

**ENHANCING CONSUMER PROTECTION WITH A FOCUS ON THE ENFORCEMENT
OF THE PRIVATE RIGHTS OF CONSUMERS:
THE FAKE-HUNTING LAWSUITS DILEMMA IN CHINA**

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Abstract

Fakes, or counterfeits, usually refer to problematic consumer goods. However, in China, there is a group of people who intentionally buy fakes and then sue against the supplier for profit: they are called “fake-hunters.” One may wonder how this can happen, yet ironically this unique phenomenon resulted from the consumer protection strategy of China. After China started economic reforms and opened up in the late 1970s, the domestic market was overwhelmed by all kinds of fake and shoddy products. In response to the severe social problem of consumer damages, punitive damages were introduced with the enactment of the *Law of the People’s Republic China on Protection of Consumer Rights and Interests* in 1993. Afterwards, fake-hunters appeared and raised the debate of whether they may be awarded punitive damages in fake-hunting lawsuits.

Continuing conflicts caused by fake-hunting lawsuits revealed a gap between China’s consumer legislation and its enforcement. Specifically, the punitive damage system was introduced for the purpose of enhancing consumer protection, through motivating each consumer to become the enforcer of the law. Meanwhile, along with the increase of for-profit fake-hunting lawsuits, resistance appeared among administrative and judicial enforcement agencies, especially the court system. Reviewing the current divergent opinions around application of punitive damages in fake-hunting cases, this study found that the missing piece which has caused the gap is the focus on the private rights of consumers.

The purpose of this study is to demonstrate the necessity for China to change the emphasis of its consumer protection strategy from regulating the market order to supporting consumers to enforce their private rights. Above all, the purpose and function of the punitive damage system in consumer protection require reconsideration by not only observers but also policy makers. Moreover, legal improvements need to be made concerning how the court should interpret the legal rules on punitive damages and how policy makers should improve consumer protection strategy accordingly.

To achieve these targets, this study consists of two parts, and applies case studies, a historical review and a comparative analysis. The analysis in Part I will illustrate the whole picture of fake-hunting lawsuits dilemma and reveals the profound reasons behind the problems. Part II investigates three correlated issues on how legal systems need to be developed to enhance consumer protection. This study concludes that focus on private rights of consumers is of great significance, and therefore China needs to improve legal systems in order to protect consumer rights and interests in transaction and redress. In the end, China should enhance consumer protection with the emphasis on supporting consumers to enforce their lawful rights.

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Chapter I: Introduction

This dissertation is on how to enhance the enforcement of consumer rights in China. In this chapter, first the objectives of this study will be introduced (1.1). Then the following sections will introduce the research background with regards to consumer protection and consumer law (1.2), legal development of consumer protection in China (1.3), and the problems with enforcement of consumer law in China (1.4). Furthermore, the structure of this dissertation and research methods of this study will be introduced in 1.5.

1.1 Objectives of this study

This study attempts to prove that a change of focus from market regulation to rights enforcement is needed to enhance consumer protection in China. This change of focus requires legal improvement at different aspects of enforcement. The conventional perspective viewing enforcement of consumer rights is insufficient. This study aims to shed light on how to improve enforcement strategy of consumer protection in China. This study has objectives at three levels.

First, this study attempts to demonstrate insufficiencies with current enforcement strategy of consumer protection in China. This study is going to investigate the profound reasons behind the fake-hunter problem. With materials of fake-hunter problem, this study will further demonstrate what have been impeding the development of consumer protection in China.

Second, this study aims to illustrate the necessity to focus on the private rights of consumers in China in order to enhance consumer protection. There has been a long-time debate around the characterization of consumer protection law, which led private law approach in the enforcement of consumer rights to be insufficient. Legal mechanisms on consumer protection in

China reflect the essence of market regulation; however, legal improvement should be made with the focus on rights protection.

In addition, this study conducts a case study of China, which is a jurisdiction deeply affected by the socialist law of the former Soviet Union. The problems China is confronting now are largely associated with the influence of the former Soviet Union law and the unique path-dependency of China. This piece of analysis may provide experience and prospects in terms of legal transplantation and institution development for other jurisdictions with similar factors.

1.2 Background of research

The first section introduces the basic research background of consumer protection and consumer law. The “consumer” is one key concept in economic theories. Adam Smith, who is the first classical economist, identified consumers’ needs as the terminal goal of economic activities by arguing “Consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer.”¹ In China, the current definition of the consumer is provided by Article 2 of the *Law of People’s Republic of China on Protection of Consumer Rights and Interest*: “the rights and interests of consumers in purchasing and using commodities or receiving services for daily consumption shall be under the protection of the present Law or under the protection of other relevant laws and regulations in absence of stipulations in this Law.” Therefore, “consumer” means people “in purchasing and using commodities or receiving services for daily consumption.”²

¹ Adam Smith, *An Inquiry into the Natures and Causes of the Wealth of Nations (with an introduction by Mark G. Spencer)* (Wordsworth Editions Limited, 2012; Introduction, Mark. G. Spencer, 2012), 658.

² Article 2 of the *Law on Protection of Consumer Rights and Interests of People’s Republic of China* (2013). The *Law on Protection of Consumer Rights and Interests of People’s Republic of China* was first promulgated in 1993, and amended in 2009 and 2013. Unless acknowledged otherwise, quotations of all the statues are from the latest version.

However, in EU consumer protection directives, “consumer” means any natural person who (in contracts) is acting for purposes which are outside his trade, business, craft, or profession.³ In this definition, the focus is non-enterprise characteristics of the consumer. Specifically, “consumer” under EU directives should meet the conditions including (1) being party of transaction; (2) not for the purpose of trade, business, craft or profession; and (3) being natural persons.⁴ At the first glance, it seems that everyone can become a consumer in a daily transaction. However, the definition of the “consumer” can differ in different jurisdictions. In this section, the main characteristics of the development of consumer protection legislation will be illustrated.

1.2.1 Protecting the consumer: a historical review

Modern consumer protection legislation developed significantly in the 1960s and 1970s.⁵ US President John F. Kennedy first outlined a vision of consumer rights in a special message to Congress on March 15, 1962 (which day became the World Consumer Rights Day), and that subsequently led to wide-spread recognition and then consumer law legislation.⁶ The four categories of consumer rights include the right to safety, the right to be informed, the right to choose; and the right to be heard.⁷ This declaration of consumer rights led profound influence to the consumer protection policy making and legislation in history.⁸ Over time, along with consumer movements and efforts from various consumer organizations, the United Nations contributed to developing a

³ For instance, Article 2 of *Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance.* EUR-Lex, 2011. Accessed July 19, 2018. <http://data.europa.eu/eli/dir/2011/83/oj>.

⁴ The Institute of Law on Protection of Consumer Rights and Interests of China(中国消费者权益保护法学研究会) ed., *消费者权益保护法学* [Studies on the Law on Protection of Consumer Rights and Interests] (Zhongguo shehui chubanshe, 2017), 3.

⁵ Gene A. Marsh, *Consumer Protection Law in a Nutshell (3rd edition)* (West Group, 1999), 6-11. See also Iain Ramsay (ed.), *Consumer Law* (Dartmouth, 1992), xi.

⁶ Consumer International, “Developing International Guideline on Consumer Protection,” accessed on July 19, 2018. <http://www.consumersinternational.org/who-we-are/consumer-rights>.

⁷ *Ibid.*

⁸ *Ibid.*

global framework to promote consumer protection legislation and its enforcement; this document was *The United Nations Guidelines for Consumer Protection* (UNGCP).⁹ The guidelines were first adopted by the General Assembly in 1985, later expanded in 1999, and recently revised by the General Assembly in 2015.¹⁰ Since their adoption, the UNGCP has had a significant influence on consumer policy actions by both governments and consumer organizations in many countries.¹¹

Up to the present, the need to protect citizens as consumers at both the domestic and international level has gained increased attention among countries around the world. Meanwhile, theories vary considering the necessity and legitimacy of providing consumer protection for citizens through law. In China, legislation on consumer rights is mainly after the economic reforms of the late 1970s.¹² Moreover, China shows her own path-dependency of consumer protection legislation.

