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A FORTY-YEAR NATURAL EXPERIMENT IN
ILLUSORY CONSUMER PROTECTION AND THE
RELATIVE EFFECTIVENESS OF ORAL AND
WRITTEN DISCLOSURES

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WRITTEN NOTICE OF COOLING-OFF PERIODS: A FORTY-YEAR NATURAL EXPERIMENT IN ILLUSORY CONSUMER PROTECTION AND THE RELATIVE EFFECTIVENESS OF ORAL AND WRITTEN DISCLOSURES

Jeff Sovern*

ABSTRACT

For more than forty years, a standard tool in the consumer protection toolbox has been the cooling-off period. Federal statutes, state statutes, and federal regulations all oblige merchants to give consumers three days to rescind certain contracts. This paper reports on a survey of businesses subject to such cooling-off periods. The study has two principal findings. First, the respondents indicated that few consumers rescind their purchases. Thus, the study raises doubts about whether cooling-off periods benefit consumers or whether they provide only illusory consumer protection. The article also offers speculations about why cooling-off periods have been of such little value to consumers.

Second, the study found that consumers who receive both oral and written notice of their rights are more likely to avail themselves of those rights than those who receive only written notices, and that the differences are statistically significant. Fifty-three percent of the sellers who gave only a written notice and did not speak of the buyer's right to cancel said buyers never cancelled, nearly double the percentage for sellers who did tell buyers (27%). Businesses that provided both oral in-person and written notices of the right to rescind were more than twice as

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likely to report that more than 1% of their customers cancelled contracts as those that provided only written notices. The article also explores why oral and written notices combined were more effective than written notice alone.

Finally, the survey asked respondents about the cost of cooling-off periods. More than four-fifths of the respondents who answered the question reported that the right to cancel had cost them either nothing or very little. This contrasts with the vehement opposition of opponents of such rules when they were first adopted in the 1960s and 1970s.

INTRODUCTION

For more than forty years, a standard tool in the consumer protection toolbox has been the cooling-off period. Lawmakers, fearing that a merchant's hard sell tactics will overwhelm consumers, oblige merchants to give consumers time—typically, three days—to rescind the contract. The theory is that given time to reflect, consumers will shake off the effects of the merchant's sales talk and cancel the transaction. Thus, Congress requires many lenders who take a security interest in a consumer's principal dwelling to provide written notice of the right to rescind, meaning that the many home improvement contractors who are automatically given a mechanic's lien by operation of state law must also give rescission notices.¹ The Federal Trade Commission mandates written notices of cooling-off periods for most door-to-door sales.² Additionally, state legislatures have enacted hundreds of statutes directing that vendors provide written notice of a right to rescind.³ These statutes cover a variety of transactions, including gym memberships, dance lessons, door-to-door sales, and telephone sales.⁴ Lawmakers continue to add new cooling-off periods to consumer transactions, such as the 2009 regulations for student loans.⁵

However, do written notices of cooling-off periods work? This article explores whether consumers use cooling-off periods, by reporting on a survey of businesses required to allow consumers to rescind the underlying transaction. Businesses that provide a written cooling-off period notice—and do not otherwise

¹ See *infra* notes 10–11 and accompanying text.

² See *infra* note 8 and accompanying text.

³ See *infra* note 7 and accompanying text.

⁴ See *id.*

⁵ See Truth in Lending, 74 Fed. Reg. 41,194 (Aug. 14, 2009) (codified at 12 C.F.R. § 226.48(c) (2012)).

bring the notice to consumers' attention—overwhelmingly say that consumers rarely, if ever, avail themselves of the right to rescind. Taken together with studies conducted in the 1960s and 1980s, the survey strongly suggests that written notices of cooling-off periods are of little or no value to consumers.

The study also offers evidence that oral notice of the right to rescind combined with written notice increases the likelihood that consumers will rescind. Even so, the rate of rescission is low enough to leave open questions about whether cooling-off period rights are useful to consumers. Ideally, consumers will rescind often enough to deter businesses from engaging in inappropriate selling practices. Exactly how often that would be remains unclear. Perhaps it varies from industry to industry. Probably the rate of rescission is too low to function as an effective deterrent even when consumers are provided with oral notice, but the rate is surely too low when consumers are given written notices and no more. In any event, if lawmakers wish cooling-off periods to function better, they should require merchants to provide oral notices of the right to rescind in addition to the written notices currently mandated.

Lawmakers should also reconsider cooling-off periods as a consumer protection device. If cooling-off periods do no good, they still might do harm. At least theoretically, lawmakers adopt cooling-off periods to redress a perceived consumer protection problem. If the problem is real and cooling-off periods do not solve it, the problem will persist unless regulators address it another way or it disappears on its own. In other words, if cooling-off periods do not solve the problem they are aimed at, they provide only illusory consumer protection.

The article proceeds as follows: Part I provides a brief history of cooling-off periods and describes past empirical research. Part II reports on the survey itself. Part III offers some speculations on why consumers rarely take advantage of cooling-off periods. Part IV discusses the cost of cooling-off period rules in light of the criticisms early opponents advanced. Finally, the conclusion (shockingly) concludes.

I. AN OVERVIEW OF COOLING-OFF PERIODS

A. History

The cooling-off period rule, as with many American laws, was transplanted from England, which adopted such a law, called the Hire Purchase Act, in 1964.⁶ Michigan enacted a cooling-off statute in 1965, and other states soon followed.⁷ Many of the early cooling-off period statutes were aimed at door-to-door sellers. Congress considered, but did not enact, a door-to-door cooling-off statute; in 1971 the Federal Trade Commission promulgated a Trade Regulation Rule giving consumers three days to rescind transactions entered into at their homes, a regulation which remains in effect today.⁸ However, the three-day right to rescind had already spread beyond door-to-door sales. In 1968, Congress had enacted the Truth in Lending Act (“TILA”), which requires businesses to provide a cooling-off period notice in many transactions in which the business takes a security interest in the consumer’s principal dwelling.⁹ Because many state laws automatically confer a mechanic’s lien upon home contractors once they have worked on a home,¹⁰ and because the right to rescind under TILA is triggered by such interests “that arise solely by operation of law,”¹¹ the statute obliges many home contractors to provide cooling-off periods. As suggested by the British origin, other countries have also adopted cooling-off periods.¹²

⁶ Hire Purchase Act, 1964, c. 53 (Eng.). The British law was suggested in the Final Report of the Committee on Consumer Protection, 244 Parl. Deb., H.L. 605 (5th ser.) (1962), sometimes referred to as the Molony Report after its chairman. That Report explained at p. 172:

[A cooling-off period] would ensure that no one assumed hire-purchase obligations without a full opportunity of understanding the nature of the bargain and weighing the transaction against his or her personal needs and resources. As against this the idea that responsible adults should not be free to make a bargain on the spot if they wish so to do, or that, a bargain having been made, one party should be at liberty to cancel it, is novel and not inherently attractive. . . . But with the realization that the persons to be protected are usually ignorant and credulous and the opposite party lacking in scruple, it is not easy to design the form of the protective device. It must not be overlooked that the overbearing salesman may be as willing to deceive the finance house concerning the correct sequence of events and the attitude and acts of the hirer as he is to beguile the latter.

⁷ The Michigan statute is currently codified at MICH. COMP. LAWS § 445.1202 (2012). Examples of cooling-off period statutes in other states include: N.Y. GEN. BUS. LAW § 394-b (McKinney 2012) (dance instruction contracts); N.Y. PERS. PROP. LAW §§ 425–431 (McKinney 2012) (door-to-door sales); OHIO REV. CODE ANN. § 1345.43 (West 2012) (prepaid entertainment contracts); MONT. CODE ANN. § 30-14-504 (West 2013) (door-to-door sales); KAN STAT. ANN. § 50-640 (West 2013) (door-to-door sales); S.C. CODE ANN. § 37-2-502 (2012) (door-to-door sales); D.C. CODE § 28-3811 (2012)

B. Rationales for Cooling-Off Period Rules

1. Door-to-Door Sales

Cooling-off periods are said to have various rationales. A recurrent theme for the original door-to-door sale rules was to protect consumers from the so-called “hard sell.”¹³ Such aggressive sales tactics were thought to persuade consumers—

(door-to-door sales); OKLA. STAT. ANN. tit. 14A, § 2-502 (West 2013) (door-to-door sales); ARK. CODE ANN. § 4-89-108 (West 2013) (door-to-door sales); N.C. GEN. STAT. ANN. § 25A-39 (West 2013) (door-to-door sales); W. VA. CODE § 33-25A-14 (2012) (health maintenance organization contracts); CAL. CIVIL CODE § 1812.85 (West 2012) (health studio services); MO. ANN. STAT. § 407.710 (West 2013) (door-to-door sales); MASS. GEN. LAWS ANN. ch. 93, § 48 (West 2013) (door-to-door sales); LA. REV. STAT. ANN. § 37:2444.2 (2013) (hearing aid).

⁸ Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. § 429.0 (2012).

⁹ 15 U.S.C. § 1635 (2012); *see also* 12 C.F.R. § 226.23 (2012). The TILA cooling-off rule does not apply to mortgages used to build or purchase a home. *See* 12 C.F.R. § 226.23(f) (2012); 12 C.F.R. § 226.2(a)(24) (2012).

¹⁰ *See, e.g.*, N.Y. LIEN LAW § 3.

¹¹ *See* 12 C.F.R. § 226.2 (2012) (definition of security interest).

¹² *See, e.g.*, Council Directive 2011/83, art. 9(1), 2011 O.J. (L 304) 64 (EU).

¹³ *See, e.g., In re Public Hearing on Proposed Trade Regulation Rule Concerning a Cooling-Off Period for Door-to-Door Sales Before the Federal Trade Commission*, 38 (F.T.C. 1971) (testimony of Sen. Frank E. Moss) [hereinafter *In re Public Hearing*] (“[Cooling-off periods] also reduce[] the reliance the salesman may place on high-pressure tactics. For when the decision to buy must make as much sense to the consumer after mature reflection as it did during an energetic sales pitch, there will be no purpose served by a high-pressure tactic designed to make the consumer sign before he can think about it.”); *id.* at 12, 13 (F.T.C. 1971) (testimony of Representative Fred B. Rooney) (“The cooling-off period . . . allows the consumer to revoke decisions made in haste, often because of pressure, or cajoling or even intimidation during a confrontation with a salesman. . . . For example, almost all [pay during service] magazine subscription sales—some of them involving contracts for \$400 to \$500 worth of magazines, books and merchandise—begin with a telephone call to the prospective subscriber. Often he is told he has been selected or designated to receive some form of free merchandise. When he agrees to have a representative visit his home to deliver his merchandise or other gift, he finds that visit results in a high pressure sales pitch to induce the consumer to sign a contract.”); *id.* at 89 (testimony of Richard A. Givens) (“The customer is vulnerable to the assertion that since the salesman has taken the trouble to come, the transaction should be completed without further deliberation or consultation by the buyer; to buttress this the salesman can plausibly say that he cannot give a promised ‘discount’ if he has to come back, or indeed, cannot come back at all.”); *id.* at 737 (statement of Kenan Heise, editor, Action Line column, *Chicago Today*) (“Ask any housewife if she wants to spend \$450 for pots and pans and she’ll ask you back whether you are out of your head. But twist it into a few dollars a week, throw in the idea that she’ll get a membership in an organization that allows her to buy everything from diapers to a car wholesale, wear her resistance down and pressure her to the point where she will be relieved to get rid of you and you have a sale.”); *see also* S. REP. NO. 1417, at 1 (1968) (accompanying the proposed Consumer Sales Protection Act) (“The Consumer Sales Protection Act is designed to provide a

who might feel a host's obligation to a guest—to buy something they did not want.¹⁴ Proponents also pointed out that consumers could not simply leave the store as they could with brick-and-mortar establishments.¹⁵ The problem was thought especially acute because the seller chose to visit the consumer, rather than the other way around, as is the case when a consumer patronizes a store. In fact, sellers could target particularly vulnerable consumers, like a poorly educated consumer who might not be able to discern that an encyclopedia described as valuable for educating her children will not actually be useful for that purpose.¹⁶ Sometimes the

consumer with some meaningful and readily available relief once he has succumbed to a high pressure sales pitch of a door-to-door salesman, but has subsequently had time to mull over the transaction and realize that he has made an unwanted purchase, paid an unconscionable price, or unnecessarily burdened his family with a major long-term expenditure.”).

¹⁴ See, e.g., *In re Public Hearing*, *supra* note 13, at 614 (statement of Dianne McKaig, Michigan Consumer Council) (“Essentially, the high pressure salesman is trading on the inherent good manners of people. It’s always embarrassing to ask someone to leave your house. Knowing this—a door-to-door salesman will stay, and stay, and stay until he thoroughly wears down a consumer’s sales resistance.”); *id.* at 696–97 (statement of Joseph F. Preloznik, Director, Judicare) (“They may be too shy or timid to tell the salesman to leave their homes, and may sign a contract, essentially unread or misunderstood, merely to get the man out of the house.”); *id.* at 439 (statement of Bette Clemens, Bureau of Consumer Protection, Pennsylvania Attorney General’s Office) (“Frequently the persistence of the sales person in the home of the consumer makes it difficult for the consumer to withstand the highly motivated sales promotion.”); *id.* at 339 (statement of M. Paul Smith, President, D.C. City Wide Consumer Council) (“Sometimes the salesman can make the consumer feel so guilty, if the consumer says no, that in the end the consumer makes a purchase knowing full well that he doesn’t want it, doesn’t need it, and can’t afford it.”); Note, *Consumer Protection: The Proposed Cooling-Off Period*, 2 VAL. U. L. REV. 338, 345 (1968) [hereinafter *Consumer Protection*] (“Another typical effect of high pressure sales is that the consumer may purchase a product he does not need or want. Sellers, within the confines of the buyer’s home, create an illusory need in the buyer for the product . . . or the seller may subject the consumer to an unrelenting ‘pitch’—the consumer finally buying the goods to rid himself of the seller.”).

¹⁵ See, e.g., *In re Public Hearing*, *supra* note 13, at 23–24 (testimony of Richard L. Levin, University of Virginia Law Student) (“[A cooling-off period] would neutralize the vulnerable position of the consumer caught in his own home. He can’t simply walk out, get in his car and go away from the establishment. The establishment is his home and if he walks out the back door, the salesman is still in his living room.”); see also *id.* at 379 (statement of David R. Cashdan, Consumer Federation of America) (“Unlike the individual who consciously decides to enter a store, the home owner is unexpectedly intruded upon. Unlike the customer in the store, the home owner cannot walk out on the salesman. In short, he is captive to the salesman’s pressures, he has no opportunity to compare values, and his purchases, of necessity, are nothing else but the product of impulse buying.”); see also *id.* at 89 (testimony of Richard A. Givens).

¹⁶ See, e.g., *In re Public Hearing*, *supra* note 13, at 684–85 (statement of Eve Galanter, President, Consumer Federation of Illinois) (“Mrs. H., a widow with three children, was told by a glib salesman that he had been informed that her children were exceptionally bright (he never disclosed who told him), and, for that reason he had come to offer her the opportunity to provide these exceptional children with the additional education they deserved. All the things she—an uneducated woman—was unable to teach

salesperson was said to resort to fraud,¹⁷ perhaps initially claiming that the purpose of the visit was not to sell something but to conduct a survey, provide a free gift, or give the consumer a check;¹⁸ such sellers were sometimes reported to use a

them, could be taught by a set of encyclopedia. The set was described as a ‘ticket to college’ and insurance against a future of welfare dependency for her family.”); *see also id.* at 616–17 (F.T.C. 1971) (statement of Dianne McKaig, Michigan Consumer Council) (“The consumer is led to believe that the presence of a set of reference books in his home is going to enhance his children’s chances of performing well in school and thus, by implication, advancing into college and into well paying careers. This is a tremendous play on family ego and on a parent’s regard for the welfare of his children.”); S. REP. NO. 1417 at 4 (1968) (accompanying the proposed Consumer Sales Protection Act) (“[C]ertain of the unique characteristics of direct selling . . . seem to leave the consumer particularly vulnerable: The buyer has not made a conscious decision, as by entering a store, to expose himself to a sales pitch: for the seller’s call is normally unsolicited and the salesman has frequently failed to identify himself accurately.”).

