2021

Six Scandals: Why We Need Consumer Protection Laws Instead of Just Markets

Jeff Sovern

SIX SCANDALS: WHY WE NEED CONSUMER PROTECTION LAWS INSTEAD OF JUST MARKETS

© *Jeff Sovern*[*]

ABSTRACT

Markets are powerful mechanisms for serving consumers. Some critics of regulation have suggested that markets also provide consumer protection. For example, Nobel Prize-winning economist Milton Friedman said "Consumers don't have to be hemmed in by rules and regulations. They're protected by the market itself." This Article's first goal is to test the claim that the market provides consumer protection by examining several recent incidents in which companies mistreated consumers and then explores whether consumers stopped patronizing the companies, which would deter misconduct. The issue also has normative implications because if markets consistently protected consumers, society would need fewer regulations and regulators, as Friedman suggested. The Article's second goal is to begin construction of a theory on when the market does or does not protect consumers.

The Article finds that reality reflects a more nuanced situation than Friedman and other critics theorized. In some instances, businesses' sales actually increased after their misconduct became public, despite the fact that, in at least two cases, consumers had told pollsters they would avoid patronizing the company. Even when companies suffered declines in sales after their misbehavior became public, the scandals became known only because of laws and those who enforce them, suggesting that it is the very rules that Friedman decried that led to a market response. Though it is impossible to know what would have happened if the problematic conduct had not occurred, the evidence suggests that markets alone are often not enough to protect consumers, or at least that markets are not a reliable consumer protection mechanism.

[*] Professor of Law, St. John's University School of Law and co-coordinator, Consumer Law and Policy Blog. The following people made this Article better: Meirav Furth-Matzkin, Frank Partnoy, Stefanie Ramirez, Sarah Dadush, Ahmed Taha, Richard Alderman, Jonathan Glater, Dee Pridgen, Mel Eisenberg, John Hunt, Mathew Bruckner, David Vladeck, Lauren Willis, Shmuel Becher, Kathleen Engel, Larry Kirsch, Paul Pastore, Jillian A. Gardner, Madeline Mallo, Liss Mendez, Amanda M. Schaefer, Jessica-Ann K. Mohabir, Adam Ratner, John Ihsan Jabbour, Janet Ruiz-Kroll, and other participants at the Third Annual Consumer Law Scholars Conference at the Berkeley Center for Consumer Law and Economic Justice at the University of California—Berkeley Law School, the 17th Conference of the International Association of Consumer Law at Indiana University Robert H. McKinney School of Law, and the St. John's Law School Faculty Retreat.

INTRODUCTION

It is an axiom that markets are powerful mechanisms for serving consumers. While many examples demonstrate this point, a recent one involves smartphones. In 2009, BlackBerries dominated the market for smartphones sold in North America.[1] Not even the president wanted to surrender the device[2] that became known as a "crackberry."[3] Yet in the span of a few years, BlackBerry sales plummeted. By 2013 BlackBerries commanded less than four percent of its market, suggesting that manufacturers had found a cure, or at least a substitute, for the addiction.[4] Three years later, the company stopped manufacturing BlackBerries,[5] relying on other companies to make its signature phones.[6] BlackBerry sales fell not because of government action, but because its competitors made products that consumers preferred. The story illustrates both that markets help consumers satisfy their desires and that government need not intervene to achieve desired results—at least sometimes.

The idea that consumers can realize their preferences without government intervention goes back to at least 1776, when Adam Smith wrote of the "invisible hand" and how producers acting out of their own self-interest often simultaneously serve the best interests of society at large.[7] Smith focused on how markets stimulate producers to serve consumers. Can consumers also use markets to obtain needed consumer protections? Some critics of regulation have argued that they can. For example, Nobel Prize-winning economist Milton Friedman said, "Consumers don't have to be hemmed in by rules and regulations. They're protected by the market itself."[8] This philosophy has also found its way

---

1. *See* Ian Austin, *Once Dominant, BlackBerry Seeks to Avoid Oblivion*, N.Y. TIMES (Aug. 12, 2013), https://dealbook.nytimes.com/2013/08/12/blackberry-to-explore-strategic-alternatives-including-a-sale-again/.

2. *See* Jeff Zeleny, *For a High-Tech President, A Hard-Fought E-Victory*, N.Y. TIMES (Jan. 22, 2009), https://www.nytimes.com/2009/01/23/us/politics/23berry.html.

3. Frank Langfitt*, Blackberry or Crackberry? A PDA Culture War*, NAT'L PUB. RADIO (Jan. 12, 2005, 12:00 AM), https://www.npr.org/templates/story/story.php?storyId=4279486.

4. Austin, *supra* note 1.

5. *See* Rob Price, *BlackBerry is Giving Up on Making its Own Phones*, BUS. INSIDER (Sept. 23, 2016, 7:49 AM), http://www.businessinsider.com/blackberry-stops-making-own-phones-quarterly-results-q2-2017-2016-9.

6. *See* Paul R. La Monica, *End of an Era: BlackBerry Will Stop Making its Own Phones*, CNN MONEY (Sept. 28, 2016, 12:39 PM), https://money.cnn.com/2016/09/28/technology/blackberry-outsource-phones/index.html.

7. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, 593 (The Elec. Book Co. 2001) (1776); *see id.* at 30-31:

> It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves not to their humanity but to their self-love, and never talk to them of our own necessities, but of their advantages.

8. Everette Hatcher, *Milton Friedman's Free to Choose "Who Protects the Consumer?" Transcript and Video (60 Minutes)*, DAILY HATCH, https://thedailyhatch.org/2013/08/12/milton-friedmans-free-to-choose-who-protects-the-consumer-transcript-and-video-60-minutes/ (last visited Dec. 28, 2020). As examples of such unneeded regulation, Friedman pointed to laws that protect

into the places where laws are made. Notably, former Congressman Jeb Hensarling, chair of the House Financial Services Committee until 2019 and a key actor in drafting consumer financial protection legislation, has said that "the best consumer protection there is is [sic] a competitive, innovative market with freedom of choice for consumers."[9] Hensarling's antipathy towards consumer protection laws is not unique in Washington. For example, within days of assuming the presidency, Donald J. Trump directed that for every new regulation the federal government issued, two others be eliminated.[10] As for consumer protection, President Trump's appointees at the Consumer Financial Protection

---

consumers from products that might injure them and laws mandating auto air bags. *See also* MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A ERSONAL STATEMENT 222, 226 (1980):

> [O]n the whole, market competition, when it is permitted to work, protects the consumer better than do the alternative government mechanisms that have been increasingly superimposed on the market.
>
> * * *
>
> [The consumer's] most effective protection is free competition at home and free trade throughout the world. The consumer is protected from being exploited by one seller by the existence of another seller from whom he can buy . . . .

Cf. Steven Shavell & A. Mitchell Polinsky, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1449 (2010):

> Consumers should have a relatively good assessment, however, of the risks of many widely sold products. A primary reason is that the media and regulators have naturally strong incentives to identify and publicize the risks of such products. . . . Moreover, firms that sell products in large volume have more to lose if consumers think that their products are dangerous and more to gain if consumers believe that their products are safe, giving them a greater incentive to invest in product safety. Additionally, large firms tend to be especially concerned about their reputation for safety because they often offer multiple product lines and have long time horizons.

FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 145-46 (1960) ("[T]he morality of action within the private sphere is not a proper object for coercive control by the state . . . . It is indeed probable that more harm and misery have been caused by men determined to use coercion to stamp out a moral evil than by men intent on doing evil."); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 557 (2003) ("State enforcement of [contracts] is unnecessary when the agreements . . . can be enforced with reputational sanctions.").

9. Brad Wolverton (@bradwolverton), TWITTER (Mar. 17, 2017, 3:15 PM), https://twitter.com/bradwolverton/status/842861977047371777 (quoting Rep. Jeb Hensarling) ("More from my @RepHensarling interview[:] 'I believe that ultimately that [sic] the best consumer protection there is is [sic] a competitive, innovative market with freedom of choice for consumers. That's what prevents consumers from getting ripped off with a $50 hamburger—it's called competition.'"). *See also* Elizabeth Gurdus, *House Financial Services Chair: CFPB Is an Unelected 'Dictator' That Must Be Stopped*, CNBC (Feb. 16, 2017, 12:08 PM), http://www.cnbc.com/2017/02/16/house-financial-services-chair-cfpb-is-an-unelected-dictator-that-must-be-stopped.html (quoting Rep. Jeb Hensarling) (The Consumer Financial Protection Bureau "is damaging the most important consumer protection there is, and that is competitive, innovative, transparent markets that give Americans the freedom of choice.").

10. Exec. Order No. 13771, 82 Fed. Reg. 9339 (2017), https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reducing-regulation-controlling-regulatory-costs/.

Bureau both cut back on enforcement actions and rescinded consumer protections.[11]

The implication of Friedman's and Hensarling's position is that when companies misbehave, consumer markets will withhold their patronage *ex post*, which should deter future company misconduct *ex ante*. This Article examines whether consumers actually react that way when companies violate consumer protection laws. To be sure, consumers have boycotted companies for other reasons, such as when companies engage in actions that environmentalists oppose.[12] Evidence also indicates that corporate misconduct affects a corporation's stock market valuation,[13] but *investor* response is different from *consumer* response when merchants mistreat consumers.

11. *See* CHRISTOPHER L. PETERSON, DORMANT: THE CONSUMER FINANCIAL PROTECTION BUREAU'S LAW ENFORCEMENT PROGRAM IN DECLINE 2 (Consumer Fed'n of Am., 2019) https://consumerfed.org/wp-content/uploads/2019/03/CFPB-Enforcement-in-Decline.pdf ("[E]nforcement activity at the CFPB has declined to levels that are either nonexistent or significantly below that of the prior Administration, even in the areas where consumer complaint activity is the highest."); 12 C.F.R. § 1041 (2020), https://files.consumerfinance.gov/f/documents/cfpb_payday_final-rule-2020-revocation.pdf (amending 12 CFR Part 1041 to rescind requirement that before extending certain loans, lenders verify that borrowers will be able to repay them).

12. *See*, *e.g.*, Mikael Homanen, *Depositors Disciplining Banks: The Impact of Scandals* 22 (Chi. Booth Stigler Ctr. For the Study of the Econ. And the State, Working Paper No. 28, 2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3293254 1 (2018) (explaining banks that financed a controversial pipeline suffered significant decreases in deposit growth, particularly in the closest branches to the pipeline); *Over 700,000 people demand banks stop financing the Dakota Access Pipeline*, BANKTRACK (Feb. 3, 2017), banktrack.org/article/global_coalition_stages_protests_and_bank_closures_across_the_globe_to_defund_dakota_access_pipeline ("Thousands have already closed their accounts and defunded over $55 million and counting.").

13. *See* Jonathan M. Karpoff & John R. Lott, *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J. L. & ECON. 757, 796-97 (1993):

> [C]orporate fraud announcements . . . correspond to an economically and statistically significant loss in the accused firm's common stock market value . . . Anecdotal evidence also suggests that firms suffering the largest reputational losses experience reductions in market demand in the form of debarment. Overall, the evidence indicates that reputational effects play an important role in disciplining firms that commit fraud.

See also Felix von Meyerinck, Vesa Pursiainen, & Markus Schmid, *Competition and the Reputational Costs of Litigation*, (Univ. of St. Gallen, School of Fin., Working Paper No. 2020.07, 2020) (finding that "the filing of a class action lawsuit is associated with large negative stock returns"); Sanjai Bhagat, James A. Brickley, Jeffrey L. Coles, *The Costs of Inefficient Bargaining and Financial Distress: Evidence from Corporate Lawsuits*, 35 J. FIN. ECON. 221 (1994) (finding that when a company sues another business, the defendant's common stock declines by about 1%); Amar Gande & Craig M. Lewis, *Shareholder-Initiated Class Action Lawsuits: Shareholder Wealth Effects and Industry Spillovers*, 44 J. FIN. & QUANTITATIVE ANALYSIS 823 (2009); Deborah L. Murphy, Ronald E. Shrieves & Samuel L. Tibbs, *Understanding the Penalties Associated with Corporate Misconduct: An Empirical Examination of Earnings and Risk*, 44 J. FIN. & QUANTITATIVE ANALYSIS 55 (2009); Bruce Haslem, Irena Hutton & Aimee Hoffmann Smith, *How Much do Corporate Defendants Really Lose? A New Verdict on the Reputation Loss Induced by Corporate Litigation*, 46 FIN. MGMNT, 323, 323 (2017) ("Our results suggest that with the exception of securities litigation, . . . loss in market value can be attributed to . . .alternative explanations rather than to reputational consequences."), An illustration may make the idea more concrete. In the early 1980s, a company made survival suits intended to protect anglers and others at sea from drowning if they fell into the water.[14] After the Coast Guard determined that nearly all the suits suffered from life-threatening defects, the Seattle Regional Office of a consumer protection agency, the Federal Trade Commission ("FTC"), sought a recall of the suits. Then-Representative Albert A. Gore, Jr. stated that it would have cost about ten cents each to fix the suits.[15] But according to an official at the FTC's Seattle office, an FTC economist intervened, saying that if people died as a result of the defect, market forces would cure the problem.[16] After a congressional hearing drew attention to the matter, the company voluntarily recalled the suits.[17] As the survival suit example illustrates, the answer to the question of whether the market provides consumer protection also has normative implications. If markets protect consumers, regulators are less necessary. But if markets fail to live up to Friedman's and Hensarling's expectations, then regulations and regulators will be needed to protect consumers.

One difference between a scandal's impact on a company's stock valuation and an impact on sales to consumers is that stock market valuations may decline because of concerns about actions by regulators or class action suits even if consumers do not boycott the company.

14. *See* BINYAMIN APPELBAUM, THE ECONOMISTS' HOUR 205 (2019).

15. *FTC Oversight: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy & Com.*, 97th Cong. 125 (1982) [hereinafter FTC Oversight Hearing] (statement of Rep. Al Gore).

16. Representative (later-vice president) Gore read the key paragraph of the memo at a congressional hearing:

> The economist assigned by the Bureau of Economics has directed the staff not to proceed with consent negotiations. First, he believes that extensive analyses of the costs of notification and recall should be undertaken by FTC staff before entering consent negotiations. Second, he suggests that if deaths actually occur, market forces (that is, lawsuits by surviving heirs) may be adequate to remedy the problem.

FTC Oversight Hearing, *supra* note 15, at 125. The text of the memo, from the Seattle Regional Office's Assistant Regional Director, Randall H. Brook, to Timothy J. Murris, the director of the FTC's Bureau of Consumer Protection and dated July 7, 1982, is reproduced in the transcript of the hearings. FTC Oversight Hearing, *supra* note 15, at 160. As Binyamin Appelbaum has noted, lawsuits are not actually a form of market forces but of government regulation. Appelbaum, *supra* note 14, at 206, n.*. Market forces more typically refer to decisions by consumers to purchase or not purchase a product. The way market forces might have functioned in this example would be for consumers to eschew buying the suits because of their defects.

After the hearing, the economist denied having made the statements attributed to him. *See* FTC Oversight Hearing, supra note 15, at 134-137 (Letter of James C. Miller, III to Chairman John D. Dingell). Nevertheless, according to an FTC commissioner, the economist's objections delayed the onset of negotiations between the FTC and the company by six months. *See* MICHAEL PERTSCHUK, FTC REVIEW (1977-1984) 178 (1984).

17. Michael Pertschuk, Comm'r, FTC, *The Consumer Movement in the 80s: A Sleeping Giant Stirs, Speech to the Consumer Federation of America's Consumer Assembly* 5 (Jan. 20, 1983) (transcript available at https://www.ftc.gov/system/files/documents/public_statements/689031/19820120_pertschuk_the_consumer_movement_in_the_80s-_a_sleeping_giant_stirs.pdf); Bayleysuit, Inc. 1983 WL 183691 (F.T.C.) (1983).

A less extreme version of Friedman's claim is seen in a model created by Lucian A. Bebchuk and Richard A. Posner, in which firms fearing reputational consequences treat consumers more fairly than the law requires.[18] If the model accurately describes dealings between businesses and consumers, laws enforcing consumer rights would serve little purpose because sellers concerned about their market would provide greater consumer protection than the law would.[19] Similarly, some commentators have argued that when it comes to the sharing economy, reputation provides better consumer protection than law.[20]

The famous ultimatum game—in which people are willing to forego benefits to punish someone who is seen as acting badly—also supports the belief that consumers will discipline misbehaving companies.[21] In that game, two people divide a sum of money. One person, the Proposer, proposes how the sum is to be divided. The other, the Responder, may accept that proposal, in which case each receives the agreed-upon share. Alternatively, the Responder may reject the proposal, in which case neither receives anything. An economist might argue that the Responder should consent to any allocation which results in the Responder receiving anything, because something is better than nothing. Yet when people actually play the game, Responders often reject anything less than thirty percent of the sum to be divided. They prefer to punish the Proposer, at the expense of receiving nothing themselves, rather than accept an allocation they see as unfair. Because people are so eager to punish a misbehaving person that they are willing to act inconsistently with their own self-interest, it seems plausible that people will boycott a company acting badly. And yet, as the remainder of this paper demonstrates, this is a step many consumers seem unwilling to take, at least in some circumstances.

Even if markets have not been able to discipline misbehaving businesses in the past, markets may now be able to because of recent technological advances. Consumers now have the power to communicate with other consumers almost

---

18. *See* Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006).

19. Cf. Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 557 (2003) ("State enforcement of [certain] agreements is unnecessary when the agreements . . . can be enforced with reputational sanctions.").

20. *See* Christopher Koopman, Matthew Mitchell, & Adam Thierer, *The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change*, 8 J. BUS., ENTREPRENEURSHIP & L., 529, 539-545 (2015); Adam Thierer, Christopher Koopman, Anne Hobson & Chris Kuiper, *How the Internet, the Sharing Economy, and Reputational Feedback Mechanisms Solve the "Lemons Problem",* 70 U. MIAMI L. REV. 830, 874 (2016) ("[T]he marketplace and technological developments . . . make it clear that information markets, reputational systems, and rapid ongoing innovation often solve problems more efficiently than regulation . . . ."); *see also infra* Hypothesis six.

21. For references to the literature of the ultimatum game, *see, e.g.*, Colin Camerer & Richard H. Thaler, *Anomalies: Ultimatums, Dictators and Manners*, 9 J. ECON. PERSPS. 209, 210-11 (1995) and the authorities cited therein.

instantaneously via the Internet and social networks. Videos of troublesome interactions are routinely shared with millions.[22]

This Article has two goals. First, it examines whether Friedman's claim accurately describes the consumer marketplace. This is the first law review Article to scrutinize recent case studies in which a company was widely seen as engaging in misconduct and then explore whether the companies in question suffered a decline in sales following the incident; in other words, whether consumers "exited" the product,[23] which cuts into profits, just as regulators and class actions do.[24] The Article finds that the role of markets in providing consumer protection is more nuanced than Friedman and Hensarling suggest. In some instances, consumers do not stop patronizing companies that have misbehaved. In other cases, at least some consumers seem to have done just that.

The second goal of the Article is to begin constructing a theory of when the market does not protect consumers, and when it might. Accordingly, the Article offers hypotheses, based on the case studies, as to factors that increase the probability that the consumer marketplace is more or less likely to protect consumers. The Article also points out methodological problems with its approach.

I. Hypothesis One: Consumers at Least Sometimes Continue Patronizing A Company That Has Misbehaved—To the Point Where the Company's Sales Do Not Appear to Have Suffered—Even When Consumers Say They Will Forego Buying From the Company.

This hypothesis finds support in the well-publicized circumstances described in two case studies, one involving United Airlines, and the other Wells Fargo. The Article now describes each of these cases and then attempts to explain why so many consumers have continued to patronize the companies.

22. *See infra* note 27 and accompanying text for an example.

23. *See generally*, ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

24. The selection of particular case studies was limited by several criteria. One requirement was that information about the entities' sales be publicly available. Another was that the company have significant sales to consumers. That eliminated from consideration, for example, companies like Boeing, which was recently embroiled in a scandal involving crashes of its 737 aircraft*, see* David Schaper, *737 Max Scandal Cuts Boeing's Once Rock-Solid Image*, NPR (Nov. 26, 2019, 11:34 PM), https://www.npr.org/2019/11/26/783197253/737-max-scandal-cuts-boeings-once-rock-solid-image, and Equifax, whose data breach compromised the personal data of some 147 million people. *See generally* EQUIFAX DATA BREACH SETTLEMENT, https://www.equifaxbreachsettlement.com/ (last visited Nov. 14, 2021). Beyond that, the case studies were selected based on their prominence in recent years on the theory that the most notorious scandals were most likely to elicit a consumer response.

A. *Scandal One: United Airlines*

On April 9, 2017, United Airlines wanted to fly several off-duty United employees on United flight 3411.[25] Unfortunately, the flight had already boarded and passengers had taken every seat. United ordered a passenger to leave the flight but the passenger refused. The passenger was then dragged off the airplane.[26] Video recording the incident went viral.[27] The incident was widely covered in the media, inspiring a New Yorker cover[28] and serving as fodder for comedy shows like Saturday Night Live.[29] Leading members of the Senate Committee on Commerce wrote an airport official seeking information about the matter.[30] The *New York Times* described the matter as a "spiraling crisis" and noted that "consumers threatened a boycott of the airline."[31] The *Chicago Tribune* reported that the damage to United's reputation "may be irreversible."[32] A poll conducted three days after the incident found that "more than 40 percent of those who have heard about [United] recently also say they would pay more money and endure a layover to avoid flying with the company."[33] United was labelled the nineteenth most hated company in America.[34] After some initial fumbles, United's CEO delivered a strong apology.[35]

25. *See* Daniel Victor & Matt Stevens, *United Airlines Passenger Is Dragged From an Overbooked Flight*, N.Y. TIMES (Apr. 10, 2017), https://www.nytimes.com/2017/04/10/business/united-flight-passenger-dragged.html.