1.2.2 Legislation on consumer protection

To define the scope of consumer law can be difficult. Consumer law can be “the sum total of the ways in which a state constitutes, defines and intervenes in markets for the purpose of protecting the ultimate consumer of goods and services.”¹³ In most legal orders, consumer law can be seen as a distinct body of law now; however, to define the scope of consumer law may raise questions.¹⁴ As to how the scope of consumer law should be defined, there are no universal criteria. Nevertheless, “the answer should probably depend upon why one is protecting the consumer—lack

⁹ The United Nations, “United Nations Guidelines on Consumer Protection,” accessed on July 19, 2018. <http://unctad.org/en/Pages/DITC/CompetitionLaw/UN-Guidelines-on-Consumer-Protection.aspx>.

¹⁰ *Ibid.*

¹¹ David Harland, “The United Nations Guidelines for Consumer Protection: Their Impact in the First Decade” in Iain Ramsay (ed.) *Consumer Law in the Global Economy: National and International Dimensions* (Ashgate and Dartmouth, 1997), 1-12.

¹² For instance, see Huixing Liang (梁慧星), 社会主义市场经济管理法律制度研究 [Research on Legal Systems of Socialist Market Economy Regulation] (Zhongguo zhengfa daxue chubanshe, 1993), 246-248.

¹³ Thierry Bourgoignie and David M. Turbek, *Consumer Law, Common Markets and Federalism in Europe and the United States* (Walter de Gruyter & Co., Berlin, 1986), 6.

¹⁴ Geraint Howells, Iain Ramsay and Thomas Wilhelmsson, “Consumer law in its International Dimension” in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson with David Kraft (eds.), *Handbook of Research on International Consumer Law* (Edward Elgar, 2010), 3.

of knowledge, lack of bargaining power—but legislators often agonise over these distinctions, which are not infrequently the subject of litigation in the courts.”¹⁵

The justifications on legislation of consumer protection can be diverse. The attempt to rectify the inequities of bargaining power between individual consumer and the supplier of goods or services has been one principle justification for much modern consumer law.¹⁶ The reason for a consumer not being in an equal bargaining power is primarily due to information problems; moreover, it cost too much too seek for remedy.¹⁷ Moreover, justifications of consumer protection legislation can be consumer sovereignty, substantive justice, human rights, and sustainable development.¹⁸ There was fierce debate between free market economists and those in support of state intervention during the 1970s and the 1980s.¹⁹ Yet the development of consumer protection legislation has proved that consumer law can be a means of socializing the market at global level.²⁰

1.2.3 Enforcement of consumer law

Whilst legislation is an important means to confirm consumer rights, enforcement is necessary to realize consumer rights provided by law. The enforcement body of consumer law can be diverse: the administrative authorities, judicial courts, attorneys, companies, private organizations, and citizens. This study adopts a broad definition of enforcement in order to cover different types of enforcement agencies, and not only administrative organs and judicial courts, but also private

¹⁵ *Ibid.*

¹⁶ David Oughton and John Lowry, *Textbook on Consumer Law (2nd edition)* (London: Blackstone, 2000), 16-19.

¹⁷ *Ibid.*

¹⁸ Geraint Howells, Iain Ramsay and Thomas Wilhelmsson, “Consumer law in its International Dimension” in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson with David Kraft (eds.), *Handbook of Research on International Consumer Law* (Edward Elgar, 2010), 10-13. Iris Benöhr, “The Evolution of Consumer Protection and Human Rights” in Iris Benöhr, *EU Consumer Law and Human Rights* (Oxford University Press, 2013), 45-76.

¹⁹ See Ross Parish, “Consumer Protection and the Ideology of Consumer Protectionists” and Ross Cranston, “Consumer Protection and Economic Theory” in A.J. Duggan and L.W. Darvall (eds.), *Consumer Protection Law and Theory* (The Law Book Company Limited, 1980), 229-242 and 243-255.

²⁰ *Supra* note 14, p10.

enforcers including individual citizens and private organizations, most particularly consumer associations.

In a remedial perspective, despite the law may have confirmed bunch of rights for consumers, it is hardly meaningful for consumers without effective enforcement. Meanwhile, consumer protection is also “the keystone of effective market regulation,” as it “regulates entry and exit of market products and services.”²¹ In this sense, enforcement of consumer law is also of key significance for market regulation.²² Enforcement of consumer protection may not only provide compensation to consumers and deterrence to the business operators, and therefore enhance compliance of business operators to market regulations.²³ Therefore, studies on enforcement of consumer law can have either a remedial and regulatory focus, or both.

The paper “Private Enforcement of Law” by William M. Landes and Richard A. Posner has had a profound influence on the legal-economical study of public-private enforcement of law.²⁴ Studies on enforcement of consumer law widely applied the public-private enforcement model, yet economic analysis is not always a principal focus. Many studies focus on the collective function of enforcement agencies in an institutional perspective, and frequently applying a comparative approach.²⁵ In addition, class action is also a frequently discussed issue of private enforcement in consumer law studies.²⁶

²¹ Fabrizio Gafaggi and Hans-W. Micklitz, “Introduction” in Fabrizio Gafaggi and Hans-W. Micklitz (eds.), *New Frontiers of Consumer Protection: the Interplay between Private and Public Enforcement* (Intersentia, 2009), 1-11.

²² *Ibid.*

²³ *Ibid.*

²⁴ William M. Landes, Richard A. Posner, “The Private Enforcement of Law,” *Journal of Legal Studies*, January 1975.

²⁵ Fabrizio Gafaggi and Hans-W. Micklitz, “Introduction” in Fabrizio Gafaggi and Hans-W. Micklitz (eds.), *New Frontiers of Consumer Protection: the Interplay between Private and Public Enforcement* (Intersentia, 2009), 1. See also Fabrizio Cafaggi, Hans-W. Micklitz, “Collective Enforcement of Consumer Law: A Framework for Comparative Assessment,” *European Review of Private Law* 16 (2008): 391-425.

²⁶ Sinai Deutch, “Consumer Class Actions: Are They a Solution for Enforcing Consumer Rights? The Israeli Model,” *Journal of Consumer Policy* 27 (2004): 179-212.

However, the enforcement of consumer law has not been a main focus in Chinese consumer protection rhetoric. Most studies on consumer law are interpretation-focused, or legislation-oriented. In China, there is a lack of attention on the cooperation or interplay between administrative and judicial enforcement of consumer law, and the compatibility between legislation and its enforcement. Since enforcement strategies are critical to consumer protection, this study focuses on the institutional dimension of consumer protection to analyze the problems with enforcement of consumer rights in China.

1.3 Legal development on consumer protection in China

Before entering into the analysis of enforcement problems, this section will first illustrate a rough picture of the legal framework with regards to consumer protection in China. In the late 1970s, China turned from a planned economy into a socialist market economy.²⁷ With high-speed economic growth, malpractices repeatedly caused damage to consumers all around the country.²⁸ In order to protect consumers from suffering from the market failures, China made great efforts in consumer protection. Currently, laws protecting consumers have been enacted at multiple levels, consumer rights have been extensively confirmed in current legislation, and mechanisms have been established for consumer rights enforcement and dispute resolution.

1.3.1 Legal framework established on consumer protection

China has established an extensively covered and multi-level legal framework on consumer protection since the 1990s. The whole framework principally can be divided into three categories: (i) fundamental law on consumer rights and interests; (ii) special laws on crucial legal

²⁷ Huixign Liang (梁慧星), 民法学说判例与立法研究 [Studies on Theories, Cases and Legislation of Civil Law] (Falv chubanshe, 2003), 62-65.

