigation: I*, 45 MICH. L. REV. 571, 579 & n.8 (1947); Dalzell, *supra*, at 347 & n.151 note 221 *infra*, and this principle would appear equally reasonable in a tort context.

[221] *E.g.*, Ochiuto v. Prudential Ins. Co., 356 Pa. 382, 52 A.2d 228 (1947).

The factors generally cited in support of the view that it is never wrong to threaten to do what one has a legal right to do include: (1) that the sole purpose of duress is to prevent *unjust* enrichment; (2) that the rule protects the security of transactions; (3) that the rule leads to the private settlement of claims, thereby reducing court congestion; and (4) that the tactic is equally available to both parties. Dawson, *supra* note 220, at 571, 573-78. The doctrine has been criticized as offering insufficient protection to coerced parties where the oppressor's acts fall short of criminal or tortious behavior. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 287-88 (1947).

[222] *See, e.g.*, Brown v. T.V. and Radio Artists Local 55, 191 F. Supp. 676 (N.D. Cal. 1961); Beatty v. United States, 168 F. Supp. 204 (Ct. Cl. 1958); Dalzell, *Duress by Economic Pressure I*, 20 N.C.L. REV. 234, 245 (1942); Dawson, *Duress Through Civil Litigation: I, II*, 45 MICH. L. REV. 571, 586, 594-95, 598, 695-96, 704, 715 (1947) (bad faith, improper means, or ends, disparity of bargaining power); 6 ARK. L. REV., *supra* note 220, at 483; 32 TULANE L. REV. 512, 514-15 (1958); *cf.* Crew v. W.T. Smith Lumber Co., 268 Ala. 628, 109 So. 2d 721 (1959) (threat unaccompanied by trespass not actionable); Bell Bakeries, Inc. v. Jefferson Standard Life Ins. Co., 245 N.C. 408, 96 S.E.2d 408 (1957) (generally not duress to threaten to do what one has a legal right to do); Bluestone v. Jones, 233 N.Y.S.2d 146 (Sup. Ct. 1962) (same); Steward v. World-Wide Auto. Corp., 20 Misc. 2d 188, 189 N.Y.S.2d 540 (Sup. Ct. 1959) (same); Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 289-90 (1947) ("The shift in emphasis that is now proposed involves the assumption that our courts cannot remain indifferent . . . to excessive and unjustified gains that are directly traceable to disparity in bargaining power"). *But cf.* Evaul v. Board of Educ., 65 N.J. Super. 68, 167 A.2d 39 (1961) (duress determined by state of mind engendered in victim, not by the unlawful conduct).

"It is never duress to institute or threaten to institute civil suits where the threat to do so is made in the honest belief that a good cause of action exists.

. . . .

"A party is always entitled to say that if his offer is not accepted, he will avail himself of his legal rights." Beatty v. United States, 168 F. Supp. 204, 206 (Ct. Cl. 1958).

[223] *See* Parker v. Hill, 85 Ark. 363, 108 S.W. 208 (1908) (continual harassment of elderly

Since no tort cases on point were discovered,[224] prediction is speculative. However, it would appear that in the absence of evidence of abuse of legal process[225] or infliction of mental suffering, a consumer "benefitted" by a good faith claim could freely communicate to the merchant, personally or through an attorney, his intention to initiate legal action should satisfactory adjustment not be forthcoming.[226]

CONCLUSION

Ethical businessmen are adequately protected against dishonest, vengeful, or unjustifiably disappointed consumers by existing law. Injunctions may be obtained against misleading or violent picketing, particularly if conducted in furtherance of a scheme to destroy the merchant's business. Where the elements of defamation, disparagement, contractual interference, or "duress" are present, damages may be recovered, perhaps including punitive damages. Should a consumer organization become too powerful or act arbitrarily, the federal antitrust laws may be utilized to enjoin the offensive activities or to recover treble damages. At all times,

lady based on bad faith claim); 6 ARK. L. REV., *supra* note 220, at 481; *cf.* RESTATEMENT OF CONTRACTS § 493, at 948 (1932) (example 16: cannot be oppressive or unconscionable in demands).

[224] Several courts have awarded tort damages or spoken in terms of a tortious act when duress is alleged, but almost all of these cases involved a disputed contract and none of the courts based recovery solely on an intentional tort theory. *See* Pittman v. Lageschulte, 45 Ill. App. 2d 207, 195 N.E.2d 394 (1963); Slade v. Slade, 310 Ill. App. 77, 33 N.E.2d 951 (1941); Gellhorn, *Limitations on Contract Terminations Rights—Franchise Cancellations*, 1967 DUKE L.J. 465, 485-86 ("the opaque doctrine of economic duress"). The only case which might bear directly on the question of intentional tort recovery for threat of legal action is Neibuhr v. Gage, 99 Minn. 149, 108 N.W. 884 (1906). There the plaintiff was threatened with criminal prosecution and not a civil suit. The former constitutes blackmail and the general policy against such behavior as expressed in existing penal sanctions for blackmail would argue in favor of tort recovery in that instance. However, public policy is not so clearly against threats of civil action, and, indeed, most courts are inclined to protect such activity. See notes 220-23 *supra* and accompanying text. Presumably, therefore, if there is a distinct tort recovery for the threat of civil litigation, the plaintiff must be able to demonstrate extenuating circumstances, perhaps comparable to those attendant a showing of intentional infliction of mental distress.

[225] *See* PROSSER § 115. According to Prosser, abuse of process requires the misapplication of legal writs, such as garnishment or attachment, for a purpose other than that for which the writ was designed, or for an "improper" purpose. *Id.* at 876-77.

[226] *See* Beatty v. United States, 168 F. Supp. 204, 206 (Ct. Cl. 1958); note 222 *supra*. *But see* Dalzell, *supra* note 220, at 366 (threat to maintain lawsuit later disproven ought to be actionable duress).

moreover, businessmen may neutralize consumer-fomented adverse publicity by using comparable tactics, explaining or disputing the allegations made.[227]

At the same time, present law is not overly restrictive and does not threaten a consumer with a bona fide complaint. For this reason such consumers ought to be encouraged to initiate non-legal self-help in a reasonable manner. The consumer must ever be aware, however, that his motive may be crucial. Actions designed to alter questionable practices or to gain personal redress are likely to be sanctioned whereas identical behavior aimed at removing a merchant from the marketplace may be proscribed. Consequently, it is advisable for consumers contemplating direct action to make their purpose clear through letters, a purpose clause in an organizational agreement, or in conversations with the offending merchant and friends. A finder of fact, moreover, may be favorably affected by evidence that the consumers informed the merchant throughout the dispute as to their intended plans, thereby giving him an opportunity to change his stance and alleviate all or further injury.

Any analysis of the rights of both parties cannot ignore the practical reality that the consumer's greatest asset is the businessman's fear of damaging publicity, whether arising from the attention called to his business practices by protesting consumers or from his initiation of a law suit.[228] Thus, the motives of the rankled consumer and the seriousness of the offense charged must be considered by the courts in attempting to balance the interests of both parties. Otherwise the cost of doing business could become too substantial for the small businessman and the possibility of consumer tyranny could loom very real.

---

[227] As a practical matter, depending upon the neighborhood, the reputation of the complainant and the reputation of the merchant, there may be a natural tendency to disbelieve the charges of an irate consumer.

[228] Unfortunately, apprehension of harmful publicity is probably experienced the least by that group of merchants most prone to engage in shoddy business practices—the "fly-by-night" operators who move from community to community selling inferior products or fraudulent home improvement plans door-to-door. *Cf.* D. CAPLOVITZ, *supra* note 1, at 58-80.