26. *Id.*

27. One video was played more than six million times in one day. *See* Ally Marotti & Lauren Zumbach, *Video Shows United Airlines' Passenger Dragged Off Plane*, CHICAGO TRIBUNE (Apr. 11, 2017), https://www.chicagotribune.com/business/ct-united-drags-passenger-0411-biz-20170410-story.html..

28. *See* Brandon Carter, *New Yorker Cover Depicts Trump, Sessions Dragging Comey Off a Plane*, THE HILL (May 11, 2017, 5:04 PM), http://thehill.com/homenews/media/333025-new-yorker-cover-depicts-trump-sessions-dragging-comey-off-a-plane.

29. *See* Paulina Firozi, *'SNL' Rips United and Pepsi in the Same Sketch*, The HILL (Apr. 16, 2017, 1:24 PM), http://thehill.com/blogs/in-the-know/in-the-know/329032-snl-rips-united-and-pepsi-in-the-same-sketch.

30. *See* Letter from Sens. John Thune, Bill Nelson, Roy Blunt, & Maria Cantwell, Comm. On Commerce, Sci. & Transp. to Ginger S. Evans, Comm'r, Chicago Dep't of Aviation (Apr. 11, 2017), https://www.commerce.senate.gov/public/_cache/files/04f5c270-f404-4351-95cb-fb17b3277d25/4A395B3AA6B66FCC0CD081434C4D9312.cst-to-united-and-o-hare.pdf.

31. Julie Creswell & Sapna Maheshwari, *United Grapples With PR Crisis Over Videos of Man Being Dragged Off Plane,* N.Y. TIMES (Apr. 11, 2017), https://www.nytimes.com/2017/04/11/business/united-airline-passenger-overbooked-flights.html.

32. Marotti & Zumbach, *supra* note 27.

33. *See* Laura Nichols, *Poll: People Won't Fly United If Another Airline Has an Identical Flight*, MORNING CONSULT (Apr. 16, 2017, 6:00 AM), https://morningconsult.com/2017/04/16/poll-people-wont-fly-united-another-airline-identical-flight/.

34. Samuel Stebbins, Evan Comen, Michael B. Sauter & Charles Stockdale, *Bad Reputation: America's Top 20 Most-Hated Companies*, USA TODAY (Feb. 1, 2018, 9:02 AM), https://www.usatoday.com/story/money/business/2018/02/01/bad-reputation-americas-top-20-most-hated-companies/1058718001/.

35. *See* Erin McCann, *United's Apologies: A Timeline,* N.Y. TIMES (Apr. 14, 2017), https://www.nytimes.com/2017/04/14/business/united-airlines-passenger-doctor.html.

Nevertheless, the outrage cooled quickly. As the *New York Times* concluded three months after the incident, "the public anger has not hurt the company's bottom line."[36] Nor did United refer to the incident as a risk factor in its filings with the SEC.[37] As can be seen in Figure 1, more passengers flew on United aircraft in each of the second, third, and fourth quarters in 2017 than had flown it in the same quarter in the previous year. While it is impossible to know what United's numbers would have been had the incident not occurred, it can at least be said that passengers continued to book United flights in large numbers after the incident.[38]

Another United anecdote illustrates some of the same points. In 2009, musician Dave Carroll wrote a song, United Breaks Guitars,[39] about his unfortunate experience flying on United. The song recounts how a fellow passenger observed guitars being thrown on the tarmac, how Carroll's checked guitar had been damaged, how United employees met Carroll's complaints with indifference, and how United denied Carroll's request for compensation.[40] In lyrics of particular significance to this Article, Carroll sang:

> Well, I won't say that I'll never fly with you again,
> 'Cause, maybe, to save the world, I probably would,
> But that won't likely happen,
> And if it did, I wouldn't bring my luggage
> 'Cause you'd just go and break it,
> Into a thousand pieces,
> Just like you broke my heart.[41]

---

36. *See* Micah Maidenberg, *United Airlines Profit Rises Despite Boycott Threats Over Passenger Treatment*, N.Y. TIMES (July 18, 2017), https://www.nytimes.com/2017/07/18/business/united-airlines-profit-earnings.html. The article reported:

> United reported a profit of $818 million in the most recent quarter, ending in June, up 39 percent compared with last year. Sales rose, too, as more customers booked flights with the carrier, amid rising demand for air service over all. In a separate report this month, United said that it had more than 71 million passengers during the first half of the year, up 4.2 percent compared with last year.
>
> * * *
>
> "It's very difficult at this point in time for consumers to exact a penalty against airlines that have exhibited poor customer service" or been involved in a high-profile situation like Mr. Dao's removal, said John Kwoka Jr., a Northeastern University economics professor.

37. *See* United Quarterly Report (Form 10-Q) 35 (July 19, 2017), https://ir.united.com/static-files/1d289c30-8a81-4310-a6a0-9a0ca7e92aaa. Corporations are required to identify "risk factors" in their 10-Q filings. *See* 17 C.F.R. § 229.305(c) (2011).

38. *See* A. Rebecca Reuber & Eileen Fischer, *Organizations Behaving Badly: When Are Discreditable Actions Likely to Damage Organizational Reputation?*, 93 J. BUS. ETHICS 39, 46 (2010) ("organizations that engage in discreditable actions, including unethical behaviors, which are revealed to external stakeholders, cannot be assumed to suffer reputational consequences.").

39. *See* Dave Carroll (sonsofmaxwell), *United Breaks Guitars*, YOUTUBE (July 6, 2009), https://www.youtube.com/watch?v=5YGc4zOqozo.

40. *Id.*

41. Dave Carroll, *United Breaks Guitars Lyrics*, http://www.songlyrics.com/dave-carroll/united-breaks-guitars-lyrics/.

In fact, however, as the reader has probably guessed, Carroll did fly United again, and not to save the world. When Carroll took United to speak at a conference of customer service representatives, the airline, ironically, lost his luggage.[42] In other words, despite his experiences, Carroll continued to patronize United, just as consumers did after the airline dragged the passenger off.

B. *Scandal Two: Wells Fargo*

One way in which Wells differed from United is that Wells experienced a series of scandals rather than one or two incidents. In 2015, Wells Fargo was ranked among the world's most respected companies[43] and claimed to have "relationships" with a third of American households.[44] Since then, it has suffered multiple scandals. First, employees opened millions of unauthorized accounts, which in some cases caused customers to suffer damage to their credit scores, and experience higher borrowing costs.[45] The first public mention of that scandal came in a pair of *Los Angeles Times* articles in late 2013, though the articles were more focused on the impact of the Wells Fargo culture on employees than on customers.[46] In May, 2015, the Los Angeles City Attorney sued Wells over the unauthorized accounts and Wells customers brought their first class action against the bank.[47] But the matter drew little nationwide attention until September 4, 2016, when the CFPB, the OCC, and the Los Angeles Attorney announced that

---

42. *See* Jesse McLean, *United Loses Luggage of 'United Breaks Guitars' Guy*, TORONTO STAR (Oct. 29, 2009), https://www.thestar.com/entertainment/2009/10/29/united_loses_luggage_of_united_breaks_guitars_guy.html. Carroll later recovered his bag. *See id.*

43. *See* Panos Mourdoukoutas, *The World's Most Respected Companies In 2015: Which Chinese Companies Made The List?* FORBES (June 28, 2015), https://www.forbes.com/sites/panosmourdoukoutas/2015/06/28/the-worlds-most-respected-companies-in-2015-which-chinese-companies-made-the-list/#b1a7f367a6fd.

44. *See* WELLS FARGO, 2015 ANNUAL REPORT 3 (2016), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/annual-reports/2015-annual-report.pdf.

45. For a fuller account of that scandal and the resulting litigation, *see generally* Jeff Sovern, *Free-Market Failure: The Wells Fargo Arbitration Clause Example,* 70 RUTGERS U.L. REV. 417 (2018) (hereinafter, Sovern, *Free-Market*). For an example of a Wells customer who experienced higher borrowing costs, *see* Emily Glazer, Christina Rexrode & AnnaMaria Andriotis, *Wells Fargo Is Trying to Fix Its Rogue Account Scandal, One Grueling Case at a Time*, WALL ST. J. (Dec. 27, 2016, 11:24 AM), https://www.wsj.com/articles/wells-fargo-is-trying-to-fix-its-rogue-account-scandal-onegrueling-case-at-a-time-1482855852.

46. *See* E. Scott Reckard, *Wells Fargo's Pressure-Cooker Sales Culture Comes at a Cost*, L.A. TIMES (Dec. 21, 2013), http://www.latimes.com/business/la-fi-wells-fargo-salepressure-20131222-story.html; *see also* E. Scott Reckard, *Wells Fargo Fires Workers Accused of Cheating on Sales Goals*, L.A. TIMES (Oct. 3, 2013), http://articles.latimes.com/2013/oct/03/business/la-fi-mo-wells-fargo-workers-fired-20131003.

47. *See* Complaint for Equitable Relief and Civil Penalties, California v. Wells Fargo & Co., No. BC580778 (Cal. Super. Ct. L.A. Cnty, May 4, 2015), http://freepdfhosting.com/c7384fa6fc.pdf; *see* Complaint, Jabbari v. Wells Fargo & Co., No. 3:15-cv-02159-VC (N.D. Cal. May 13, 2015), ECF No. 1.

they were collectively fining Wells \$185 million.[48] Then-Wells CEO John Stumpf was pilloried during the ensuing congressional hearings, and he soon resigned.[49]

Polling suggested that Wells would suffer a drop in consumer patronage.[50] According to the survey, 14% of Wells customers had decided to bank elsewhere, while another 30% were considering it. The percentage of non-Wells depositors who said they were unlikely to become Wells customers increased from 22% to more than half.[51]

Other Wells scandals followed,[52] involving improper auto repossessions,[53] charging customers for missing deadlines when the missed deadlines were actually Wells Fargo's fault,[54] changing mortgage terms without permission,[55] assessing improper charges on car loan customers which in some cases had led to

---

48. *See* Wells Fargo Bank, N.A., CFPB No. 2016-CFPB-0015 (Sept. 4, 2016), 2016 WL 6646128, http://files.consumerfinance.gov/f/documents/092016_cfpb_WFB consentorder.pdf.

49. *See An Examination of Wells Fargo's Unauthorized Accounts and the Regulatory Response:* Hearing Before the S. Comm. on Banking, Hous., and Urb. Affs., 114th Cong. (2016); *Holding Wall Street Accountable: Investigating Wells Fargo's Opening of Unauthorized Customer Accounts:* Hearing Before the H. Comm. on Financial Services, 114th Cong. (2016). Perhaps the most memorable moment in the hearings came when Senator Elizabeth Warren accused Stumpf of "gutless leadership" and called upon him to resign. *See* Michael Corkery, *Elizabeth Warren Accuses Wells Fargo Chief of 'Gutless Leadership,'* N.Y. TIMES (Sept. 20, 2016), https://www.nytimes.com/2016/09/21/business/dealbook/wells-fargo-ceo-john-stumpf-senate-testimony.html. Wells announced Stumpf's departure on October 12, 2016. *See* Michael Corkery & Stacy Cowley, *Wells Fargo Chief Abruptly Steps Down*, N.Y. TIMES (Oct. 12, 2016), https://www.nytimes.com/2016/10/13/business/dealbook/wells-fargo-ceo.html.

50. *See* Matt Egan, *Wells Fargo's Reputation is Tanking, Survey Finds*, CNN BUSINESS (Oct. 24, 2016, 1:05 PM), https://money.cnn.com/2016/10/24/investing/wells-fargo-fake-accounts-angry-customers/index.html.

51. Positive perceptions of the bank fell from 60% to 24% while negative perceptions increased from 15% to 52%. *Id.*

52. The items that follow include only scandals involving consumers. Though Wells was also accused of mistreating those who invested with it, those matters are not included on the theory they do not reflect consumer protection issues. *See, e.g.*, *FINRA Orders Wells Fargo Broker-Dealers to Pay \$3.4 Million in Restitution and Reminds Firms of Sales Practice Obligations for Volatility-Linked Products*, FINRA (Oct. 16, 2017), https://www.finra.org/media-center/news-releases/2017/finra-orders-wells-fargo-broker-dealers-pay-34-million-restitution-and#:~:text=WASHINGTON%20%E2%80%94%20The%20Financial%20Industry%20Regulatory,of%20volatility%2Dlinked%20exchange%2Dtraded.

53. *See* U.S. Dept. of Justice, *Justice Department Reaches \$4 Million Settlement with Wells Fargo Dealer Services for Illegally Repossessing Servicemembers' Cars*, U.S. DEPT. OF JUST. (Sept. 29, 2016), https://www.justice.gov/opa/pr/justice-department-reaches-4-million-settlement-wells-fargo-dealer-services-illegally.

54. Jesse Eisenger, *Here's Another Way Wells Fargo Took Advantage Of Customers*, PROPUBLICA (Jan. 23, 2017, 9:00AM), https://www.propublica.org/article/heres-another-way-wells-fargo-took-advantage-of-customers.

55. Gretchen Morgenson, *Lawsuit Accuses Wells Fargo of Making Improper Changes to Mortgages,* N.Y. TIMES (June 14, 2017), https://mobile.nytimes.com/2017/06/14/business/wells-fargo-loan-mortgage.html?ref=business&_r=0&referer=.

repossession (a problem disclosed by Wells itself),[56] enrolling customers in online bill paying services without authorization,[57] and foreclosing on homeowners who were eligible for mortgage modifications that would have enabled them to keep their homes,[58] among others. The list of problems was so long that one commentator asked, "Has Wells fatigue set in?"[59]

Regulators imposed ever more draconian sanctions on Wells, including the downgrading of Wells Fargo Bank's Community Revinvestment Act rating to "needs to improve",[60] the Federal Reserve's decision to prevent Wells from increasing its size beyond what it had been at the end of 2017,[61] and a collective fine by the CFPB and OCC of $1 billion.[62]

New York Times columnist Ron Lieber wrote "the overall picture is of an institution that no one should trust."[63] Some questioned whether the bank would survive its scandals.[64] Wells Fargo was proclaimed the eleventh most hated company in the United States in 2018.[65] Put another way, some saw Wells as the banking equivalent of a Blackberry. But did consumers?

---

56. *See* Press Release, Wells Fargo, Wells Fargo Announces Plan to Remediate Customers for Auto Insurance Coverage (July 27, 2017), https://newsroom.wf.com/press-release/consumer-lending/wells-fargo-announces-plan-remediate-customers-auto-insurance.

57. *See* Press Release, Wells Fargo, Wells Fargo Reports Completion of Expanded Third-Party Review of Retail Banking Accounts, Paving Way to Complete Remediation Effort (Aug. 31, 2017), https://newsroom.wf.com/press-release/wells-fargo-reports-completion-expanded-third-party-review-retail-banking-accounts.

58. *See* Kari Paul, *Wells Fargo Accidentally Foreclosed on More Homes—What You Should Do in a Similar Situation*, MARKETWATCH (Aug. 7, 2018), https://www.marketwatch.com/story/wells-fargo-may-have-accidentally-foreclosed-on-400-homeswhat-you-should-do-in-a-similar-situation-2018-08-07.

59. Victoria Finkle, *Wells Fargo was Hit with More Scandal. But Does Anyone Care?*, AM. BANKER (Aug. 13, 2018), https://www.americanbanker.com/opinion/wells-fargo-was-hit-with-more-scandal-but-does-anyone-care.

60. *See* OFFICE OF THE COMPTROLLER OF THE CURRENCY, CRA PERFORMANCE EVALUATIONS: APRIL 2017 (Apr. 2017), https://occ.gov/topics/compliance-bsa/cra/perfomance-evaluations-by-month/2017/cra-performance-evaluations-apr-2017.html.

61. *See* Press Release, Bd. of Governors of Fed. Reserve Sys., Responding to Widespread Consumer Abuses and Compliance Breakdowns by Wells Fargo, Federal Reserve Restricts Wells' Growth Until Firm Improves Governance and Controls. Concurrent with Fed Action, Wells to Replace Three Directors by April, One by Year End (Feb. 2, 2018), https://www.federalreserve.gov/newsevents/pressreleases/enforcement20180202a.htm.

62. *See* Press Release, Consumer Fin. Prot. Bureau, Bureau of Consumer Financial Protection Announces Settlement With Wells Fargo For Auto-Loan Administration and Mortgage Practices (Apr. 20, 2018), https://www.consumerfinance.gov/about-us/newsroom/bureau-consumer-financial-protection-announces-settlement-wells-fargo-auto-loan-administration-and-mortgage-practices/.

63. Ron Lieber, *Wells Fargo Should Be More Generous With Federal Workers,* N.Y. TIMES (Jan. 4, 2019), https://www.nytimes.com/2019/01/04/your-money/wells-fargo-government-shutdown-loan.html.

64. *E.g.*, Peter Conti-Brown, *Why Wells Fargo Might Not Survive Its Fake Accounts Scandal*, FORTUNE (Aug. 31, 2017), http://fortune.com/2017/08/31/wells-fargo-fake-accounts-scandal-2017-tim-sloan/.

65. Stebbins et al*., supra* note 34.

Wells saw that as a possibility. The Securities and Exchange Commission requires companies obliged to file 10-Qs to identify risk factors for their businesses.[66] Though the unauthorized account scandal had attracted attention from regulators, private plaintiffs, and the media before the September 2016 consent decree, Wells had not specifically mentioned it in its financial filings.[67] That changed after the consent decree. In its first 10-Q filed after the consent decree, Wells referred to the scandal multiple times and noted that "negative publicity or public opinion resulting from these matters may increase the risk of reputational harm to our business, which can impact our ability to keep and attract customers, . . . result in the loss of revenue, or have other material adverse effects on our results of operations and financial condition."[68] It thus appears that Wells did not regard the scandal as likely to affect sales until at least the point at which the regulators levied substantial fines. Later 10-Q filings also raised the possibility that Wells might lose customers because of the unauthorized account scandal as well as other scandals described above.[69]

It is difficult to determine the precise impact of the scandals on consumers' willingness to bank at Wells, based on the available data. While every quarter, Wells reported the percentage increase or decrease in the number of primary consumer checking accounts from the same quarter the previous year, the figures cannot be relied upon because the underlying numbers seemingly were inflated by the unauthorized accounts until 2016. Wells defines primary checking account customers as "[c]ustomers who actively use their checking account with transactions such as debit card purchases, online bill payments, and direct deposit."[70] Consumers who did not know about a checking account would surely not have used it and so their accounts would not have been considered "primary." According to a consent order the Securities and Exchange Commission agreed to with Wells, unused checking accounts were usually closed within 90 days.[71] That

66. *See* Regulation S-K, Item 305(c), 17 C.F.R. § 229.305(c).

67. *See, e.g.*, Wells Fargo & Co., Annual Report (Form 10-K) (Feb. 24, 2016), https://www.sec.gov/Archives/edgar/data/72971/000007297116001045/wfc-12312015x10k.htm.

68. Wells Fargo & Co., Quarterly Report (Form 10-Q) 67 (Nov. 3, 2016), https://www.sec.gov/Archives/edgar/data/72971/000007297116001340/wfc-9302016x10q.htm. The scandal was also referred to on pages 3, 66, and elsewhere in the 10-Q. *Id.*

69. *E.g.*, Wells Fargo & Co., Quarterly Report (Form 10-Q) 67 (Nov. 6, 2018) https://www.sec.gov/Archives/edgar/data/72971/000007297118000471/wfc-09302018x10q.htm.

70. *E.g.*, Press Release, Wells Fargo, Wells Fargo Reports $5.2 Billion In Quarterly Net Income, 9 n. 6 (July 13, 2018), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/earnings/second-quarter-2018-earnings.pdf.

71. *See* Wells Fargo, Order, SEC Administrative Proceeding File No. 3-19704 Para. 40 (Feb. 21, 2020), https://www.sec.gov/litigation/admin/2020/34-88257.pdf.

> In some cases (like checking or savings accounts), the unused accounts were closed relatively quickly (usually within 90 days if unfunded), but in other cases (like debit cards, the largest product category included in the cross-sell metric, or bill pay, another large contributor to cross-sell), the unused accounts remained open without activity for up to four years.

There is some ambiguity because the SEC order separates debit cards from checking accounts while Wells Fargo's definition of primary checking accounts includes "[c]ustomers who actively use their implies that the number of primary checking accounts overstated their number, though the exact period during and the extent to which that was the case is unclear. The SEC consent order speaks of the fraud lasting "through 2016,"[72] though that would mean that Wells continued to open unauthorized accounts even months after the CFPB, OCC, and Los Angles City Attorney had announced the substantial fines they imposed on Wells and when Wells was under considerable public pressure. In any event, it appears that the figures reported for 2016 and earlier cannot be relied upon.

Nevertheless, it is possible to come to some conclusions about the impact of the scandals. Many consumers were clearly willing to bank at Wells despite the scandals. As indicated in a 2017 Wells Fargo press release from 2017, and reflected in Figure 2, the number of primary consumer checking accounts at Wells in the first quarter of 2017 rose by 1.6% over the same quarter from the previous year.[73] Given that the number of primary consumer checking accounts Wells reported in the first quarter of 2016 was probably inflated by unauthorized accounts, the actual increase in the first quarter of 2017 may have been even larger than reported, but even if it was not, the increase indicates that some consumers, at least, were not dissuaded from opening accounts at Wells. The increase reported in the second quarter of 2017 was smaller, at .7%,[74] but still an increase, and that over what may have been inflated numbers. It was not until the third quarter of 2017, which included the first anniversary of the $185 million fine, that Wells suffered a drop in the number of primary consumer checking customers, and even then it was only .2%, or less than the increase Wells had experienced the previous quarter. Even that decline requires the—likely false–assumption that the 2016 figures were not inflated. In the fourth quarter of 2017, the numbers again increased, though by only .2%. Wells experienced a slightly larger increase in the first quarter of 2018, though one that was still under 1%. The number of primary consumer checking continued to improve during the remaining quarters of 2018.

checking account with transactions such as debit card purchases . . . ," indicating that debit cards are linked to checking accounts. *E.g.*, Press Release, Wells Fargo, Wells Fargo Reports $5.2 Billion In Quarterly Net Income, 9 n. 6 (July 13, 2018), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/earnings/second-quarter-2018-earnings.pdf. It seems likely that the primary checking accounts as reported in Wells Fargo's financial statements do not include debit card accounts as such but may be linked to debit cards and if so, and if the consumer used the debit card to pay for items using money in the checking account, that would be evidence that the consumer used the checking account as a primary checking account.