²⁸ Mingfang Lv (吕明方), 中国: 呼唤质量 [China: An Appeal for Quality], *Society* 社会 4 (1992): 2-6.

issues, and (iii) consumer-favored legal provisions incorporated in other statutes. In addition, the Supreme People's Court juridical directives regarding consumer lawsuits play an important role in the function of the framework.

First, the fundamental act on Chinese consumer protection is the *Law of the People's Republic of China on Protection of Consumer Rights and Interests* (the PRC Consumer Protection Law in the following context). It provides a framework consisting of: (1) general principles; (2) consumer rights; (3) obligations of business operators; (4) consumer protection by the state; (5) consumer organizations; (6) dispute resolution; (7) legal liabilities; and (8) supplementary provisions. The Consumer Protection Law is “for the protection of the legitimate rights and interests of consumers, maintenance of the socio-economic order, and promotion of the healthy development of a socialist market economy.”²⁹ This law covers the rights and interests of consumers in purchasing and using commodities or receiving services for daily consumption.³⁰ Consumers shall be under the protection of the Consumer Protection Law or under the protection of other relevant laws and regulations in absence of stipulations in this law.³¹

Second, there are special laws on particular legal issues concerning consumer protection. The *Anti-Unfair Competition Law of the People's Republic of China* (the PRC Unfair Competition Law in the following context) was enacted for the purposes of promoting the sound development of the socialist market economy, encouraging and protecting fair competition, preventing unfair competition practices, and safeguarding the lawful rights and interests of businesses and

²⁹ Article 1 of *Law of the People's Republic of China on the Protection of Consumer Rights and Interests*. *Law of the People's Republic of China on the Protection of Consumer Rights and Interests*, the PRC Consumer Protection Law in the following text, was first promulgated on October 31, 1993 and implemented on January 1, 1994. The PRC Consumer Protection Law was amended in 2009 and 2013. Unless acknowledged otherwise, quotations of all the statutes are from the latest version.

³⁰ Article 2 of the PRC Consumer Protection Law.

³¹ *Ibid.*

consumers.³² The *Product Quality Law of the People's Republic of China* (the PRC Product Quality Law in the following context) is aimed to strengthen the supervision and control over product quality, to define the liabilities for product quality, to protect the legitimate rights and interests of users and consumers and to safeguard the socio-economic order.³³ In addition, there are legal acts on consumer issues including consumer safety and hygiene (for instance, the PRC Food Safety Law and the PRC Food Hygiene Law), quality and measurement of consumer goods, advertising, standards and price.³⁴

The third category includes legal rules incorporated in various legal acts, including civil and criminal laws, administrative regulations. The Consumer Protection Law constructs a fundamental system for consumer protection. Meanwhile, legal acts including the PRC Contract Law, the *Tort Liability Law the People's Republic of China* and the *Civil Procedure Law of the People's Republic of China*³⁵, were not enacted particularly in respect to consumer protection, but contain articles in respect to consumer rights and interests as well. For instance, the articles regarding standardized terms in *Contract Law* (Article 39 to 41) and articles on tort liability of defective products in *PRC Tort Liability Law* (Article 42) both provide a necessary substantive legal basis for consumers to apply for dispute resolution. Furthermore, the PRC Civil Procedural Law not only provides the common rules for civil litigation, but also empowers consumers through special procedural rules, represented by the recently endorsed public interests litigation (Article 55 of 2013 amendment).

³² Article 1 of the *Anti-Unfair Competition Law of the People's Republic of China* was first promulgated on September 2, 1993 and amended in 2017. Unless acknowledged otherwise, quotations of all the statutes are from the latest version.

³³ Article 1 of the *Product Quality Law of the People's Republic of China* was first promulgated on February 22, 1993, and amended in 2007 and 2009. Unless acknowledged otherwise, quotations of all the statutes are from the latest version.

³⁴ Mingyue Xu (许明月), and Changqi Li (李昌麒), *消费者保护法 (第四版)* [Consumer Protection Law (4th edition)] (Falv chubanshe, 2014), 34-39.

³⁵ The *Civil Procedure Law of the People's Republic of China* was first promulgated on April 9, 1991, and amended in 2007, 2012 and 2017. Unless acknowledged otherwise, quotations of all the statutes are from the latest version.

Legal provisions on consumer protection exist not only in civil law field, but also in criminal law and various administrative regulations. In criminal law and administrative regulations, consumer protection is approached through penalties or sanctions based on the liabilities the business operator ought to burden. Crimes impeding consumer rights and interests covered by the *Criminal Law of the People's Republic of China* are defined primarily in Section One of Chapter III, including crimes of producing and selling shoddy products, producing and selling counterfeit or inferior drugs, producing and selling unhygienic, poisonous or harmful foods, producing and selling inferior medical equipment, producing and selling products that do not meet safety standards, and crimes of false advertising.

Administrative regulations perform functions of consumer protection at various aspects. Some regulations are for the purpose of putting constraints onto business operators in order to strengthen their compliance with laws on market practices and consumer protection. For instance, *Measures of Penalties against Infringement upon Consumers' Rights and Interests*, issued by the former State Administration of Commerce and Industry³⁶ in 2015, belongs to this category. Moreover, some regulations are to direct government authorities to respond to specific problems and supporting consumers, such as *Regulations on the Implementation of the Consumer Protection Law* (State Administration of Industry and Commerce, 2015), *Measures of Investigation and Handling of Internet Food Safety Violations* (State Food and Drug Administration, 2016), and *Guiding Opinions on Protection of the Rights and Interests of Financial Consumer* (General Office of the State Council, 2015). In addition, while frequently ignored in most consumer law rhetoric, Supreme People's Court judicial directives play an indispensable role in the Chinese judiciary, including on consumer protection. China has a vast territory, uneven economic status among different parts of the

³⁶ The institutional reform in 2018 changed the administrative system, and the State Administration of Industry and Commerce now has been reconstructed as State Administration for Market Regulation, accessed July 19, 2018. <http://samr.saic.gov.cn/>.

country, and a complexity of disputes which results in the frequent occurrence of “different judgements over same (similar) cases.”³⁷ The Supreme People’s Court has been trying hard to improve the quality of judgement and credibility of the court system, and consolidated a series of approaches in order to uniform judicial standardization.³⁸

In conclusion, China has structured a multi-level and integrated consumer protection legal framework with a large diversity of legal resources. Consumer law in China can refer to the fundamental law for consumer protection, i.e. the PRC Consumer Protection Law in particular, or all kind of statutes and other forms of legal provisions which perform the function of consumer protection. Although defining a clear scope of consumer law remains controversial in academic debate, consumer protection law shows distinct characteristics compared to other legislations.³⁹ The foremost feature of consumer law is that they provide legal protection to consumers.⁴⁰

1.3.2 Consumer rights confirmed in current legislation

In China, there are different definitions on consumer rights in theory.⁴¹ According to the commonly accepted theory, consumer rights refer to the legally protected benefits or interests that consumers enjoy in accordance with law when they purchase and use products, or receive services.⁴² Meanwhile, some hold the opinion that consumer rights are fundamental human rights.⁴³ At the

³⁷ “*Tong an bu tong pan*” 同案不同判 in Chinese.

³⁸ Those approaches are: (i) judicial interpretation; (ii) trial supervision; (iii) case guidance; (iv) judicial policy; (v) directive speech; and (vi) meeting minutes. Judicial interpretations released by the Supreme People’s Court have long been one informal legal resource but with high applicable authority in Chinese judiciary. Case guidance of the Supreme People’s Court has profound influence in the field of consumer protection as well. See Zhenmin Wang (王振民), and Ge Wu (吴革) eds., 消费者权益保护及产品责任指导案例与审判依据 [Directive Cases and Judgement Basis on the Protection of Consumer Rights and Interests and Product Liability] (Falv chubanshe, 2011), 1 in 编写说明 [Instructions].

³⁹ Mingyue Xu (许明月), and Changqi Li (李昌麒), see *supra* note 34, p41-45.