¹⁷ *See In re Public Hearing, supra* note 13, at 89 (testimony of Richard A. Givens) (“The sale[] is not subject to supervision to the extent that is usual in stores, and, if the sales are on a commission basis, [the salesperson] is more likely to make extravagant representations which he, himself, can later deny or which his employer may later dismiss as unauthorized.”). *See also* Cooling-Off Period for Door-to-Door Sales, 37 Fed. Reg. 22,933, 22,938 (Oct. 26, 1972) (“Misrepresentation on the part of salesmen regarding the quality, price, or characteristics of a product is the next source of consumer complaints regarding door-to-door sales. The quality and durability of products and services sold in the home frequently do not live up to the representations of the salesman.”).

¹⁸ *See, e.g., In re Public Hearing, supra* note 13, at 37 (testimony of Sen. Frank E. Moss) (“We have received many complaints that door-to-door salesmen pose as building inspectors, survey takers, or company representatives distributing ‘free’ products in order to gain entry to a house. Once inside the house, the salesman can much more effectively use high-pressure techniques to make a sale.”); *id.* at 899 (F.T.C. 1971) (statement of Elasko Thigpen, Director, Greater Peoria Legal Aid Society) (“One tactic that is used down our way is the salesman will come in with a check. They offer them \$5. I have come to bring you \$5. It is yours. You don’t have to do anything. Just let me come in. He has the \$5 check ready. He sits and sells them a vacuum cleaner.”); *id.* at 662 (statement of George P. Graves, Chief of Police, Western Springs, IL) (“[T]he magazine solicitor generally does not tell the people that he is there to sell magazines. [They claim to be] a Job Corp. worker. They represented themselves as being from the Office of Economic Opportunity or that they were from Poverty Appeal Programs.”); Project, *The Direct Selling Industry: An Empirical Study*, 16 UCLA L. REV. 883, 921 (1969) [hereinafter *The Direct Selling Industry*] (“Interviewees frequently complained that door-to-door salesmen are misleading about their products, prices, and terms, and the fact that they are salesmen.”). To demonstrate a hard sell, Maryland’s Attorney General, Francis Burch, attached to his congressional testimony a lengthy script one company used to sell a camera and accompanying paraphernalia. *See Door-to-Door Sales Regulation: Hearings on S. 1599 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 90th Cong. 71–77 (1968) [hereinafter *Hearings on S. 1599*] (statement of Francis B. Burch, Attorney General of Maryland). Some excerpts:

The basic cost of the program, the ridiculously low sum of only \$9.97 per year. That would fit into your budget, wouldn’t it . . . ?

. . . .

. . . Before I leave, there is one other thing the company asked me to mention to you folks. In all honesty, I have to tell you that we have had an objection.

Now, please, don't misunderstand me. The objection was not with the program itself. Everyone just loves the program. When we first started to get the letters, people told us they just loved the program and how much they really were enjoying it. The only thing they objected to was the way of taking care of it. They said: "That's an awfully long time to drag out something that small." Nobody in their right mind wanted to drag anything out that long unless it would be a house or something like that. They wanted to know if there wasn't some other way they could take care of it. We had as many different ideas as we had people, so, we were forced to come up with an alternate plan

.
Let me ask you this. If we really made it worth your while, I mean really worth your while, could you take care of this in a shorter period of time? I mean instead of sending in \$9.97 once a year, could you send it in once a month? In other words, you will send in \$9.97 once a month, right? That way you will have this all taken care of in 15 months. Now when you do this, not only is more convenient for you, but, it also saves us about 14 years of bookkeeping expense

.
. . . Oh! I almost forgot. What color album did you want?

Senator Brewster also inserted a script for an encyclopedia company in the hearings at pages 147–52. Excerpts follow (emphasis in original):

I'm not a salesman so please don't be alarmed. I've been asked to interview some of the families in this area. It's a matter of asking you and your wife a question or two. It takes about a minute I'm with the Promotional Division of E.E., Inc. . . . The families that we are interviewing right now, families like yourselves, that are helping us out, we are paying them very handsomely for their help, not in cash but in the form of merchandise. . . . If you'll agree to write us a testimonial letter within 90 days after you receive the set, we'll agree to ship you this complete \$489 edition [of a 20-volume "complete international reference library"] right up to our door *within the next two weeks* as an advertising premium at our expense; and we even pay all the postage

.
. . . Gee, I almost forgot. There is one thing I have to make crystal clear to you. We give you the Cadillac so to speak, but we have to draw the line somewhere. We don't give you the Gas and Oil. In other words, you get this Complete Library within 2 weeks but we don't keep it up to date for you too. The Yearbook Services that come out each year, that adds on to our set, that keeps it up to date However, I can't sell you any *yearbook services*. I wish we could but it just wouldn't look right. It just wouldn't be good advertising to place the complete set in anyone's home as an advertiser, then turn around and sell them the yearbook services for 20 to 30 years and make a profit off of them. It would not only be bad advertising; it would insult their intelligence. However, since we know that the average family would never pay \$500 or more to buy any set unless they could keep it up to date, because thousands of new things are happening every day, and since we realize that

there is a good chance that you might not even want this set in your home if you didn't have some way of keeping your own set up to date, I am obligated by my company to show you how this beautiful international reference library is kept up to date even though I could not sell the yearbook services to you even if I wanted to

. . . .
. . . [T]he 1st yearbook doesn't come out until May or June of next year. What happens if you want to know about something that happened last month . . . ? See these coupons here We have at present over 2,000 experts in every field working in our Library Research Department in New York City. Any time something new comes up and you want to know more about it *right now*, all you would have to do is clip out one of these research coupons and send in a letter with the coupon to our Research Department in New York. An expert in that field . . . types up a complete report and sends you everything you ask for immediately

. . . .
. . . . Educational Enterprises wanted to know how much money it would cost us on a mass production basis to put out 10 research coupons each year and one yearbook each year that would keep your set completely up to date for you; a complete \$65.00 per year service. It took 25 accountants over 6 months to come up with the answer. Do you know what the answer was? You will be amazed. We surely were . . . about 9 [cents] a day If each and every year we would ship you the 10 research coupons and the yearbook, a complete \$65.00 per year service that would keep the set completely up to date, and we would only charge you the exact cost it costs us on mass production, 9 [cents] a day, about the same cost an average family spends on their newspaper they read and throw away—would you have any possible objection to keeping your set up to date with us ? We have never gotten an objection yet We send you this little Calendar Bank and all you have to do is take a dime out of your pocket change and put it in here to change the date. Each month you take the key to your bank, open it here, and send us the dimes.

. . . .
You'll be 30 [cents] over, so please keep 3 dimes for yourself [T]his dime does seem to separate the insincere people from families like yourselves who are sincere. Isn't that ridiculous ? [T]he only objection we ever get is 10 years is a long time having to send in dimes every month [I]n ten years it costs us more in bookkeeping charges than we ever collect in dimes. That's what this conscience slot on the bank is for. If you pop a quarter and a dime in back here, like getting a pack of smokes, or a bottle of beer, out of your pocket change, if you figure it up; the complete ten year program is taken care of in two years, 9 [cents] a day for 10 years, 5 times faster = 9 [cents] x 5 = 45 [cents] per day = 2 years. And you don't have to keep sending us dimes for the last 8 years [W]e don't care how you handle it. You can send us the dimes over the ten years. You do it just anyway you feel like. Don't make much difference. Anyway you look at it, it's going to come out of your pocket change without making hardly any obligation to anyone. How would you like to take care of it?" (Close on the long term 2 year plan,

10 [cents] in the front of the bank and pop a quarter and a dime in the conscience slot like getting a pack of smokes.)

See also P.F. Collier & Son Corp. v. F.T.C., 427 F.2d 261, 272 (6th Cir. 1970), *cert. denied*, 400 U.S. 926 (1970):

We find substantial evidence in the record as a whole to support the [Federal Trade] Commission's findings that Collier & Son committed, for at least a substantial period of its corporate existence, the following illegal trade practices in violation of Section 5 of the Federal Trade Commission Act: Its agents, in the door-to-door sales of books, falsely represented that they were conducting a survey; that the encyclopedia was offered free or at a reduced price provided that yearly supplements were purchased; that the agent was connected with Collier & Son's or Crowell Collier's advertising or publicity department and was not selling anything; that the encyclopedia was offered free or at a reduced rate if the potential customers would comment on the set in a letter, and authorize their names to be used in advertising the encyclopedia; that theirs was a special offer for a limited time only and being made only to a select group of people and not to the public at large; that the general sales promotion would be conducted at a later date; that the annual supplement volume regularly sold for \$10.00 but was being offered to the prospects for only \$3.95; that certain additional books included in the combination offer were being given free with the purchase of encyclopedias and supplements; and that the encyclopedia was nationally advertised for \$389 or more.

See also PHILIP G. SCHRAG, COUNSEL FOR THE DECEIVED 104–05 (1972) (reproducing an excerpt from a script used by telemarketers):

Good afternoon. This is Miss _____ with the Standard Business Information office and we are taking an inquiry on reading habits. If you were on a trip and a hostess came up with your choice of publications, which three would you be most likely to leaf through along the way? For your first choice would you prefer *American* or *Esquire*? Your second choice would be *Ladies' Home Journal* or *McCalls*? Your third choice: *Redbook* or *Modern Photography*? Fine. For your cooperation and to promote industry this year we will send you copies of (the three choices) along with *Look*, *Cue* and the *Saturday Review*, for the next sixty months, at our expense. All we do today is list your name and address. Your first name is? And your last name? And your correct business address? The name of the firm? I guess you're kind of curious as to why we're doing this. Every year we send out thousands of copies to business people like yourself in order to increase our circulation. You really get these because of our increased demand for quality circulation. All they ask you to do is to merely take care of a small publisher's service charge which is only 64 cents a week. That certainly is fair enough, isn't it? Thanks and do enjoy your magazines.

See also *In re Public Hearing*, *supra* note 13, at 318–19 (statement of Christian S. White, Public Interest Research Group):

contract, which was labeled to look like something else entirely.¹⁹ Other sellers reportedly made it difficult for consumers to ascertain the price of the goods sold.²⁰

Even if the consumer did wish to make the purchase, home sales made it difficult for the consumer to compare prices charged by other vendors in the pre-

Several years ago I answered a knock on my front door in Philadelphia, and was greeted by a magazine salesman. . . . Each subscription constituted points toward a college scholarship for the individual selling. * * * As I had been schooled in the need to be polite, I didn't slam the door in the man's face. I was pretty soon listening to the entire spiel in my living room. All I had to do was place the order and the salesman would get his credit towards a college scholarship. * * * This individual was rather well-trained in the appearance of sincerity and I took him at his word, when he stated that the contract could be cancelled at any time if I was not satisfied. Really it was the only way to get him out of the house to consent. My first two rejections of the offer being made simply triggered a repeat of the well-learned pitch from the beginning. Rather than withstand another gush of sincerity from the individual, who really showed no inclination to leave, I agreed. After he had left, I finally had a chance to look at the contract without constant distraction. It was, to put it mildly, somewhat different from my budding scholar's description. . . . My immediate attempts to cancel were rebuffed. I really met with no response. My threat to stop payment with the check were met by threats to my credit rating. . . . Attempts to visit the office led to the discovery that the office did not exist. The address given was a phony. The girl answering the phone number, even, was not about to let on where she, or anyone in authority, could be visited in person. The end result was a long expensive subscription to some unwanted magazines which tended generally to arrive rather late.

Id. at 351 (statement of Theresa Clark, Chief, Program Coordination, United Planning Organization) (“Thousands of D.C. residents are in serious financial trouble today because of a cheering hello, I have a beautiful free gift for you, if you can just answer some of these questions. Or hi, there, you are a lucky winner of this beautiful clock.”); *The Direct Selling Industry*, *supra* at 903–06.

¹⁹ *Hearings on S. 1599*, *supra* note 18, at 70 (statement of Francis B. Burch, Attorney General of Maryland) (“[I]n one case involving books, the contract has the harmless sounding title ‘Products Acceptance Division.’ In another case involving home sale of photographic supplies and equipment, the purchase order form was entitled ‘Public Relations Report.’”).

²⁰ *See In re Public Hearing*, *supra* note 13, at 663 (statement of Dianne McKaig, Michigan Consumer Council) (“Misrepresentation of purchase price is common in magazine subscription sales. A customer may be told verbally that he will be paying so much a month for his subscription, while the actual contract requires that he pay that same amount on a weekly basis.”); *The Direct Selling Industry*, *supra* note 18, at 910 (footnote omitted) (“In many instances . . . the consumer is misled by a welter of confusing information. . . . [t]he price is often only given in terms of so many cents per day or week without ever revealing the sum total. . . . The payments, if discussed at all, are extended over a long period to reduce their size per month and then are suddenly compressed during the close. . . . The consumer interviews indicated how ill-informed the consumer may be about the total price of purchases.”).

Internet era, and so cooling-off period advocates argued that consumers should have an opportunity to do so after making the purchase; if the consumer found a better price elsewhere, the consumer should be able to back out of the contract.²¹ As one recent commentator observed, “Cooling-off periods can in fact be seen as an indirect mechanism for information revelation.”²² The right to rescind was also aimed at so-called impulse sales which the consumer later regrets.²³ Some argued that cooling-off periods would aid “reputable door-to-door sellers, since certain customers might be more willing to buy when they know they can get out of a so-called bad deal.”²⁴

Recent justifications for the right to rescind have been put in the language of economics, but amount to the same thing. Thus, Pamaria Rekaiti and Roger Van den Bergh have written “Irrational behavior, situational monopoly power, and asymmetric information . . . explain cooling-off periods using an explicit economic

²¹ See, e.g., Promulgation of Trade Regulation Rule and Statement of Its Basis and Purpose, 37 Fed. Reg. 22,934, 22,939 (Oct. 27, 1972) (“Excessive prices for products sold in the home are commonplace Since the sale is being made in the home, the consumer is unable to ascertain the price of similar or substitute products as he could do if he visited several retail establishments.”); *In re Public Hearing*, *supra* note 13, at 439–40 (statement of Bette Clemens, Bureau of Consumer Protection, Pennsylvania Attorney General’s Office) (“The practice of going to the home of the consumer tends to eliminate the options open to the consumer who shops in the business establishment of the business person. It is the practice of most consumers to shop for comparative prices when purchasing from business establishments. It apparently is not the practice when the consumer is a captive audience of a door-to-door salesman.”); *Consumer Protection*, *supra* note 14, at 343–44 (“the provision seeks to allow the in-home consumer the benefits of comparative shopping”); William G. Meserve, *The Proposed Federal Door-to-Door Sales Act: An Examination of its Effectiveness as a Consumer Remedy and the Constitutional Validity of its Enforcement Provisions*, 37 GEO. WASH. L. REV. 1171, 1187 (1969) (footnote omitted) (“Several direct sellers have complained that a cooling-off period may give competitors an opportunity to ‘raid’ their customers. But if another competitor is offering the consumer better value for his money, it is a basic tenet of our economic system that he should make the sale.”).

²² Sven Hoeppe, *The Unintended Consequence of Doorstep Consumer Protection: Surprise, Reciprocation, and Consistency* (May 14, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2057605. See also Shmuel I. Becher & Tal Z. Zarsky, *Open Doors, Trap Doors, and the Law*, 74 LAW & CONTEMP. PROBS. 63, 65–67 (2011).

²³ See *Hearings on S. 1599*, *supra* note 18, at 44 (statement of David Caplovitz, Professor, Columbia University) (“Door-to-door selling reduces [the] deliberative process to a minimum at the same time that it maximizes what has been called ‘impulse buying.’ It is quite one thing to buy an inexpensive trinket on impulse, and quite another to assume a debt of several hundred dollars or more in this way.”); Meserve, *supra* note 21, at 1186 (footnote omitted) (“When a purchase has been made on impulse, ‘buyer’s remorse’ will undoubtedly set in after the salesman has left and may result in a cancellation.”).

²⁴ See *Hearings on S. 1599*, *supra* note 18, at 26 (statement of Warren Magnuson, Chairman, S. Comm. on Commerce).

logic”²⁵ In their view, the cooling-off period works if before it ends, “[r]isk perception returns to normal levels (for rational decision-making) . . . consumers are no longer exposed to the aggressive sales techniques; their utility function then again takes the shape it has in the absence of these particular marketing methods.”²⁶

It is one thing to identify these problems with door-to-door sales. It is another to show that they occurred frequently enough to merit legal intervention, or that the intervention could solve the problem. The historical record is murky on these latter points. A 1968 empirical study of the direct selling industry conducted by the U.C.L.A. Law Review offered some help. That study reported:

In light of the high-pressure and fraudulent techniques employed to make a sale, it is not surprising that door-to-door customers are frequently dissatisfied with their purchases. Some customers realize after the salesman is gone that they neither want nor need the merchandise they just purchased. Others discover that they have paid an unreasonable price for an inferior product. . . . Many low-income consumers realize *at the time they purchase* that they are paying excessively high prices and credit charges. However, their immobility and inability to obtain credit elsewhere results in a lack of alternative markets that reduces their choice to either paying the price or doing without the wanted article.²⁷

In an attempt to determine the scope of the problem and the appropriate remedy, the FTC held extensive hearings before adopting its cooling-off period rule. Its statement upon adopting that rule reported that “From the record in these proceedings, it is clear that the frequency and number of complaints arising out of door-to-door sales is substantial.”²⁸ The FTC also pointed to statements it received

²⁵ Pamaria Rekaiti & Roger Van den Bergh, *Cooling-Off Periods in the Consumer Laws of EC Members States. A Comparative Law and Economics Approach*, 23 J. CONSUMER POL’Y 371, 375 (2000).