72. *See, e.g.*, Wells Fargo, Order, SEC Administrative Proceeding File No. 3-19704 Para. 1 (Feb. 21, 2020), https://www.sec.gov/litigation/admin/2020/34-88257.pdf.

73. Press Release, Wells Fargo, Wells Fargo Reports $5.5 Billion in Quarterly Net Income (Apr. 13, 2017), https://newsroom.wf.com/English/news-releases/news-release-details/2017/Wells-Fargo-Reports-5.5-Billion-in-Quarterly-Net-Income/default.aspx.

74. Press Release, Wells Fargo, Wells Fargo Reports $5.8 Billion in Quarterly Net Income (July 14, 2017), https://newsroom.wf.com/press-release/corporate-and-financial/wells-fargo-reports-58-billion-quarterly-net-income.

Of course, it is impossible to know whether even more consumers would have opened checking accounts at Wells if there had been no scandals: many factors contribute to consumer decisions about where to bank and we should be wary of assuming that consumer decision-making on such matters is focused on the one thing we are examining. But according to the figures, Wells enjoyed more checking account customers after the scandals described above than before. The changes are so trivial that they demonstrate that whatever punishment consumers inflicted on Wells, for many, it did not extend to abandoning it as their bank. A series of scandals will not always dissuade consumers from patronizing a business.[75]

C. *Why Did Consumers Continue Patronizing United and Wells?*

This subsection offers speculations about why consumers did not treat United and Wells the way they did Blackberry. Fortunately, economic theory supplies several possible explanations.

Adam Smith argued that market participants acting out of self-interest would collectively incentivize producers to provide products consumers desire.[76] But whether consumers will incentivize producers to provide consumer protection depends on whether consumers collectively avoid products made by tarnished companies. Whether consumers will avoid such products in turn may depend on their motivations, or to put it another way, on whether it is in consumers' short-term self-interest to avoid the products. If consumers fear that they will suffer an injury if they use particular products, they are likely to avoid them. For example, consumers who saw United's first response, which was perceived as blaming the passenger,[77] might have feared that United would remove them from a flight as

---

75. One observer reported:

> "[M]edian deposit growth per branch at Wells Fargo was just 5.6% between June 30, 2016, and June 30, 2017, down from 7.5% in the year ended June 30, 2016, before the scandal became public.
>
> Bank of America and JPMorgan Chase reported stronger same-store deposit growth of 9.9% and 12.5%, respectively, for the year ended June 30, 2017.
>
> Though lower than peers, Wells Fargo's same-store branch growth was in line with the overall median deposit growth of 5.9% for all FDIC-insured branches in the U.S.

See Maria Tor, *18% of Wells Fargo Branches Lost Deposits, FDIC Data Shows*, S&P GLOBAL (Oct. 24, 2017). That data, too, support the claim that more people were willing to bank at Wells after the scandal became public than before, though the data imply or at least leave open the possibility that Wells might have experienced even more growth if the scandal had not occurred.

76. *See* F. Eugene Heath, *Invisible Hand*, BRITANICA (Dec 22, 2021), https://www.britannica.com/topic/invisible-hand.

77. *See* McCann, *supra* note 35:

> The company's first response placed the blame for the episode on [the passenger]. In a statement on [the] morning [after the flight], United said, "We apologize for the overbook situation," but made no reference to [the passenger] or the video. * * *

well and so might have been willing to make alternative travel arrangements out of self-interest.

But if consumers need not fear that they will be dragged off a plane or subjected to improper treatment by their bank, it is harder to see how consumers act out of self-interest, at least in the short term, when they book more expensive flights on other airlines or undergo the burden of moving their accounts. Indeed, in some cases, it may not be realistic to expect the company to repeat the misconduct. For example, after United's CEO promised "we are going to fix what's broken so this never happens again,"[78] and Wells officials had promised to make things right,[79] it seemed much less likely that consumers would have had to fear that United or Wells would engage in similar conduct, especially in light of the adverse publicity.

Consumers boycotting a company may still be motivated by a desire to punish the company, but that is different from the type of motive Adam Smith described in his invisible hand scenario.[80] Consumers may, for example, boycott a company to avoid being "complicit with practices that they regard as immoral."[81] Of course, there have been many attempted boycotts for ideological reasons, such as concerns over treatment of particular groups or worker rights, and some succeed.[82] But those concerns may strike consumers as more significant than punishing an airline for dragging someone off a flight. Such concerns are also motivated by a desire to change ongoing conduct, as opposed to the United incident in which United had already pledged not to repeat the offending

78. *See* Ben Mutzabaugh, *United Airlines CEO Issues Second Apology, 'I Promise You We Will Do Better*,' USA TODAY (Apr. 11, 2017) https://www.usatoday.com/story/travel/flights/todayinthesky/2017/04/11/full-text-united-ceo-munoz-apologizes-flight-3411-pledges-review/100336992/. Munoz said:

> The truly horrific event that occurred on this flight has elicited many responses from all of us: outrage, anger, disappointment. I share all of those sentiments, and one above all: my deepest apologies for what happened. Like you, I continue to be disturbed by what happened on this flight and I deeply apologize to the customer forcibly removed and to all the customers aboard. No one should ever be mistreated this way.
>
> I want you to know that we take full responsibility and we will work to make it right.
>
> [W]e are going to fix what's broken so this never happens again. * * *
>
> I promise you we will do better.

79. *See* Wells Fargo, *Wells Fargo's Transformation*, WELLS FARGO 1 (2019), https://www08.wellsfargomedia.com/assets/pdf/commitment/progress-report.pdf.

80. Consumers may want to punish the company so as to deter other companies from behaving as the offending company did—sometimes called general deterrence. That could conceivably be out of self-interest, so that they themselves are not mistreated by other companies, but the odds that, for example, one particular individual will be dragged off an airplane are surely too low to make that a realistic fear.

81. Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 616 (2004).

82. *See generally*, Monroe Friedman, *Consumer Boycotts in the United States 1970-1980: Contemporary Events in Historical Perspective*, 19 J. CONSUMER AFF. 96, 108 (1985) (of 90 boycotts examined, 24 were rated successful or partly successful; as to some of the others, there may have been insufficient information to determine if they were successful).

behavior. Even so, those boycotts faced significant obstacles that the consumers who chose iPhones over BlackBerries did not, and most have not been labelled even partial successes.[83]

One of these obstacles is the tragedy of the commons problem. Assume that all consumers benefit if United suffers a decline in ridership after dragging the passenger off, because the decline in ridership will deter future such misconduct by airlines. If enough individuals forego United flights, airlines will be deterred from removing passengers. Now suppose a particular consumer wants to book a flight and United offers the cheapest or most convenient flight to the consumer's destination. The consumer might rationally choose the convenient and inexpensive United flight on the theory that (1) other consumers will punish United, (2) one more consumer boycotting the airline won't make a difference, and therefore (3) if the consumer foregoes the cheaper, more convenient flight, it will not serve any purpose and will put the consumer to unnecessary expense or inconvenience. If enough consumers believe similarly, United will not in fact suffer a decline in ridership, and the free market will fail to punish it. Tragedies of the commons problems exist when the incentives individuals face are inconsistent with the best interests of the community. The result risks undermining the boycott. As Nobel laureate George Stigler wrote, when "self-interest and ethical values with wide verbal allegiance are in conflict, much of the time[,] most of the time in fact, self-interest theory . . . will win."[84] Indeed, even a president has been known to consume a product he had called on others to boycott only days before.[85]

Free riders present a related problem.[86] If a boycott against Wells succeeds and banks no longer open unauthorized accounts, it would benefit all bank consumers, whether they participated in the boycott or not. Even free riders who banked at Wells during the boycott need not fear that Wells will open unauthorized accounts in their names. That weakens the incentive to participate in such boycotts. In addition, because all consumers face the same incentives, it increases the likelihood that too few consumers join the boycott to make it effective.[87]

83. *Id.*

84. George Stigler, Tanner Lectures on Human Values at Harvard University (Apr. 24, 25, and 28, 1980) *in* THE ECONOMIST AS PREACHER, AND OTHER ESSAYS 176 (1982).

85. *See* Frank Luntz (@FrankLuntz), TWITTER, (Apr. 5, 2021, 6:50 PM), https://twitter.com/frankluntz/status/1379204885585911813?s=11 ("Despite Trump's call to boycott Coca-Cola 48 hours ago, there is a Coke bottle behind the phone on the right side of his desk;" showing photograph of Trump with the bottle).

86. *See* Phillippe Delacote, *On the Sources of Consumer Boycotts Ineffectiveness*, 18 J. ENV'T. & DEV. 306, 307 (2009); Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 602-03 (2004).

87. *Cf.* Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. 929, 937 (2020) ("remaining a passive consumer and free riding other's efforts is often the rational thing to do . . . .").

Consumers contemplating a boycott for consumer protection reasons may also rationalize a decision not to participate on the ground that regulators will punish the company so that they need not do so.[88] And consumers incurring pain now for only the possibility of a reward later also collide with the very human tendency to prioritize current rewards over future benefits, known as present bias.[89]

In other words, as long as consumers believe that United provided a subpar product—removing them from flights for reasons beyond consumers' control—consumers might avoid booking flights on United out of self-interest, just as they switched from BlackBerries to iPhones out of self-interest. But once consumers become convinced that United will not drag them off planes, and the only reason to boycott the airline is to send a message to airlines about the consequences of bad conduct, rational consumers acting purely out of short-term considerations of self-interest should choose to fly United to the same extent they would have if the incident had not occurred. That, of course, is the exact opposite of Adam Smith's invisible hand, which argued that people acting out of self-interest also accomplish the goals of the broader society. And that may explain in part why United's sales did not suffer a decline.

If consumers rationally forego a company's products when they fear a recurrence of misconduct, but rationally consume it when they do not have such fears, even after bad behavior, companies should respond by allaying consumer concerns about a repetition of the bad conduct.[90] And that is precisely what both United and Wells attempted to do.[91]

How then, to explain the polls that found that consumers would stop doing business with United and Wells? One plausible explanation is the long-observed gulf that exists between what survey respondents say they will do and what they actually do when confronted with the same choice in real life.[92]

88. Of course, all this assumes that consumers actually remember the United incident and think about how they should respond. An equally plausible possibility is that the by the time consumers booked their next flight, they had forgotten about the scandal.

89. *See* Ted O'Donoghue and Matthew Rabin, *Present Bias: Lessons Learned and To Be Learned*, 105 AM. ECON. REV. PAPERS & PROCEEDINGS 273 (2015); Ted O'Donoghue and Matthew Rabin, *Doing It Now or Later*, 89 AM. ECON. REV. 103 (1999).

90. Apologies can be a potent method of doing so. *See* Yonathan A. Arbel & Yotam Kaplan, *Tort Reform Through the Back Door: A Critique of Law and Apologies*, 90 S. CAL. L.REV. 1199, 1203 (2017) ("[T]here is a large consensus that apologies are cost-saving devices which can cut down operational costs by millions of dollars in regulatory fines, judgments, and public outrage.").

91. *See supra* note 77-79 and accompanying text.

92. *See* Richard T. LaPiere, *Attitudes vs. Actions,* 13 SOCIAL FORCES 230, 233-34 (1934) (explaining approximately 90% of 128 surveyed auto camps, tourist camps, restaurants and hotels said they would not accept people of Chinese ethnicity as customers, but only one of 251 hotels, auto camps, tourist camps, and restaurants, which included the surveyed facilities, actually refused to accommodate a Chinese guest who visited the establishment). *See generally*, Howard Schuman, *Attitudes vs. Actions Versus Attitudes vs. Attitudes*, 36 *PUBLIC OPINION QUARTERLY* 347 (1972) (noting inconsistencies between survey responses and real-life behavior).

Another possible explanation is that consumers who want to use a service will simply find reasons to discount negative information about the company that provides it.[93] Motivated reasoning is a well-known force.[94] Consumers might join Marlowe's Barabas in dismissing inconvenient facts: "But that was in another country, and besides, the wench is dead."[95]

In any event, United and Wells demonstrate that consumers will continue to patronize companies that have engaged in misconduct and suggest that the market alone is not sufficient to protect consumers. This Article presents more hypotheses and case studies in the pages to come. But first, a note about methodological issues.

AN INTERLUDE ABOUT METHODOLOGICAL PROBLEMS

Multiple methodological problems limit the conclusions that can be drawn from the data reported in this Article. Fluctuations in sales are a blunt instrument by which to measure the impact of company misconduct. Changes in sales can be caused by many factors, of which only one is a decision by consumers to stop buying a company's products.[96] Thus, a company's decision to increase or decrease prices, increase or decrease its advertising budget, or open or close branches may affect its sales. So may similar decisions by competitors. The economy impacts sales of many products. Even the weather can alter sales. Acquisitions and sales of assets can also affect sales.[97] The Article buttresses the value of the sales data by also relying on contemporaneous media accounts of why sales fell and the risk factors companies reported in financial statements, but they too have limitations.

---

93. *See* Rohini Ahluwalia, *How Prevalent is the Negativity Effect in Consumer Environments?* 29 J. CONSUMER RSCH. 270, 278 (2002) ("when consumers are familiar with a brand and like it, the negativity effect is attenuated . . . .").

94. *See generally* Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCH BULL. 480 (1990).

95. *See generally* Christopher Marlowe, *The Jew of Malta*, Act IV, Scene I (circa 1590).

96. The Article proceeds on the assumption that year-over-year changes in sales or similar numbers are the best guide to consumer willingness to buy from a company. When those sales increase, it means some consumers who were not formerly among the company's customers were willing to buy the company's products or else that existing customers increased their purchases, indicating that they were not dissuaded by the scandal. When sales decrease, the implication that the scandal has driven customers away is plausible, though not necessarily true. For some scandals, the article also reports on market share, see *infra* notes 172, 205-06, but that information is not available for every market.

97. Later, the Article discusses JPMorgan Chase, whose 2008 acquisition of Washington Mutual increased the number of the bank's branches by some 2,200 and increased deposits by $188.3 billion. *See* Robin Sidel, David Enrich & Dan Fitzpatrick, *WaMu Is Seized, Sold Off to J.P. Morgan, In Largest Failure in U.S. Banking History*, WALL ST. J. (Sept. 26, 2008, 12:01 AM), https://www.wsj.com/articles/SB122238415586576687. The Article will also turn to Target, which sold its pharmacy and clinic business, producing a consequent drop in sales. *See* Target Corp., *Quarterly Report (Form 10-Q)* 11 (Aug. 24, 2016), https://investors.target.com/static-files/cdc8528c-ba8c-4967-881f-cff51279dd87.

As with any counterfactual, we cannot know what a company's numbers would have been if it had not engaged in the objectionable conduct, and so we cannot conclude definitively from a decline that consumers are punishing the company, nor can we infer from an increase in sales that no consumers chose to shop elsewhere to avoid a misbehaving company. As the saying goes, the absence of evidence is not always evidence of an absence. But we can determine whether consumers are continuing to patronize the company notwithstanding the conduct, and that offers some insight into the likely deterrent value of the consumer market on misconduct.

Finally, another limit is that companies reporting sales information typically do so for periods of a quarter. Consequently, short-lived drops in sales that did not significantly impact a business's quarterly results, if any, will not show up in the study. But perhaps such minor drops in sales are too small to have a deterrent effect in any case. Such short-term drops do occur, however.[98]

II. Hypothesis Two: Whether Consumers Know the Price and Key Characteristics of the Competing Product at the Time They Make the Purchasing Decision May Affect Their Willingness to Buy From an Offending Company.

How consumers make purchasing decisions may also affect whether they patronize misbehaving companies. The combination of the earlier-discussed United incident and the Target data breach, reported below, suggests just that. Consumers often book flights by visiting a web site and entering their destination and travel dates.[99] The web site then displays a list of flights at various prices and times. Consumers choosing flights but boycotting United, say, can see exactly how much more a competitor's product will cost or how much less convenient it will be. It requires considerable discipline to pay more to fly a different airline when you can see precisely what the cost of doing so is.

But consumers avoiding a bricks and mortar store experience a different, more diluted, decision-making process. Unless a consumer is shopping online, the consumer is likely to make the decision to travel to stores without knowing most of the prices the various businesses charge. It requires less determination for consumers to avoid a particular store when they lack specific knowledge of the price of doing so. That may explain in part why United did not seem to suffer losses in business while Target may have suffered losses after its data breach, as the Article now explores.

98. One study, using mobile phone data, found that monthly customer visits to outlets declined by 2-4% after announcement of a securities class action lawsuit. *See* von Meyerinck et al., *supra* note 13, at 42.

99. *See e.g.*, ORBITZ, https://www.orbitz.com/Flights; EXPEDIA https://www.expedia.com/Flights; CHEAPOAIR https://www.cheapoair.com/flights/.

A. *Scandal Three: Target*

On December 19, 2013, Target announced that it had been the victim of a major data breach.[100] Target initially reported that 40 million accounts had been compromised, but on January 10, 2014, Target disclosed that in fact data on 70 to 110 million people had been affected.[101] Media outlets reported a substantial increase in the number of accounts available for sale on the black market.[102] Media criticism focused on the lengthy period during which hackers had access to the data.[103] After the breach, consumers lowered their assessments of the security of personal information of debit cards, implying that the breach affected consumer attitudes generally.[104] Target later agreed to pay $10 million to settle a class action by Target shoppers.[105]

Target's sales declined after the announcement and Target responded by cutting prices 10%.[106] As shown in Figure 3, during the fourth quarter of 2014, when Target made the first breach announcement, Target's sales dropped 6.6% from the same quarter in the previous year. Because Target's fourth quarter ended February 1, the first breach announcement came about halfway through the quarter and the second announcement—that more consumers' data had been compromised than previously thought—was made with about three weeks left in the quarter. While the 6.6% drop may have been caused in part by Target's discounting, as well as by a decline in sales, Target reported in an SEC filing that

100. *See* Press Release, Target Corp., Target Confirms Unauthorized Access to Payment Card Data in U.S. Stores (Dec. 19, 2013), https://corporate.target.com/press/releases/2013/12/target-confirms-unauthorized-access-to-payment-car.

101. *See* Press Release, Target Corp., Target Provides Update on Data Breach and Financial Performance (Jan. 10. 2014), https://corporate.target.com/press/releases/2014/01/target-provides-update-on-data-breach-and-financia; Elizabeth A. Harris & Nicole Perlroth, *For Target, the Breach Numbers Grow*, N.Y. TIMES, (Jan. 10, 2014), https://www.nytimes.com/2014/01/11/business/target-breach-affected-70-million-customers.html.

102. *See, e.g.*, Harris & Perlroth, *supra* note 101, at *1.

103. *See* Paula Rosenblum, *The Target Data Breach Is Becoming A Nightmare*, FORBES (Jan. 17, 2014, 2:22 PM), https://www.forbes.com/sites/paularosenblum/2014/01/17/the-target-data-breach-is-becoming-a-nightmare/#1aef75191a35 ("[The hackers] kept coming back to harvest data almost daily over the course of several weeks.").

104. *See* CLAIRE GREENE & JOANNA STAVINS, FED. RSRV. BANK OF BOS., *DID THE TARGET BREACH CHANGE CONSUMER ASSESSMENTS OF PAYMENT CARD SECURITY?* 4 (2016), https://www.bostonfed.org/publications/research-data-report/2016/did-the-target-data-breach-change-consumer-assessments-of-payment-card-security.aspx. The authors did not find, however, a significant change in consumer debit card use.

105. *See* In re: Target Corporation Customer Data Security Breach Litigation, Order Certifying a Settlement Class, Preliminarily Approving Class Action Settlement and Directing Notice to the Settlement Class, MDL No. 14-2522 (PAM/JJK) (D. Minn. 2015), https://storage.courtlistener.com/recap/gov.uscourts.mnd.137664.364.0.pdf; *Target agrees to pay $10 mln to settle lawsuit from data breach,* REUTERS (Mar. 19 2015, 7:34 AM), https://www.cnbc.com/2015/03/19/target-agrees-to-pay-10-mln-to-settle-lawsuit-from-data-breach.html.

106. *See* Press Release, Target Corp., A Message from CEO Gregg Steinhafel about Target's Payment Card Issues (Dec. 20, 2013), https://corporate.target.com/press/releases/2013/12/a-message-from-ceo-gregg-steinhafel-about-targets; Harris & Perlroth, *supra* note 101, at *1.

it had experienced "weaker than expected" sales in the United States "immediately following the announcement of the Data Breach."[107] Target also noted that if it "experience[d] additional significant data security breaches or fail[ed] to detect and appropriately respond to significant data security breaches . . . guests could further lose confidence in our ability to protect their information, which could cause them to discontinue using our REDcards or pharmacy services, or stop shopping with us altogether."[108] The implication is that Target saw the sales decline attributable to the data breach as over by the time it issued the report ("immediately following the announcement");[109] Target also noted that "sales began to recover in January 2014."[110] By the following year, Target had concluded that the breach "will not have a long-term impact to our relationship with our guests . . . ."[111] Target's view that it had weathered the storm finds support in the fact that in each of the seven following quarters, Target's sales exceeded the amount for the same quarter in the previous year.[112]

It is impossible to know why the breach didn't have a longer-term impact, but one possibility is that consumers became convinced it would not recur. In other words, as time went on and Target did not suffer other breaches, consumers probably saw Target much like United Airlines in the sense that it was a company that had put a mistake behind it. Conceivably, the abundance of other breaches also convinced consumers that it was impossible to find sellers that would not suffer a data breach sooner or later, assuming they hadn't already.[113]

But other reasons may also help explain why consumers stopped shopping at Target, however briefly, even though they continued patronizing United and Wells Fargo. They are discussed in the next two sections.