⁴⁰ *Ibid.*

⁴¹ See detailed discussion in Chapter IV and V.

⁴² Mingyue Xu (许明月), and Changqi Li (李昌麒), see *supra* note 34, p70.

⁴³ Huixing Liang (梁慧星), 社会主义市场经济管理法律制度研究 [Research on Legal Systems of Socialist Market Economy Regulation], (Zhongguo zhengfa daxue chubanshe, 1993), 246-248.

legislative level, consumer rights are confirmed mainly through the Consumer Protection Law in China. The latest amendment to the Consumer Protection Law in 2013 provided nine types of consumer rights in Chapter II: the right to (1) maintain personal and property safety; (2) obtain true information; (3) have free choice; (4) fair trade; (5) redress damages; (6) form consumer organizations; (7) acquire consumer education; (8) maintaining human dignity and one's personal information; and (9) social monitoring.⁴⁴ These nine categories of consumer rights were developed based on the international criteria on consumer rights, with adjustment to the Chinese situation.⁴⁵

In addition, since there are various legal acts and regulations that contain rules in the rights and interests of consumers, consumer rights are not limited to the provisions in the Consumer Protection Law. Overall, since the enactment of the Consumer Protection Law in 1993, the scope and protection level of consumer rights have kept improving and has caught up with the international level.⁴⁶

1.3.3 Mechanisms built to enforce consumer rights

China has built mechanisms to enforce consumer rights under the Consumer Protection Law. Enforcement mechanisms of consumer rights include some principal peculiarities. First, there are various enforcement bodies. Furthermore, government organs have extensive involvement in consumer protection, and consumer associations perform an important role. In addition, public interest litigation is introduced to empower consumers. Consumers may chose appropriate approach to solve the disputes with business operators and enforce their rights.

Above all, the government takes the primary role in consumer protection enforcement. The PRC Consumer Protection Law provides the responsibility of the state to protect consumers' rights

⁴⁴ Article 7-15 of the PRC Consumer Protection Law.

⁴⁵ Mingyue Xu (许明月), and Changqi Li (李昌麒), see *supra* note 34, p70-73

⁴⁶ *Ibid.*

and interests at the legislative, administrative and judicial levels.⁴⁷ In legislative processes on consumer rights and interests, the policy maker should fully hear the voice from consumers and consumer associations.⁴⁸ Administrative authorities, central or local, are responsible for consumer protection, and the state should not permit any harm to consumer rights and interests.⁴⁹ In particular, the people's court should provide convenience to consumers so that consumer disputes can be settled promptly and fairly.⁵⁰

In addition to public authorities, consumer associations in China play a significant role in enforcement of consumer rights.⁵¹ Specifically, the consumer associations provide useful information and consulting service, participate in the legislative process and market monitoring, support consumers at various aspects, including supporting consumers in mediation and arbitration with business operators, supporting consumers in litigation, and exposing business malpractice to the public.⁵²

Regarding consumer dispute resolution, the basic structure is also established by the PRC Consumer Protection Law. Consumers have the right: (1) to consult and conciliate with business operators; (2) to request to consumer associations for mediation; (3) to appeal to relevant administrative departments; (4) to apply to arbitral organs for arbitration according to the arbitral agreements with business operators; and (5) to file a lawsuit before the people's court.⁵³ Consumers can choose among different approaches for dispute resolution and seek a remedy.

Moreover, collective redress mechanisms have also been introduced for the interest of consumers. The amendment to the *Civil Procedural Law* of 2013 introduced public interest

⁴⁷ Chapter IV on Consumer Protection by the State in the PRC Consumer Protection Law.

⁴⁸ Article 30 of the PRC Consumer Protection Law.

⁴⁹ Article 31 to 34 of the PRC Consumer Protection Law.

⁵⁰ Article 35 of the PRC Consumer Protection Law.

⁵¹ Shishi Li (李适时) ed., 中华人民共和国消费者权益保护法释义(最新修正版) [Explanations of the Law on Protection of Consumer Rights and Interests the People's Republic of China (Latest revised edition)] (Beijing: Falv chubanshe, 2013), 168-173.

⁵² Article 37 of the PRC Consumer Protection Law.

⁵³ Article 39 of the PRC Consumer Protection Law.

proceedings for collective redress of consumer damages.⁵⁴ Qualified consumer associations, including the China Consumer Association and other consumer associations at provincial level, are granted the standing to sue on behalf of mass consumers when the lawful rights and interests of a large number of consumers are harmed.⁵⁵ The Consumer Protection Law of 2013 also confirmed the right of consumer associations to bring a collective lawsuit in the public interest before the court as well, which added to the function of consumer associations in the enforcement of consumer rights.⁵⁶

1.4 Enforcement of consumer rights in China remains insufficient

Despite establishment of a legal framework and enforcement mechanisms, malpractices of business operators are still serious. According to the analysis from the China Consumer Association, the amount of consumer complaints has hardly decreased; meanwhile, the increasing complexity of transactions has added to the difficulties for successful resolution, see Figure 1.4 (a), Figure 1.4 (b) and Figure 1.4 (c).⁵⁷

⁵⁴ Article 55 of PRC Civil Procedural Law.

⁵⁵ *Ibid.*

⁵⁶ Article 47 of the PRC Consumer Protection Law.

⁵⁷ The figures used the data from annual reports on consumer claims statistics of China Consumer Association, accessed on July 19, 2018. <http://www.cca.org.cn/zxsd/detail/2074.html>.

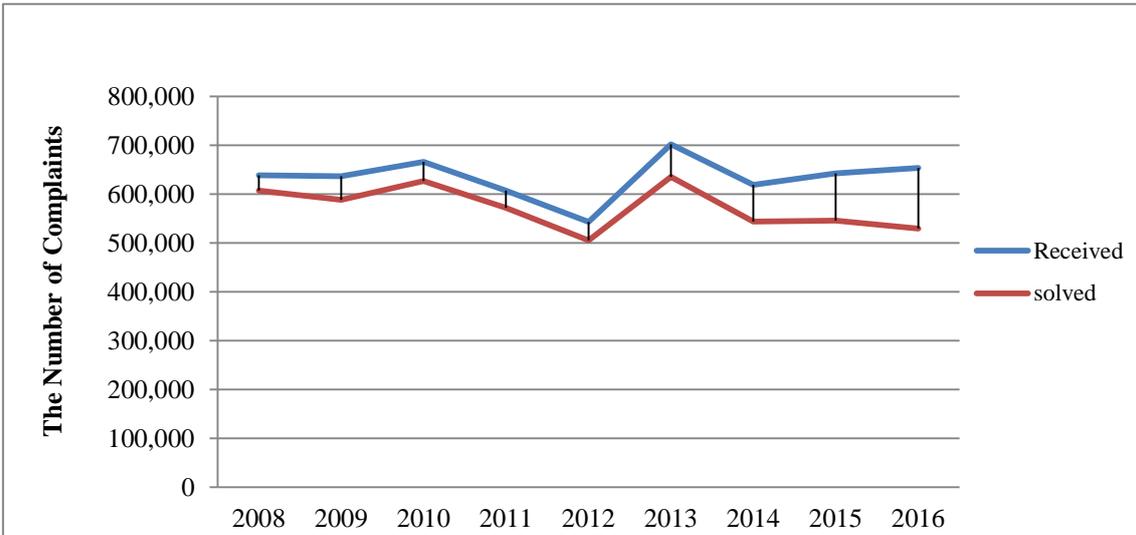


Figure 1.4(a). Complaints received and solved by consumer associations nationwide in China (2008-2016)