²⁶ *Id.* at 377. The authors also explained, at 373:

In order to protect the weak consumer and correct the perceived imbalance in economic power, the legislator attempts by means of mandatory rules to adjust the environment within which the bargain is struck. These rules are introduced to redistribute the incidence of costs between the contracting parties and to restore equality within the market.

²⁷ *The Direct Selling Industry*, *supra* note 18, at 914.

²⁸ Promulgation of Trade Regulation Rule and Statement of Its Basis and Purpose, 37 Fed. Reg. 22,934, 22,937 (Oct. 26, 1972). These complaints included 74 complaints to a consumer protection office in Chicago, 670 to the Wisconsin Attorney General’s office (out of 3,000 complaints arising from any

from state officials and others “who reported an almost immediate and dramatic drop in the number of consumer complaints” after their states had enacted cooling-off period laws.²⁹ However, these latter statements were undermined by other

source), 15–20% of the complaints received by Legal Services of Greater Miami, Inc., *id.* at 22,937 n.31; *see also In re Public Hearing, supra* note 13, at 613 (statement of Diane McKaig, Michigan Consumer Council) (“Out of 800 complaints addressed to our office in the past year, 68 or eight and a half percent were from consumers with problems resulting from door-to-door sales. . . . We do not suggest that these figures represent a statistically reliable sampling. However, they are sufficient to convince us that abuses of door-to-door selling comprise a significant portion of current consumer problems. And since only a fraction of the consumer grievances in Michigan come to our attention, we anticipate that we have seen merely the tip of the iceberg.”); *id.* at 737 (statement of Kenan Heise) (“Last year, as editor of the Action Line column in Chicago Today newspaper, I handled 3,000 to 5,000 complaints dealing with door-to-door salesmen and their firms.”); *id.* at 863 (statement of Solomon Harge, Director, Consumer Protection Association, Cleveland, Ohio) (about 40% of the complaints received in his office deal with door-to-door sales).

²⁹ Promulgation of Trade Regulation Rule and Statement of Its Basis and Purpose, 37 Fed. Reg. 22,934, 22, 941–942 (Oct. 26, 1972). The Statement’s n.61 stated in part:

Walter W. Faick, president of the Maryland Consumers Association, in speaking of the Maryland cooling-off law said, “Since the law became effective . . . on July 1, 1970, (we) have not received a single complaint in regard to the home solicitation sales problem” . . . Mrs. Camillo Haney, coordinator for Consumer Affairs, Department of Justice, State of Wisconsin, “we have a 3-day cooling-off period in the area of freezer meat and food service plans. Problems in the food industry have just about been eliminated since it went into effect” With respect to the effect of Utah’s adoption of the Uniform Commercial Code cooling-off provision, Mrs. Richard P. Barnes, chairman, Council of Advisors on Consumer Credit said, “it has been my privilege to observe first-hand the effects Many un reputable dealers have left our State, some have gone out of business, others have improved their methods and our consumers are receiving more fair treatment” Mr. Donald Ebberson, executive director, Consumer Assembly of Greater New York, reported his investigations had shown a dramatic drop in the number of complaints arising out of door-to-door sales.

See also In re Public Hearing, supra note 13, at 433 (statement of Frederic Sherwood, chairman Ad Hoc Inter-Industry committee) (“[T]he legal department of the military . . . signed by four of the officers [reports] that the problems in the direct selling area have practically disappeared since the adoption by Maryland of a cooling-off law.”); *id.* at 440 (statement of Bette Clemens, Bureau of Consumer Protection, Pennsylvania Attorney General’s Office) (“The experience of the Bureau of Consumer Protection in the Commonwealth of Pennsylvania is that the two-day cooling-off period has been a most important and useful tool in the protection of the consumer. The legitimate business person has not suffered from the Pennsylvania law which is now two years old. . . . [o]ur law has been a godsend to Pennsylvania consumers.”); *id.* at 834 (statement of Professor Victor P. Buell, School of Business Administration, University of Massachusetts) (“The Assistant Attorney General of my own state tells me that since Massachusetts enacted cooling off legislation consumer complaints to his office on home solicitors have virtually ceased.”); *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 422 (1966) (footnote omitted) (“The files of the

statements in the record. For example, a representative from the Michigan Consumer Council, a state which had already enacted a cooling-off period rule by the time the FTC held hearings on its then-proposed Rule, observed that in “only seven of those 68 cases [in which the Council received complaints about door-to-door sales], had the consumer himself petitioned the seller within three business days for rescission of the transaction”³⁰ Another witness, after pointing out that 21 states and three cities had adopted cooling-off laws, including some that were several years old, opined:

[T]o my knowledge there is no evidence to show that these laws are beneficial to the consumer. The reputable companies do not want dissatisfied customers, so they permit cancellations within reasonable time limits.

And those companies, which cause the problems, continue with their fraudulent or deceptive practices, knowing that the occasional cancellations, which take place, can be lived with, and there will be no punishment or penalty for them.³¹

frauds division of the Philadelphia district attorney’s office [to which the author of the comment was given access] are replete with complaints from consumers who have had requests for cancellations refused, although made only hours after signing.”)

³⁰ *In re Public Hearing*, *supra* note 13, at 619 (statement of Dianne McKaig, Michigan Consumer Counsel). *See also id.* at 639 (statement of Paul Hamer, Village Attorney, Wheeling, Illinois) (“the Illinois cooling off statute had had ‘[n]ot too much’ effect in Wheeling.”); *id.* at 660 (statement of Lee A. Ellis, Village Manager, Village of Winnetka, Illinois) (“Illinois statute has not been of any benefit ‘largely because of ignorance, I believe.’”).

³¹ *In re Public Hearing*, *supra* note 13, at 182–82 (statement of Richard Goodman, C.H. Stuart & Co., Inc.); *see also Hearings on S. 1599*, *supra* note 18, at 124, 127 (testimony of Allen E. Bachman, Executive Vice President, National Better Business Bureau, Inc.):

I have checked our files on five of the largest of these companies who employ over 50,000 sales persons. I find that we have received only five complaints from consumers against all five in the past 5 years. I might state that in the past 2 weeks I have been able to check the record of more companies, some large and some small, and I find that 35 complaints against 30 door-to-door sales companies are recorded in the National Bureau files during the 5-year period extending from 1963 to 1967, inclusive. An estimated 500,000 door-to-door sales people are associated with these companies. It is true that there are a number of organizations, which operate on the fringes of the legitimate direct selling industry such as the home improvement swindlers. Better Business Bureau recorded 23,298 complains [sic] within the general classification “home improvement and remodeling” in 1967. However, I do not think that the honest direct seller should be penalized for sins of these unscrupulous operators. . . . Senator Brewster: I do notice that your home improvement business assembles the second greatest

From this distance, it is hard to know how widespread the problems were. Certainly, critics reported problems with many door-to-door sales personnel.³² Supporters provided considerable anecdotal data and some empirical data to support the efficacy of cooling-off periods, but the case was not airtight, and some contemporary commentators were dubious.³³

2. Truth in Lending's Cooling-Off Period

The evidence of the legislative intent for the TILA rescission provision is sparse. Cooling-off periods seem not to have been considered during committee

number of complaints and that this is over 6 percent. And by and large, you testify that this is the result of direct sales. Mr. Bachman: Yes, sir.

³² See, e.g., *Hearings on S. 1599*, *supra* note 18, at 54 (statement of Leslie V. Dix, Director for Legislative Affairs, President's Committee on Consumer Interests) ("The California attorney general's office reported they receive more complaints about the unethical sales techniques used by door-to-door salesmen than any other problem. Authenticated national figures of the total loss to consumers are not available, but consumer losses in but one segment of the industry—home improvement sales—have been estimated by the national Better Business Bureau at \$500 million to \$1 billion [perhaps this should be billion] yearly, or roughly between 4 percent and 8 percent of the entire home improvement business."); see also *id.* at 69 (statement of Francis B. Burch, Attorney General of Maryland) ("one of the most frequent areas of complaint involves questionable practices found in home-solicitation sales").

³³ See *Consumer Protection*, *supra* note 14, at 339 ("A cooling-off period is not necessarily a panacea. The desirability of such a provision must be investigated thoroughly."); William E. Hogan, *Cooling-Off Legislation*, 26 *BUS. LAW.* 875, 878 (1970–1971) ("The precise problem to be remedied by these statutes is unclear."); Richard R. Ross, *The Illinois Cooling-off Provision: Three Days to Do What?*, 2 *S. ILL. U. L.J.* 421, 455 (1977) (a special investigator in the Carbondale, Illinois office of the Consumer Protection Division of the Illinois Attorney General's Office opined that the Illinois cooling-off statute "stands little used and untested as to its full potential"). In contrast, others thought cooling-off periods should be extended to retail sales generally; see generally Michael B. Metzger & Dennis B. Wolkoff, *Fulfilling a Promise: Extending a Cooling-off Period to Retail Sales in General*, 58 *MINN. L. REV.* 753, 755 (1974) ("the main reason for extending this sort of remedy into the general retail sales area is simply to provide a large number of consumers with a simple, inexpensive and speedy remedy in all cases where they have been victimized by defective products, dilatory delivery, deceptive or high-pressure sales practices, or even their own stupidity"). The National Consumer Law Center's National Consumer Act, a model consumer protection statute, proposed that all consumer transactions in amounts exceeding fifty dollars be subject to a three-day right of rescission, unless the consumer requested "credit, money, property or services without delay in an emergency . . ."; see National Consumer Law Center, National Consumer Act §§ 2.501, 2.505 (First Final Draft 1970). The theory was that "[m]ost reputable merchants allow this action irrespective of any rights the consumer may have. Therefore, this Act merely codifies what reputable merchants do as a matter of good business practice." *Id.*, cmt. 2 to 2.501. Consumers were not to be under any obligation as to transactions conducted outside the seller's place of business unless they gave written notice of affirmation to the seller. *Id.* at §§ 2.501–.503. Comment 1 to 2.501 explains the rationale: "[T]he consumer should have a period of time in which to make up his mind, on the theory that he has not exercised full volition when being pressured in this own home or away from a merchant's place of business."

deliberations. Instead, during the debate on the House floor, Representative Cahill proposed that three days before a lender enters into a transaction in which the creditor would take a security interest in the borrower's residence, the creditor provide the required disclosures to the borrower.³⁴ The House adopted this amendment without debate.³⁵ This provision was transmuted into the cooling-off period during the conference proceedings, and the Conference Report does not offer a rationale for the change.³⁶ Nevertheless, in light of contemporaneous measures requiring cooling-off periods in door-to-door sales, it seems safe to assume that Congress wished to protect consumers from unscrupulous sales tactics by affording borrowers time for reflection.³⁷

* * *

These justifications seem to share an assumption that some unstated percentage of consumers will use cooling-off periods to cancel sales.³⁸ Thus, it is

³⁴ See 114 CONG. REC. 1611 (1968).

³⁵ Richard J. Bliss, Note, *Truth in Lending—Right of Rescission*, WIS. L. REV. 192, 195 n.18 (1975).

³⁶ H.R. CONF. REP. NO. 1397, reprinted in 1968 U.S.C.C.A.N. 2023. The full text of the Conference Report on the cooling-off period states: “[s]ection 203(e) of the House-passed bill required that the disclosures required under the bill would have to be made at least 3 days before the consummation of any transaction in connection with which a security interest was to be retained or acquired in the obligor's residence. The corresponding provisions in the conference substitute are found in section 125, with substantial modifications. Purchase money first mortgages are exempted altogether from the provisions of section 125. As to other transactions, the obligor is given a right of rescission which runs until midnight of the third business day following consummation of the transaction, or delivery of all material disclosures (including disclosure of the right to rescind without liability), whichever is later. Upon exercise of this right, any security interests created under the transaction are voided, the creditor must refund any advances, and the obligor must tender back any property, or its reasonable value, which he has received from the creditor.”

³⁷ See *Eby v. Reb Realty*, 495 F.2d 646, 652 (9th Cir. 1974) (provision intended “to blunt unscrupulous sales tactics by giving homeowners a means to unburden themselves of security interests exacted by such tactics”); Letter from Federal Reserve Board Opinion (Oct. 31, 1969), quoting 4 CCG Consumer Credit Guide Para. 30,205 (1969) (“The right of rescission . . . is designed to provide a customer with a 3-day ‘cooling-off’ period to think it over before he takes such a serious step as pledging his residence as security for a credit transaction.”).

³⁸ Rekaiti & Van den Bergh, *supra* note 25, at 393 (“[T]he main economic goal of cooling-off periods is to give traders an incentive to provide information about the quality of the goods and services offered through the price mechanism. In this respect, cooling-off periods will be ineffective when the cancellation right is exercised only occasionally. . . . The marginal consumer will exercise his right once he realizes that he can conclude a similar contract acquiring products or services of higher quality. In contrast, the infra-marginal consumer will accept what he is given and will not bother to use his withdrawal right, even if he is provided with numerous written notifications and pre-printed forms. . . . If the number of infra-marginal consumers is higher than the number of the marginal consumers, the

possible to test the effectiveness of three-day cooling-off period laws by determining whether consumers actually rescind transactions. If consumers do not, it is probably safe to assume both that the rules have little deterrent effect on merchant misconduct and that they are not an effective remedy for that misconduct.

C. *Previous Empirical Research*

The only empirical study of the effectiveness of cooling-off periods conducted in the sixties, when many of these rules were created, was a survey involving a one-day cooling-off period. That study found that the one-day period “benefits consumers very little.”³⁹ While it is certainly possible that a three-day period will be helpful to consumers even though a one-day period is not, the study’s authors were skeptical, and speculated that three days “is not likely to have a major effect on consumers or dealers.”⁴⁰

Two 1981 surveys sponsored by the FTC on its cooling-off rule for door-to-door sales, seven years after that rule took effect, seemed to bear out this skepticism. The Public Sector Research Group (“PSRG”) questioned more than 1,400 consumers, 16.4% reported having bought something from a door-to-door seller in the previous year, 31.4% claimed to have made a purchase at a “product party,” and 12.4% had purchased an item from a salesperson in the buyer’s workplace, and therefore should have been able to rescind under the FTC Rule.⁴¹ Not one of the respondents reported using the cooling-off period to rescind, though the proportion of consumers who reported being “not at all satisfied” with their purchases, 8.3%—only 28 consumers declared themselves less than very

trader may not be incited by the mandatory provision of the cooling-off period to provide higher quality. It may be more profitable for him to receive some products back, to repay the marginal purchasers, and to continue to offer low quality to the rest of this business, which anyway constitutes the majority of his customers.”).

³⁹ Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618, 628 (1969) [hereinafter *Yale Study*]. The *Yale Study* explored the effectiveness of a Connecticut statute. The authors reported, at 628–29:

Only seven dealers responded that customers had used this provision, and only two of those indicated that it had been used more than three times since the law went into effect. This conclusion is further corroborated by Legal Aid lawyers who say that since the Act was passed they have had no clients seek advice within the cooling-off period.

⁴⁰ *Id.* at 630.