---

107. TARGET CORP., Annual Report (Form 10-K) 7 (Mar. 14, 2014).

108. *Id.*

109. *Id.* at 5. Elsewhere in the report, Target wrote that it was "unable to determine whether there will be a long-term impact to our relationship with our guests," *id.* at 5, but it isn't clear whether that was a reference to the possibility of a second breach or if Target was expressing concern that the breach might by itself produce a long-term impact.

110. TARGET CORP., supra note 107, at 19 ("Prior to our December 19, 2013 announcement of the Data Breach, our U.S. Segment fourth quarter comparable sales were positive, followed by meaningfully negative comparable sales results following the announcement. Comparable sales began to recover in January 2014. The collective interaction of year-over-year changes in the retail calendar (*e.g.*, the number of days between Thanksgiving and Christmas), combined with the broad array of competitive, consumer behavioral and weather factors makes any quantification of the precise impact of the Data Breach on sales infeasible.").

111. TARGET CORP., Annual Report (Form 10-K) 5 (Mar. 13, 2015).

112. *See* TARGET CORP., Quarterly Report (Form 10-Q) 11 (Aug. 24, 2016). In December 2015, Target sold its pharmacy and clinic business, which explains much if not all of the sales declines during 2016.

113. *See* PRIVACY RIGHTS CLEARINGHOUSE, *Data Breaches*, https://www.privacyrights.org/data-breaches (last visited Dec. 23, 2020) (Reporting that more than 9,000 data breaches have occurred.); *see also* Heather McLaughlin, *End-of-Year Data Breach Report*, IDENTITY THEFT RES. CTR. (Jan. 28, 2020), https://www.idtheftcenter.org/identity-theft-resource-centers-annual-end-of-year-data-breach-report-reveals-17-percent-increase-in-breaches-over-2018/ (identifying that in 2019 alone, there were 1,473 data breaches in the United States, exposing 164,683,455 sensitive records).

III. Hypothesis Three: The Difficulty of Shifting Providers Affects Consumers' Willingness to Avoid Misbehaving Companies.

The availability—or not—of other merchants which treat consumers better is also relevant to consumers deciding whether to patronize a company.[114] If only a few airlines fly a particular route, for example, consumers who need to travel that route may face a difficult time boycotting one or more of them.[115] Similarly, if consumers conclude that all or nearly all providers of a particular product will treat them similarly, it serves no purpose to change providers. For example, a CFPB study found that more than 92% of general purpose reloadable prepaid card agreements included arbitration clauses.[116] Consequently, consumers seeking such an agreement without an arbitration clause might not find one in their local market.

Even if alternatives exist, it may be that the difficulty in switching from one provider to another also plays a role in consumer willingness to switch their business from one company to another. The response to the Wells scandals may be explained in part by such a phenomenon. As Consumer Reports has noted, it takes "money to move your money,"[117] as well as time, because of the need to change direct deposits and payments, and the likelihood that during the transition, the consumer needs to maintain accounts at both the former and the new institutions to ensure that automatic payments do not empty the wrong account.[118] The time, cost, and inconvenience of exit, in other words, may dissuade consumers from changing banks.[119] In contrast, the cost of switching from Target may be less, at least if other stores offering comparable items are not much less convenient to travel to.

A. *Scandal Four: Robo-signing and JPMorgan Chase*

The robo-signing scandal offers another illustration of this effect. During the Great Recession and its aftermath, millions of Americans lost homes to

---

114. *See* Arbel & Shapira *supra* note 87, at 945 (2020) ("Most passive consumers would not exit in concentrated markets, where there are few alternatives (and thus no competitors to switch to)."). *Cf.* von Meyerinck, *supra* note 13.

115. *See* Dept. of Transp., Comment of FTC Commissioner Rohit Chopra https://www.ftc.gov/es/system/files/documents/public_statements/1576174/chopra_comment_to_us_department_of_transportations_dot-ost-2019-0182.pdf ("Given the significant consolidation in the [airline] industry and the lack of choice on most routes, it is unreasonable to expect 'market forces' to correct . . . harms.").

116. Consumer Fin. Prot. Bureau, Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a) (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-tocongress-2015.pdf.

117. *See* Suzanne Martindale et al., Trapped at the Bank: Removing Obstacles to Consumer Choice in Banking 1, 19 (2012), http://consumersunion.org/wp-content/uploads/ 2013/09/TrappedAtTheBank1.pdf.

118. *See also* Sovern, *Free-Market*, *supra* note 45 at 448.

119. *See* Egan, *supra* note 50 (quoting CLSA bank analyst Mike Mayo) ("[T]he existing [Wells] customer base is incredibly sticky").

foreclosure.[120] The foreclosure process typically requires the filing of various documents, including sworn affidavits.[121] Some financial institutions found it difficult to supply the needed documents for such a large number of foreclosures. As a result, they had their staff swear to facts of which they lacked personal knowledge, sometimes at assembly-line speed.[122] The same people, listed on different documents as officers of different banks, appeared to have signed a variety of documents required for foreclosure on behalf of different institutions.[123] In some instances, companies filed documents openly assigning mortgages to companies identified in the filings as "Bogus Assignee."[124] These practices became known as robo-signing.

---

120. *See* Erin Carlyle, *2014 Foreclosure Filings Hit Lowest Level Since 2006, RealtyTrac Says*, FORBES (Jan. 15, 2015, 12:01 AM), https://www.forbes.com/sites/erincarlyle/2015/01/15/foreclosure-filings-drop-by-18-in-2014-hit-lowest-level-since-2006-realtytrac-says/#1925985948e5 ("Since the financial crisis began in September 2008, about 5.5 million homes have been lost to foreclosure across the country . . . .").

121. *See* Christopher K. Odinet, *Banks, Break-Ins, and Bad Actors in Mortgage Foreclosure*, 83 U. CIN. L. REV. 1155, 1167-69 (2015) (offering a more complete description of the foreclosure process requirements and the breakdowns following the Great Recession).

122. *See* Deposition of Jeffrey D. Stephan at 46-47, 62-64, 67-68, Fed. Nat'l Mortg, Ass'n v. Bradbury, No. BRI-RE-09-65 (Me. Dist. Ct. June 7, 2010), http://4closurefraud.org/2010/06/16/2nd-deposition-of-jeffrey-stephan-gmacs-assignment-affidavit-slave/ (testifying that he is asked to sign as many as 8,000 documents a month, he may have been signing 10,000 documents a month six months earlier, that he signs affidavits without knowing information they contain beyond the name of the borrower, the entity on whose behalf he is signing and the figures they contain, that this is in accordance with GMAC Mortgage policies and procedures, and that he does not know whether other parts of the affidavit are true); *see also* Deposition of Erica Johnson-Seck at 14, IndyMac Fed. Bank v. Machado, No. 50 2008 CA 037322XXXX MB AW (Fla. Cir. Ct. July 9, 2009) (testifying that she spends not more than 30 seconds signing each document and that she doesn't read them before signing them); *see also* Deposition of Beth Ann Cottrell 5-11, Chase Home Fin., LLC v. Fleming, Case No. 50-2009-CA-026599 (Fla. Cir. Ct. May 18, 2010), http://4closurefraud.org/2010/09/21/gmac-you-aint-the-only-one-full-deposition-of-beth-cottrell-chase-home-finance-robo-signer-extraordinaire/ (testifying that she signed affidavits under oath in which she claimed that she had personal knowledge of many things of which she did not actually have personal knowledge and made no effort to verify). The press also reported on the depositions. *See also* Alan Zibel, *Bank of America Delays Foreclosures in 23 States*, WASH. POST (Oct. 2, 2010, 1:51 AM), http://www.washingtonpost.com/wp-dyn/content/article/2010/10/01/AR2010100105392.html?nav=rss_business/industries; *see also* David Streitfeld, *JPMorgan Suspending Foreclosures,* N.Y. TIMES (Sept. 29, 2010), https://www.nytimes.com/2010/09/30/business/30mortgage.html.

123. *See* Deposition of Erica Johnson-Seck at 14, IndyMac Fed. Bank v. Machado, No. 50 2008 CA 037322XXXX MB AW (Fla. Cir. Ct. July 9, 2009) (testifying that she has signing authority on behalf of OneWest Bank, IndyMac Federal Bank, IndyMac Bank, FSB, Deutsche Bank, Bank of New York, and U.S Bank, among others, and is an officer of some); Lynn E. Szymoniak, *An Officer of Too Many Banks*, SCRIBD (Jan. 14, 2010), https://www.scribd.com/document/25266216/An-Officer-of-Too-Many-Banks.

124. *See* DAVID DAYEN, CHAIN OF TITLE: HOW THREE ORDINARY AMERICANS UNCOVERED WALL STREET'S GREAT FORECLOSURE FRAUD 148, 151-54 (2016); Amir Efrati & Carrick Mollenkamp*, U.S. Probes Foreclosure-Data Provider*, WALL ST. J. (Apr. 3, 2010, 12:01 AM), https://www.wsj.com/articles/SB10001424052702303450704575160242758576742; *see also* 4closureFraud, *Enough is Enough! Docx Assignment of Mortgage – Bogus Assignee for Intervening Asmts All over the Public Records!* (Feb. 10, 2010), http://4closurefraud.org/2010/02/10/enough-is-enough-docx-assignment-of-mortgagebogus-assignee-for-intervening-asmts-all-over-the-public-records/.

While the problems could be dismissed as purely technical and therefore not worthy of attention—after all, the people being foreclosed upon had supposedly failed to make their monthly payments—some observers were troubled by the notion of taking someone's home away without proper proof, analogizing it to convicting known criminals based on planted evidence.[125] Some of the technical errors led to problems that were anything but technical: banks attempted to foreclose on consumers when the bank did not own the mortgage,[126] the consumer had paid off the mortgage,[127] or the consumer didn't even have a mortgage.[128] Banks were alleged to have broken into homes that were not even in foreclosure, sometimes disposing of the contents, which in one instance included the ashes of the homeowner's husband.[129] As robo-signing drew more challenges in court and publicity, some banks, including JPMorgan Chase,[130] halted their foreclosures. Connecticut suspended all foreclosures within the state for sixty days,[131] while the Texas Attorney General also called for a foreclosure suspension.[132]

Reports of robo-signing drew considerable media attention in 2010.[133] Stories appeared in leading newspapers as well as news shows like Good Morning America,[134] 60 Minutes,[135] ABC News,[136] and late-night comedy shows such as

---

125. *See* Palm Beach Young Democrats, *Who Holds the Title?*, YOUTUBE (July 9, 2018), https://www.youtube.com/watch?v=5v1lhfGrVig..

126. *See* Robbie Whelan, *Foreclosure? Not So Fast*, WALL ST. J. (Oct. 4, 2010, 12:01 AM), https://www.wsj.com/articles/SB10001424052748704029304575526182962738098?mod=WSJ_hpp_LEFTTopStories.

127. *See* Andrew Martin, *In a Sign of Foreclosure Flaws, Suits Claim Break-Ins by Banks*, N.Y. TIMES (Dec. 21, 2010), https://www.nytimes.com/2010/12/22/business/22lockout.html.

128. *See* Lee Weisbecker, *Cooper: BofA Foreclosed on Homeowner who Paid Cash*, TRIANGLE BUS. J. (Oct. 7, 2010, 2:11 PM), https://www.bizjournals.com/triangle/stories/2010/10/04/daily48.html (referring to North Carolina Attorney General Roy Cooper).

129. *See* Martin, *supra* note 127.

130. *See* Streitfeld, *supra* note 122.

131. *See* Ariana Eunjung Cha, *Connecticut Halts all Foreclosures for all Banks*, WASH. POST (Oct. 1, 2010, 2:41 PM), http://voices.washingtonpost.com/political-economy/2010/10/connecticut_halts_all_foreclos.html.

132. *See* Press Release, Attorney Gen. of Tex., Attorney Gen. Abbott Calls for a Halt on Foreclosures While Loan Servicers Review Their Bus. Practices (Oct. 5, 2010), https://www.texasattorneygeneral.gov/oagnews/release.php?id=3500.

133. *See, e.g.*, Efrati & Mollenkamp, *supra* note 124; *see generally* DAVID DAYEN, CHAIN OF TITLE: HOW THREE ORDINARY AMERICANS UNCOVERED WALL STREET'S GREAT FORECLOSURE FRAUD (2016).

134. *See* DAVID DAYEN, CHAIN OF TITLE: HOW THREE ORDINARY AMERICANS UNCOVERED WALL STREET'S GREAT FORECLOSURE FRAUD 222 (2016).

135. *See* CBS News, *The Next Housing Shock*, YOUTUBE (Apr. 3, 2011), https://www.youtube.com/watch?v=QwrO6jhtC5E.

136. *See* Matt Gutman & Bradley Blackburn, *Foreclosure Crisis: 23 States Halt Foreclosure as Officials Review Bank Practices*, ABC NEWS (Oct. 4, 2010, 6:52 PM), https://abcnews.go.com/WN/robo-signers-blamed-foreclosure-mistakes/story?id=11798650.

The Daily Show.[137] Robo-signing also made the news in February 2012 when 49 state attorneys general, together with several federal agencies, entered into a settlement worth more than $50 billion with JPMorgan Chase, Wells Fargo, and other banks in what was described as "the largest consumer financial protection settlement in US history."[138]

If consumers were to eschew banking at institutions involved in the robo-signing scandal, we might expect them to do so in larger numbers at two separate times. The first is the fall of 2010, when several banks suspended foreclosures[139] because the banks' decisions to suspend foreclosures implies recognition of wrongdoing by the bank itself. The second time is February 2012, when the National Mortgage Settlement was announced,[140] because such a large settlement also implies wrongdoing.

Figure 4 shows the changes in total checking accounts at JPMorgan Chase from 2009 to 2013.[141] During the third quarter of 2010, when the bank halted foreclosures, the number of consumer checking accounts at JPMorgan Chase rose by more than five percent.[142] That number increased by an even larger amount in the following quarter.[143] In the first quarter of 2012, consumer checking accounts increased by 1.55%, and rose by more than four percent in each of the following seven quarters.[144] While those increases were probably fueled at least in part by the country's recovery from the Great Recession, they also demonstrate that consumers were willing to continue opening checking accounts at the bank despite the robo-signing scandal. The bank's filings with the SEC similarly did not show concerns about consumers avoiding the bank because of the robo-signing scandal, though the filings mentioned other causes for anxiety arising from the scandal.[145] To be sure, many things enter into consumer decisions to bank or not bank at a particular institution, but at a minimum, increases in the number of active checking accounts in the hundreds of thousands suggests that many consumers were not sufficiently troubled by the robo-signing scandal to

---

137. *See* The Daily Show with Jon Stewart, *Foreclosure Crisis,* COMEDY CENT. (Oct. 7, 2010), https://www.cc.com/video/g1vl91/the-daily-show-with-jon-stewart-foreclosure-crisis.

138. *See* Joint State-Fed. Nat'l Mortg. Servicing Settlements, *About the Settlement*, NAT'L MORTG. SETTLEMENT, http://www.nationalmortgagesettlement.com/about.html (last visited Dec. 21, 2020); *see generally* Jessica Ziehler, *The 2012 Mortgage Settlement with Large Banks*, 32 REV. BANKING & FIN. L. 286 (2012-13).

139. *See supra* notes 131-37 and accompanying text.

140. *See supra* note 138 and accompanying text.

141. In 2008, JPMorgan Chase acquired Washington Mutual, *see supra* note 97, which makes comparisons with that year less useful. In addition, the Great Recession of 2007-2008 probably had an impact on the numbers as well.

142. *See* Figure 4.

143. JPMorgan Chase & Co., Annual Report 74 (Form 10-K) (Feb. 28, 2011).

144. JPMorgan Chase & Co., Quarterly Report 20 (Form 10-Q) (May 10, 2012) and Figure 4.

145. *See* JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 9, 192 (Nov. 9, 2010), https://www.sec.gov/Archives/edgar/data/19617/000095012310102689/y86142e10vq.htm; JPMorgan Chase & Co., Annual Report (Form 10-K) 12, 295-97 (Feb. 29, 2012), https://www.sec.gov/Archives/edgar/data/19617/000001961712000163/corp10k2011.htm#s724F6ED77930BA9567517127A7C8CC2C.

bank elsewhere. In contrast during the last three quarters in 2011, a relatively quiet period for the robo-signing scandal, the number of consumer checking accounts declined from the same quarter in the previous year, adding more force to the claim that consumer decisions about where to bank were motivated by something other than the robo-signing scandal.

IV. Hypotheses Four and Five: How Consumers Think of Themselves Matters and So Does the Number of Consumers Significantly Affected

These hypotheses are illustrated by the contrast between consumer reaction to the General Motors ignition switch scandal and the Volkswagen emission scandal. Though the GM scandal was arguably the worse of the two—the GM defect was found to have killed 124 consumers, injured hundreds more, and GM did nothing to correct the problem for years—consumers seemed to have more confidence in GM products than in Volkswagens. First, this Article reports on the GM scandal.

A. *Scandal Five: General Motors*

As early as 2003, General Motors began receiving complaints that its cars were inadvertently shutting down while operating because of a problem with the ignition switch.[146] GM engineers initially decided not to take action on the matter.[147] In 2005, a GM employee emailed others within the company that the ignition switch presented a "serious safety problem."[148] Still, the company contented itself by notifying its dealers to advise customers to remove heavy items from key rings holding car keys.[149] Shortly afterwards, the *New York Times*

---

146. *See* Anton R. Valukas, Report to Board of Directors of General Motors Company Regarding Ignition Switch Recalls 54 (2014), http://www.beasleyallen.com/webfiles/valukas-report-on-gm-redacted.pdf [hereinafter, Valukas Report]. It appears GM engineers first noticed the problem in 2001. *See also* Max Blau, *No Accident: Inside GM's Deadly Ignition Switch Scandal*, Atlanta Mag. (Jan. 6, 2016), http://www.atlantamagazine.com/great-reads/no-accident-inside-gms-deadly-ignition-switch-scandal/.

147. *See* Memorandum from the House Comm. on Energy and Commerce Majority Staff, Hearing on "The GM Ignition Switch Recall: Why Did It Take So Long?" 6 (Mar. 30, 2014) [hereinafter House Committee Memo], https://media.npr.org/assets/news/2014/01/gm-documents/033014-committee-memo.pdf.

148. The email also stated:

> I'm thinking big recall. I was driving 45 mph when I hit the pothole and the car shut off, and I had a car driving behind me that swerved around me. I don't like to imagine a customer driving their kids in the back seat, on I-75, and hitting a pothole, in rush hour traffic.

Jeff Bennett & Siobhan Hughes, *GM Officials Ignored Alert on Car Stalling*, Wall St. J. (June 18, 2014, 12:28 PM), https://www.wsj.com/articles/rep-murphy-unconvinced-gm-didnt-make-effort-to-cover-up-bad-decisions-1403101342.

149. *See* Valukas Report, *supra* note 146, at 88, 91. In December 2005, GM formalized the recommendation by issuing a Technical Service Bulletin to its dealers, but the Bulletin was not made available to consumers.

published an article noting that after the reporter's spouse had bumped her knee against the steering column in a GM car, the engine had shut off; the car's key ring did not contain any extraneous items and had only the key, the car's fob, and a tag identifying the car.[150] The article noted that GM did not consider the problem a safety issue,[151] a position that drew scathing criticism from a reporter writing in the *Cleveland Plain-Dealer*.[152] The *Plain-Dealer* reporter's position seemed to be tragically vindicated the following month when a GM car crashed, the airbag did not deploy, and the driver was killed; an investigation disclosed that the engine was in "accessory," meaning that the engine was not on, though the electrical systems were.[153]

In April 2006, GM authorized changes to be made in its ignition switches to prevent the cars from shutting down during operation.[154] The modified switches were incorporated in GM's 2007 car models, though GM neither announced a recall of the cars it had already sold with the defective switches nor did it change the number used to identify the modified part.[155] The failure to change the part number made it more difficult to identify the problem's cause because later observers who did not realize the part had changed were misled into thinking that GM had not changed its manufacturing process.[156] It thus appeared even to GM insiders that the shutdowns had a cause other than the badly designed part.

As time passed, others noticed that motorists died with undeployed airbags and ignition keys in "accessory" in certain GM models.[157] Various GM employees looked into the matter, but according to a later report commissioned by GM, felt no urgency to resolve it, which may explain why GM did so little over the years.[158] The report described the "GM nod," acknowledged by GM's

---

150. Jeff Sabatini, *Making a Case for Ignitions that Don't Need Keys*, N.Y. TIMES (June 19, 2005), https://www.nytimes.com/2005/06/19/automobiles/making-a-case-for-ignitions-that-dont-need-keys.html.

151. *Id*. *See also* Gary Heller, *The All-New Chevrolet Cobalt Has Many Virtues and Many Faults*, SUNBURY DAILY ITEM, May 26, 2005, at 45 (noting that the engine shut down four times during the reviewer's test drives and that after the reviewer had figured out that bumping the key fob caused the shutdowns, the reviewer still bumped it accidentally and turned off the engine).