Source: China Consumer Association Statistics

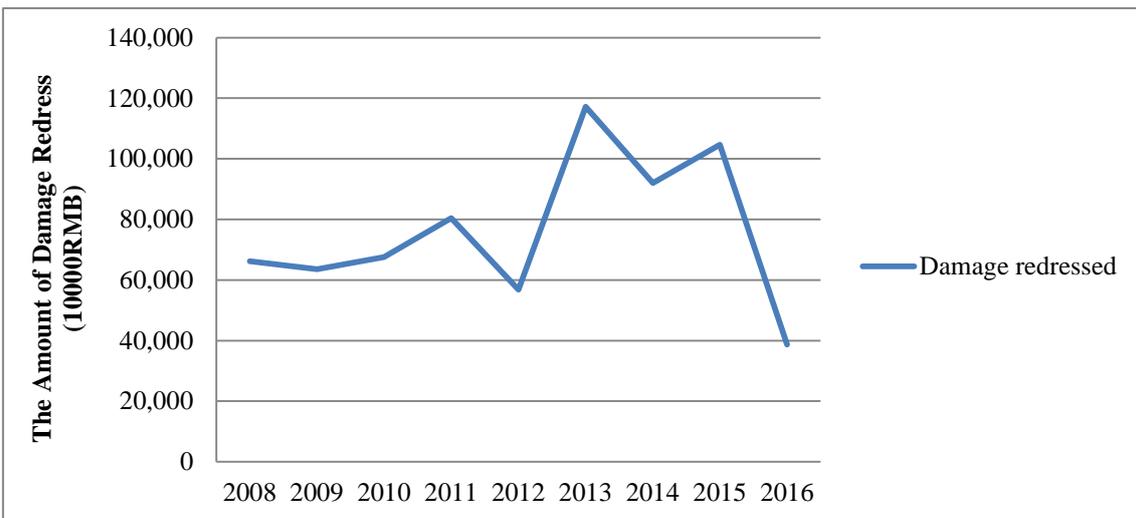


Figure 1.4 (b). Damage redressed by consumer associations nationwide in China (2008 - 2016)

Source: China Consumer Association Statistics

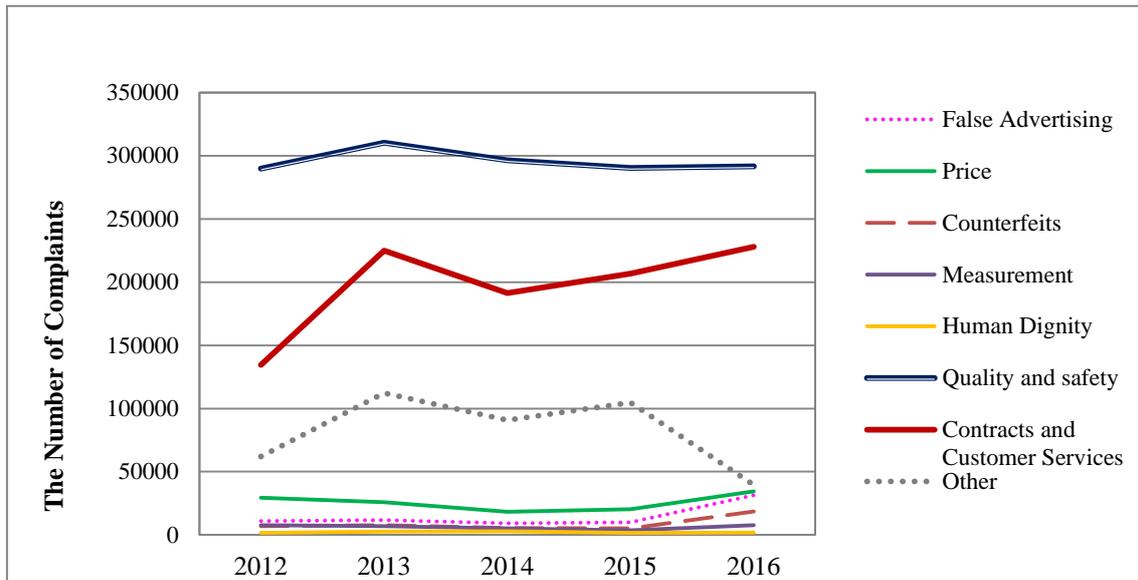


Figure 1.4(c). Complaints received by consumer associations nationwide in China in classification (2012 - 2016)

Source: China Consumer Association Statistics⁵⁸

The rapid development of a market economy has been generating rocketing diversity of businesses and a rapid growth of distance transactions over the internet.⁵⁹ At the same time, the increase of unfair and deceptive business operations (including contract breaches, poor customer services, price fraud, false advertising, and counterfeit goods) may have contributed to the declining of resolution rates and redress of consumer damages.

1.4.1 Gap left by the insufficiency of public enforcement

In China, administrative authorities have showed ineffectiveness on market regulation for years. While China established legal systems to protection consumers from the malpractices of

⁵⁸ This figure combined the number of “quality” and “safety” together, and combined “customer services” and “contracts” together for the purpose of analysis. Moreover, there is a change in 2012 on the classification of different types of disputes. Therefore this study uses the data after 2012 for clarity. See China Consumer Association, accessed on July 19, 2018. <http://www.cca.org.cn/zxsd/detail/2074.html>.

⁵⁹ Fei Ni (倪斐), 我国网络交易中消费者权益立法保护的不足与完善 [On the Protection of Consumer’s Rights in Network Transactions and its Legislative Improvements], *Hebei Law Science* 河北法学 4 (2011): 127-131.

business operators, the result prove unsatisfactory. The statistics from the China Consumer Association shows that there is a significant gap left by the insufficiency of administrative enforcement. The tension between administrative ineffectiveness and widespread consumer damage became even serious when the *Sanlu* diary incident happened in 2008.⁶⁰ Observers bitterly criticized the incompetence of the government authorities in monitoring the market, and sharply pointed out the profound institutional problems such as local protectionism as well.⁶¹

1.4.2 Encouraging private enforcement to fill the gap

The first statute on consumer protection was enacted in 1993 (effective from January 1, 1994), the PRC Consumer Protection Law. In order to empower consumers to redress their damages, and also deter business operators, a punitive damage system was introduced into this law.⁶² In this sense the punitive damage system can be private enforcement of consumer law; in other words, it was a system that encouraged each consumer to become the enforcer of the law through financial motivation.⁶³ However, in the following years after the law came into force, the consumer problems still remained serious. With the purpose to enhance consumer protection through deterring business operators, the PRC Consumer Protection Law and the PRC Food Safety Law introduced punitive

⁶⁰ Lisa Schlein (26 September 2008), "China's Melamine Milk Crisis Creates Crisis of Confidence," Voice of America, accessed July 19, 2018.

<https://www.voanews.com/a/a-13-2008-09-26-voa45/403825.html>.

⁶¹ Robert W. Kerns Jr., "The counterfeit food crisis in China: a systemic problem and possible solutions," *North Carolina Journal of International Law* 41 (2016): 573-591. See also Quanzeng Shi (史全增), 论我国地方政府在食品安全监管中的责任 [On the Food Safety Regulatory Responsibility of Chinese Local Government], *Law and Economy* 财经法学 5 (2017): 74-86.

⁶² Shishi Li (李适时) ed., 中华人民共和国消费者权益保护法释义 (最新修正版) [Explanations of the Law on Protection of Consumer Rights and Interests the People's Republic of China (Latest revised edition)] (Beijing: Falv chubanshe, 2013), 260-261.