⁴¹ See PUBLIC SECTOR RESEARCH GROUP, FINAL REPORT OF AN IMPACT EVALUATION OF THE COOLING-OFF PERIOD FOR DOOR-TO-DOOR SALES TRADE RULE I-5 (1981) [hereinafter *PSRG Survey*].

satisfied—is small enough to raise questions about the significance of that fact.⁴² Two other reasons may also account for the failure to invoke the cooling-off rule. First, very few seem to have felt unhappy about the purchase before the three days expired. It is difficult to tell from the report precisely how many consumers felt disappointed before the three days elapsed, but the number is surely small, given that only seven reported being dissatisfied before the product arrived, which arrival may itself have been after the three days had run⁴³ (altogether, 81.8% reported that they did not receive the ordered item until after the three days passed).⁴⁴ As the authors of the study note “given the small number of consumers who were dissatisfied with the transaction within three days, perhaps it is not surprising that no one invoked the Rule.”⁴⁵

Second, ignorance of the cooling-off period may have played some role in the failure to invoke the rule, though it appears many of the consumers knew of the rule. The study reported that 43.1% of the respondents stated without prompting that they had a right to cancel within three days. An additional 40.8%, when asked specifically about the cooling-off period, replied that they knew of it—but as the study authors noted, the specific question may have introduced some bias into the response and so indicated more awareness than actually existed.⁴⁶ In addition, many of the respondents who had made purchases subject to the rule acknowledged that their sellers had told them of their return rights. Thus, 61.2% stated that the seller had told them “something” of their right to return the item, with 61.6% stating that they received written information, and 42.7% said both that they received written information and the salesperson explained the right to rescind to them.⁴⁷ In sum, 80.2% claimed to have been informed of the right to cancel before agreeing to the purchase.⁴⁸ Still, it is not clear how many of the dissatisfied knew of their rights.

PSRG also explored how the consumers who were less than very satisfied responded to the experience. Of the 28 consumers in that category, 86.8% did

⁴² *Id.* at I-5. By contrast, 78.3% stated that they were “very satisfied” with their purchases.

⁴³ *Id.* at III-23, III-26.

⁴⁴ *Id.* at I-5.

⁴⁵ *Id.* at III-26.

⁴⁶ *Id.* at III-30–31.

⁴⁷ *Id.* at I-6, III-32, III-38.

⁴⁸ *Id.* at I-6.

nothing.⁴⁹ Again, though, the small number of dissatisfied consumers raises questions about how significant those numbers are. When PSRG inquired as to the reasons for the failure to act, 63% explained that they “weren’t that dissatisfied,” which again may explain why they failed to invoke the cooling-off rule.⁵⁰ Nineteen percent reported that action was “too much trouble,” while 27% expressed the view that “it wouldn’t do any good”; 27% “didn’t want to offend the salesperson.”⁵¹

The PSRG Study also sheds some weak light on the rationale for the FTC Rule: arming consumers against hard sales. Specifically, the Study suggests that many consumers proved able to resist hard sells. Of those contacted at least once by a door-to-door seller, only 28.6% reported making at least one purchase.⁵² Whether that is because hard sells had become less common since promulgation of the FTC Rule is impossible to tell, but if few consumers rescind, it is difficult to see why the Rule would have caused merchants to change their behavior.

The second study sponsored by the FTC was conducted by Walker Research, Inc.⁵³ Walker interviewed 112 executives of companies involved in door-to-door sales, though not all completed all the questions.⁵⁴ Only 2% of the respondents concluded that the Rule had increased the number of cancellations their company experienced,⁵⁵ while 18% said that their customers had not cancelled contracts within the three-day cooling-off period.⁵⁶ When asked for their best estimate of the number of their company’s total contracts cancelled within three days, whether or not it was pursuant to the Rule, the 100 executives responding reported an average of 11,935 cancellations, representing 0.3% of all direct sales contracts entered into by the companies.⁵⁷ That number may not accurately report the number of

⁴⁹ *Id.* at III-27. PSRG reported that some complained to the seller, asked for repair, refund, or an exchange, or tried to cancel their purchases or did cancel them, or some combination of the foregoing. Because PSRG reported that no one invoked the FTC Rule, it appears that those who tried to cancel or succeeded in doing so did so independently of the Rule, perhaps after the three days elapsed.

⁵⁰ *Id.* at III-26.

⁵¹ *Id.*

⁵² *Id.* at III-6.

⁵³ WALKER RESEARCH, INC., THREE-DAY COOLING-OFF PERIOD TRADE RULE EVALUATION STUDY (1981) [hereinafter WALKER STUDY].

⁵⁴ *Id.* at 4.

⁵⁵ *Id.* at 16.

⁵⁶ *Id.* at 42.

⁵⁷ *Id.*

cancellations, however, because 35% of the respondents either did not know if their company had experienced cancellations or explained that cancellations were handled by the distributor.⁵⁸ Nearly half of the executives answering the question (47 of 100) reported having had a contract cancelled within three days;⁵⁹ of those, 25 stated that 1% of their customers cancelled; three reported a 2% or 3% cancellation rate; three each experienced an 8% and 10% cancellation rate; two claimed a 12% cancellation rate; four reported that 20% of their customers rescinded within three days; two said 25% did; one said that 28% did; and four did not know how many cancelled.⁶⁰ The average cancellation rate among those reporting cancellations was 6%.⁶¹

Of the 106 respondents who stated that their companies had a refund policy, 71% stated that the time limit for returning items either exceeded three days or that they had no time limit; only 19% had a three-day limit, and of course it is impossible to know how many of those would have selected that limit in the absence of the Rule.⁶²

Just under half the respondents, or 53, claimed knowledge of their company's sales or marketing procedures before 1974, when the Rule went into effect.⁶³ Of those, 81% said their company allowed customers to cancel the purchase, while 17% reported that their companies did not provide such a right.⁶⁴ Of the 43 that had a cancellation policy in place before promulgation of the Rule, 86% reported that it exceeded three days while 7% said that it ran for three days.⁶⁵

While Walker found that many of the executives knew something about the cooling-off period Rule—65% stated that buyers have three days to cancel transactions and 79% had “partially true” knowledge of the cooling-off period law—it also reported that 21% “were unable to provide any correct or specific

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 43.

⁶¹ *Id.*

⁶² *Id.* at 25.

⁶³ *Id.* at 30–31.

⁶⁴ *Id.* at 31.

⁶⁵ *Id.*

knowledge of the Rule,” and only 1% of the respondents stated all parts of the Rule’s requirements as it related to their company.⁶⁶

II. THE SURVEY

The survey was conducted during 2010. Three research assistants, Vitaly Libman, Jamie Weller, and Alexander Bader, called 1,875 businesses thought to be subject to cooling-off period rules. Ultimately, representatives of 200 businesses agreed to answer questions, or 10.7% of the businesses called.⁶⁷ Of those, 155 stated that they provided cooling-off period notices, or 77.5%. The businesses answering questions collectively provided consumers with at least 162,546 cooling-off period notices.⁶⁸

It was not possible to survey pure door-to-door sellers, which would have been desirable given the focus of the early cooling-off period laws on such transactions. Such businesses are rare these days.⁶⁹ Thus, the survey cannot shed light on whether cooling-off period laws assisted consumers in dealing with door-to-door sellers, except by inference.

⁶⁶ *Id.* at 9–10.

⁶⁷ The businesses called included 40 debt management businesses (none of whom answered questions), 1,735 home improvement contractors (175 respondents), and 100 gyms (25 respondents).

⁶⁸ This figure was arrived at by asking those responding to questions, “About how many times have you sold something and given the customer a contract with a right to cancel?” When respondents answered with a range (e.g., 200–300), the lowest number was selected for purposes of this calculation; accordingly, the actual number might be much higher.

⁶⁹ This contrasts with their prevalence in the past. *See, e.g., Hearings on S. 1599, supra* note 18, at 14 (statement of Paul Rand Dixon, Chairman, F.T.C.) (“The door-to-door salesman has been part of the American scene from the earliest days of our country. . . . Over the years the products he has sold have encompassed just about every type that can be found on the market. The direct selling distributive process has grown with the Nation until today we have approximately 2 million door-to-door salesmen offering the products of approximately 1,500 direct selling companies whose combined annual business is of multibillion-dollar proportions.”). *See also In re Public Hearing, supra* note 13, at 117 (“depending on whose statistics you read and believe, there are between 5.2 and 5 million door-to-door salesmen, still the dishonesty is probably less than 10 percent”). By contrast, the Bureau of Labor Statistics estimated that as of 2012, the country had 6,650 door-to-door sellers, news or street vendors, or related workers (the statistics are not broken out separately). *Door-to-Door Sales Workers, News and Street Vendors, and Related Workers*, BUREAU OF LABOR STATISTICS (May 2012), <http://www.bls.gov/oes/current/oes419091.htm>. Conceivably, cooling-off period laws contributed to the demise of door-to-door sellers, though it seems unlikely given that so many other businesses subject to such laws have survived, and even flourished. A more plausible explanation is that the low cost of other marketing methods—such as selling on the internet, email marketing (often called spam), telemarketing, direct mail, and the like—rendered door-to-door sales uncompetitive.

Such an inference may be drawn from the fact that many of the business answering questions were home improvement contractors, however. Home improvement selling often takes place at least partially in the home; contractors may need to visit the home to estimate costs and make recommendations, for example. But because the survey did not include a question designed to determine the extent to which contacts occurred in the home, it is not possible to know how many of those answering the survey did in fact visit consumers' homes, much less attempt to conduct business there.

The first question posed in our survey asked if the businesses gave consumers a "written statement informing them that they have a right to cancel the contract;" only those who answered "yes" were asked further questions. Consequently, all the businesses that reported that few consumers rescinded claimed that they provided such a notice to consumers.

Of those providing the cooling-off period notices, as Figure 1 indicates, more than a third (35%) reported that buyers never cancel within three days, and another 29% claimed that fewer than 1% of the buyers cancelled within three days. Eight percent indicated that at least 1% but no more than 2% of the buyers rescinded within three days. In other words, nearly three quarters of the respondents stated that 2% or fewer consumers cancelled within three days. Even that number may understate the number of cancellations respondents reported however, because 10% of the respondents used non-numerical statements that implied low numbers of cancellations (e.g., "very slim," "slim," "very few," "few," and "very small") to indicate how many consumers rescinded. Only 3% reported that 10% or more of their buyers cancelled, with only 1%—or two respondents—reporting at least a 20% rate of rescission. Another 2% stated that 3-5% of buyers cancelled within three days, and 8% reported a cancellation rate of at least 5% but no more than 10%. Table 1 shows the raw numbers in a tabular form.

These numbers show such a low rate of rescission that they raise serious questions about the effectiveness of cooling-off periods. How many consumers must rescind to make rescission an effective remedy is difficult to determine. Ideally, enough consumers would rescind to deter merchants from engaging in inappropriate sales practices, like the hard sell tactics described above, and all consumers who had agreed to a bad bargain, perhaps because of an impulse purchase at an excessive price, would rescind—but no other consumers. However, figuring out how many consumers must rescind to meet those standards is more difficult than just identifying the goal.

One possible reference point is retail store return rates. It appears that consumers are more likely to return items to stores than invoke the cooling-off periods many of our survey respondents were obliged to provide. According to the National Retail Federation, returns amounted to 8.77% of total sales in 2012.⁷⁰ However, it would be a mistake to read too much into the comparison. Retail store return rates also include fraudulent returns, returns of gifts, and items that are very different from the subjects of cooling-off periods. Consumers returning an item to a store obviously have the item in their possession and so can more readily form a negative opinion of it than is typically true of things subject to cooling-off periods; therefore the figures are not strictly comparable. Still, the greater tendency of consumers to return items to stores than to use cooling-off periods offers further support for the notion that cooling-off periods are not very effective consumer protections.

The study also suggests a way to make cooling-off rights more effective: by mandating oral notice of rescission rights. Question seven inquired whether sellers “bring up with buyers the buyer’s right to cancel.” Though 32% (representing 51 merchants) stated that they never did,⁷¹ nearly half—52% (81)—replied that they did so at least 76% of the time, while another 2% (3) said they raised the matter “often,” one percent reported that they “usually” noted the right to cancel, and 6% (9) simply answered “yes.”⁷² Another 4% (7) said they mentioned the right to

⁷⁰ See *Consumer Returns in the Retail Industry*, THE RETAIL EQUATION 3 (Dec. 2012), http://www.theretailequation.com/Retailers/images/public/pdfs/industry_reports/ir_2012_nrf_retail_returns_survey.pdf. The survey reported that return fraud represented 3.4% of total returns and that more than a third of gift recipients would return an item during the holiday season. *Id.* at 3–4. See also *Crafting a Returns Policy that Creates a Competitive Advantage Online*, FORRESTER CONSULTING 6 (Apr. 2008), http://www.ups.com/media/en/returns_forrester.pdf (“Return rates for the online retail industry converge at around 7%.”).

⁷¹ Those saying they did not review the right to rescind with customers explained “[n]ever, though it is in the contract. In this day and age you must accentuate the positives”; “[b]eyond it being in the contract, we do not bring it up”; “[i]t’s in the contract and I ask them to read it”; “[w]e try not to bring it up because psychologically you may induce a cancellation”; “[n]o, because the agreement we have is pretty clear. The right to rescind is also located at the end of the contract, which was written by a lawyer and then revised by me to make even clearer. I don’t point it out to them in the contract because most of my customers have more than a high school education.”

⁷² Typical comments by respondents saying they explained the right to rescind included “[w]hen I go over the contract with the consumers, I tell each of them of the right to cancel”; “[w]e ask if the customer understands [the] cancellation rule”; “[w]e bring it up on every contract, as it is written in and read aloud, 100% of the time”; “the provision regarding the right to cancel is written in bold”; “I say that under the law . . . you have the right to cancel in 3 business days, and if [you] would like to cancel after that [it] would likely be okay also as I’m flexible”; “I point it out specifically in the contract as I go through it with the customer. I make sure I do this because sometimes consumers will sign the contract

rescind more than zero but no more than a quarter of the time; and 1% (2) each stated that they brought it to the buyer's attention 26-50% of the time and 51-75% of the time.⁷³

Comparison of rescission rates for those who provided both oral and written notice with those who provided only the written notices shows that those who also told consumers about the right to rescind experienced a higher rescission rate at a statistically significant level.⁷⁴ Figure 2 shows rescission rates for the 106 respondents who said they brought up the right of rescission with buyers compared with the same data for the 51 sellers who said they never brought it up with buyers.⁷⁵ Fifty-three percent of the sellers who gave only a written notice and did not speak of the buyer's right to cancel said buyers never cancelled, nearly double the percentage for sellers who did tell buyers (27%). When the percentage that said they had never had a buyer who cancelled is added to the percentage that said less than 1% cancelled, the percentages are 80 and 57 for those who did not tell buyers and those who did, respectively. Businesses that provided both oral in-person and written notices of the right to rescind were more than twice as likely to report that more than 1% of their customers cancelled contracts as those that provided only written notices. It thus appears that oral notice has an impact on whether people

without reading it"; "[i]f you (the consumer) have concerns about this just know you do have a right to cancel in three business days (if the consumer is hemming and hawing, telling them this shows them that they have options." Some responses raised questions about whether the respondent was violating the law: "[w]e cover the entire contract with them. We also explain to customers that they have the right to nullify their right to cancel and have the job start immediately should they want to do so."

⁷³ The Yale Study found that "about half of the dealers" gave consumers oral notice of the right to rescind. Yale Study, *supra* note 39, at 629. Thus, the practice of telling consumers about cooling-off periods is not novel.

⁷⁴ Statistical significance was measured by a chi square test. Significance was found at a .05% level. For purposes of this comparison, the eleven respondents who provided the non-numerical answers very slim, slim, very few, few, or very small were treated as if they had answered 1% to 5%, while the two who answered not many or some but not that many were treated as if they replied 5% to 10%. All eleven reported that they told consumers orally about the right to rescind.

⁷⁵ Some statutes require merchants to provide both oral and written notice of the right to rescind. *See, e.g.*, ARIZ. REV. STAT. ANN. § 44-1276 (2003); ARK. CODE ANN. § 4-89-108 (2001); CAL. CIV. CODE § 1689.7 (West 2011); CONN. GEN. STAT. ANN. § 42-135a (West 2000); DEL. CODE ANN. tit. 6, § 4404 (2012); IDAHO CODE ANN. § 48-1004 (2003); IOWA CODE ANN. § 555A.4 (West 2001); MD. CODE ANN., COM. LAW § 14-302 (LexisNexis 2013); MASS. GEN. LAWS ANN. ch. 93, § 48 (West 1997); MINN. STAT. ANN. § 325G.08 (West 2004); NEV. REV. STAT. ANN. § 598.280 (LexisNexis 2004); N.M. STAT. ANN. § 57-12-21 (2005); N.Y. PERS. PROP. LAW § 428 (McKinney 2013); N.D. CENT. CODE § 51-18-02 (1999); OHIO REV. CODE ANN. § 1345.23 (West 2004); OR. REV. STAT. § 83.730 (1988).

rescind their contracts: those who are given only written notices are much less likely to cancel.