152. *See* Christopher Jensen, *Salamis, Key Rings and GM's Ongoing Sense of Humor*, CLEVELAND PLAIN DEALER, June 26, 2005, at F1:

> [I]f you're whisking along at 65 mph or trying to pull across an intersection and the engine stops, [you restart the car after switching to neutral]. Only a gutless ninny would worry about such a problem. Real men are not afraid of temporary reductions in forward momentum. . . .
>
> [Y]ou have to admit it is pretty funny to hear somebody pretend that turning off the engine by mistake isn't a safety issue.

153. *See* House Committee Memo, *supra* note 147.

154. *Id.* at 7.

155. *Id.*

156. *See* Chris Isidore, *The 57-cent Part at the Center of GM's Recall Crisis*, CNN MONEY (Apr. 2, 2014, 12:02 PM), https://money.cnn.com/2014/04/02/news/companies/gm-recall-part/index.html#:~:text=A%20problem%20with%20a%20tiny,part%20number%20was%20never%20changed.

157. *See* Valukas Report, supra note 146, at 8-9, 115.

158. *Id.* at 10-11.

CEO, Mary Barra: "when those present agree to a plan but no one does anything."[159]

The ignition switch scandal eventually surfaced not because of regulators or a GM announcement, but because of the dogged work of a lawyer representing a family that had lost one of its members.[160] In fact, it was the plaintiff's expert, not GM engineers, who discovered that the part responsible for the injuries had been altered.[161] By the time GM began recalls on February 13, 2014,[162] a decade after first looking into the matter, its cars were already linked to thirteen deaths.[163] Ultimately, GM recalled 29 million vehicles in North America in 2014, though not all because of ignition switch issues.[164] GM also established a compensation fund headed by Ken Feinberg;[165] Feinberg concluded that 124 people had died from the ignition switches, and hundreds more had been injured.[166]

During congressional hearings, it was reported that a 1.6 millimeter increase in the size of the defective part would have been enough to resolve the problem.[167] In 2015, GM agreed with federal prosecutors to settle a criminal case by paying a $900 million penalty.[168] The Department of Justice press release was particularly damning.[169] It quoted the Secretary of Transportation, Anthony Foxx, as saying that the company had "actively concealed the truth from NHTSA and the public."[170] It also reported that Special Inspector General Goldsmith

159. *Id.* at 2, 256. The report also mentioned that an employee characterized the GM salute as "crossing of the arms and pointing outward towards others, indicating that the responsibility belongs to someone else, not me." *Id.* at 255.

160. *See* Blau, *supra* note 146.

161. *See* Valukas Report, *supra* note 146, at 11.

162. Aaron Smith, *GM Recalls 778,000 Cars for Faulty Ignition*, CNN, (Feb. 14, 2014, 6:59 AM), https://money.cnn.com/2014/02/13/autos/gm-recall/index.html.

163. *See* House Committee Memo, *supra* note 147, at 11; *See also* Michael A. Fletcher, *General Motors Recalls Another 2.7 Million Vehicles*, WASH. POST (May 15, 2014), https://www.washingtonpost.com/business/economy/general-motors-recalls-another-27-million-vehicles/2014/05/15/f8bce616-dc40-11e3-bda1-9b46b2066796_story.html?utm_term=.bc3b1c5874e8.

164. *See* Jeff Bennett, *GM to Recall 8.45 Million More Vehicles in North America*, WALL ST. J. (June 30, 2014, 3:18 PM), https://www.wsj.com/articles/gm-to-recall-7-6-million-more-vehicles-in-u-s-1404153705.

165. *See GM to Implement Compensation Program for Ignition Switch Recall,* GEN. MOTORS CO. (June 5, 2014), https://www.gm.com/mol/m-2014-Jun-060514-ignition-recall.html.

166. David Shepardson, *GM Compensation Fund Completes Review with 124 Deaths*, DETROIT NEWS (Aug. 24, 2015, 5:13 PM), https://www.detroitnews.com/story/business/autos/general-motors/2015/08/24/gm-ignition-fund-completes-review/32287697/.

167. *See* Isidore, *supra* note 156.

168. *See* Jim Cain, *GM Reaches Agreement with U.S. Attorney's Office,* GEN. MOTORS CO. (Sept. 17, 2015), https://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2015/sep/0917-doj.html.

169. *See* U.S. Dep't of Just., *U.S. Attorney of the Southern District of New York Announces Criminal Charges Against General Motors and Deferred Prosecution Agreement with $900 Million Forfeiture* (Sept. 17, 2015), https://www.justice.gov/opa/pr/us-attorney-southern-district-new-york-announces-criminal-charges-against-general-motors-and.

170. *Id.*

Romero said that "GM could have significantly reduced the risk of this deadly defect by improving the key design for less than one dollar per vehicle but GM chose not to because of the cost."[171] GM is reported to have ended up paying about $2 billion in criminal and civil penalties and settlements.[172]

Beginning in April 2014, commentators noted that the recalls seemed not to have affected GM's sales and speculated as to why it hadn't.[173] Figure 5 shows that GM did suffer a modest decline in US sales in the first quarter of 2014, when compared to the same quarter in 2013, but that its year-over-year sales increased in each of the following seven quarters. Indeed, in each of the last three quarters of 2014, GM's sales rose by at least 6.76%. Examination of GM's market share in the United States tells a similar story. Figure 6 shows a slight dip in the first quarter of 2014, [174] followed by an increase, and then fluctuations over the next seven quarters, ranging from 16.9% to 17.9%. In other words, except for one quarter, it is difficult to see evidence of consumers spurning GM in the aftermath of the scandal, and even in that lone quarter the evidence is not strong. Among the explanations observers proffered for the lack of decline were the improving economy, loyalty to GM, consumers ignoring reports of recalls, consumer fatigue with scandals, and the fact that GM no longer sold the models that had had defective switches.[175] In May 2014, after an article had already pointed out that GM's sales did not appear to have suffered, GM announced that it would offer steep discounts on new cars to owners of the cars that had been recalled for the ignition problem.[176] That also may help explain why GM's sales did not decline, though as the offer did not apply to GM purchasers generally, it is unlikely to be a complete explanation, especially as an earlier $500 discount to the same consumers was said to have been unsuccessful as many owners of the recalled autos could not afford to buy new cars.[177]

---

171. *Id.*

172. Lawrence Hurley, *General Motors Settles Ignition-Switch Cases*, REUTERS (Sept. 5, 2016, 12:36 PM), https://www.reuters.com/article/us-gm-recall-trial/general-motors-settles-last-bellwether-ignition-switch-cases-idUSKCN11B1Y7.

173. *See* Jeff Bennett, *GM Profit Falls 82%, Hurt by Recalls, But Results Not as Bad as Feared*, WALL ST. J. (Apr. 24, 2014, 7:20 PM), https://www.wsj.com/articles/gm-profit-falls-82-hurt-by-recalls-but-results-not-as-bad-as-feared-1398340610 ("[C]onsumers are still willing to buy—and pay more—for [GM's] new cars and trucks despite troubling disclosures about past vehicles."); *see also* Jonathan Berr, *Why GM's Recalls Aren't Denting Sales*, CBS NEWS (July 3, 2014), https://www.cbsnews.com/news/why-gms-recalls-arent-denting-sales/; *Big Sales Jump Signals GM is Driving Away from Recall Crisis*, NBC NEWS (June 4, 2014), https://www.nbcnews.com/storyline/gm-recall/big-sales-jump-signals-gm-driving-away-recall-crisis-n122376.

174. *See* Bennett, *supra* note 173, at 38 ("Despite the overall sales gain,[GM's] U.S. Market share fell to 17% from 17.7% a year ago and its world-wide share slipped a fraction to 11.1% as its sales gains were below the industry average.").

175. *See* Jeff Bennett & Michael Calia, *Sales Spring Ahead for Car Makers*, WALL ST. J., May 2, 2014, at B2; Berr, *supra* note 173; NBC NEWS, *supra* note 173.

176. *See* Jeff Bennett, *GM Recall Spurs Discount*, WALL ST. J., May 7, 2014, at B4.

177. *Id.* While GM's 10-K filings noted that recalls could damage GM's reputation, they did not indicate whether or not the ignition switch scandal had had such an effect. *See, e.g.*, Gen. Motors. Co., Annual Report (Form 10-K) (Feb. 3, 2016). In its first 10-K filing after the matter became public,

B. *Scandal Six: Volkswagen*

Volkswagen marketed its diesel engines as safe for the environment.[178] But in fact Volkswagen manufactured cars that were, as one observer put it, "programmed to cheat" on auto emissions tests.[179] Hundreds of thousands of Volkswagen diesel cars were programmed to recognize when emissions were being tested and reduce emissions on those occasions, but otherwise to disengage the systems that prevented the car from emitting pollutants, with the result that they spewed unlawful quantities of pollutants into the air when operating normally.[180] Reports indicate that unwitting Volkswagen diesel owners were drawn to the car by the company's claims that its diesel engines made its vehicles cleaner than other autos,[181] and that the motorists were dismayed to discover that the claims were false.

The deception began to come to light after a nonprofit organization, the International Council on Clean Transportation, provided a grant to West Virginia University scientists to test auto emissions in road tests, as opposed to on the rollers used in government emissions tests.[182] The scientists issued a report in 2014.[183] They had discovered that the Volkswagen Jetta they had tested produced fifteen to thirty-five times the legal amounts of certain emissions.[184] A regulator, the California Air Resources Board, then conducted its own testing, and also

---

GM wrote "Because the matters are ongoing there can be no assurance as to how the resulting consequences, if any, may impact our . . . reputation . . . ." *See* Gen. Motors. Co., Annual Report (Form 10-K) (Feb. 4, 2015). That sentence did not appear in later 10-Ks implying that GM later came to a conclusion about how, if at all, the scandal would affect its reputation.

178. *See* Audi, *Green Police Audi Ad Super Bowl 2010*, YOUTUBE (Apr. 24, 2012), https://www.youtube.com/watch?v=PVPyHrPZbVM (advertisement depicting police arresting people for damaging the environment describe diesel as "clean" and "good to go").

179. *See* JACK EWING, FASTER, HIGHER, FARTHER: HOW ONE OF THE WORLD'S LARGEST AUTOMAKERS COMMITTED A MASSIVE AND STUNNING FRAUD 180 (2017).

180. *See* Sarah Dadush, *Why You Should Be Unsettled by the Biggest Automotive Settlement in History*, 89 U. COLO. L. FORUM 1 (2018).

181. *See, e.g.*, Andrew Stoy, *Why VW's Betrayal with Diesel Engines is Different*, AUTO. NEWS (Sept. 21, 2015, 1:00 AM), https://www.autonews.com/article/20150921/BLOG06/150929989/why-vw-s-betrayal-with-diesel-engines-is-different:

> [I]t became apparent that [Volkswagen diesel] buyers were, and are, like me, environmentally conscious driving enthusiasts.
>
> That we were all unknowingly "rolling coal," spewing exponentially more emissions into the atmosphere than we realized, and that Volkswagen was fully aware of its deception, carries a potent sting for those of us who believed the extra cost of a VW TDI vehicle was worth the fuel economy and emissions benefits.

182. *See* Sonari Glinton, *How A Little Lab In West Virginia Caught Volkswagen's Big Cheat*, NPR, (Sept. 24, 2015, 5:04 AM), https://www.npr.org/2015/09/24/443053672/how-a-little-lab-in-west-virginia-caught-volkswagens-big-cheat.

183. *See* Gregory J. Thompson, IN-USE EMISSIONS TESTING OF LIGHT-DUTY DIESEL VEHICLES IN THE UNITED STATES, W. VA. U. (May 15, 2014), https://www.cafee.wvu.edu/files/d/843c9c22-dfb4-4901-a6ec-68943652924a/wvu_lddv_in-use_icct_report_final_may2014.pdf.

184. Jack Ewing, *Inside VW's Campaign of Trickery*, N.Y. TIMES, (May 6, 2017), https://www.nytimes.com/2017/05/06/business/inside-vws-campaign-of-trickery.html.

found that the Volkswagen diesels were not performing as the company claimed.[185] Rather than acknowledging that it had used a "defeat device" to conceal its excessive emissions, Volkswagen embarked on what one journalist called "a delaying tactic."[186] The company negotiated with the California regulator and pledged to recall the cars and fix the software.[187] But even after the recall, the cars' emissions still exceeded legal limits.[188] A year after the scientists had discovered the emissions discrepancy, Volkswagen finally admitted to regulators that it had used a defeat device.[189]

On September 18, 2015, the Environmental Protection Agency accused Volkswagen of using defeat devices.[190] Within days, the company acknowledged that eleven million of its cars had been programmed to conceal the true amount of their emissions when subjected to standard emissions testing.[191]

On January 11, 2016, Volkswagen CEO Matthias Muller apologized for the company's behavior.[192] But later that evening, Muller told National Public Radio that the problem was a technical problem, rather than an ethical issue, and that the company hadn't lied.[193] During a later interview, Muller apologized for his comments.[194]

At about the same time, the media reported both federal[195] and state[196] law enforcement officials as saying that Volkswagen was not cooperating with their investigations and refusing to provide needed documents. According to one report:

---

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *See* Press Release, Environmental Protection Agency, EPA, California Notify Volkswagen of Clean Air Act Violations / Carmaker allegedly used software that circumvents emissions testing for certain air pollutants (Sept. 18, 2015), https://archive.epa.gov/epa/newsreleases/epa-california-notify-volkswagen-clean-air-act-violations-carmaker-allegedly-used.html.

191. Jack Ewing, *Volkswagen Says 11 Million Cars Worldwide Are Affected in Diesel Deception*, N.Y. TIMES, (Sept. 22, 2015), https://www.nytimes.com/2015/09/23/business/international/volkswagen-diesel-car-scandal.html.

192. *Volkswagen Boss Apologises to America for Cheating Diesel Emissions Test,* THE GUARDIAN, (Jan. 11, 2016), https://www.theguardian.com/business/2016/jan/11/volkswagen-boss-apologises-to-america-for-cheating-diesel-emissions-tests.

193. Sonari Glinton, *'We Didn't Lie,' Volkswagen CEO Says Of Emissions Scandal*, NPR (Jan. 11, 2016), https://www.npr.org/sections/thetwo-way/2016/01/11/462682378/we-didnt-lie-volkswagen-ceo-says-of-emissions-scandal.

194. *See id.*

195. *See* Coral Davenport & Danny Hakim, *U.S. Sues Volkswagen in Diesel Emissions Scandal,* N.Y. TIMES, (Jan. 4, 2016), https://www.nytimes.com/2016/01/05/business/vw-sued-justice-department-emissions-scandal.html.

196. *See* Danny Hakim & Jack Ewing, *VW Refuses to Give American States Documents in Emissions Inquiries,* N.Y. TIMES, (Jan. 8, 2016), https://www.nytimes.com/2016/01/09/business/vw-refuses-to-give-us-states-documents-in-emissions-inquiries.html.

> "Our patience with Volkswagen is wearing thin," New York's attorney general, Eric T. Schneiderman, said. "Volkswagen's cooperation with the states' investigation has been spotty — and frankly, more of the kind one expects from a company in denial than one seeking to leave behind a culture of admitted deception."[197]

Consumers had filed at least 500 cases against Volkswagen by the end of 2015.[198] The federal government followed suit in January 2016.[199] The litigation produced a $14.7 billion settlement—said to be the largest ever automotive settlement[200]—between the company and various governmental agencies as well as the owners of 475,000 autos in October 2016.[201] In January 2017, the federal government settled its criminal and civil claims against Volkswagen in an agreement under which the company agreed to pay $4.3 billion.[202] Volkswagen also pled guilty to three felony counts, while the government announced indictments of six company employees.[203]

Jack Ewing has written about how the scandal affected Volkswagen's sales:

> The emissions revelations quickly began to hurt sales worldwide. The decline was most immediate in the United States, in part because Volkswagen halted sales of diesels . . . Sales were stable in October 2015, the first full month of sales after the EPA citation. But in November, sales . . . plunged 25 percent in the United States, even as the overall auto market boomed. In December, sales fell another 9 percent . . . Volkswagen [offered] owners in the United States a prepaid Visa card they could use to make $500 in purchases, another card good for $500 at Volkswagen dealers, plus free roadside assistance. But many owners regarded the gesture as laughably inadequate.[204]

---

197. *Id.* The article also quoted other Attorneys General to similar effect. Volkswagen argued that German privacy laws prevented it from providing the requested information.

198. *See* JACK EWING, FASTER, HIGHER, FARTHER: HOW ONE OF THE WORLD'S LARGEST AUTOMAKERS COMMITTED A MASSIVE AND STUNNING FRAUD 226 (2017).

199. Press Release, U.S. Dep't of Just., United States Files Complaint Against Volkswagen, Audi and Porsche for Alleged Clean Air Act Violations, (Jan. 4, 2016), https://www.justice.gov/opa/pr/united-states-files-complaint-against-volkswagen-audi-and-porsche-alleged-clean-air-act.

200. *See* Sara Dadush, *Identity Harm*, 80 U. COLO. L. REV. 863, 865 (2018).

201. David Shepardson, *U.S. Judge Approves $14.7 Billion Settlement in VW Diesel Scandal*, REUTERS, (Oct. 26, 2016, 11:08 AM), https://www.reuters.com/article/us-volkswagen-emissions/u-s-judge-approves-14-7-billion-deal-in-vw-diesel-scandal-idUSKCN12P22F.

202. Press Release, U.S. Dep't of Just., Volkswagen AG Agrees to Plead Guilty and Pay $4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests (Jan. 11, 2017), https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six.

203. *Id*. For a book-length exploration of worldwide responses to the Volkswagen scandal, *see* ENFORCING CONSUMER AND CAPITAL MARKETS LAW (2020) (Beate Gsell & Thomas M.J. Mollers eds., 2020).

204. JACK EWING, FASTER, HIGHER, FARTHER: HOW ONE OF THE WORLD'S LARGEST AUTOMAKERS COMMITTED A MASSIVE AND STUNNING FRAUD 217-18 (2017).

In October 2015, Volkswagen offered discounts that amounted "by one measure to almost twice the industry average."[205] As reflected in Figure 7, the number of passenger autos the company delivered to the United States in the last quarter of 2015 fell by 4.1% from deliveries during the same quarter in 2014. Deliveries declined by 5.7% in the following quarter, a drop that the company described as "mainly a consequence of the diesel issue,"[206] by 8.3% in the next quarter, and then by another 4% in the quarter after that. Volkswagen also largely attributed these drops to "the diesel issue."[207] As indicated in Figure 8, Volkswagen suffered a modest drop in market share from 4.6% in 2014 to 4.5% in 2015 (remember, the EPA disclosed the problem only in September of 2015, meaning that it could affect sales for less than a third of the year), fell again to 4.4% in 2016, and then bounced back to 4.7% in 2017.

Volkswagen also acknowledged in its annual reports that as a result of the scandal, demand for its autos "may decrease—possibly exacerbated by a loss of reputation . . . ."[208] The company also predicted a "sharp decrease in sales revenue" in the Passenger Car Business Area.[209] Volkswagen sales eventually bounced back to some extent,[210] though even by November 2017, the company's sales had not returned to the levels seen before the scandal.[211]

---

205. David Welch, *VW Discounts Almost Double U.S. Average After Cheating Scandal*, AUTO. NEWS, (Oct. 22, 2015), http://www.autonews.com/article/20151022/RETAIL01/151029942/vw-discounts-almost-double-u.s.-average-after-cheating-scandal.

206. VOLKSWAGEN AG., INTERIM REPORT 10 (2016), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2016/volkswagen/englisch/Q1_2016_e.pdf.

207. VOLKSWAGEN AG., HALF-YEAR REPORT 11 (2016), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2016/volkswagen/englisch/HY_2016_e.pdf; VOLKSWAGEN AG., INTERIM REPORT 13 (2016), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2016/volkswagen/englisch/Q3_2016_e.pdf

208. VOLKSWAGEN AG., ANNUAL REPORT 173, (2016), https://www.volkswagenag.com/presence/investorrelation/publications/annual-reports/2016/volkswagen/englisch/Y_2015_e.pdf; VOLKSWAGEN AG., ANNUAL REPORT 183 (2017), https://www.volkswagenag.com/presence/investorrelation/publications/annual-reports/2017/volkswagen/en/Y_2016_e.pdf.

209. VOLKSWAGEN AG., ANNUAL REPORT 169 (2016), https://www.volkswagenag.com/presence/investorrelation/publications/annual-reports/2016/volkswagen/englisch/Y_2015_e.pdf.

210. *See* Neal E. Boudette, *Volkswagen Sales in U.S. Rebound After Diesel Scandal,* N.Y. TIMES, (Nov. 1, 2017), https://www.nytimes.com/2017/11/01/business/volkswagen-sales-diesel.html ("Volkswagen has now reported a year-over-year sales increase in 11 of the last 12 months. So far this year, its sales are up 9.4 percent—more than any other nonluxury auto brand, according to the research firm Autodata.").

211. *Id.* ("VW sales have still not returned to the level achieved before the diesel scandal erupted two years ago, when American dealers were selling more than 30,000 cars a month. But the resurgence is striking in a year when car sales nationwide are declining."). Volkswagen reports its share of the North American market for passenger cars and light trucks. In other words, the reports include not only its share of the United States market but also its share of sales in Canada and Mexico. Figure 8 shows that from 2014 to 2015, the company's market share dropped from 4.6% to 4.5%. It stayed at 4.5% for 2016 and then rose to 4.7% for 2017. The data is too noisy to attribute the 2015-2016 drop with any certainty to the emissions scandal, or, alternatively, to determine whether the fact that it dropped only very slightly indicates that the scandal did not affect sales.