⁶³ Yide Ma (马一德), 消费者权益保护专论 [Monograph on Protection of Consumers' Rights and Interests] (Beijing: Falv chubanshe, 2016), 211-212.

damage, and the amendment of the PRC Consumer Protection Law increased the maximum of punitive damage in 2013.⁶⁴

1.4.3 Conflicts caused by fake-hunting lawsuits

Whilst the malpractices of businesses had not been put under control, new problems occurred. Taking advantage of the punitive damage provision, some people started to look for counterfeit products and sue for profit, and they were called fake-hunters (da-jia-ren).⁶⁵ Since the name of first person who won a fake-hunting case was Hai Wang, the resulting widespread increase of fake-hunters was named the “Wanghai phenomenon.”⁶⁶

On one hand, advocates argue that punitive damage is a powerful tool to regulate fakes and counterfeits.⁶⁷ In order to stop the malpractice of the counterfeits suppliers, consumers should be encouraged to fight against them through civil lawsuits; therefore, punitive damage is not only a punishment to the counterfeit suppliers, but also a reward to consumers.⁶⁸ In this sense, despite the fact that plaintiffs may have already known that the products being supplied are counterfeits, they should not be denied the right to claim for punitive damages.⁶⁹

On the other hand, opponents against awarding punitive damage to fake-hunters focus on fairness and justice in fake-hunter cases. To put it concretely, although the *PRC Law on Protection*

⁶⁴ Lixin Yang (杨立新), 我国消费者保护惩罚性赔偿的新发展 [The New Development of Punitive Damages for Consumer Protection in China], *The Jurist 法学家* 2 (2014): 78-90.

⁶⁵ Feng Xu (徐风), and Shumin Zhu (朱树民), 职业打假人: 钢丝上的舞者 [Professional Da-Jia-Ren (fake-hunter): the Dancer on the String], *Democracy and Legal System 民主与法制* 14 (2007): 12-14.

⁶⁶ Lixin Yang (杨立新), “王海现象”的民法思考——论消费者权益保护中的惩罚性赔偿金 [Civil Ponderation over Wang-hai Phenomenon], *Hebei Law Science 河北法学* 5 (1997): 1-9.

⁶⁷ Shan He (河山), 论“缺一赔十”的惩罚性赔偿思想 [On the Punitive Damage Spirit of “Ten for One Loss”], *Journal of Law Application 法律适用* 8 (1993): 12-13.

⁶⁸ *Ibid.* See also Junhai Liu (刘俊海), 论消费者权益保护理念的升华与制度创新——以我国《消费者权益保护法》修改为中心 [Upgrading of the Philosophy of Consumer Protection and the Systematic Innovation——Focusing on the Amendment of Consumer Protection Law], *Law Science Magazine 法学杂志* 5 (2013): 27-38.

⁶⁹ Lixin Yang (杨立新), “王海现象”的民法思考——论消费者权益保护中的惩罚性赔偿金 [Civil Ponderation over Wang-hai Phenomenon], *Hebei Law Science 河北法学* 5 (1997): 1-9.

of *Consumer Rights and Interests* provided punitive damage for consumers, this law was not to encourage them to bring lawsuits to the court for profits.⁷⁰ Considering consumers have weaker status in bargaining against the business operators, the consumer protection law introduced punitive damages to empower consumers in redressing their damages.⁷¹ If punitive damage becomes a mechanism largely benefiting fake-hunters, and even nurturing a fake-hunting industry, then it fails to realize the original institutional purpose.⁷²

The problem with regards to the conflicts around fake-hunters is not only limited to how the law should be interpreted, but also concerning which direction consumer protection should be further enhanced. Specifically, whether punitive damage system can be considered effective in regulating the business operators and helpful for consumers to enforce their lawful rights require more consideration.

1.5 Structure of this dissertation

Despite development in legislation on consumer protection in China, problems remain in the enforcement of consumer rights. To shed light on how to improve enforcement strategy of consumer protection in China, this study is going to investigate the profound reasons behind the phenomenon of fake-hunting. This dissertation consists of four main parts: introduction (Chapter I), analysis on the enforcement of consumer protection in China (Part I), proposals for China to enhance consumer protection (Part II) and the conclusion (Chapter VIII).

⁷⁰ Heng Deng (邓恒), 探求惩罚性赔偿的实质意义 审视职业打假人的法律地位 [On Punitive Damage and Professional Fake-Hunters], *People's Court Daily* 人民法院报, published on 12 April 2017, accessed July 19, 2018. <http://gb.oversea.cnki.net>.

⁷¹ Mingrui Guo (郭明瑞), “知假买假”受消费者权益保护法保护吗?——兼论消费者权益保护法的适用范围 [Should Intentional Counterfeit Purchase Be Protected by Consumer Law?], *Contemporary Law Review* 当代法学 6 (2015): 68-73.

⁷² Renyu Li (李仁玉), and Chao Chen (陈超), 知假买假惩罚性赔偿法律适用探析 [Analysis on Whether Punitive Damage is Applicable to Buying Known Fake Products], *Law Science Magazine* 法学杂志 1 (2015): 48-58.

Part I includes Chapter II, Chapter III and Chapter IV, covering general analysis of consumer enforcement problems in China centered on fake-hunting lawsuits dilemma. In other words, while the legislative purpose of punitive damages in consumer law was to punish the business operators and prevent similar incidents from occurring again, both the administrative and judicial enforcement agencies started to challenge the properness of supporting the claims of fake-hunters in the face of fake-hunting lawsuits. Part II includes Chapter V, Chapter VI and Chapter VII. Chapters in Part II will make proposals at three principal aspects concerning enforcement problem in China.

Chapter II addresses the problem of fake-hunting lawsuits dilemma. The fake-hunting lawsuits dilemma represents the gap between legislation and its enforcement on consumer protection. To put it more concretely, the legislative purpose of punitive damage in consumer law has been facing challenges from both administrative and judicial enforcement agencies, with regards to the increasing fake-hunting lawsuits. What stays behind this gap is the divergence in viewing consumer protection and consumer rights. Chapter II points out that the problems arose from fake-hunting lawsuits dilemma are at two levels: (1) whether the fake-hunters, who buy fakes intentionally for profit, should be awarded punitive damage; and (2) whether punitive damage is an eligible instrument to enforce consumer protection.

Chapter III demonstrates that behind the divergent understanding of the nature of punitive damages and consumer rights is the tension between economic law and civil law. Moreover, the split understanding of consumer rights as collective rights or private rights also has resulted in problems with regards to enforcement of consumer protection in China. The legislative purpose of punitive damage under consumer law was mainly from the perspective of protecting the collective rights of consumers, taking punitive damage as a legal instrument for a regulatory purpose. Meanwhile, the focus on private rights in consumer protection is not addressed enough.

Chapter IV investigates how to rectify the problem resulting from the insufficient focus on the private rights of consumers. Chapter IV aims to find China a model to perceive its own problem through a comparative study with Japan. Japan confronted the similar problem of insufficiency in consumer redress, yet Japan took a different approach to enhance the enforcement of private rights of consumers. The comparative analysis shows that for China, it is necessary to rethink the purpose and function of punitive damage in consumer protection, in particular with regards to fake-hunting lawsuits.

Part II consists of three Chapters. Chapter V conducts a review of purpose and function of punitive damage in China. China introduced punitive damage in 1993 with the purpose of consumer protection through market regulation. However, problems appeared around applying punitive damage as a regulatory instrument. With a focus on private rights of consumers, it is more eligible to consider punitive damage as remedial enforcement of consumer protection in China. Based on the review of punitive damage system in China in Chapter V, Chapter VI and Chapter VII are concerning how to improve the current system at interpretation and institution levels to enhance the enforcement of private rights of consumers.

Chapter VI first deals with the inconsistency in the application of punitive damage based on fraudulent acts under the Consumer Protection Law. For long time, it has been under debate whether the court should order punitive damages in fake-hunting lawsuits based on fraudulent acts under the Consumer Protection Law. After analyzing the previous discussions, this chapter demonstrates the nature of punitive damage liability. Moreover, from the perspective of redressing the private rights of consumers, punitive damages should not be ordered to fake-hunters. In addition, in order to protect consumers from fraudulent advertising and mislabeling, to encourage consumer organizations to bring injunctive lawsuits can be an alternative to punitive damage through fake-hunters.

Whilst Chapter VI principally aims at solving the enforcement inconsistency at interpretation level, Chapter VII is going to address the private rights of consumers at institution level. In China, enforcement of consumer rights showed a titling emphasis on public interests of consumers. However, the private interests of consumers are not addressed enough. This chapter takes the latest cases that approved punitive damage in consumer public interests litigation, and demonstrates the problems with current collective redress mechanisms. To solve the problems and enhance the enforcement of consumer rights, China should develop compensatory group litigation led by consumer organizations.