It makes intuitive sense that those who are both told about the right to rescind and given written notice are more likely to rescind than those merely receive the written notice for several reasons. First, oral disclosures increase the likelihood that those who do not read written notices become aware of the right to rescind.⁷⁶ Mounting evidence shows that consumers overlook written disclosures.⁷⁷ If consumers who receive only a written notice never read it, they may not realize they have a right to rescind.

Second, by mentioning the right to rescind, merchants may make consumers feel backing out is acceptable, in a way that just providing a legal notice does not. Third, oral communication of a cooling-off period may be effective for some consumers in conveying meaning in a way that written notices are not.⁷⁸ While the

⁷⁶ *But see* Fred McChesney, *Regulating Without Evidence: The FTC's "Cooling-Off" Rule*, J. CONTEMP. STUD. 57, 65 (1984) (claiming that ignorance of the cooling-off rule was not the reason people did not invoke the rule; rather, it was because consumers were "overwhelmingly satisfied with their purchases").

⁷⁷ *See, e.g.*, Debra Pogrud Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, in SELECTED WORKS OF DEBRA P. STARK 1, 30 (2009) (Many participants in an experiment signed a consent form without even skimming it. After being told they had signed a fake form which obliged them to administer electric shocks and do pushups, and which the form itself advised against signing, a third signed the genuine consent without reading it.); *7,500 Online Shoppers Unknowingly Sold Their Souls*, FOXNEWS.COM (Apr. 15, 2010), <http://www.foxnews.com/scitech/2010/04/15/online-shoppers-unknowingly-sold-souls/> (consumers clicked on box to consent to software download that also required them to surrender their soul; had they read the form, they would have seen that they could have retained their souls and received payment by clicking a different box); Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199 (2009) (survey found that significant majorities of consumers reported that they did not read certain standard form contracts before agreeing to them); *see generally* Jeff Sovern, *Preventing Future Economic Crises Through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 OHIO ST. L.J. 761, 797–98 (2010); OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (2014).

⁷⁸ *See* Deborah Tannen, *Relative Focus on Involvement in Oral and Written Discourse*, in LITERACY, LANGUAGE, AND LEARNING: THE NATURE AND CONSEQUENCES OF READING AND WRITING 124, 128 (David R. Olson, Nancy Torrance & Angela Hildyard eds., 1985) ("[A] writer and reader are generally separated in time and place, so immediate context is lost. . . . [T]he reader cannot ask for clarification when confused, so the writer must anticipate all likely confusion and preclude it by filling in needed background information and as many as possible of the steps of a logical argument. . . . [B]ecause the writer and reader are likely to share minimal social context, the writer can make fewer assumptions about shared attitudes and beliefs.").

results of studies of the effectiveness of oral communications versus written have varied, some studies have found in some circumstances that those who listen to information have a more accurate memory of what they heard than those who read the same information.⁷⁹ It is possible that for some consumers, cooling-off periods are best communicated orally, even though some other information is better conveyed in writing.⁸⁰ In any event, since those who told consumers about the right to rescind also gave consumers the written notice, consumers who learn better through writing would also have been reached. The combination of both telling consumers and giving them the writing should have conveyed the existence of the right to rescind to all consumers who learn through either writing or speech, while giving only the written notice reaches only those who read notices.

If lawmakers retain cooling-off rules, they should consider adding oral disclosure requirements to the cooling-off period laws that do not already include them.⁸¹ Indeed, lawmakers should consider adding oral disclosure requirements to

⁷⁹ Milton W. Horowitz & Alan Berkowitz, *Listening and Reading, Speaking and Writing: An Experimental Investigation of Differential Acquisition and Reproduction of Memory*, 24 PERCEPTUAL & MOTOR SKILLS 207, 214 (1967) (when some students were read a story and others read it themselves, those “who listened to the story displayed a far more accurate memory than [those] who read it”). But other results have been more nuanced. See Milton W. Horowitz, *Organizational Processes Underlying Differences Between Listening and Reading as a Function of Complexity of Material*, 18 J. COMM. 37 (1968) (listeners were more likely than readers to distort what they had heard but omitted less); Gert Rickheit, Hans Strohner, Jochen Müsseler & Dieter Nattkemper, *Recalling Oral and Written Discourse*, 4 J. EDUC. PSYCH. 438 (1987) (the subjects’ general communication experiences determine whether they take in the information better orally or in writing); Jochen Müsseler, Gert Rickheit & Hans Strohner, *Influences of Modality, Text Difficulty, and Processing Control of Inferences in Text Processing*, in INFERENCES IN TEXT PROCESSING 247 (G. Rickheit & H. Strohner eds., 1985) (the subjects who heard an easy text made more elaborative inferences than those who read it while with a more difficult text that was reversed).

⁸⁰ Others may more readily take in information in writing than orally, see, e.g., Paul Hong, Ara Samuel Makdessian, David A.F. Ellis & S. Mark Taylor, *Informed Consent in Rhinoplasty: Prospective Randomized Study of Risk Recall in Patients Who Are Given Written Disclosure of Risks Versus Traditional Oral Discussion Groups*, 38 J. OTOLARYNGOLOGY-HEAD & NECK SURGERY 369 (2009); Ara Samuel Makdessian, David A.F. Ellis, & Jonathan C. Irish, *Informed Consent in Facial Plastic Surgery: Effectiveness of a Simple Educational Intervention*, 6 ARCH FACIAL PLASTIC SURGERY 26 (2004), and so oral disclosures should not supersede written disclosures, but supplement them. See also I.J. Langdon, R. Hardin & I.D. Learmonth, *Informed Consent for Total Hip Arthroplasty: Does a Written Information Sheet Improve Recall by Patients?*, 84 ROYAL C. SURGEONS ENG. 404 (2002) (patients receiving both written and oral information who were later tested on recall of the information typically scored better than those who were given only oral information).

⁸¹ Some laws already provide for oral notices. See, e.g., 12 C.F.R. § 226.5a(d)(1); see also *supra* note 75. While oral notices create enforcement issues, those issues can be overcome. Businesses can record the giving of the notice and ask the consumer to identify himself or herself on the recording and acknowledge hearing the notice. Consumers can be asked to sign an acknowledgement of receipt of the

the general consumer protection arsenal. Of course, just because oral notice is effective in the limited context of cooling-off periods does not mean that it will help consumers in other contexts, but further study could clarify its impact.⁸²

Early advocates of cooling-off periods might not have been surprised by these results. Many keenly understood that consumers would not avail themselves of rescission rights if they were not aware of them.⁸³ Indeed, one advocate, a special investigator in the Carbondale, Illinois office of the Consumer Protection Division of the Illinois Attorney General's Office, called notice "the cornerstone of the cooling-off provision" while noting that "[i]t has been the author's personal experience that many consumers have either no knowledge of their rights under the cooling-off provision, or have inflated notions of its application to any sale of merchandise at any location."⁸⁴ Commentators understood also the need to use notices that would communicate effectively to consumers that they had a right to

oral notice, just as they are asked to sign to indicate receipt of a written notice. Credit card issuers are already required to provide oral notices when they solicit consumers to apply for a credit card on the telephone, so these problems have already been dealt with, though card issuers also have the option of providing the information in writing within thirty days after the consumer requests the card. *See* 12 C.F.R. § 226.5a(d)(2)(ii).

⁸² Ironically, one implication of the study is that merchants who wish to reduce rescission rates and who currently tell consumers about the right to rescind should consider remaining silent about cooling-off periods if the law does not require them to tell the consumer.

⁸³ *See, e.g., In re Public Hearing, supra* note 13, at 39 (testimony of Sen. Frank E. Moss) ("To fail clearly to inform the buyer of his rights would be to emasculate the intended effect of this regulation, and the Commission has wisely recognized this fact."); Byron D. Sher, *The "Cooling-Off" Period in Door-to-Door Sales*, 15 UCLA L. REV. 717, 761 (1968) ("A statutory right to cancel will be useless to the consumer unless he is fully informed of the right while he still has time to exercise it. A cooling-off statute that does not require such disclosure creates the illusion of consumer protection without in fact providing any."); Note, *The Direct Selling Industry: An Empirical Study*, 16 UCLA L. REV. 883, 1012–13 (1969) ("Any form of cooling-off statute adopted is totally meaningless unless those for whose benefit it is passed are aware that they have the right to cancel."). Concern was also expressed about whether the wording of the notice would convey to consumers their rights. *See Hearings on S. 1599, supra* note 18, at 46 (statement of David Caplovitz, Professor, Columbia University) ("I would hope that in the final draft of the bill, a more frequently used word, such as 'cancel' can be substituted for the word 'rescind,' which I think will not be easily understood by the kinds of consumers I have had most experience with.").

⁸⁴ Ross, *supra* note 33, at 438 ("If the buyer is to have full access to his right to cancel, he must be made fully aware of that right. Since many consumers are unaware of the cooling-off provision or their rights under it, the notice provision given by the seller should be displayed in such a fashion that the consumer is immediately made aware of his right to rescind.").

rescind.⁸⁵ They also feared that those most likely to be swindled might not read the notices.⁸⁶

While it appears clear that written notice of a right to rescind is not enough by itself to protect consumers, it is less clear whether oral disclosures of rescission rights are the solution to the problem of insufficient consumer use of cooling-off periods. Even when consumers are told of the right to rescind, few consumers take advantage of it. According to the study, 14% of the merchants who told consumers of the right to rescind had a rescission rate of at least 5%, while 43% reported at least a 1% rate of rescission. Are those the appropriate numbers? This study cannot answer that question. The amount necessary to deter bad behavior might vary from merchant to merchant while the appropriate rescission rate might also differ for different merchants. Still, the numbers seem low enough to raise doubts about the effectiveness of cooling-off periods as a consumer protection device even when consumers are both told about the right to rescind and receive written notice.

Nevertheless, the survey cannot by itself establish that cooling-off periods are ineffective, for several reasons. First, it obviously sheds no light on those who declined to answer the questions. As with any survey, the respondents who chose to answer may differ from those who refused. For example, respondents are likely to be more conscientious and public-spirited than non-respondents are, in that they were willing to answer the questions even though they did not receive any benefit from doing so.⁸⁷ If that is true, they are less likely to engage in the troublesome

⁸⁵ See, e.g., *Hearings on S. 1599*, *supra* note 18, at 46 (statement of David Caplovitz, Professor, Columbia University) (“[T]he part of the notice which informs the consumer that he has a right to question that contract if he is dissatisfied with the merchandise frequently appears in very small type toward the end of the document, and most of the people that I am speaking of, and that is the low income consumers, are not likely to read these documents, and in any case they are not likely to understand what that paper is about.”); Beaufort J.B. Clarke, Comment, *Home Solicitation Sales—The Legislative Response to a “Cooling-Off” Period*, 24 S.C. L. REV. 880 (1972) (“[I]f the intent of the statute is to protect those most abused, in effect, low-income groups, the requisite formality of disclosure should turn on what would be sufficient to alert the average member of that group.”); Meserve, *supra* note 21, at 1179 (“It would not take much imagination to phrase . . . a notice in words that are comprehensible only to lawyers and to sandwich this notice in among other provisions of the contract in such a fashion that only the most scrupulous consumer could happen upon it. At the minimum, therefore, the statute should specify a uniform wording of the notice and require “clear and conspicuous” disclosure. Perhaps it should also specify the size, boldness and color of type.”).

⁸⁶ *In re Public Hearing*, *supra* note 13, at 81 (testimony of Betty Furness, Chairman, New York State Consumer Protection Board) (“We must take cognizance of the fact that the very people most easily defrauded are those who either cannot or will not read pages of complicated legal material, whether it is a deliberately obfuscating contract or even a declaration of their own rights.”).

⁸⁷ Cf. Sovern, *supra* note 77, at 783.

conduct that inspired cooling-off period rules in the first place, and so we would expect to see lower rescission rates for them than for those who did not answer. In other words, even if cooling-off period rules did not help the customers of those who answered the questions, they might still help the customers of other, less public-spirited sellers. This point finds support in the fact that, without being prompted, 10 respondents mentioned that other businesses engaged in high pressure sales methods, and another four, for a total of 14 or 7% of the total, stated that customers had complained of other sellers using high pressure tactics.

Second, the respondents might not have reported accurately the number of customers who rescinded. They might have been dishonest or mistaken. While it is difficult to identify a motive for dishonesty in that the callers were clearly not potential customers or regulators, some merchants might simply have been uncomfortable acknowledging a painful truth. Optimistic sellers might also believe incorrectly that they have fewer cancellations than they actually have.

Third, the businesses surveyed were confined to certain types, located in certain states. Just because some types of businesses experience low rescission rates does not mean that other businesses do.

Accordingly, the survey cannot conclusively rebut the claim that cooling-off periods may still be a useful consumer protection device. However, it does raise serious doubt about the validity of that claim. At a minimum, it suggests that further study is required before rule-makers rely on cooling-off periods to address genuine consumer protection problems.

III. SOME SPECULATIONS ON WHY COOLING-OFF PERIODS ARE NOT MORE EFFECTIVE

The survey discussed in the preceding Part raises serious questions about the efficacy of cooling-off period rules. This Part explores why they are ineffective.⁸⁸

⁸⁸ The 1969 Yale Study, *supra* note 39, at 628–30, offered its own speculations:

Several factors explain the limited value of the one-day cooling-off period. First, 40 dealers, about 90 per cent of those responding, stated that before the Act they allowed customers to cancel sales already concluded. If this is true, the statute simply brought the law into line with existing business practices. Second, although notice of the buyer's right to cancel must be printed on the contract, the seller does not have to inform the buyer orally of his rights. About half of the dealers reported that they did so inform their buyers, but it is likely that many buyers never know they have the right to cancel. Third, and most important, the period is simply too short to have a substantial effect.

A. *Are Cooling-Off Periods Ineffective Because of Consumer Irrationalities?*

As with many consumer protections, cooling-off periods assume that consumers make decisions rationally, at least when reflecting upon whether they wish to rescind the transaction.⁸⁹ However, it has become commonplace to note that behavioral economics has proved that in many respects, consumers are not rational. The likelihood that consumers will use cooling-off periods is affected in particular by the endowment effect, its sibling, the status quo effect, and cognitive dissonance.

1. The Endowment Effect

Experiments have demonstrated that consumers often want to retain items that they have possessed even briefly. For example, when experimenters randomly distributed to some people coffee mugs and to others candy bars, nearly all declined to trade their item for the other even though they had had the item only for a short time and had not been given a choice over which item they would receive.⁹⁰

Many of the experiments involving the endowment effect have been based on something already in the possession of the consumer. Often with cooling-off periods, the consumer will not have the sale item yet because the seller will refrain from providing it until the cooling-off period has expired (this is not always, true; consumers purchasing gym memberships, for example, can typically use the gym as soon as they have signed up). One study found that the endowment effect can

Most buyers do not reconsider a contract until after the goods are received or the services are performed. These events will usually not occur within a day of the sale, especially since the sellers know that the contract may be cancelled in that time.

Id. (footnotes omitted).

⁸⁹ See, e.g., Meserve, *supra* note 21, at 1188 (“the cooling-off period will . . . be extremely helpful in combating high pressure or coercive sales tactics and in fostering rational and informed consumer choice by reducing both impulse buying and buying without an opportunity to compare value”).

⁹⁰ Jack Knetsch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, AM. ECON. REV. 1277, 1278 (2000) (89% of those given the mug refused to trade it for a candy bar while 90% of those given a candy bar refused to trade it for a mug); see also Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 194–97 (1991) (describing additional experiments); Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1342 (1990) (“instant endowment effect”); Jack L. Knetsch & J.A. Sinden, *Willingness to Pay and Compensation Demanded: Experimental Evidence of an Unexpected Disparity in Measures of Value*, 99 Q. J. ECON. 507 (1984) (other experiments).

apply even to something the consumer never possessed. The study authors gave consumers coupons for a restaurant and found that “mere possession of only a coupon for one of the choice options leads to an instantaneous increase in subjects’ preference for that option.”⁹¹ As Stacy L. Wood has written, studies suggest, “product ownership depends more on cognitive perception than physical possession.”⁹² Accordingly, the endowment effect, or something like it, could help explain why consumers rarely take advantage of cooling-off periods.

Consumers tend to underestimate the impact of the endowment effect, and so they become more attached to objects than they anticipate.⁹³ Therefore, consumers who decide to buy on the theory that they can always back out within three days are unlikely to realize that the decision to buy increases their desire to own the object long before the three days have elapsed. Indeed, cooling-off periods may actually be self-defeating as a consumer protection. Thus, Jon D. Hanson and Douglas A. Kysar have argued that by “simply getting the product into the hands of the consumer, its value to that consumer may be enhanced.”⁹⁴ Richard Thaler has added:

Consider the case of a two-week trial period with a money back guarantee. At the first decision point, the consumer thinks he can lose at most the transaction costs of taking the good home and back. If the transaction costs are less than the

⁹¹ Sankar Sen & Eric J. Johnson, *Mere-Possession Effects Without Possession in Consumer Choice*, 24 J. CONSUMER RES. 105, 111 (1997).