C. *GM and Volkswagen Compared*

As the foregoing demonstrates, the Volkswagen scandal appeared to draw a much harsher response from consumers than the GM scandal. Yet the scandals seemingly have much in common. Both put lives at risk, though the risks GM created were both more immediate and generated identifiable deaths—factors which might be expected to generate a greater consumer reaction. Both came to light through the actions of outsiders. Both resulted in federal criminal prosecutions and the payment of billions of dollars, though Volkswagens' payments were considerably larger. Both companies seemed to take steps to conceal their misconduct. And most obviously, both involved automobiles.

But consumers responded to the scandals differently. Perhaps that is because of reasons already mentioned, such as consumer fatigue with scandals.[212] But it seems unlikely that consumers would have been too fatigued with scandals to respond to the GM matter in 2014 and yet reacted to the Volkswagen matter in 2015. The relative size of the amounts the two companies paid also seems not to explain the different treatment. While headlines trumpeted that Volkswagen had agreed to the "biggest auto-scandal settlement in U.S. history,"[213] those headlines ran after Volkswagen sales were already headed back up and so could not have explained the company's loss of business.

Other explanations for the difference seem more plausible. One explanation derives from Volkswagen's marketing its diesel engines as reducing pollutants when in fact the cars had the opposite effect. Consumers who see themselves as environmentalists may be more interested in boycotting and even punishing a company that took advantage of their beliefs but did not deliver the promised results and covered up the fact that it couldn't. Sarah Dadush has written of "identity harm," which she defines as "the anguish experienced by a consumer who learns that her efforts to consume in line with her personal values have been undermined by a business's exaggerated or false promises about its wares."[214] Professor Dadush uses the Volkswagen scandal as an illustration of an identity harm, and it is possible that consumers who care about the environment would eschew Volkswagens after such a debacle. If your sales model is based on persuading a particular kind of consumer that you share their values, and then you not only fail to live up to those values but also cover up the truth, deny the facts when you are caught, finally apologize, and then seemingly attempt to walk back your apology, consumers who found your product attractive are unlikely to see your values as meshing with theirs. In contrast, the GM scandal did not produce the type of identity harm Dadush describes.

The contrast between consumer response to the GM and Volkswagen scandals may also be explained by another consideration: consumers may be

---

212. *See supra* note 175 and accompanying text.

213. *See* James F. Peltz & Samantha Masunaga, *The Biggest Auto-Scandal Settlement in U.S. History was Just Approved. VW Buybacks Start Soon*, L.A. TIMES, (Oct. 25, 2016, 8:24 AM), https://www.latimes.com/business/autos/la-fi-hy-vw-settlement-20161025-snap-story.html.

214. *See* Sarah Dadush, *Identity Harm*, 89 U. COLO. L. REV. 863, 865 (2018).

quicker to stop purchasing from a company if they themselves have a bad experience as opposed to hearing about others having a bad experience. If so, we would expect to see a less significant impact on company sales from misconduct that affects directly only one customer—such as the United incident—than misbehavior that affected many—such as the Volkswagen scandal or the Target data breach. And in fact, Volkswagen's and Target's sales suffered much more than United's. It is easy to imagine Volkswagen customers promising themselves never to buy another Volkswagen after being misled by the company into thinking they were doing something good for the environment when in fact they were damaging the globe. To be sure, the families who lost a member because of the GM ignition switches may have made similar promises, but there were fewer than 150 such families, while as many as 110 million consumers may have had their data compromised by the Target incident.

This explanation may appear at first blush to fall short with Wells Fargo. Millions of consumers were victimized by the Wells unauthorized account scandal alone. But, perhaps surprisingly, few consumers filed public complaints with the Consumer Financial Protection Bureau's complaint database about the scandal—approximately nineteen.[215] It may be that few of them knew about the unauthorized accounts, or that Wells closed the accounts before many felt a need to complain to the CFPB. But another explanation may lie in the fact that few consumers suffered significant harm from the incident.[216] While other Wells misconduct described above imposed greater harm on affected consumers, such as the illegal car repossessions, those other episodes afflicted many fewer consumers than the unauthorized accounts fiasco. If few Wells customers were sufficiently troubled by the unauthorized accounts to complain about them, it seems unlikely that many would go to the bother of moving their bank accounts elsewhere. It thus seems preferable to formulate the hypothesis in terms of the number of consumers who were *significantly* affected.[217]

---

215. *See* Sovern, *Free-Market supra* note 45 at 451-52. The CFPB gives consumers the choice of having complaints made public—minus information which could be used to identify the consumer—or kept private. It is impossible to know how many consumers complained to the Bureau about the scandal and opted to keep their complaint private, but it is also unclear why any would do so as to the Wells Fargo unauthorized account scandal, especially as in either case, the customer's identity remains confidential.

216. *See* RICHARD CORDRAY, WATCHDOG: HOW PROTECTING CONSUMERS CAN SAVE OUR FAMILIES, OUR ECONOMY, AND OUR DEMOCRACY 174 (2020):

> [T[he entire episode had caused relatively small amounts of actual consumer harm. The mere opening and closing of accounts had not caused financial losses for many of the consumers, and what losses there were in terms of fees or charges often were fairly small amounts, adding up to only a few million dollars across all customers.

217. The Volkswagen case could support other hypotheses as well. For example, it suggests that consumers react more forcefully when the misconduct seems more deliberate than accidental, a company engages in a coverup, or the wrongdoer walks back an apology. On the other hand, the Wells Fargo unauthorized account scandal was directly traceable to management's push for the opening of more accounts and Wells Fargo management knew of the unauthorized accounts well before it acted. *SEE* INDEP. DIRS. OF THE BD. OF WELLS FARGO & CO., SALES PRACTICES INVESTIGATION REPORT 55 (2017), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/presentations

V. Hypothesis Six: Even Though Consumers Might Not Withdraw Their Patronage in Response to Poor Conduct, Companies Sometimes Act as if They Did—But Not Always.

The story of these scandals does not end with the consumer response, or lack of one. Some companies also responded to their scandals. For example, even though United's ejection of the passenger did not seem to elicit a response by consumers, the airline acted as if it feared that its misconduct would draw a reaction, though whether by the market or lawmakers or both is impossible to tell. After the United incident, United apparently took steps to prevent another such incident. The number of passengers involuntarily removed from United flights due to overbooking fell from 900 in the first three months of 2017 to only twenty-seven in the corresponding period for 2018.[218] Other airlines behaved similarly. Among eighteen airlines tracked by the Department of Transportation, the number of bumped passengers fell by more than three-quarters, suggesting that other carriers may also have been motivated to reduce the number of involuntarily removed passengers.[219]

Perhaps United was concerned that if it booted more passengers off its planes, lawmakers would enact unfavorable legislation regulating when consumers can be removed from aircraft, the market would respond, or both. In short, while a market response to United's conduct is not apparent, it isn't clear whether the possibility of such a negative response caused United to adjust its conduct.

But not all the companies discussed in this Article responded similarly. Take Wells Fargo. On the one hand, Wells undertook investigations of its own, which seems like the act of a company eager to restore its credibility and reputation. Nor do the investigations appear to have been cursory. As noted above, some of Wells' misconduct came to light only because Wells itself disclosed it.[220] But on the other hand, a scathing 2020 report by the staff of the House Financial Services Committee found that Wells management repeatedly failed to satisfy various

---

/2017/board-report.pdfat (describing how Wells' CEO was notified of one incident in 2002 and received numerous customer and employee complaints which "he or his assistants referred to appropriate subordinates without further follow-up. According to Wells Fargo employees, concerns about sales practices and 'gaming' were raised with [the CEO] during the 2012-2014 timeframe;" the board first learned of the problem in 2014); *see* Shaev v. Baker, No. 16-cv-05541-JST, 2017 WL 1735573, at *18 (N.D. Cal. May 4, 2017) (the board first learned of the problem in 2013); *see also* Mutzabaugh, *supra* note 78 (United initially flubbed its apology). And Target also suffered a drop in sales despite its being a victim of a data breach. See Target, *Annual Report* (Mar. 2014), *supra* note 107. No evidence suggests that Target acted deliberately.

218. *See* U.S. Dept. of Transportation, Air Travel Consumer Report 34 (2018), https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/316046/2018-july-atcr.pdf (the drop was from .44 to .01 for every 10,000 passengers).

219. *Id.* The number of bumped passengers dropped from 9556 to 2254, or from .62 to .12 per 10,000 passengers.

220. *See supra* note 56 and accompanying text.

regulators with its plans to meet the requirements of consent decrees,[221] then-Wells CEO Timothy Sloane's congressional testimony about Wells Fargo's compliance with plans was inaccurate,[222] "Wells Fargo's risk management infrastructure remained dangerously broken,"[223] and that Wells "continues to engage in consumer abuses."[224] Similarly, the media reported in 2019 that Wells employees said that Wells continued to pressure them to achieve sales targets and "squeeze extra money out of customers."[225] And in 2021, the OCC assessed a $250 million civil money penalty against Wells in part because Wells failed to live up to its promises in a 2018 consent order.[226] It thus appears that the fear of a market response might not have been sufficient to deter Wells from misconduct. Relatedly, Volkswagen dragged its feet in admitting wrong-doing and then attempted to undermine its own apology,[227] while GM took years to acknowledge its behavior, though it remains unclear to what extent, if at all, GM's delays were deliberate.

One explanation for the different responses may have been that the United incident seems to have been a one-time occurrence, while Wells Fargo's misconduct had been ongoing for years and had taken many forms. It is one thing to announce a policy about a specific matter—removing passengers from flights—that is relatively cabined in scope. It is another to change an entire corporate culture, as Wells seems to need, or abandon a practice, like Volkswagen's, that may have been quite remunerative while it was in place. But in any event, the evidence that fear of a market response was sufficient to generate good seller behavior from these companies is at best inconclusive.

The foregoing paragraphs address the capacity of markets to deter misconduct. But laws can both deter misconduct and compensate those who have suffered because of it. Can markets also provide a mechanism for compensation?

221. *See* MAJORITY STAFF OF H. COMM. ON FIN. SERV., 116TH CONG., THE REAL WELLS FARGO: BOARD & MANAGEMENT FAILURES, CONSUMER ABUSES, AND INEFFECTIVE REGULATORY OVERSIGHT 36-41 (2020).

222. *Id.* at 61-62.

223. *Id.* at 62.

224. *Id.* at 62-64.

225. *See* Emily Flitter & Stacy Cowley, *Wells Fargo Says Its Culture Has Changed. Some Employees Disagree.*, N.Y. TIMES, (Mar. 9, 2019), https://www.nytimes.com/2019/03/09/business/wells-fargo-sales-culture.html; *see also* Imani Moise & Pete Schroeder, *How Wells Fargo's Regulators and Employees Drove Out its CEO*, REUTERS (Apr. 9, 2019, 1:13 AM), https://www.reuters.com/article/us-wells-fargo-fed-insight/how-wells-fargos-regulators-and-employees-drove-out-its-ceo-idUSKCN1RL0EA ("The day after former Wells Fargo & Co Chief Executive Tim Sloan told U.S. lawmakers he was transforming the bank's high-pressure culture, Federal Reserve officials met privately with bank employees. . . . Fed officials were told by four bank employees that little had changed within the bank's culture since the scandal that engulfed Wells Fargo almost three years ago.").

226. *See* News Release Office of the Comptroller of the Currency, OCC Assesses $250 Million Civil Money Penalty, Issues Cease and Desist Order Against Wells Fargo, https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-95.html (Sept. 9, 2021).

227. *See supra* notes 186, 193 and accompanying text.

All six companies discussed in this Article paid compensation to injured consumers. In three instances, Volkswagen, Target, and JPMorgan Chase, that came about through the more or less normal functioning of the legal system. But in three other cases, companies may have agreed to compensation that they were not actually obliged by the law to provide.

United reported reaching a settlement with the passenger forcibly removed from its flight within weeks after the incident.[228] Similarly, United offered guitarist Dave Carroll compensation.[229] As for Wells, it first looked as if few, if any, consumers would obtain compensation when Wells invoked an arbitration clause in its consumer contracts and a court ruled that the clause barred injured consumers from asserting a class action based on the unauthorized accounts.[230] But then Wells waived its right to bar consumers from bringing a class action and settled the class action for $142 million.[231] Similarly, GM hired compensation specialist Ken Feinberg to dole out money to victims.[232] Put another way, each of these companies appear to have gone beyond what the law required them to do when it came to compensation. Conceivably, they did so to placate regulators. But it is also possible that they wanted to send a message to consumers that the companies were in fact trustworthy and therefore consumers should not withhold their patronage. To be sure, the United payments were probably not large in comparison to United's revenues. But the Wells and GM payments are a different

228. *See* Daniel Victor & Christopher Drew, *United Airlines Reaches Settlement With Passenger Who Was Dragged Off Plane*, N.Y. TIMES (Apr. 27, 2017), https://www.nytimes.com/2017/04/27/business/united-david-dao-settlement.html ("'Mr. Munoz said he was going to do the right thing, and he has,' Thomas A. Demetrio, one of Dr. Dao's lawyers, said of Oscar Munoz, United's chief executive.").

229. *See* Mark Tran*, Singer Gets His Revenge on United Airlines and Soars to Fame*, THE GUARDIAN (July 23, 2009), https://www.theguardian.com/news/blog/2009/jul/23/youtube-united-breaks-guitars-video.

230. *See* Order Granting Defendants' Motions to Compel Arbitration at 1, Jabbari v. Wells Fargo & Co., Case No. 3:15-cv-02159-VC, ECF No. 69 (N.D. Cal. Sept. 23, 2015) (holding that the issue of arbitrability is for the arbitrator to decide under the agreement). *See generally* Michael Corkery & Stacy Cowley, *Wells Fargo Killing Sham Account Suits by Using Arbitration*, N.Y. TIMES (Dec. 6, 2016), https://www.nytimes.com/2016/12/06/business/dealbook/wells-fargo-killing-sham-account-suits-by-using-arbitration.html#:~:text=The%20bank%20has%20sought%20to,process%20that%20often%20favors%20corporations.

231. *See* James Rufus Koren, *Wells Fargo Ups Sham-Account Settlement to $142 Million, Making More Customers Eligible*, L.A. TIMES (Apr. 21, 2017, 12:10 PM), http://www.latimes.com/business/la-fi-wells-settlement-plan-20170421-story.html; *See generally* Sovern, *Free-Market*, supra note 45 at 422-23.

232. Feinberg served as the first special master for the September 11 Victims Compensation Fund and also distributed funds in connection with Agent Orange, Jerry Sandusky, the Virginia Tech and Sandy Hook massacres, the BP Deepwater Horizon oil spill, and other matters. *See* Steve Almasy, *Kenneth Feinberg has handled settlements with 9/11 victims and the BP oil disaster. The United Methodist Church split is his latest high-profile project*, CNN (Jan. 3, 2020, 6:05 PM), https://www.cnn.com/2020/01/03/us/kenneth-feinberg/index.html.

story, especially in the case of Wells, which might have been able to confine its payments to a much smaller sum.[233]

On the other hand, there is no public evidence to suggest that United's behavior owes anything to law or regulators. Thus, in some cases, at least, even when the market is somnambulant, it may be that fears that consumers will awaken will cause companies to behave differently in the future and compensate injured consumers.

VI. HYPOTHESIS SEVEN: LAWS AND ACTIONS BY THOSE WHO ENFORCE THEM ARE OFTEN THE TRIGGER WHEN CONSUMERS WITHDRAW PATRONAGE FROM BUSINESSES FOR MISCONDUCT.

Of the incidents described above, only one—United—did not come to public attention because of a regulator, lawsuit, or law. Though legislators requested a local investigation into the United incident,[234] the event was already well known by that point. Consumers learned of the United matter because of social networks and the media.

The other scandals discussed in this Article came to public attention because of rules, in one way or another. Consider the two scandals as to which consumers seemingly responded most forcefully: Target was obliged to announce its breach because of state laws mandating breach disclosures,[235] while the Volkswagen matter drew significant attention only after a California regulator became involved.[236] Two of the remaining scandals came to light because of private lawsuits: the GM ignition switch issue and robo-signing scandals.[237] The manner in which the Wells Fargo unauthorized account scandal became public is particularly interesting. In 2013, the *Los Angeles Times* reported that Wells Fargo employees had opened sham accounts, but its reports drew little attention despite the fact that the *Times* is a nationally-known newspaper.[238] When the CFPB,

---

233. The settlement Wells reached with the CFPB, OCC, and Los Angeles City Attorney's Office obliged Wells to pay $5 million to compensate consumers. *See* Wells Fargo Bank, N.A., No. 2016-CFPB-0015, at 14 (Sept. 8, 2016) (Admin. Proc. Consent Ord.), https://files.consumerfinance.gov/f/documents/092016_cfpb_WFBconsentorder.pdf. If it had not waived its arbitration clause, Wells might have been able to limit its compensation payments to that amount or something not much larger because the likelihood is that few consumers would have filed for arbitration.

234. *See supra* note 30 and accompanying text.

235. The first data breach notification law took effect in California in 2003. *See* CAL. CIV. CODE § 1798.82 (Deering 2021). Since then, every state has enacted a similar statute. *See* Nat'l Conference of State Legislators, *Security Breach Notification Laws*, NCSL (Sept. 29, 2018), https://perma.cc/33DQ-TFJV.

236. *See supra* note 181 and accompanying text.

237. *See supra* notes 122-24, 160-61 and accompanying text. While a regulator—the National Highway Traffic Safety Administration—has jurisdiction over automobile recalls for safety reasons, it did not play a key role in the GM matter and drew its share of criticism for dropping the ball. *See, e.g.*, Christopher Jensen, *In General Motors Recalls, Inaction and Trail of Fatal Crashes*, N.Y. TIMES (Mar. 2, 2014), https://www.nytimes.com/2014/03/03/business/in-general-motors-recalls-inaction-and-trail-of-fatal-crashes.html.

238. *See supra* note 46 and accompanying text.

OCC, and Los Angeles City Attorney levied a $185 million fine on Wells in September, 2016, however, the matter became front-page news, and elicited repeated congressional hearings.[239] A variety of governmental activities kept Wells in the news, including additional enforcement actions.[240] While it is difficult to know precisely why the national media paid attention in 2016 to what it had largely ignored in 2013, two things seem likely to have contributed. One was the size of the fine imposed by the regulators, which may have had a signaling effect; a smaller fine might have conveyed that the matter was not very important.[241] The other was the sheer number of the unauthorized accounts—then thought to be two million-—which came to light only because of investigation by the three regulators. In any event, as discussed above, consumers seem not to have responded to the Wells scandal.

In short, even if the market can be trusted to discipline miscreant companies—and this Article reports findings that cast that in doubt—the market cannot be relied on to identify misbehavior in the first place. Put another way, without rules and regulators or private litigants to enforce them, some significant misconduct would escape notice and so would not elicit a consumer response. For example, it is almost certain that consumers would not have known about the Target data breach if laws did not require Target to disclose it. Companies have little incentive to disclose data breaches that will harm their business—which is why every state in the country has enacted laws to require such disclosures.[242] Similarly, if cars were not subject to emissions limits, neither the California regulator nor the EPA would likely have explored the Volkswagen emission problems.

Nor is there reason to think that the free market would have led to action on the GM ignition switch problem. After all, it had not done so in the decade or more since GM began using the faulty switches even though the problem had been described in the *New York Times* and elsewhere.[243] As for Wells Fargo, it was only after regulators levied substantial fines that Wells began mentioning the scandal in its SEC filings and noting that it could have an impact on the bank's ability to retain and attract new customers, and yet its scandal still seemed to have been overlooked in the marketplace.[244] The implication is that the exact same behavior, absent involvement by regulators, would not have had an impact on sales. It thus appears that to the extent that the market penalizes companies for misconduct, it sometimes *requires* regulators to function, rather than supplanting

239. *See supra* note 48-49 and accompanying text.

240. *See supra* notes 46-49 and accompanying text.

241. While the size of penalties companies pay may not have an impact on decision-making by *consumers*, *see supra* note 74-75 and accompanying text, it appears to have had an effect on national media coverage in the Wells Fargo scandal.

242. *See* Nat'l Conf. of State Legislators, *Security Breach Notification Laws*, NCSL (Sept. 29, 2018), https://perma.cc/33DQ-TFJV.

243. *See supra* notes 146-54.

244. *See supra* notes 67-69 and accompanying text.

them. Yonathan A. Arbel has labeled this type of partnership "reputation-by-regulation."[245]

In sum, if relevant laws had not existed and if regulators and consumer attorneys had not taken an interest, it is almost certain that the only scandal reported in this Article that would have led to a change in behavior or compensation was the United scandal. Indeed, the strong likelihood is that the other scandals would not even have entered consumer awareness.

VII. THE PROBLEM OF UNPUBLICIZED PROBLEMS

The problems described above were all widely-publicized. But what about unpublicized problems? How would consumers even learn about them? In a purely-local marketplace, such as a store in a small community, word-of-mouth might suffice, but such marketplaces are beyond the scope of this Article. In any event, neighbors swapping gossip about misbehaving corporations are unlikely to reach a broad enough audience to sway many purchases. Technology such as camera phones and the internet converted the United incident from a local event to a national event, but such occurrences remain uncommon.

Consumers may rely on reports of experiences with companies, at sites like Yelp, or on reports of experiences with products, at sites like Amazon.com.[246] Some evidence suggests that many consumers base decisions upon such sites.[247] But the ratings on those sites are unreliable for a variety of reasons, including that some reviews are simply falsified and some sellers provide gift cards for positive reviews.[248]

Another reason rating sites may be unreliable is what Yonathan A. Arbel has called "regression to the extreme": the tendency of consumers who love or hate a product to rate it, and those who have less extreme reactions not to rate it at all.[249] Professor Arbel as well as others have also noted the tendency of professional reviewers' assessments to differ from reviews by consumers on rating sites.[250] Arbel also argues that consumers lack the ability to "de-bias" the

245. *See* Yonathan A. Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets*, 54 WAKE FOREST L. REV. 123, 1287–88 (2019). *See also* Juan Jose Ganuza, Fernando Gomez, & Marta Robles, *Product Liability Versus Reputation*, 32 J. L. ECON. & ORG. 213 (2016).