Chapter VIII is the concluding chapter. Based on an overview of the inconsistency and imbalance in China's enforcement strategy of consumer protection, it concludes that both the notion and legal system addressing the private rights of consumers should be established. Furthermore, China needs to revise the previous approach from emphasizing collective rights of consumers through market regulation. Rather, legal improvements need to be made to enhance consumer protection with focus on enforcement of private rights of consumers.

Part I. Analysis on the Enforcement of Consumer Protection in China

The purpose of this part is to address that to enhance consumer protection in China, it is necessary to change the emphasis of enforcement strategy from market regulation to supporting consumers to enforce their rights. In particular, it is to be pointed out that the private rights of consumers require more attention.

Rethinking the conventional wisdom, Chapter II starts with reviewing the evolvement of fake-hunting lawsuits dilemma in China. With case studies, it illustrates that there is a gap between the legislative purpose of punitive damages in consumer law and the enforcement in practice. The reason for this gap is lacking the focus on private rights of consumers in previous discussion.”

Chapter III aims at illustrates what has resulted in the gap between legislation and enforcement with regards to fake-hunting lawsuits dilemma. From a context-based analysis, it demonstrates the tension between economic law and civil law as two “departments” of law in characterizing consumer law and punitive damage system. Furthermore, the divergence in understanding consumer rights as “collective rights” or “private rights” is the principle reason for the lacking the focus on private rights of consumers.

Chapter IV is targeted at finding a way for China to rectify the problems resulted from neglecting the private rights of consumers in developing legal system to enforce consumer protection. In order to find China a model to perceive her own problem and approach the solution, it chooses Japan to conduct a comparative study. The Japanese example shows that China should reconsider the purpose and function of punitive damage system in Chinese consumer law and conduct legal improvement to support consumers with focus on private rights.

Chapter II: Fake-Hunting Lawsuits Dilemma Showed Enforcement Problems with Punitive

Damages

This chapter aims to demonstrate the origin, evolution, and problems the fake-hunting lawsuits dilemma has caused to the enforcement of consumer law in China. At first evolution of fake-hunting lawsuits dilemmas in China will be introduced (2.1). The following section uses cases to illustrate the situation in judicial practice (2.2). The following section demonstrates the divergence among judicial decisions, attitude changes of the Supreme People's Court on fake-hunting lawsuits, and also challenges from administrative organs against fake-hunters (2.3). The last section demonstrates the gap between the legislative purpose of punitive damage system in consumer law and its enforcement (2.4).

2.1 Evolvement of fake-hunting lawsuits in China

First of all, one may wonder what fake-hunting is and why it happens in China. The issue of fake-hunting generated from the problem of fakes, which is a commonly used term in China to refer to various types of counterfeit consumer goods.⁷³ This section starts with setting the background, and providing a review on the governance of counterfeits at global level. Then, the chapter goes further to introduce the origin and evolvement of fake-hunting lawsuits in China.

2.1.1 Counterfeits as a primary threat to consumers

⁷³ The State Council of the People's Republic of China 国务院，国务院关于严厉打击生产和经销假冒伪劣商品违法行为的通知 [The State Council of the People's Republic of China Notice on Strictly Combating Illegal Practices of Production and Operation of Fake and Shoddy Products], *Gazette of the State Council of the People's Republic of China* 中华人民共和国国务院公报 18 (1992), accessed July 19, 2018. 中国知网 www.cnki.net.

There is no universal definition of counterfeits, yet counterfeiting is a global problem of both huge significance and great complexity. At the global level, counterfeiting can be “a federal and state crime, involving the manufacturing or distribution of goods under someone else’s name, and without their permission.”⁷⁴ Counterfeiting can generate various problems, including copyright infringement, public health, tax fraud, environmental pollution, and can even support child labor and organized crime.⁷⁵ International conventions to combat counterfeiting as a crime include *Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health*” (entry into force 2016)⁷⁶, and *An International Convention for the Suppression of Counterfeiting Currency* (entry into force 1931).⁷⁷ In the case of counterfeiting a brand name product, trademark law is the most closely related. As counterfeiting usually constitutes unfair competition, anti-unfair competition laws and regulations are applicable methods.

From the perspective of consumer protection, product counterfeiting is a form of consumer fraud, which means that a product is sold but purporting to be something that it is not.⁷⁸ Currently, consumers have been facing increasing risks with rapidly growing prevalence of counterfeit products worldwide, according to the statistics conducted by OECD.⁷⁹ Hazardous counterfeited products can

⁷⁴ International Anti-Counterfeiting Coalition (IACC), accessed July 19, 2018.

<http://www.iacc.org/resources/about/what-is-counterfeiting>

⁷⁵ United Nations Office on Drugs and Crime (UNODC), “Focus on The Illicit Trafficking of Counterfeit Goods and Transnational Organized Crime,” accessed July 19, 2018.

https://www.unodc.org/documents/counterfeit/FocusSheet/Counterfeit_focussheet_EN_HIRES.pdf

⁷⁶ Council of Europe, “Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health,” accessed July 19, 2018.

<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/211>.

⁷⁷ United Nations, accessed July 19, 2018.

<https://treaties.un.org/pages/LONViewDetails.aspx?src=LON&id=555&chapter=30&clang=en>

⁷⁸ United Nations Office on Drugs and Crime (UNODC), “Counterfeit Products,” accessed July 19, 2018.

https://www.unodc.org/documents/data-and-analysis/tocta/8.Counterfeit_products.pdf

⁷⁹ Business Action to Stop Counterfeiting and Piracy (BASCAP), “Strengthening Consumer Protection: Measures to Adapt the United Nations Guidelines for Consumer Protection to Guard against Counterfeiting and Piracy,” December 2016, accessed July 19, 2018.

<https://cdn.iccwbo.org/content/uploads/sites/3/2017/01/ICC-BASCAP-Strengthening-consumer-protection-Measures-to-adapt-the-UN-Guidelines-for-Consumer-Protection-Dec-2016.pdf>. See also, Organisation

for Economic Co-operation and Development (OECD), “Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact,” April 2016, accessed July 19, 2018.

<http://www.oecd.org/gov/risk/trade-in-counterfeit-and-pirated-goods-9789264252653-en.htm>.

generate serious consumer health and safety risks, since such products are not under the monitor and management of legitimate companies, not to mention any guarantee of compelling standards.⁸⁰ Furthermore, the development and popularization of online shopping through e-commerce platforms has raised the possibility for consumers to encounter counterfeits as well.⁸¹

In China, counterfeit products are termed as “*Jia-mao-wei-lie*” products, which literally mean all kinds of fakes including imitations, knock-offs, inferior quality products, adulterated products, mislabeled or unsafe foods and drugs in general.⁸² In terms of “fake-hunting” in China, fakes can be considered as products or services that are supplied by a business operator who committed fraud to the consumer,⁸³ and foods that do not meet national safety standards⁸⁴ in accordance with current legislation.

Counterfeit consumer products, or fakes, have long been a threat to Chinese consumers. Before the 1970s, China was in the period of a planned economy, where the market was government-controlled and consumer products were in scarcity.⁸⁵ Along with economic reforms and the market opening since the late 1970s, a large quantity of commodities rushed into the market, while the government’s supervision and regulation were far from sufficient.⁸⁶ As a result, products of inferior quality caused various incidents: adulterated wine and spirits caused deaths; non-conforming cosmetics resulted in disfigurement, and injuries from inferior electronic hot-water heater leakages or rice cooker explosions have occurred among a host of incidents.⁸⁷

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² *Supra* note 73.

⁸³ See Article 49 of the PRC Consumer Protection Law of 1993, and Article 55 of the PRC Consumer Protection Law of 2013.

⁸⁴ See Article 96 of the PRC Food Safety Law of 2009, and Article 148 of the PRC Food Safety Law of 2015.