⁹² Stacy L. Wood, *Remote Purchase Environments: The Influence of Return Policy Leniency on Two-Stage Decision Processes*, 38 J. MARKETING RES. 157, 167 (2001).

⁹³ George Loewenstein & Daniel Adler, *A Bias in the Prediction of Tastes*, 105 ECON. J. 929, 929 (1995) (“In [two] experiments, subjects without an object underestimated how much they would value the object when they received it.”).

⁹⁴ Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 734 (1999). They also observed:

Thus, manufacturers might use money-back guarantees, test drives, thirty-day no-risk trial periods, free samples, and other marketing ploys, all of which are designed to create in the consumer a sense of ownership. Because of the endowment effect, the sense of ownership by itself might lead the consumer to experience an increased valuation of the product. . . . [M]arketers utilizing an endowment effect approach have the added advantage that consumers will fail to perceive the risks of taking a product home—they will, in effect, really perceive it as a “no-risk” offer.

Id.

value of the utilization of the good for two weeks, then the maximizing consumer pays for the good and takes it home. The second decision point comes two weeks later. If the consumer has fully adapted to the purchase, he views the cost of keeping the good as an opportunity cost. Once this happens, the sale is more likely.⁹⁵

The endowment effect is a subset of prospect theory, the theory devised by Amos Tversky and Daniel Kahneman, which claims that consumers are generally risk-averse when facing losses.⁹⁶ If the consumer perceives rescinding as a loss of the item contracted for, then the consumer will wish to avoid rescinding. While the consumer would in exchange regain the purchase price, prospect theory indicates that gains are less attractive to consumers than loss-avoidance, and so the gain of the purchase price would not offset the loss.

2. The Status Quo Effect

Other irrationalities can produce a similar effect. Thus, the status quo effect, which is similar to the endowment effect, refers to what may be thought of as consumer inertia: the tendency of consumers to stay with the status quo.⁹⁷ Again, that would argue for not rescinding a contract, once made.

3. Cognitive Dissonance

Cognitive dissonance may also help explain the reluctance of people to rescind. Nobel laureate George A. Akerlof and William T. Dickens have written, “persons who have made decisions tend to discard information that would suggest such decisions are in error because the cognition that the decision might be in error is in conflict with the cognition that ego is a smart person.”⁹⁸ It appears that once

⁹⁵ Richard Thaler, *Toward a Positive Theory of Consumer Choice*, 1 J. ECON. BEHAV. & ORG. 39, 46 (1980). See also Yale Study, *supra* note 39, at 628–30 (“[D]ealers may use the right to cancel as part of the sales pitch to lower the buyer’s resistance to the sale.”).

⁹⁶ See DANIEL KAHNEMAN, THINKING FAST AND SLOW 293 (2011).

⁹⁷ See Raymond S. Hartman, Michael J. Duane & Chi-Keung Woo, *Consumer Rationality and the Status Quo*, 106 Q. J. ECON. 141, 143–44 (1991); Eric J. Johnson, John Hershey, Jacqueline Meszaros & Howard Kunreuther, *Framing, Probability Distortions, and Insurance Decisions*, in CHOICES, VALUES, AND FRAMES 224, 235–37 (Daniel Kahneman & Amos Tversky eds., 2000); Kahneman et al., *supra* note 90, at 197 (“[I]ndividuals have a strong tendency to remain at the status quo”); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 8 (1988) (“[D]ecision makers exhibit a significant status quo bias.”).

⁹⁸ See George A. Akerlof & William T. Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. 307, 309 (2001); see also Mara Mather, Eldar Shafir & Matcya K. Johnson, *Misrememberance of Options Past: Source Monitoring and Choice*, 11 AM. PSYCHOL. SOC’Y 132, 137

people conclude, many are unwilling to abandon that conclusion, even when the evidence behind the conclusion has been refuted.⁹⁹ Thus, once consumers have chosen to buy something, their confidence in the decision increases and they may resist acknowledging reasons to rescind the purchase.¹⁰⁰

Finally, researchers have also found that when consumers purchase items that carry a right to rescind, they may overestimate the likelihood that they will later exercise the right to rescind: “consumers believe that when the product is purchased . . . they will follow up to opt out, but when the time comes, they do not

(2000) (“The present study shows a general tendency for memory errors to favor one’s chosen option, by misattributing positive qualities to the chosen option and negative qualities to the foregone alternative.”).

⁹⁹ See Craig Anderson, Mark Lepper & Lee Ross, *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037 (1980) (“[describing experiments that] offer further evidence for the basic hypothesis that people often cling to their beliefs to a considerably greater extent than is logically or normatively warranted [T]hese studies [also] . . . suggest[] that initial beliefs may persevere in the face of a subsequent invalidation of the evidence on which they are based, even when this initial evidence is itself as weak and inconclusive as a single pair of dubiously representative cases.”). See also Charles Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2098 (1979) (“People who hold strong opinions on complex social issues are likely to examine relevant empirical evidence in a biased manner. They are apt to accept ‘confirming’ evidence at face value while subjecting ‘disconfirming’ evidence to critical evaluation, and as a result to draw undue support for their initial positions from mixed or random empirical findings.”); S. Plous, *Biases in the Assimilation of Technological Breakdowns: Do Accidents Make Us Safer?*, 21 J. APPLIED SOC. PSYCHOL. 1058, 1078 (1991) (emphasis in original) (“In all three studies, technological breakdowns led to biased assimilation and attitude polarization even though subjects were exposed to identical descriptions of the same event Previous supporters of a given technology tended to focus on the fact that the safeguards worked and tended to be reassured by noncatastrophic breakdowns, whereas opponents focused on the very fact that the breakdowns occurred and tended to be disturbed that something serious had gone wrong. Moreover, supporters and opponents used the breakdowns to arrive at different conclusions about the possibility of a future catastrophe. After reading about a given breakdown, supporters reported seeing the chances of a future catastrophe as *lower* than before, while opponents reported seeing the chances as *greater* than before.”).

¹⁰⁰ See Paul Rosenfeld, John G. Kennedy & Robert A. Giacalone, *Decision Making: A Demonstration of the Postdecision Dissonance Effect*, 126 J. SOC. PSYCHOL. 663 (2001) (once people make a decision, their belief in the correctness of the choice increases); Aaron L. Brownstein, Stephen J. Read & Dan Simon, *Bias at the Racetrack: Effects of Individual Expertise and Task Importance on Predecision Reevaluation of Alternatives*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 891 (2004) (once the study participants predict that a horse will win a race, their ratings of the horse improved); Robert Knox & James A. Inkster, *Postdecision Dissonance at Post Time*, 8 J. PERSONALITY & SOC. PSYCHOL. 319 (1968) (same).

believe they have sufficient time slack to do so.”¹⁰¹ Put another way, consumers may choose to buy even if they are not certain that they wish to own the item on the theory that they have an escape valve in the form of the right to rescind, but when the time comes to exercise that right, they fail to do so.

While cooling-off periods thus seem helpful to sellers trying to make a sale, many of the merchants we surveyed were either unaware of that fact, or at least unwilling to admit it, though nearly a third were.¹⁰² One survey question asked, “Do you think buyers are more willing to buy because they have a right to cancel?” Of those answering this question, as shown in Figure 4, 86, or 58% said no, while 46, or 31% said yes. The remainder who provided cooling-off period notices gave a variety of responses, ranging from “probably” to “probably not.” One respondent who answered negatively explained “I think we’re just educating them by giving [the right to rescind]. If another [seller] did not provide the right, but had a lower price than us, they would probably get the business.” And another opined: “No. If they’re looking to buy, then [they] are in purchase mode and are not likely looking to back out.” Still another said: “That’s tough but I’d have to say it has no effect on their buying decisions regarding my business. When they hire me, it’s because they want the job done. They don’t hire me because of the right to cancel.” By contrast, a seller who gave a positive answer explained: “Yes. It gives them little bit of leeway in case of buyer’s remorse.” Another said “Yes. I think it provides a comfort level.”

The idea that consumers will not use cooling-off periods no matter what because of their own internalities¹⁰³ is somewhat inconsistent with the idea

¹⁰¹ See John G. Lynch Jr. & Gal Zauberman, *When Do You Want It? Time, Decisions, and Public Policy*, 25 J. PUB. POL’Y & MARKETING 67, 72 (2006).

¹⁰² During the 1971 FTC Hearings, one witness suggested that sellers subject to cooling-off periods might use the right to rescind as a sales point:

I could conceive of a situation where a door-to-door salesman will walk into a home and he will tout that to the buyer, and he will tell the buyer that he is better off than if he had bought downtown at one of the stores, even though he may be buying comparable merchandise, because with a door-to-door sales contract he has three days in which he can change his mind.

In re Public Hearing, *supra* note 13, at 173 (statement of Professor Jerome Shuman, Georgetown University Law Center). Stores could, of course, respond by offering a right to rescind of their own, even though they are not required to do so.

¹⁰³ Internalities have been defined as systematic consumer behaviors that function as if consumers are imposing externalities upon themselves. See Colin Camerer, Samuel Issacharoff, George Lowenstein, Ted O’Donoghue & Matthew Rabin, *Regulation for Conservatives: Behavioral Economics and the Case*

expressed above that consumers are more likely to rescind if they receive both oral and written notice of the right to rescind than simply written notice. That is because if consumers won't rescind no matter what, the form of notice should not affect the likelihood of rescission. Yet, the rate of rescission is higher—statistically significantly higher—for those who received both oral and written notice. Even for those who receive both oral and written notice, the rescission rate remains low. Perhaps, then, some consumers are able to overcome their irrationalities, but only some. In any event, these irrationalities remain a plausible explanation for low rescission rates.

B. *Is the Time Available for Rescission Too Short?*

Early advocates of the cooling-off period debated how long the period should be, something that is reflected in the fact that historically the periods have not been of uniform length.¹⁰⁴ On the one hand, advocates wanted a long enough period “to give the consumer adequate time to reconsider the purchase and exercise the right of cancellation if he so desires,”¹⁰⁵ and on the other, they feared that because sellers often refuse to deliver the goods until the cooling-off period expires, too long a

for “Asymmetric Paternalism,” 151 U. PA. L. REV. 1211, 1221 n.30 (2003); R.J. Herrnstein, George F. Loewenstein, Drazen Prelec & William Vaughan, Jr., *Utility Maximization and Melioration: Internalities in Individual Choice*, 6 J. BEHAV. DECISION MAKING 149, 150 (1993).

¹⁰⁴ Compare the one-day period specified by the Connecticut statute involved in Yale Study, *supra* note 39, at 618, or the one-day period provided for in MICH. COMP. LAWS § 445.1202 (2012), or 13 PA. STAT. ANN. § 500-202 (c)(4) (Supp. 1964), described in Comment, *Translating Sympathy for Deceived Consumers into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 421–22 (1966), with the longer periods provided under the British Hire-Purchase Act. The proposed Consumer Sales Protection Act reported by the Senate Committee on Commerce in 1968 would have provided two business days to rescind. See S. REP. NO. 90-1417 at 1 (July 17, 1968). See also *Hearings on S. 1599*, *supra* note 18, at 45 (statement of David Caplovitz, Professor, Columbia University) (wondering if 24-hour cooling-off period in the version of the bill he testified about would be sufficient); *In re Public Hearing*, *supra* note 13, at 635 (statement of Paul Hamer, Village Attorney, Wheeling, Illinois) (suggesting five “working days”).

¹⁰⁵ Sher, *supra* note 83, at 757. See also *id.* at 757–58 (“Since ‘decompression’ normally will occur soon after the salesman departs, an extended cancellation period probably is not needed to provide protection.”); *In re Public Hearing*, *supra* note 13, at 43 (testimony of Sen. Frank E. Moss) (“Just so it is long enough that an individual really has time to, as we say, cool off from the sales pitch and make a decision.”); Pamaria Rekaiti & Roger Van den Bergh, *Cooling-Off Periods in the Consumer Laws of EC Members States. A Comparative Law and Economics Approach*, 23 J. CONSUMER POL’Y 371, 385 (2000) (“[A] cooling-off period should allow the consumer sufficient time to gather and process all relevant information concerning his purchase.”). The Yale Study speculated that the one day cooling-off period at issue in Connecticut was “too short to have a substantial effect,” but its authors also thought that three days “is not likely to have a major effect on consumers or dealers.” Yale Study, *supra* note 39, at 628–30.

period would frustrate consumers awaiting performance.¹⁰⁶ Lawmakers in this country largely settled on three days seemingly based more on “feel” than any rigorous empirical analysis.¹⁰⁷ They wondered how long the period should be, but lacked a basis for deciding.¹⁰⁸ Some advocates argued for longer periods, but again without any real evidence that a longer period would produce different results.¹⁰⁹ By contrast, European law provides for a two-week right of withdrawal,¹¹⁰ though at least one cooling-off period runs for only thirty minutes.¹¹¹

The brevity of the cooling-off period seems especially significant given that advocates for such rules complained that door-to-door sellers misrepresented the quality and durability of their wares.¹¹² If sellers do not supply the goods until after

¹⁰⁶ Sher, *supra* note 83, at 758 (“To avoid the risks and inconveniences involved in leaving goods with a consumer who may thereafter cancel, many sellers no doubt will choose to withhold delivery until the cooling-off period has ended without cancellation. Thus, in some cases it is possible that the buyer will not be permitted to enjoy the goods or services as soon as he otherwise might, and that the longer the cooling-off period, the longer the delay.”). See also Note, *supra* note 83, at 1015 (“The direct selling industry has a legitimate interest in having a reasonably short cooling-off period. An excessively long period, one which would conflict with established and economical delivery practices, for example, is unfair to the industry and, therefore, should be avoided.”).

¹⁰⁷ Sher, *supra* note 83, at 758 (footnotes omitted) (three days “seem adequate.”); Note, *supra* note 83, at 1015 (“It is also difficult to see how any time beyond a period of one week substantially improves the probability that a consumer will discover that he has been pressured into purchasing something he neither needs, wants, nor can pay for.”).

¹⁰⁸ See *In re Public Hearing*, *supra* note 13, at 18 (“[FTC Assistant Director for Industry Guidance, Bureau of Consumer Protection William D.] Dixon: Do you think that three days is an adequate period for such a rule? [Representative Fred B.] Rooney: Yes, I do. I really do. I think when the wife or the husband initially signs a contract and they discuss it for a period of three days, I think that is adequate.”).

¹⁰⁹ *In re Public Hearing*, *supra* note 13, at 22 (testimony of Richard L. Levin, University of Virginia Law Student) (urging five-day period); *id.* at 58 (testimony of Donald Elberson, Executive Director, Consumer Assembly of Greater New York) (“We are also concerned with the three-day period, thinking it too short for the consumer to gather information for real decision-making. We are of the opinion that the proposal of the National Consumer Law Center of Boston, which leaves a door-to-door sale unconsummated until a consumer sends an approval notice in good time, is the type of regulation needed.”); *id.* at 345–46 (statement of M. Paul Smith, President, D.C. City Wide Consumer Council) (“three days is really not enough . . . [A] week should be the minimum.”); *id.* at 360 (statement of Georgia Dickerson, Consumer Advisor, Southeast Neighborhood Development House) (“seven calendar days”); *id.* at 853 (statement of Wilbur C. Leatherberry, Legal Aid Society of Cleveland, Ohio) (“I do not think three days is enough time.”).

¹¹⁰ See Directive 2011/83/EU of the European Parliament, art. 9(1) O.J. (L304) 78 (2011).

¹¹¹ See 12 C.F.R. § 1005.34 (2013).

¹¹² Promulgation of Trade Regulation Rule and Statement of Its Basis and Purpose, 37 Fed. Reg. 22,934, 22,938 (Oct. 26, 1972).

the rescission period has elapsed, no cooling-off period will offer much help in evaluating their quality. Even if sellers do provide the item during the three days, buyers are unlikely to be able to judge its durability so quickly.