246. According to one source, "Yelp has 73 million unique monthly users on their mobile app, and over 100 million unique monthly users on their desktop site" Boost Medical, *11 Yelp Statistics For 2020 You Need to Know As a Business Owner* (Dec. 2, 2019) https://boostmedical.com/yelp-statistics/.

247. *See* Augie Ray, *Why Ratings and Reviews Suck and How to Save Them*, SOCIALMEDIA TODAY, (Feb. 13, 2012), https://www.socialmediatoday.com/content/why-ratings-and-reviews-suck-and-how-save-them-0 (consumer ratings and reviews "remain the most trusted form of communication, lagging only recommendations from families and friends."); *see generally* Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. REG. 547, 569–570 (2016).

248. *See* Nicole Nguyen, *Fake Reviews and Inflated Ratings Are Still a Problem for Amazon*, WALL ST. J. (June 13, 2021).

249. *See* Arbel, *supra* note 245, at 1265-66.

250. *Id.* at 1268.

resulting ratings so as to use them effectively.[251] One study found that an initial review can have a significant effect on subsequent reviews, leading ratings of the same product to have markedly different grades on different websites.[252] And some reviewers have not, in fact, purchased the product on which they commented.[253]

But, at most, reviews are effective only in communicating problems that consumers have identified. They would not have conveyed information about, for example, the Volkswagen emissions fraud or the Target breach, neither of which were discovered by consumers.

In sum, reputation in the national marketplace, in the absence of action by the legal system, seems like a precarious mechanism for deterring misconduct. If consumers respond so minimally to incidents that draw sustained and national attention, from conventional news media and even from comedy shows, it seems unlikely that they will respond forcefully to the many consumer protection failures that do not draw such attention.

VIII. SOME NORMATIVE IMPLICATIONS

It is time to return to Milton Friedman's view that consumers don't need regulations because the market protects them. Examination of the available evidence about the six scandals shows that in fact consumer markets do not consistently protect consumers. While in two of the six scandals—Volkswagen and Target—there was fairly clear evidence that consumers withheld their patronage from misbehaving sellers, and possibly a third—GM—in at least three—United, Wells Fargo, and JPMorgan Chase—no such evidence is apparent. In other words, in at least some cases markets seem not to provide consumer protection. Moreover, even when the market functioned in the case studies to punish businesses, it did so only because laws and those who enforced them had laid the groundwork. It thus appears that consumers will receive protection only if society provides regulations and regulators in addition to the marketplace.[254] The case studies thus suggest that Friedman's view was simply wrong.

---

251. *Id.* at 1275.

252. *See* Sungsik Park, Wochoel Shin, & Jinhong Xie, *The Fateful First Consumer Review*, MARKETING SCI. 481, 481-83 (2021).

253. See Eric T. Anderson & Duncan I. Simester, *Reviews without a Purchase: Low Ratings, Loyal Customers, and Deception*, 51 J. MKTG. RSCH. 249, 249 (2014) ("[A]pproximately 5% of product reviews on a large private label retailer's website are submitted by customers with no record of ever purchasing the product they are reviewing.").

254. Another problem with relying on reputation to enforce consumer protections is that companies might be more sensitive to the concerns of so-called influencers but ignore the concerns of those less likely to affect the views of others. *Cf.* Eyal Zamir & Yuval Farkash, *Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal Scholarship*, 12 JERUSALEM REV. LEG. STUD. 137, 166 (2015) (reputational forces "favor large, recurring, and sophisticated customers").

Assuming that it is possible to identify cases in which consumers will avoid misbehaving companies, regulators could choose to take that into account in assessing penalties. That is to say, if a regulator anticipates that, say, a $1 million dollar penalty is appropriate for particular conduct, and that a drop in sales will cost the company $250,000 in profits, the regulator could reduce the penalty to $750,000.[255] Conversely, regulators in some cases should expect that their actions will not cause a sales decline and so they should proceed on the assumption that if they fail to assess the appropriate penalty, the company may not pay as much as it should. But as the incidents discussed in this Article indicate, it is very difficult to determine when consumers will stop patronizing miscreant businesses, much less how much the sales decline will be. Far more research would be needed to make such predictions. Moreover, reducing penalties for such reasons risks diluting the signaling effect of large penalties. While the Wells Fargo case does not support the claim that record-setting penalties trigger consumer responses,[256] the evidence is still too sparse to be certain. It would be ironic if regulators reduced a planned fine, say, because they anticipated a market response, and then consumers continued to buy the company's products because the small size of the fine caused them to believe that the misconduct was not serious.[257]

In addition, markets sometimes are incapable of protecting consumers for other reasons. Sometimes they fail to work properly.[258] Markets presuppose that consumers are capable of withdrawing their patronage and that is not always the case. For example, those pursued by debt buyers cannot choose the purchasers of their debt; consumers have no options as to which consumer reporting agencies provide information about their credit history; and neither student loan borrowers nor mortgage borrowers can select the servicers of their debts. Monopolistic power also diminishes the ability of consumers to withhold their business from unsatisfactory sellers. Where consumers lack the power to go elsewhere, the marketplace offers consumers no opportunities to discipline businesses. In such cases, laws and those who enforce them may be the only recourse when companies misbehave.

---

255. Cf. Cindy R. Alexander, *On the nature of the reputational penalty for corporate crime: Evidence*, 42 J. LAW & ECON. 489, 489-90 (1999) ("'Reputational' penalties are imposed through the market. . . . The practical implication is that the judicial system can achieve socially optimal deterrence by setting penalties for corporate crimes against customers and other related parties at a substantial discount below penalties for otherwise-similar third-party crimes. Without such a discount, social costs of excess deterrence will be borne.").

256. *See supra* notes 62, 73-74 and accompanying text.

257. Conceivably, regulators could fix a penalty based on assumptions about the market response and then adjust the penalty if the company's sales varied enough from what had been assumed. Regulators and litigators also have remedies available to them that can be more carefully tailored to particular problems than boycotts can be, including injunctions, cease and desist orders, corrective advertising, and the like. For an example of corrective advertising, *see generally* Warner-Lambert Co. v. Federal Trade Commission, 562 F.2d 749 (D.C. Cir. 1977).

258. *See generally* JOHN CASSIDY, HOW MARKETS FAIL: THE LOGIC OF ECONOMIC CALAMITIES (2009).

CONCLUSION

While this study, as with any contrafactual, suffers from methodological limits, at a minimum it is clear that many consumers are willing in some circumstances to continue patronizing businesses that have treated consumers badly. In three cases, businesses that violated consumer protection laws or norms experienced increased sales. A fourth suffered a brief dip and then its sales also rose. In those two situations, consumers found out about the company's bad behavior only because of laws and those enforcing them. It also seems fair to say that in five of the six scandals examined in this Article, if there had been no laws or law enforcers, the misbehaving companies would have faced little or no sanctions for their misconduct—and the sixth company did not face any apparent sanctions from either the market or regulators.

This Article offers several hypotheses to explain the data reported, including that when consumers believe that the company will not repeat the offending conduct, they are not likely to avoid the company's products; that the way consumers are presented choices affects consumer decision-making; that how difficult it is to switch to other businesses affects decision-making (e.g., the cost of switching accounts from one bank to another, or whether alternative providers exist); that consumers are more likely to go elsewhere when the company has sold itself as catering to consumer values but failed to deliver (e.g., protecting the environment, as in the case of Volkswagen); and that the number of consumers significantly affected by the incident may affect how the market responds. In any event, it appears that, contrary to the claim of Milton Friedman and others, markets cannot be relied upon by themselves to effect consumer protection, and that therefore regulation and regulators are needed to protect consumers.

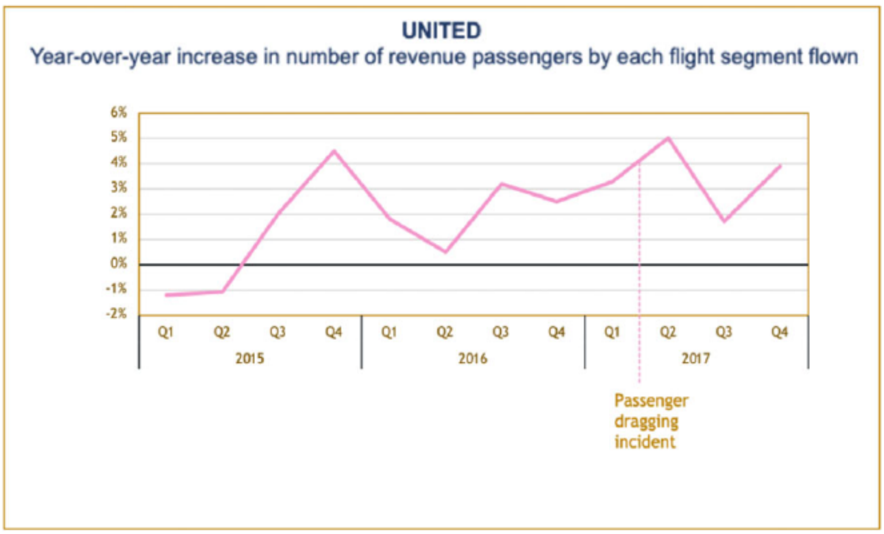
APPENDIX OF TABLES AND GRAPHS

Figure 1:
United Airlines Year Over Year Increase in Number of Revenue Passengers

Year	Quarter	United Passengers	YoY Percentage
2015	Q1	31,522[259]	-1.2%
	Q2	36,231[260]	-1.1%
	Q3	37,464[261]	2.0%
	Q4	35,152[262]	4.75%

259. United Airlines Inc., Quarterly Report (Form 10-Q) 28 (Apr. 23, 2015).
260. United Airlines Inc., Quarterly Report (Form 10-Q) 29 (July 23, 2015).
261. United Airlines Inc., Quarterly Report (Form 10-Q) 29 (Oct. 22, 2015).
262. United Airlines Inc., Annual Report (Form 10-K) 28 (Feb. 18, 2016).

2016	Q1	32,087[263]	1.8%
	Q2	36,416[264]	0.5%
	Q3	38,651[265]	3.2%
	Q4	36,023[266]	2.5%
2017	Q1	33,105[267]	3.27%
	Q2	38,247[268]	5.0%
	Q3	39,302[269]	1.7%
	Q4	37,413[270]	3.9%



263. United Airlines Inc., Quarterly Report (Form 10-Q) 28 (Apr. 21, 2016).
264. United Airlines Inc., Quarterly Report (Form 10-Q) 27 (July 19, 2016).
265. United Airlines Inc., Quarterly Report (Form 10-Q) 28 (Oct. 17, 2016).
266. United Airlines Inc., Annual Report (Form 10-K) 27 (Feb. 23, 2017).
267. United Airlines Inc., Quarterly Report (Form 10-Q) 24 (Apr. 18, 2017).
268. United Airlines Inc., Quarterly Report (Form 10-Q) 25 (July 19, 2017).
269. United Airlines Inc., Quarterly Report (Form 10-Q) 27 (Oct. 19, 2017).
270. United Airlines Inc., Annual Report (Form 10-K) 27 (Feb. 22, 2018).

Figure 2:
Wells Fargo Year-Over-Year Changes in Primary Checking Account Customers by Quarter[271]

Year	Quarter	Percent
2014	Q 1	5.1%[272]
	Q 2	4.6%[273]
	Q 3	4.9%[274]
	Q 4	5.2%[275]
2015	Q 1	5.7%[276]
	Q 2	5.6%[277]
	Q 3	5.8%[278]
	Q 4	5.6%[279]
2016	Q 1	5.0%[280]
	Q 2	4.7%[281]
	Q 3	4.7%[282]
	Q 4	3.5%[283]
2017	Q 1	1.6 %[284]

271. Wells defines primary checking account customers as "[c]ustomers who actively use their checking account with transactions such as debit card purchases, online bill payments, and direct deposit." *See, e.g.*, Press Release, Wells Fargo, Wells Fargo Reports $5.2 Billion in Quarterly Net Income 9, n.6 (July 13, 2018), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/earnings/second-quarter-2018-earnings.pdf.

272. Press Release, Wells Fargo, Wells Fargo Reports Record Quarterly Net Income (Apr. 11, 2014).

273. Press Release, Wells Fargo, Wells Fargo Reports $5.7 Billion in Quarterly Net Income (July 11, 2014).

274. Press Release, Wells Fargo, Wells Fargo Reports $5.7 Billion in Quarterly Net Income (Oct. 14, 2014).

275. Press Release, Wells Fargo, Wells Fargo Reports Record Full Year Net Income (Jan. 14, 2015).

276. Press Release, Wells Fargo, Wells Fargo Reports $5.8 Billion in Quarterly Net Income (Apr. 15, 2015).

277. Press Release, Wells Fargo, Wells Fargo Reports $5.7 Billion in Quarterly Net Income (July 14, 2015).

278. Press Release, Wells Fargo, Wells Fargo Reports $5.8 Billion in Quarterly Net Income (Oct. 14, 2015).

279. Press Release, Wells Fargo, Wells Fargo Reports $5.7 Billion in Quarterly Net Income; Diluted EPS of $1.03 8 (Jan. 15, 2016).

280. Press Release, Wells Fargo, Wells Fargo Reports $5.5 Billion in Quarterly Net Income (Apr. 13, 2016).

281. Press Release, Wells Fargo, Wells Fargo Reports $5.6 Billion in Quarterly Net Income (July 15, 2016).

282. Press Release, Wells Fargo, Wells Fargo Reports $5.6 Billion in Quarterly Net Income (Oct. 14, 2016).

283. Press Release, Wells Fargo, Wells Fargo Reports Fourth Quarter 2017 Net Income of $6.2 Billion; Diluted EPS of $1.16 (Jan. 12, 2018).

284. Press Release, Wells Fargo, Wells Fargo Reports $5.5 Billion in Quarterly Net Income (Apr. 13, 2017).

	Q 2	0.7 %[285]
	Q 3	- 0.2 %[286]
	Q 4	0.2 %[287]
2018	Q 1	0.9%[288]
	Q 2	1.2%[289]
	Q 3	1.7%[290]
	Q 4	1.2%[291]
2019	Q 1	1.1%[292]

285. Press Release, Wells Fargo, Wells Fargo Reports $5.8 Billion in Quarterly Net Income (July 14, 2017).

286. Press Release, Wells Fargo, Wells Fargo Reports Third Quarter 2017 Net Income of $4.6 Billion (Oct. 13, 2017).

287. Press Release, Wells Fargo, Wells Fargo Reports Fourth Quarter 2017 Net Income of $6.2 Billion; Diluted EPS of $1.16, *supra* note 280.

288. Press Release, Wells Fargo, Wells Fargo Reports Preliminary First Quarter 2018 Net Income of $5.9 Billion; Diluted EPS of $1.12 (Apr. 13, 2018), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/earnings/first-quarter-2018-earnings.pdf.

289. Press Release, Wells Fargo, Wells Fargo Reports $5.2 Billion in Quarterly Net Income 9 (July 13, 2018), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/earnings/second-quarter-2018-earnings.pdf.

290. Press Release, Wells Fargo, Wells Fargo Reports $6.0 Billion in Quarterly Net Income; Diluted EPS of $1.139 (Oct. 12, 2018), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/earnings/third-quarter-2018-earnings.pdf.

291. Press Release, Wells Fargo, Wells Fargo Reports $6.1 Billion in Quarterly Net Income; Diluted EPS of $1.21 (Jan. 15, 2019), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/earnings/fourth-quarter-2018-earnings.pdf.

292. Press Release, Wells Fargo, Wells Fargo Reports $5.9 Billion in Quarterly Net Income; Diluted EPS of $1.20 (Apr. 12, 2019), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/earnings/first-quarter-2019-earnings.pdf.

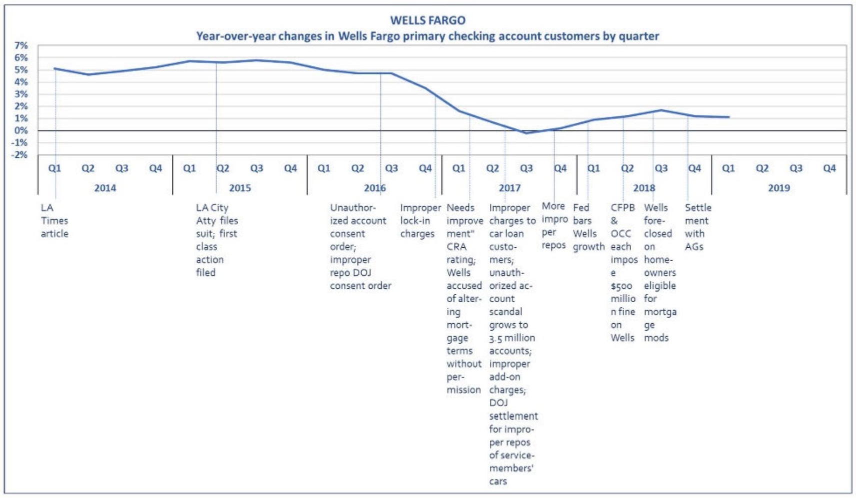

WELLS FARGO
Year-over-year changes in Wells Fargo primary checking account customers by quarter
7%
6%
5%
4%
3%
2%
1%
0%
-1%
-2%
Q1 Q2 Q3 Q4 Q1 Q2 Q3 Q4 Q1 Q2 Q3 Q4 Q1 Q2 Q3 Q4 Q1 Q2 Q3 Q4 Q1 Q2 Q3 Q4
2014
2015
2016
2017
2018
2019
LA Times article
LA City Atty files suit; first class action filed
Unauthor-ized account consent order; improper repo DOJ consent order
Improper lock-in charges
Needs improve ment" CRA rating; Wells accused of alter-ing mort-gage terms without per-mission
Improper charges to car loan custo-mers; unauth-orized ac-count scandal grows to 3.5 million accounts; improper add-on charges; DOJ settlement for impro-per repos of service-members' cars
More impro per repos
Fed bars Wells growth
CFPB & OCC each impos e $500 millio n fine on Wells
Wells fore-closed on home-owners eligible for mortga ge mods
Settle ment with AGs

Figure 3
Target Sales in the U.S. Segment[293] 2013-Present (in millions)

Year	Quarter	Sales	(YoY) Percentage Change Compared to Previous Year
2013	Q 1	$16,620[294]	0.5%
	Q 2	$16,841[295]	2.4%
	Q 3	$16,925[296]	2.0%
	Q 4	$20,893[297]	-6.6%
2014	Q 1	$16,657[298]	0.2%
	Q 2	$16,957[299]	0.7%
	Q 3	$17,254[300]	1.9%
	Q 4	$21,753[301]	4.1%
2015	Q 1	$17,119[302]	2.8%
	Q 2	$17,427[303]	2.8%
	Q 3	$17,613[304]	2.1%
	Q 4	$21,626[305]	-0.5%

293. U.S. Segment includes all U.S. retail operations. In January 2015 Target closed its stores in Canada. Sales figures from 2013-2014 show only U.S. Segment sales; the 2015 sales figures show total sales, which are only in the U.S.

294. Target Corp., Quarterly Report (Form 10-Q) 11 (May 30, 2013).

295. Target Corp., Quarterly Report (Form 10-Q) 11 (Aug. 28, 2013).

296. Target Corp., Quarterly Report (Form 10-Q) 11 (Nov. 27, 2013).

297. Target Corp., Annual Report (Form 10-K) 19 (Mar. 14, 2014).

298. Target Corp., Quarterly Report (Form 10-Q) 12 (May 29, 2014).

299. Target Corp., Quarterly Report (Form 10-Q) 12 (Aug. 27, 2014).

300. Target Corp., Quarterly Report (Form 10-Q) 12 (Nov. 26, 2014).

301. Target Corp., Annual Report (Form 10-K) 13 (Mar. 13, 2015).

302. Target Corp., Quarterly Report (Form 10-Q) 13 (May 28, 2015).

303. Target Corp., Quarterly Report (Form 10-Q) 14 (Aug. 25, 2015).

304. Target Corp., Quarterly Report (Form 10-Q) 14 (Nov. 25, 2015).

305. Target Corp., Annual Report (Form 10-K) 18 (Mar. 11, 2016).

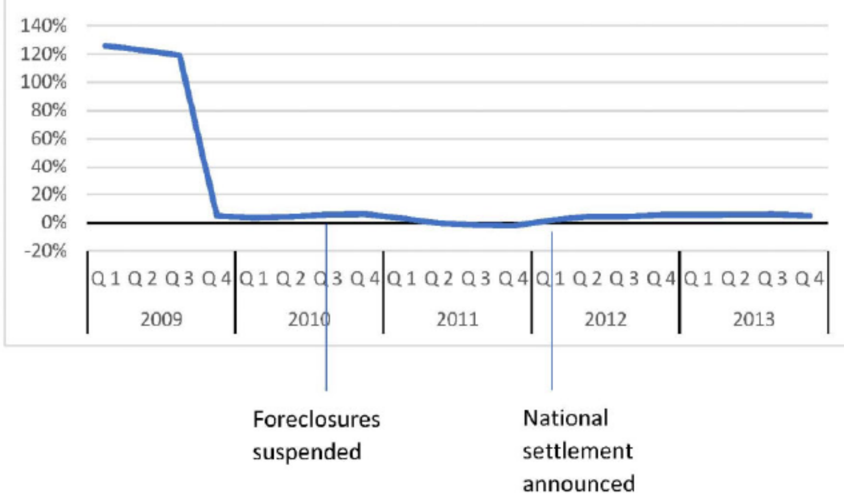
Figure 4
JPMorgan Chase Total Checking Accounts (in thousands)

Year	Quarter	Checking Accounts	Percentage Change Compared to Previous Year
2008	Q 1	11,068[306]	
	Q 2	11,336[307]	
	Q 3	11,672[308]	
	Q 4	24,499[309]	
2009	Q 1	24,984[310]	125.73[311]%
	Q 2	25,252[312]	122.76%
	Q 3	25,546[313]	118.87%
	Q 4	25,712[314]	4.95%
2010	Q 1	25,830[315]	3.39%
	Q 2	26,351[316]	4.35%
	Q 3	27,014[317]	5.75%
	Q 4	27,252[318]	5.99%
2011	Q 1	26,622[319]	3.07%
	Q 2	26,266[320]	-0.32%
	Q 3	26,541[321]	-1.75%
	Q 4	26,626[322]	-2.30%
2012	Q 1	27,034[323]	1.55%

306. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 24 (May 12, 2008).
307. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 27 (Aug. 11, 2008).
308. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 30 (Nov. 7, 2008).
309. JPMorgan Chase & Co., Annual Report (Form 10-K) 47 (Mar. 2, 2009).
310. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 24 (May 7, 2009).
311. This increase and the next two are at least partly caused by the acquisition of Washington Mutual. *See supra* notes 96, 104.
312. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 27 (Aug. 10, 2009).
313. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 28 (Nov. 9, 2009).
314. JPMorgan Chase & Co., Annual Report (Form 10-K) 60 (Feb. 24, 2010).
315. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 25 (May 10, 2010).
316. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 29 (Aug. 6, 2010).
317. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 29 (Nov. 9, 2010).
318. JPMorgan Chase & Co., Annual Report (Form 10-K) 74 (Feb. 28, 2011).
319. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 22 (May 6, 2011).
320. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 26 (Aug. 5, 2011).
321. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 25 (Nov. 4, 2011).
322. JPMorgan Chase & Co., Annual Report (Form 10-K) 88 (Feb. 29, 2012).
323. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 20 (May 10, 2012).