This study sheds little light on whether longer cooling-off periods would affect rescission rates. The most that can be said is that if it is true that those who receive only a written notice do not realize they have a right to rescind, or that consumer irrationalities prevent them from rescinding, longer cooling-off periods would probably not change rescission rates. Of course, longer rescission periods have a cost of their own: because merchants typically do not supply the ordered item until the cooling-off period has expired, longer cooling-off periods delay the transaction.¹¹³ Consumers may not wish to delay transactions in exchange for a longer option to rescind, especially since few consumers actually avail themselves of that option.¹¹⁴

C. *Could Cooling-Off Period Rules Be a Victim of Their Own Success?*

Some early advocates of cooling-off periods argued that they would deter misbehavior.¹¹⁵ Apparently, the theory was that unscrupulous sellers would

¹¹³ See Rekaiti & Van den Bergh, *supra* note 105, at 381–82 (“[C]ooling-off periods increase the costs of carrying out transactions. Contracts are in effect completed only after the expiration of the cooling-off period, which causes delay and uncertainty. If the latter transaction costs exceed the benefits achieved by curing the economic distortions in consumer markets, cooling-off periods may, on balance, be welfare reducing.”).

¹¹⁴ In a different context, consumers objected to delays. The original version of the Real Estate Settlement Procedure Act (RESPA) provided that real estate closings could not take place until at least twelve days after the RESPA disclosures were provided to consumers. See Real Estate Settlement Procedures Act of 1974, Pub. L. No. 93-533, § 6(a), 88 Stat. 1726 (1974). In fact, some closings were delayed considerably beyond the twelve days, though some believe that lenders exacerbated the delays in an attempt to undermine RESPA. See H.R. REP. NO. 94-667, at 17 (1975) (dissenting views of Rep. Leonor K. Sullivan); JOHN A. SPANOGLE & RALPH J. ROHNER, CONSUMER LAW CASES AND MATERIALS 128, 129 (1979). Consumers anxious to move into their new homes were infuriated by delays that were supposedly intended to benefit them. This led to perhaps the only protest against a consumer protection law that ever took place at a football game, when consumers mobbed Wisconsin Senator William Proxmire at a Green Bay Packer football game and chanted “down with RESPA.” See *Oversight on the Real Estate Settlement Procedures Act of 1974: Hearings on S. 2327 and S. 239 before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong. at 1 (1975); see also Robert R. Elliot, *R.E.S.P.A. Revisited (Upon You)*, 62 A.B.A. J. 1131 (1976). RESPA was later amended and the current rules require the final RESPA disclosures to be made available to the borrower at least one business day before settlement. See 24 C.F.R. § 3500.10 (2013).

¹¹⁵ See, e.g., Note, *Consumer Protection: The Proposed Cooling-Off Provision*, 2 VAL. U. L. REV. 339, 346 (1968) (footnote omitted) (“The right to cancel may remove the seller’s reliance upon the expense

experience so many rescissions, with the attendant unrecovered costs, that they would abandon their misbehavior. Alternatively, they might be driven out of business. Conceivably, then, cooling-off periods have achieved that success, and the fact that few consumers exercise their right to rescind is not a reflection of the failure of cooling-off periods, but rather their success.¹¹⁶

The fact that home improvement contractors—the businesses queried most often in the survey—continue to be frequent subjects of consumer complaints somewhat undermines the notion that cooling-off periods have been successful. The argument is that if so many consumers are dissatisfied with their home contractors, cooling-off periods have not solved the issue of home contracting problems. The problem with the argument is that at best, cooling-off periods can solve problems involving whether the consumer should have entered into the contract in the first place. Problems occurring after the expiration of the cooling-off period are beyond the power of the cooling-off period to cure. If a contractor provides shoddy work, and the consumer complains to a consumer protection agency, that does not indicate that the cooling-off period has failed, because cooling-off periods cannot solve problems of performance, only of contract-formation.¹¹⁷ In short, that home contractors are frequent subjects of complaint is at most suggestive that cooling-off periods have failed.

of a lawsuit to preclude a consumer from seeking his proper remedy. This, in turn, may cause the seller to curtail his unlawful activities. In this sense, the cooling-off provision may restrict the evil rather than merely providing redress.”). *See also* Letter from Betty Furness, Special Assistant to the President for Consumer Affairs, to Senator Warren G. Magnuson, Chair, Comm. on Commerce (Mar. 5, 1968), *quoted in* S. REP. NO. 90-1417 at 10, 11 (1968), accompanying the proposed Consumer Sales Protection Act (“Enactment of this legislation will not eliminate the unscrupulous practices, but we believe it will have a deterrent effect on such practices in the sizable and rapidly growing door-to-door sales industry.”).

¹¹⁶ *See* McChesney, *supra* note 76, at 65 (“It is possible that the Cooling-Off Rule has converted a market in which deception and dissatisfaction ran rampant to one now characterized by such levels of satisfaction that almost no one tries to cancel sales contracts, despite a legal right to do so. It is equally possible, however, that dissatisfaction in the industry was minimal to start with, and that the isolated problems that did exist could be handled as they arose.”).

¹¹⁷ Some proponents of cooling-off periods were clearly aware of this limit. *See, e.g.,* Meserve, *supra* note 21, at 1184–85 (1969) (“[I]t is sometimes necessary for the consumer to see, and occasionally use, the merchandise before he realizes that he has been deceived . . . [A] cooling-off period which runs from the date of the transaction will effectively deal with misrepresentations about the characteristics of the merchandise only where the deception is quite obvious or where the goods are delivered at the time of the sale. It will have little effect in combating more subtle misrepresentations about the quality and performance characteristics of goods delivered after the cooling-off period has expired . . .”).

Nevertheless, the theory that cooling-off periods have been a panacea seems implausible. Unscrupulous merchants are unlikely to be deterred by an event that rarely occurs.

D. Are Cooling-Off Periods Ineffective Because They Are Designed to Cure a Problem That Does Not Exist (and Perhaps Never Did)?

In a 1984 article, Fred McChesney argued that the evidence available at that time “suggests that the [FTC] Cooling-Off Rule addresses nonexistent problems while imposing real costs on consumers. At the very least, the data indicate strongly that problems are not nearly as widespread as the Commission believed, and that the industry had already implemented policies sufficient to redress them.”¹¹⁸ McChesney’s assessment of the FTC’s Statement of Basis and Purpose was that it “includes almost no quantitative information and is totally devoid of any systematic evidence of the need for the rule.”¹¹⁹

My reading of the documentation in the FTC’s Statement of Basis and Purpose is less clear-cut than McChesney’s. It is probably fair to say that both critics and supporters of the Rule would have found evidence in the FTC’s record to support their positions.¹²⁰

Perhaps it is telling that the FTC was careful not to raise expectations too high:

Those who gave the strongest support for the effectiveness of the remedy clearly recognized that it would not be a panacea for all of the problems associated with door-to-door selling. However, they correctly pointed out that it would be of material assistance in alleviating some of the problems associated with door-to-door selling.¹²¹

¹¹⁸ McChesney, *supra* note 76, at 58.

¹¹⁹ *Id.* at 62.

¹²⁰ See *supra* notes 13–18, 20–21, 28–31.

¹²¹ Promulgation of Trade Regulation Rule and Statement of Its Basis and Purpose, 37 Fed. Reg. 22,934, 22,942 (Oct. 26, 1972) (footnote omitted). See also *In re Public Hearing*, *supra* note 13, at 27 (testimony of Richard L. Levin, University of Virginia Law Student) (“[T]he cooling-off period will not supply a complete panacea. It is not designed to be the end-all solution of problems presented in door-to-door sales, but it is consistent with rational aims of consumer protection. It may help out on many unfair practices and sales abuses which flourish in the door-to-door sales industry.”); Meserve, *supra*

In any event, it is impossible from this distance to determine to what extent consumers were confronted with “hard sell” tactics when the FTC adopted its cooling-off period, or to what extent those tactics succeeded in persuading consumers to enter into contracts that they did not wish to agree to or later regretted. However, perhaps the critical question today is not what happened forty years ago, but whether the hard sell still occurs. The survey was not designed to answer that question. However, if hard sells persist, the survey suggests that cooling-off periods are not succeeding in protecting consumers against them, if only because few consumers rescind. Unless of course, those who use hard selling tactics also declined to answer the survey questions, which is entirely plausible—in which case the survey would not shed light on whether cooling-off periods are proof against them.¹²²

IV. THE HARMS CAUSED BY COOLING-OFF PERIODS

An evaluation of the merits of cooling-off periods would be incomplete without some assessment of their downside. Early opponents of cooling-off periods were often vehement in their opposition. Indeed, some complained that cooling-off

note 21, at 1188 (“[I]t is clear that the cooling-off period will not provide a complete panacea for consumers involved in transactions with unscrupulous door-to-door salesmen. It will, however, be extremely helpful in combating high pressure or coercive sales tactics and in fostering rational and informed consumer choice by reducing both impulse buying and buying without an opportunity to compare value. It will also aid in dealing with some types of fraudulent selling, particularly deception involving the price of an item, but it will be of lesser utility in combating sophisticated deceptive schemes, such as referral selling and less obvious misrepresentations about the quality and performance characteristics of undelivered merchandise.”).

¹²² It might be possible to conduct a study to determine whether cooling-off periods help against the hard sell with telephone sales. Some states have enacted telephone sale cooling-off period statutes while others have not. A survey of consumers in both types of states that inquired whether consumers have bought items from telemarketers and later regretted making the purchase might offer some indication of whether there truly is a problem, at least in the telemarketing context. If consumers in states that did not have a cooling-off period demonstrated a greater level of regret and more frequently expressed a desire to rescind such contracts, for example, it would suggest that there is a problem that cooling-off periods can help with. The PSRG Study did just that in 1981 and found that respondents from states with telephone sale cooling-off period laws were marginally more likely to be “very satisfied” with their purchases than those from states without such laws (76.6% vs. 69.6%). *See* PUB. SECTOR RESEARCH GRP., FINAL REPORT OF AN IMPACT EVALUATION OF THE COOLING-OFF PERIOD FOR DOOR-TO-DOOR SALES TRADE RULE III-65 (1981). But the authors cautioned that the sample sizes for the survey were small. Oddly enough, residents of states which had not enacted a telemarketing cooling-off period were slightly more likely to think they had a right to cancel within three days than residents of states which had such laws. *Id.* at III-65.

periods were “contrary to fundamental business concepts,”¹²³ “designed to undermine the foundation of the law of contracts,”¹²⁴ “discriminatory in the worst way and probably unconstitutional,”¹²⁵ would make contracts “a mere illusion,”¹²⁶ “leave [consumers] in greater jeopardy than the 10 percent of our society that is out to take [consumers]”¹²⁷ would “invite bad faith contracts,”¹²⁸ and that cooling-off

¹²³ See *Hearings on S. 1599*, *supra* note 18, at 112 (statement of Robert O. Lockman, Vice President, Marketing, The West Bend Co.) (“Cooling-off legislation is contrary to fundamental business concepts that have been in existence for hundreds of years. To say that a signature given in the home can be withdrawn only invites the kind of permissiveness we see so much of in our society today. I am concerned about how it would change the law of contracts and traditional sales practices, but I am equally, if not more, concerned about how it would change consumer attitudes and how it would invite dilution of the individual’s responsibility for his business acts and decisions.”).

¹²⁴ *Hearings on S. 1599*, *supra* note 18, at 204–05 (statement of William J. Halliday, Jr., Secretary and General Counsel, Amway Corp.) (“[W]e are unalterably opposed to legislation which has as its basis the termination of what otherwise are good and valid contracts. Ten of the 12 members of this subcommittee are attorneys at law. I am certain that you gentlemen recognize that one of the very foundations of a legal system is the sanctity of the contract. Without contracts, we would have very little law. Labor relations are regulated by contracts. Business relations, including Government buying, are regulated by contract. Even that most personal relationship of all, the marriage relationship, is in essence a contract. And yet the proposed legislation that we have before us is designed to undermine the foundation of the law of contracts as we have understood it for many centuries. . . . We submit that adoption of legislation such as is contemplated in Senate bill 1599 will have as its principal result a total destruction of our industry.”). See also Sher, *supra* note 83, at 732 (footnotes omitted) (“The cooling-off period is sometimes attacked on the ground that it will tend to undermine the sanctity of contract and the solemnity of the signature Other critics of the cooling-off concept state that the right to cancel will undercut the principle that ‘a man’s word is his bond,’ and will ‘be unfortunate for the American way of life.’”).

¹²⁵ *Hearings on S. 1599*, *supra* note 18, at 207 (statement of S. Martin Lindquist, Senior Vice President, Rena Ware Distributors, Inc.) (“If it is to apply to one method or one part of retailing only, then it is discriminatory in the worst way and probably unconstitutional.”).

¹²⁶ *In re Public Hearing*, *supra* note 13, at 123–24 (testimony of David Yoho, President, Surfa-Shield Institute) (“[Cooling-off periods would make] the contract, which was once considered a man’s word, his bond and seal, . . . a mere illusion. It is no longer binding and it means very little, and our Government through its various agencies not only sanctions but encourages unilateral breach of covenant and with that gives the right of protection and enforcement to one party of the transaction and sometimes criminal sanction to the other party. . . . Finally, in my humble belief, the signing of a contract is still the giving of my word. I wonder how much we change the societal structure of our country when we tell a man, ‘Give me your word, but it does not really mean anything because you can change it later if you want to.’”).

¹²⁷ *Id.* at 123–24 (“[T]his kind of law may be made workable by a sizable staff, but in the end will be unable to protect the consumer, and, in fact, leave him in greater jeopardy than the 10 percent of our society that is out to take him.”).

¹²⁸ *Hearings on S. 1599*, *supra* note 18, at 112 (statement of Robert O. Lockman, Vice President, Marketing, The West Bend Co.) (“[W]e permit the consumer to cancel his order at any time for any

period rules were “class legislation.”¹²⁹ It was said that cooling-off periods would occasion “agony” for consumers.¹³⁰ Byron D. Sher, a contemporaneous observer, summarized the economic arguments against the FTC rule as follows:

[D]irect sellers also argue that giving buyers a right to cancel will have a disastrous effect on their business. Their main contention is that the cooling-off period amounts to an “invitation to cancel” that will interfere with the “decision-making” process and frustrate the efforts of salesmen to facilitate the process. * * *

* * * [The] prescribed notice is variously described as a “warning” to buyers, an “invitation to cancel,” or an invitation to “vacillation.” Moreover, it is said, during the cooling-off period the buyer may be “unsold” by competitors of the seller, or by sellers of other products or services competing for the same consumer dollars, or by members of the family who wanted to buy something different in the first place, or by family or friends who think the consumer does not really “need” the commodity. * * *¹³¹

Sher himself anticipated that the Rule would have a greater impact than it seems to have had, but found that possibility acceptable: “There is no question that the right to cancel will affect the consumer’s decision-making process. But an informed consumer decision uninfluenced by excessive sales pressure is precisely the effect the cooling-off period is designed to achieve.”¹³² Still others feared that the Rule

reason before shipment is made and it takes us anywhere from 4 to 6 weeks to make shipment. . . . [W]e have had very few cancellations—something less than 2 percent. However, if cancellations were invited or encouraged by cooling-off legislation, we believe the cancellation rate would be much higher and could become burdensome. We believe that the proposed legislation would invite bad-faith contracts, that is to say, orders signed by a purchaser with the full intention of canceling the order the next day.”)

¹²⁹ *In re Public Hearing*, *supra* note 13, at 123–24 (testimony of David Yoho, President, Surfa-Shield Institute).

¹³⁰ *See Meserve*, *supra* note 21, at 1187 (“[I]f the buyer retains time to think it over after concluding the agreement, the direct sellers argue that he will experience moments of agony until the cooling-off period expires and may ultimately decide to terminate his worries by cancelling the transaction. This, they claim, is unpleasant for the consumer, and, of course, bad for the direct seller’s business.”).

¹³¹ Sher, *supra* note 83, at 730–31 (footnotes omitted). *See also* Rekaiti & Van den Bergh, *supra* note 105, at 391–92 (“During the cooling-off period, consumers will be able to search for substitutes and make the relevant price-quality comparisons. This may enable them to withdraw from contracts requiring them to pay monopoly prices which are substantially higher than the prices charged in regular sales outlets.”).

¹³² Sher, *supra* note 83, at 731 (footnotes omitted).

would impair selling practices that benefited consumers.¹³³ Commentators that are more recent have also thought that cooling-off periods may be “quite costly.”¹³⁴

However, the industry view about cooling-off periods appears to have shifted dramatically in the decades since the FTC Rule was adopted. This can be inferred from comments filed—or perhaps more accurately, not filed—with the FTC. Periodically, the FTC solicits comments on its rules to see if they should be retained or revised. It did so most recently for the Cooling-Off Period Rule in 2009.¹³⁵ The FTC’s Request elicited only six comments. One trade organization, the Direct Selling Association expressed the view “that the Rule serves a valuable purpose for consumers.”¹³⁶ The only merchant objection to the Rule came from a seller of fresh fish that complained that the Rule permitted buyers to cancel sales and by the time that seller could reclaim the fish, several weeks would have passed and so buyers could keep the fish for free.¹³⁷ That is obviously very different from the more strident industry objections of the 1960s and 1970s. While the failure of the industry to voice more forceful complaints may be attributable to many reasons, possibly including the decline in the number of door-to-door sellers over the intervening years and a belief that resources are better devoted to uses other than

¹³³ See, e.g., *Hearings on S. 1599*, *supra* note 18, at 103 (statement of T.S. Knight, Chairman, C.H. Stuart & Co., Inc.) (“Each year more direct selling representatives are invited into the homes of consumers. Millions of people like this modern way to shop. Retailing direct to the home has a high satisfaction quotient. As reported by the Better Business Bureaus, only [one and half percent] of all consumers problems arise from sales made in the home.”).

¹³⁴ See *Rekaiti & Van den Bergh*, *supra* note 105, at 383 (“[C]ompliance with the legally imposed duty to provide all buyers in certain transactions with a cooling-off period may prove quite costly for the sellers. It may also be reasonably assumed that a part of those costs are passed on to consumers. Cooling-off periods inevitably cause two negative effects: uncertainty and delay. The seller might ask a higher price, proportional to the value of the product, when the transaction is finally completed, in order to be compensated for the costs of transactions that were called off. But even if all agreements are finalized after the expiration of the cooling-off period, the payment still comes at a later point in time. The deferred payment’s value is always less than the immediate payment’s value. Hence, the seller may impose a price increase incorporating an interest for the delayed receipt of payment.”).

¹³⁵ The Request for Comments may be found at *Trade Regulation Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Location*, 74 Fed. Reg. 18,170 (2009) (codified at 16 C.F.R. § 429).

¹³⁶ See Letter from John W. Webb, Associate Legal Counsel, Direct Selling Ass’n, to Donald S. Clark, Sec’y, Fed. Trade Comm’n (June 22, 2009) (on file with author), available at <http://ftc.gov/os/comments/coolingoffrule/541414-00003.pdf>.

¹³⁷ See Steve Fabian, co-owner, Fabian Seafood Company, Comment regarding Cooling-Off Rule Regulatory Review, FEDERAL TRADE COMMISSION (June 13, 2009, 1:49:53 PM), <http://ftc.gov/os/comments/coolingoffrule/541414-00001.html>.

combating a Rule that was not likely to be rescinded, the fact that the industry chose not to seek repeal of the Rule is revealing.

What accounts for this shift? The study sheds some light on that. Specifically, it found that opponents' fears about the cost of cooling-off rules were considerably overstated.¹³⁸ Thus, 96, or 65%, of those answering the question "What, if anything, has the right to cancel cost your business?" responded "nothing," as Figure Four illustrates. Another 26, or 18%, indicated that the cost had been very little. In all, 83% reported that the rules right to cancel had cost them either nothing or very little. Only 24, or 16% reported that the cost had been more than very little.

This contrasts somewhat with the 1981 Walker survey, discussed earlier.¹³⁹ That study also asked 100 of the executives whether they had incurred costs because of the Rule. Just over half—52—replied that they had; 45 said that they had not.¹⁴⁰ Of the 45 who said the Rule had not generated costs, 22% reported that they had not experienced any cancellations.¹⁴¹ However, some companies had experienced cancellations: 23 reported having suffered lost commissions on sales cancelled under the Rule, with a mean loss of \$10,947 in the most recently-completed fiscal year.¹⁴² One respondent claimed a loss in that fiscal year of \$50,000, implying many cancellations.¹⁴³ Two respondents reported losses of \$10,000 each while one each reported losses of \$75, \$2,000, \$3,500, \$5,000 and \$7,000.¹⁴⁴ Half the respondents reported costs averaging \$7,173 in the last fiscal year for paper and printing; a quarter required additional personnel to process, document and administer the procedures, consuming an average of \$17,896; 16 reported increased filing costs averaging \$3,286; 14 said added inventory costs generate an average of \$12,886 in costs; a dozen claimed that maintenance of

¹³⁸ Yale Study, *supra* note 39, at 629 (footnotes omitted) ("This marginal benefit to the consumers may be balanced against an almost total lack of harm to dealers and financing agencies. The financing agencies simply delay approval of credit until after the period has lapsed. The dealers report little difficulty with the provision, and only three dealers stated that they lost buyers to competitors who undersold them—the main fear of the businessmen prior to the Act.").

¹³⁹ See WALKER STUDY, *supra* note 53 and accompanying text.

¹⁴⁰ *Id.* at 33.

¹⁴¹ *Id.*

¹⁴² *Id.* at 34, 39.

¹⁴³ *Id.* at 39.

¹⁴⁴ *Id.*

computerized records produced an average of \$5,000 in costs; and six claimed costs of \$7,625 in postage and handling.¹⁴⁵

Walker asked the executives whether they thought the Rule had had a harmful or beneficial effect on their company and the direct selling industry as a whole. Interestingly, far more respondents thought the Rule had had no effect on their company than no effect on the industry. As for the effect on their company, 69% saw no effect, while 16% thought the Rule harmful and 15% beneficial.¹⁴⁶ Many of those who saw the Rule as harmful or beneficial in its net effects still saw some countervailing effects: thus, 22% of those who believed the Rule to be harmful overall thought it had some beneficial effects on their company while 29% who assessed the Rule as beneficial overall indicated it had some negative effects, though since both groups were small, the study authors suggested the data should be used “cautiously.”¹⁴⁷ Respondents identified the following harmful effects of the rule: increased costs (mentioned by 13%) through printing, record maintenance or paper work, administration costs, legal costs, uncollected refunds, or training. Thirteen percent of the executives noted other harmful effects, including negative connotations for consumers, discouraging sales/negative for salesmen, administering the Rule, and increased cancellations.¹⁴⁸ Among the benefits noted were that the Rule gives consumers confidence in purchasing (8% mentioned this), eliminates high pressure sales (4%), makes company more stable/honest (4%), reduced shipping costs/unconfirmed order cost (2%), demands better sales people (2%), and encourages sales (1%).¹⁴⁹

About 29% believed it had had a harmful effect on the industry; 35% claimed the Rule had had a beneficial effect; and 30% doubted that it had had any effect.¹⁵⁰ Of those who concluded the Rule had been harmful in its net effects, 47% also thought it had had some beneficial effects, while 36% of those who found the Rule beneficial overall also saw some harmful effects.¹⁵¹ Among the harmful effects mentioned were an increase in costs (noted by 22%), an increase in cancellations

¹⁴⁵ *Id.* at 34.

¹⁴⁶ *Id.* at 15.

¹⁴⁷ *Id.* at 18.

¹⁴⁸ *Id.* at 16.

¹⁴⁹ *Id.* at 17.

¹⁵⁰ *Id.* at 11.

¹⁵¹ *Id.* at 14.

(14%), and “discouraging sales of placing a burden on the salesmen” (12%).¹⁵² The increase in costs came from printing, record maintenance and paper work, administrative costs, training, other costs to salesmen, uncollected refunds, and legal costs.¹⁵³ The benefits mentioned included “giving consumers confidence in purchasing” (noted by 21%), eliminating high-pressure sales (17%), “making the company more stable or honest” (17%), “giving the Industry guidelines and uniformity” (4%), eliminating credit risks (4%), and “encourages sales” (3%).¹⁵⁴

While it is impossible to be certain about the differences between the findings on costs of the 1981 Walker survey and our 2010 survey, several explanations are possible. First, a lot has changed in commerce in the nearly thirty years separating the two studies. For example, the advent of personal computers and the internet has made the printing and conveying of forms less cumbersome and expensive. Second, nearly half of the respondents to the Walker survey had experience in their business before promulgation of cooling-off period rules¹⁵⁵ and so could compare business expenses under two different legal regimes, while by 2010, probably few of the respondents could recall commerce before rescission rules. The 1981 respondents probably remembered the cost of shifting from the pre-cooling-off rule era, and included among the costs legal, training, and administrative costs in implementing the Rule. By 2010, those costs were probably trivial; the form of the notices had been well established, and for those who do not review the contract with the consumer, probably the chief cost was duplicating the notice, which surely is not substantial. Some of the reasons given by respondents to the Walker survey, such as negative connotations for consumers and discouraging sales/negative for salesmen, may have been a vestige of the campaign against the rules, and do not seem to reflect the realities of 2010.

In sum, cooling-off periods do not seem very harmful to businesses. Nevertheless, if they do not harm business, they may still harm consumers. To the extent that cooling-off periods are adopted to address a genuine problem—something that remains unclear—that problem seems unlikely to be solved by cooling-off periods if consumers eschew them. If the right to rescind is enacted in lieu of some other solution, then the consumer protection problem will persist, unaddressed. Cooling-off periods may create the illusion of consumer protection

¹⁵² *Id.* at 12.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 13.

¹⁵⁵ See WALKER STUDY, *supra* note 53 and accompanying text.

without the reality. Indeed, at least one predatory lender used cooling-off periods as a form of legal jujitsu: when First Alliance, was in litigation over a loan, it defended its conduct in the media on the ground that the consumer had two opportunities to rescind.¹⁵⁶ In other words, the lender took advantage of what now appears to be a worthless consumer protection to argue that it should be exonerated.

V. CONCLUSION

This paper reports two main findings. First, in at least one circumstance, consumers who receive both oral and written notice of their rights to rescind are significantly more likely to avail themselves of those rights, than those who receive only written notices. While that proposition remains to be tested in other contexts, it raises questions about whether lawmakers wishing to inform consumers of their rights should supplement written disclosures requirements with mandates for oral disclosures as well. Given the evidence that consumers overlook written disclosures, oral disclosures may be a helpful consumer protection device.

Second, the study raises serious questions about whether consumers take advantage of cooling-off periods. Taken together with the finding in two 1981 studies commissioned by the FTC, there is reason to doubt that cooling-off laws are helpful to consumers. It is possible that cooling-off periods can still be justified because the study also indicates that they do not impose significant costs on businesses—a “it couldn’t hurt” rationale—but in fact, cooling-off period laws may have one troublesome downside. If they are adopted to address a genuine consumer protection problem, but consumers rarely rescind, the consumer protection problem cooling-off periods are intended to cure will persist, unless other measures are taken to deal with it. Put another way, cooling-off periods provide only illusory consumer protection, and if they are used in lieu of other consumer protection mechanisms, then the law will not solve the problem. It remains unclear, however, whether the problems the original cooling-off period laws were adopted to combat—the hard sell—is a problem, but if it is, or if cooling-off period rules are adopted to deal with another problem, no reason exists to think they will work.

It is not much of an exaggeration to say that the study suggests that cooling-off periods have little impact. Ironically, in light of the overheated rhetoric

¹⁵⁶ See Diana B. Henriques with Lowell Bergman, *Mortgage Lives: A Special Report; Profiting From Fine Print with Wall Street's Help*, N.Y. TIMES, Mar. 15, 2000, available at <http://www.nytimes.com/2000/03/15/business/mortgaged-lives-special-report-profiting-fine-print-with-wall-street-s-help.html?pagewanted=all&src=pm> (quoting Brian Chisick, First Alliance’s founder: “[a]ll borrowers are given two separate three-day periods to reject the terms of the obligation. She decided not to.”).

accompanying their creation, cooling-off periods appear to have virtually no benefits or costs.

Figure One: Percentage of Buyers Who Attempt to Cancel Within the 3-day Period

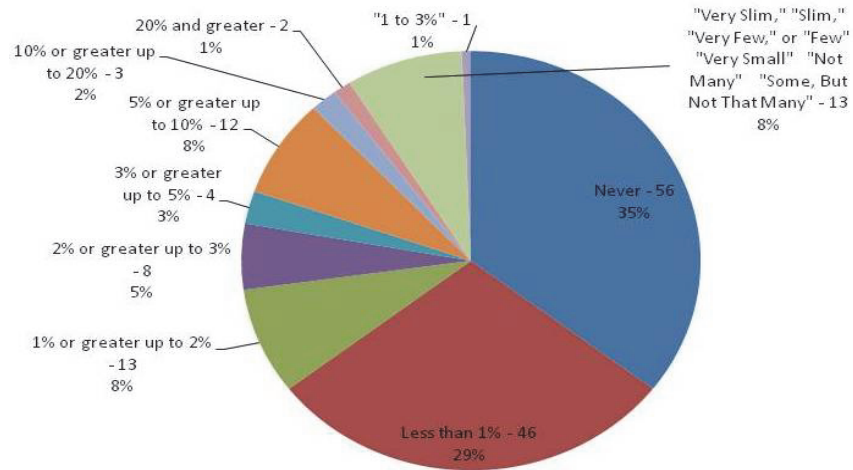
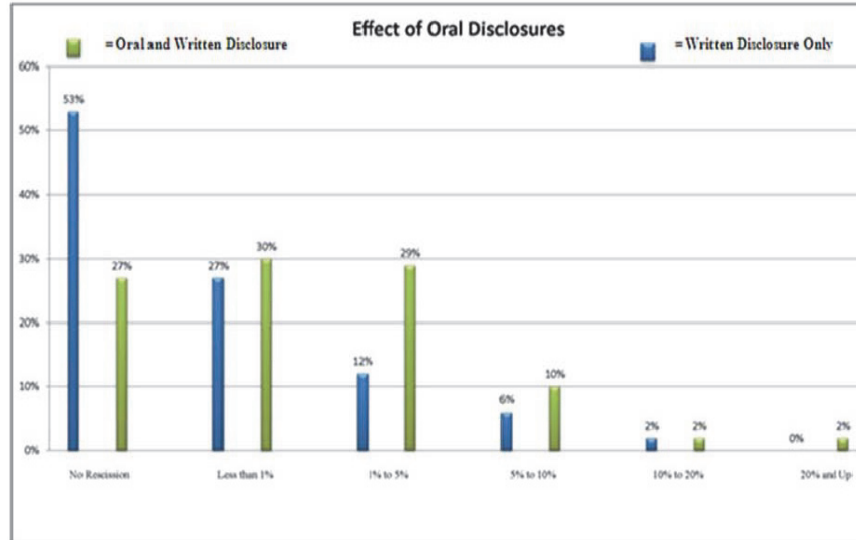


Figure 2: Comparison of Written Disclosures and Oral and Written Disclosures



**Table One: Number of Buyers that Attempt to Cancel Within
the 3-day Period**

Never	56
Less than	46
1% or Greater up to 2%	13
2% or Greater up to 3%	8
3% or Greater up to 5%	4
5% or Greater up to 10%	12
10% or Greater up to 20%	3
20% and Greater	2
“Very Slim,” “Slim,”	
“Very Few,” or “Few,”	
“Very Small,” “Not Many,”	
“Some, But Not That Many”	13
1 to 3%	1

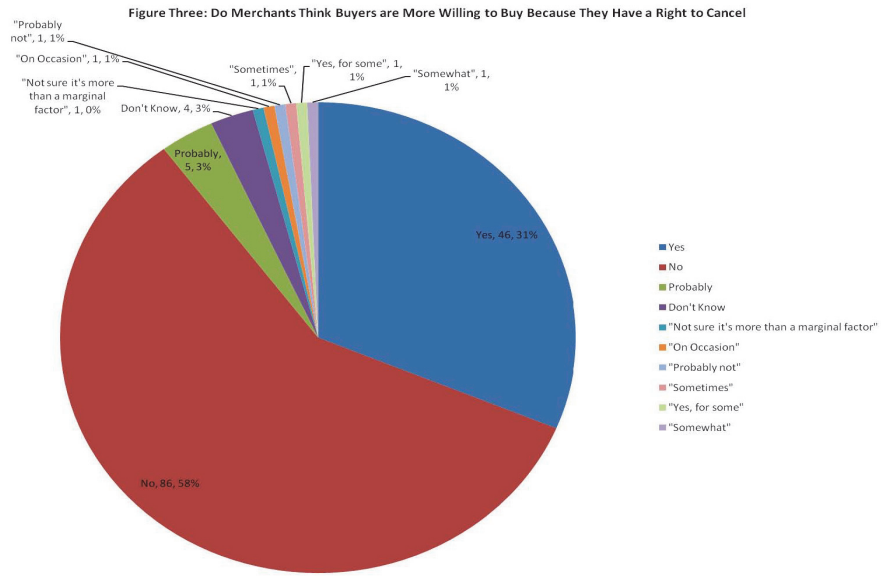


Figure Four: Amount that the Right to Cancel Has Cost Each Business