	Q 2	27,384[324]	4.26%
	Q 3	27,669[325]	4.25%
	Q 4	28,073[326]	5.43%
2013	Q 1	28,530[327]	5.53%
	Q 2	28,937[328]	5.67%
	Q 3	29,301[329]	5.90%
	Q 4	29,437[330]	4.86%

Figure 4
JPMorgan Chase Total Checking Accounts (in thousands) Percentage Change Compared to Previous Year



324. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 28 (Aug. 9, 2012).

325. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 27 (Nov. 8, 2012).

326. JPMorgan Chase & Co., Annual Report (Form 10-K) 83 (Feb. 28, 2013) (this number includes Chase Liquid Cards because the report did not break them out separately).

327. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 18 (May 8, 2013) (this number includes Chase Liquid Cards because the report did not break them out separately).

328. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 23 (Aug. 7, 2013) (this number includes Chase Liquid Cards because the report did not break them out separately).

329. JPMorgan Chase & Co., Quarterly Report (Form 10-Q) 25 (Nov. 1, 2013) (this number includes Chase Liquid Cards because the report did not break them out separately).

330. JPMorgan Chase & Co., Annual Report (Form 10-K) 89 (Feb. 20, 2014) (this number includes Chase Liquid Cards because the report did not break them out separately).

Figure 5
GM United States Sales (2013-2018) in Thousands

	Quarter	GM United States Sales	YoY Percentage Change
2012	Q1	608[331]	
	Q2	707[332]	
	Q3	652[333]	
	Q4	629[334]	
2013	Q1	665[335]	9.38%
	Q2	755[336]	6.79%
	Q3	697[337]	6.90%
	Q4	669[338]	6.36%
2014	Q1	650[339]	-2.26%
	Q2	806[340]	6.76%
	Q3	752[341]	7.89%
	Q4	727[342]	8.67%
2015	Q1	684[343]	5.23%
	Q2	822[344]	1.99%
	Q3	794[345]	5.59%
	Q4	782[346]	7.57 %

331. Gen. Motors Co, Quarterly Report (Form 10-Q/A) 49 (May 2, 2012).

332. Gen. Motors Co., Quarterly Report (Form 10-Q) 56 (Aug. 3, 2012).

333. Gen. Motors Co., Quarterly Report (Form 10-Q) 39 (Oct. 30, 2013).

334. Gen. Motors Co., Annual Report (Form 10-K) 4 (Feb. 15, 2013) (The annual report reports that GM sold 2,596 vehicles in 2012. Subtracting the sales for the first three quarters from this amount yields the amount stated in the table.).

335. Gen. Motors Co., Quarterly Report (Form 10-Q/A) 49 (May 9, 2013).

336. Gen. Motors Co., Quarterly Report (Form 10-Q) 39 (July 25, 2013).

337. Gen. Motors Co., Quarterly Report (Form 10-Q) 39 (Oct. 30, 2013).

338. Gen. Motors Co., Annual Report (Form 10-K) 3 (Feb. 6, 2014) (The annual report reports that GM sold 2,786 vehicles in 2013. Subtracting the sales for the first three quarters from this amount yields the amount stated in the table.).

339. Gen. Motors Co., Quarterly Report (Form 10-Q) 27 (Apr. 24, 2014).

340. Gen. Motors Co., Quarterly Report (Form 10-Q) 32 (July 24, 2014).

341. Gen. Motors Co., Quarterly Report (Form 10-Q) 32 (Oct. 23, 2014).

342. Gen. Motors Co., Annual Report (Form 10-K) 2 (Feb. 4, 2015) (The annual report states that GM sold 2,935 vehicles in 2013. Subtracting the sales for the first three quarters from this amount yields the amount stated in the table.).

343. Gen. Motors Co., Quarterly Report (Form 10-Q) 28 (Apr. 23, 2015).

344. Gen. Motors Co., Quarterly Report (Form 10-Q) 30 (July 23, 2015).

345. Gen. Motors Co., Quarterly Report (Form 10-Q) 31 (Oct. 21, 2015).

346. Gen. Motors Co., *supra* note 174, at 2 (The annual report states that GM sold 3,082 vehicles in 2013. Subtracting the sales for the first three quarters from this amount yields the amount stated in the table.).

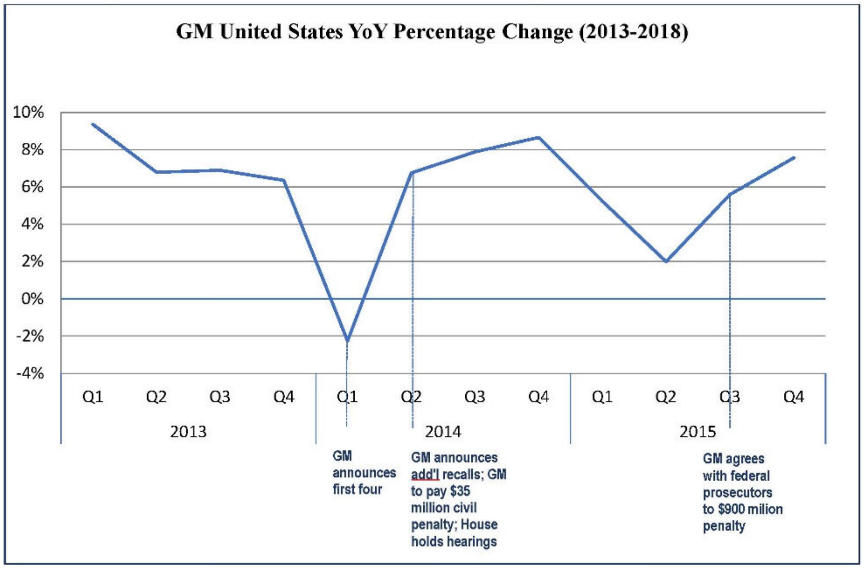

GM United States YoY Percentage Change (2013-2018)
10%
8%
6%
4%
2%
0%
-2%
-4%
Q1 Q2 Q3 Q4 Q1 Q2 Q3 Q4 Q1 Q2 Q3 Q4
2013
2014
2015
GM announces first four
GM announces add'l recalls; GM to pay $35 million civil penalty; House holds hearings
GM agrees with federal prosecutors to $900 milion penalty

Figure 6
GM Market Share Percentage (2013-2018)

Year	Quarter	GM Market Share
2013	Q1	17.7%[347]
	Q2	18.0%[348]
	Q3	17.3%[349]
	Q4	17.2%[350]
2014	Q1	17.0%[351]
	Q2	17.9%[352]
	Q3	17.3%[353]
	Q4	17.4%[354]
2015	Q1	16.9%[355]
	Q2	17.6%[356]
	Q3	17.1%[357]
	Q4	17.3%[358]

347. Gen. Motors Co., Quarterly Report (Form 10-Q) 49 (May 2, 2013),

348. Gen. Motors Co., *supra* note 336.

349. Gen. Motors Co., *supra* note 337.

350. Gen. Motors Co., Annual Report (Form 10-K) 3 (Feb. 15, 2013) (The 10-K does not list the figures for the quarter, but for the entire year. The quarterly figures can be derived by subtracting the data for the first three quarters from the annual total.).

351. Gen. Motors Co., *supra* note 339.

352. Gen. Motors Co., *supra* note 340.

353. Gen. Motors Co., *supra* note 341.

354. Gen. Motors Co., Annual Report (Form 10-K) 2 (Feb. 6, 2014), https://investor.gm.com/static-files/b1007910-5036-49eb-b233-cad977f4f04d.

355. Gen. Motors Co., *supra* note 343.

356. Gen. Motors Co., *supra* note 344.

357. Gen. Motors Co., *supra* note 345.

358. Gen. Motors Co., *supra* note 174, at 2.

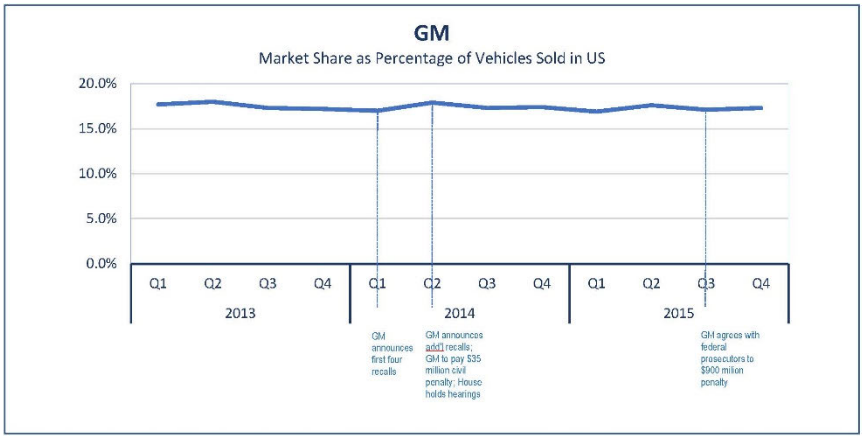

GM
Market Share as Percentage of Vehicles Sold in US
20.0%
15.0%
10.0%
5.0%
0.0%
Q1 Q2 Q3 Q4 Q1 Q2 Q3 Q4 Q1 Q2 Q3 Q4
2013
2014
2015
GM announces first four recalls
GM announces add'l recalls; GM to pay $35 million civil penalty; House holds hearings
GM agrees with federal prosecutors to $900 milion penalty

Figure 7
Volkswagen Sales

Year	Period as reported in quarterly reports	VW Passenger Car U.S. Deliveries (thousands) as reported	Quarter	VW U.S. Passenger Car Deliveries (by quarter/thousands) as calculated from reports	YoY Percentage Change from the same quarter in the previous year
2013	Jan-Mar	142,755[359]	Q1	142,755	
	Jan-June	303,925[360]	Q2	161,170[361]	
	Jan-Sept	463,186[362]	Q3	159,261[363]	
	Jan-Dec	611,747[364]	Q4	148,561[365]	
2014	Jan-Mar	133,481[366]	Q1	133,481	-6.5%
	Jan-June	287,952[367]	Q2	154,471	-4.2%
	Jan-Sept	439,576[368]	Q3	151,624	-4.8%
	Jan-Dec	599,734[369]	Q4	160,158	7.8%
2015	Jan-Mar	131,581[370]	Q1	131,581	**-1.4%**
	Jan-June	294,992[371]	Q2	163,411	5.8%
	Jan-Sept	453,518[372]	Q3	158,526	4.6%
	Jan-Dec	607,096[373]	Q4	153,578	-4.1%
2016	Jan-Mar	124,027[374]	Q1	124,027	-5.7%
	Jan-June	273,843[375]	Q2	149,816	-8.3%
	Jan-Sept	425,971[376]	Q3	152,128	-4.0%
	Jan-Dec	591,063[377]	Q4	165,092	7.5%
2017	Jan-Mar	135,436[378]	Q1	135,436	9.2%
	Jan-June	293,432[379]	Q2	157,996	5.5%
	Jan-Sept	457,035[380]	Q3	163,603	7.5%
	Jan-Dec	625,128[381]	Q4	168,093	1.8%

359. VOLKSWAGEN AG., INTERIM REPORT: JANUARY-MARCH 11 (2013), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2013/volkswagen/englisch/Q1_2013_e.pdf.

360. Volkswagen AG., HALF-YEARLY FINANCIAL REPORT 11 (2013), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2013/volkswagen/englisch/HY_2013_e.pdf.

361. While Volkswagen does not provide this information separately, it is possible to determine it by subtracting the January to March numbers from the January to June figures Volkswagen does supply.

362. VOLKSWAGEN AG., INTERIM REPORT: JANUARY-SEPTEMBER 11 (2013), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2013/volkswagen/englisch/Q3_2013_e.pdf.

363. While Volkswagen does not provide this information separately, it is possible to determine it by subtracting the January to June numbers from the January to September figures Volkswagen does supply.

364. VOLKSWAGEN AG., ANNUAL REPORT 80 (2014), https://www.volkswagenag.com/presence/investorrelation/publications/annual-reports/2014/volkswagen/english/Y_2013_e.pdf.

365. While Volkswagen does not provide this information separately, it is possible to determine it by subtracting the January to September numbers from the annual figures Volkswagen does supply.

366. VOLKSWAGEN AG., INTERIM REPORT: JANUARY-MARCH 11 (2014), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2014/volkswagen/englisch/Q1_2014_e.pdf.

367. VOLKSWAGEN AG., HALF-YEARLY FINANCIAL REPORT 11 (2014), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2014/volkswagen/englisch/HY_2014_e.pdf.

368. VOLKSWAGEN AG., INTERIM REPORT: JANUARY-SEPTEMBER 11 (2014), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2014/volkswagen/englisch/Q3_2014_e.pdf.

369. VOLKSWAGEN AG., ANNUAL REPORT 85 (2015), https://www.volkswagenag.com/presence/investorrelation/publications/annual-reports/2015/volkswagen/english/GB+2014_e.pdf.

370. VOLKSWAGEN AG., INTERIM REPORT: JANUARY-MARCH 11 (2015), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2015/volkswagen/englisch/Q1_2015_e.pdf.

371. VOLKSWAGEN AG., HALF-YEARLY FINANCIAL REPORT 11 (2015), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2015/volkswagen/englisch/HY_2015_e.pdf.

372. VOLKSWAGEN AG., INTERIM REPORT: JANUARY-SEPTEMBER 12 (2015), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2015/volkswagen/englisch/Q3_2015_e.pdf.

373. VOLKSWAGEN AG., ANNUAL REPORT 97 (2016), https://www.volkswagenag.com/presence/investorrelation/publications/annual-reports/2016/volkswagen/englisch/Y_2015_e.pdf.

374. VOLKSWAGEN AG., INTERIM REPORT: JANUARY-MARCH 11 (2016), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2016/volkswagen/englisch/Q1_2016_e.pdf.

375. VOLKSWAGEN AG., HALF-YEARLY FINANCIAL REPORT 12 (2016), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2016/volkswagen/englisch/HY_2016_e.pdf.

376. VOLKSWAGEN AG., INTERIM REPORT: JANUARY-SEPTEMBER 13 (2016), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2016/volkswagen/englisch/Q3_2016_e.pdf.

377. VOLKSWAGEN AG., ANNUAL REPORT 107 (2017), https://www.volkswagenag.com/presence/investorrelation/publications/annual-reports/2017/volkswagen/en/Y_2016_e.pdf.

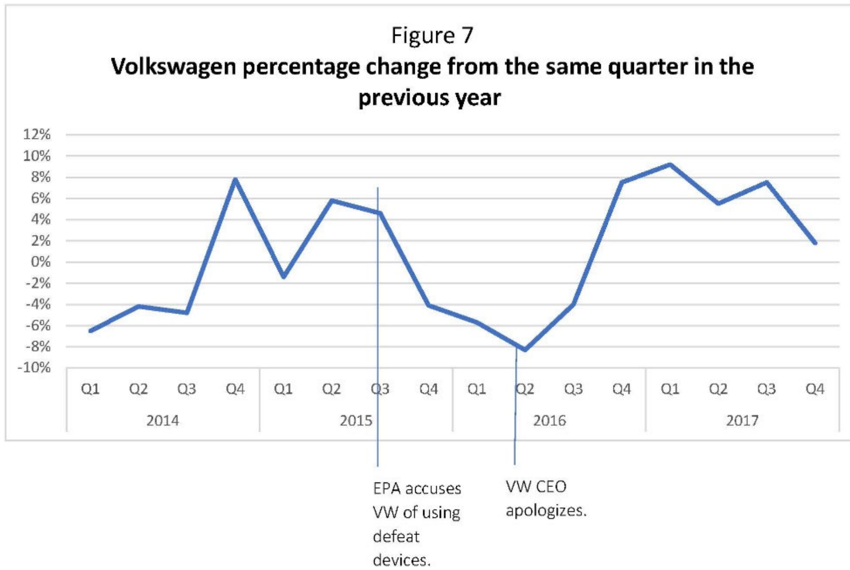


Figure 7
Volkswagen percentage change from the same quarter in the previous year

378. VOLKSWAGEN AG., INTERIM REPORT: JANUARY-MARCH 13 (2017), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2017/volkswagen/en/Q1_2017_e.pdf.

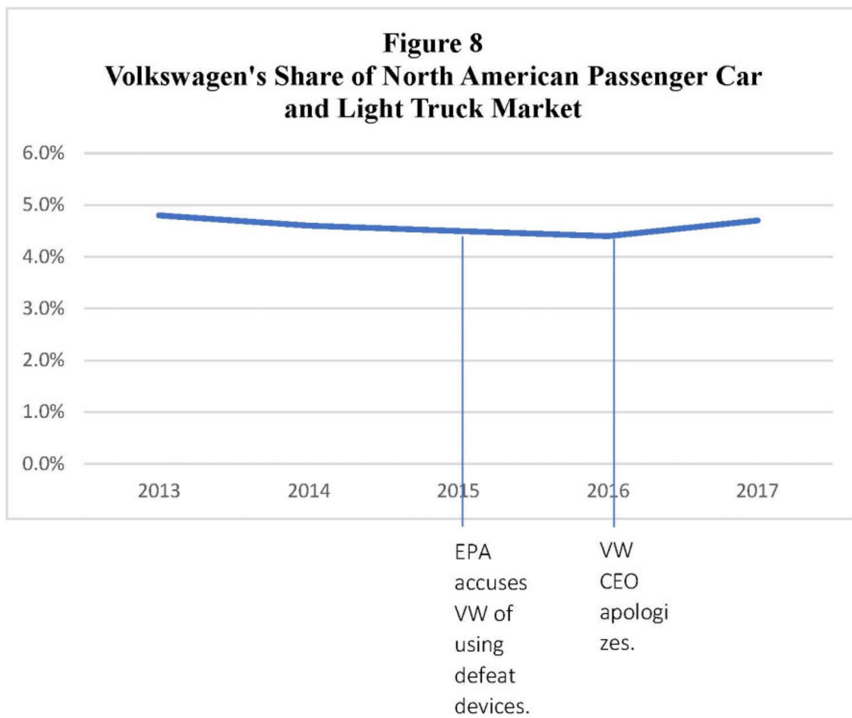
379. VOLKSWAGEN AG., HALF-YEARLY FINANCIAL REPORT 11 (2017), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2017/volkswagen/en/HY_2017_e.pdf.

380. VOLKSWAGEN AG., INTERIM REPORT: JANUARY-SEPTEMBER 12 (2017), https://www.volkswagenag.com/presence/investorrelation/publications/interim-reports/2017/volkswagen/en/Q3_2017_e.pdf.

381. VOLKSWAGEN AG., ANNUAL REPORT 104 (2018), https://www.volkswagenag.com/presence/investorrelation/publications/annual-reports/2018/volkswagen/en/Y_2017_e.pdf.

Figure 8
Volkswagen's Share of North American Passenger Car and Light Truck Market

Year	Market Share
2013	4.8%[382]
2014	4.6%[383]
2015	4.5[384]
2016	4.4[385]
2017	4.7[386]



382. VOLKSWAGEN AG., ANNUAL REPORT 79 (2014), https://www.volkswagenag.com/presence/investorrelation/publications/annual-reports/2014/volkswagen/english/Y_2013_e.pdf.

383. VOLKSWAGEN AG., ANNUAL REPORT 84 (2015), https://www.volkswagenag.com/presence/investorrelation/publications/annual-reports/2015/volkswagen/english/GB+2014_e.pdf

384. VOLKSWAGEN AG., ANNUAL REPORT 96 (2016), https://www.volkswagenag.com/presence/investorrelation/publications/annual-reports/2016/volkswagen/englisch/Y_2015_e.pdf.

385. VOLKSWAGEN AG., ANNUAL REPORT 105 (2017), https://www.volkswagenag.com/presence/investorrelation/publications/annual-reports/2017/volkswagen/en/Y_2016_e.pdf.

386. VOLKSWAGEN AG., ANNUAL REPORT 102 (2018), https://www.volkswagenag.com/presence/investorrelation/publications/annual-reports/2018/volkswagen/en/Y_2017_e.pdf.