⁸⁵ Huixing Liang (梁慧星), 中国产品责任法——兼论假冒伪劣之根源和对策 [Product Liability Law of China: on The Particular Source and Solutions to the Fake and Shoddy Products], *Law Science* 法学 6 (2001): 38-44.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

2.1.2 Early legislation on protecting consumers from fakes

Since the 1980s, Chinese legislators have made great efforts to improve the situation and enacted a series of new legislations.⁸⁸ Product liability was for the first time introduced into *The General Principles of Civil Law of PRC* (1986).⁸⁹ Article 122 of this law did not use the word “defect”—which is more commonly used in defining product liability—but rather used “non-conforming,” which led to conflicts among scholars on whether the manufacture or seller should bear strict liability for their products.⁹⁰ Subsequently, the *Product Liability Law of the PRC* was enacted in 1993, and the strict liability of defective products was clearly provided in this law.⁹¹

In 1993, the *PRC Law on the Protection of Consumer Rights and Interests* was promulgated, and became the fundamental law for consumer protection. In particular, punitive damage was introduced into China via this law. Article 49 of the *Law on the Protection of Consumer Rights and Interests* (1993) provided that “A business operator that conducts fraudulent acts in providing a commodity or a service shall increase the compensation for losses of the consumer, at the request of the consumer. The amount of the increased compensation shall be equal to the price of the commodity purchased or the fee for the service.” Therefore, when consumers incur damage from fakes or shoddy products, they can demand not only compensation corresponding to the product

⁸⁸ *Ibid.*

⁸⁹ Article 122 of the PRC Food Safety Law stipulates that: “If a product that does not meet the standards causes property damage or physical injury to others, the manufacturer or seller shall bear civil liability according to the law. If the transporter or storekeeper is responsible for the matter, the manufacturer or seller shall have the right to demand compensation for its losses.”

⁹⁰ *Ibid.* According to Huixing Liang, the legislation drafters accepted the suggestions from the academia, and the Article 122 was provided with the purpose of impose a strict liability on the manufacture and sell regarding defected products.

⁹¹ In the PRC Product Liability Law of 1993, product liability was provided from Article 29 to Article 34. After the PRC Product Liability Law was amended in 2000, the current provision on product liability is from Article 41 to Article 46.

liability of the manufacture or seller, but also punitive damages according to the *Law on the Protection of Consumer Rights and Interests of the People's Republic of China*.⁹²

2.1.3 Punitive damage became an important system to enforce consumer protection

Notwithstanding the legislative developments, consumer problems due to the malpractices of the business operators remain serious. Product accidents and food incidents kept occurring repeatedly, with domestic consumers being hurt again and again.⁹³ One notorious case is the *Tainted Baby Milk Incident*: thousands of babies had been suffering physical damage from poisonous chemicals, before *Sanlu Group's* counterfeited dairy products with melamine were first unveiled in September 2008.⁹⁴ Until December, newspapers reported that *Sanlu's* contaminated milk had caused six babies' deaths from kidney stones and other kidney damage, with an estimated 300,000 victims in total.⁹⁵ The World Health Organization called this melamine milk incident in China "one of the largest food safety events the UN health agency has had to deal with in recent years."⁹⁶ While the company went bankrupt and the chief executives were sentenced, this serious food incident caused

⁹² In addition, punitive damages have also been introduced into the PRC Travel Law in 2013, and the amendment of PRC Trademark Law in 2013.

⁹³ Xiaolei Pu (蒲晓磊), 假冒伪劣商品屡打不绝 [Combating against Fake and Shoddy Products Seems Endless], *Hainan People's Committee* 海南人大 9 (2017): 24-25.

⁹⁴ Xinhua (17 September 2008), "China seizes 22 companies with contaminated baby milk powder," accessed July 19, 2018. http://news.xinhuanet.com/english/2008-09/17/content_10046949.htm, see also https://web.archive.org/web/20121021182912/http://news.xinhuanet.com/english/2008-09/17/content_10046949.htm.

⁹⁵ Tania Branigan (2 December 2008), "Chinese Figures Show Fivefold Rise in Babies Sick from Contaminated Milk," accessed July 19, 2018. <https://www.theguardian.com/world/2008/dec/02/china>. Also see Associated Press (2 December 2008), "China: 6 Babies likely Died from Toxic Milk," accessed July 19, 2018. http://www.nbcnews.com/id/28004966/ns/health-food_safety/t/china-babies-likely-died-toxic-milk/#.WeM4BrivgZ8.

⁹⁶ Lisa Schlein (26 September 2008), "China's Melamine Milk Crisis Creates Crisis of Confidence," Voice of America, accessed July 19, 2018. <https://www.voanews.com/a/a-13-2008-09-26-voa45/403825.html>

immeasurable harm to thousands of families, and also a serious confidence crisis among consumers towards domestic dairy products, which may still take a long time to overcome.⁹⁷

Subsequently, a new wave of legislation was promoted in response to the bitter criticism on dysfunction of laws and government regulation failure, including the *Food Safety Law of the People's Republic of China* (2009) and the *Tort Liability Law of the People's Republic of China* (2009).⁹⁸ The *Food Safety Law* (2009) imposed stricter responsibility on both the business operators and the local regulating authorities, with Article 96 introducing a ten-time multiple punitive damage against counterfeiting foods.⁹⁹ The PRC Tort Liability Law (2009) also emphasized the responsibility of counterfeit suppliers, by imposing punitive damages corresponding to harm caused by counterfeits in Article 47.¹⁰⁰

In 2013, the amount of punitive damage was increased to three-time compensation in Article 55 of the Consumer Protection Law in terms of “fraudulent act” of business operators. Correspondingly, the PRC Food Safety Law (2015 amendment) became even stricter, and commentators suggested it was “the strictest ever food safety law in the history of China.”¹⁰¹ In

⁹⁷ *Ibid.* Also see Xiaolei Pu (蒲晓磊), 假冒伪劣商品屡打不绝 [Combating against Fake and Shoddy Products Seems Endless], *Hainan People's Committee* 海南人大 9 (2017): 24-25.

⁹⁸ Xiang Yuan (袁祥), and Yiyin Wang (王逸吟) (26 February 2009), 以更完善的法律制度 严防三鹿奶粉事件重演 [To Prevent Dairy Incident from Happening again with Improved Legal System], resource from *Guangming Ribao* [光明日报], accessed July 19, 2018. <http://cpc.people.com.cn/GB/64093/64387/8872633.html?ol4f>

⁹⁹ In 2015, the PRC Food Safety Law was amended, including the provision with regards to punitive damage. The second paragraph of Article 148 of the PRC Food Safety Law of 2015 stipulates that: “*To those who produce foods that do not meet food safety standards or operate foods that are known to be inconsistent with food safety standards, in addition to claiming compensation for losses, consumers may also ask the producer or operator to pay compensation of ten times the price or three times the loss; If the amount of compensation is less than one thousand yuan, it will be one thousand yuan. However, the article does not encompass the situation where food labels and instructions have flaws that do not affect food safety or mislead consumers.*”

¹⁰⁰ Article 47 of the PRC Tort Liability Law provides that: “*Where a manufacturer or seller knowing any defect of a product continues to manufacture or sell the product and the defect causes a death or any serious damage to the health of another person, the victim shall be entitled to require the corresponding punitive compensation.*”

¹⁰¹ Xinhua 新华网 (25 April 2015), “史上最严食品安全法严在哪儿?” [How Strict is “The Strictest Ever Food Safety Law in China?”], accessed July 19, 2018. http://news.xinhuanet.com/politics/2015-04/25/c_127730790.htm How

addition, the PRC Supreme People's Court published *Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases Involving Food and Drug Disputes* on December 23, 2013.¹⁰² Article 3 provided that, "In a dispute on quality problems of food or drugs, if the buyer claims a right against the manufacturer or seller, the manufacture or seller cannot make a protest or defend against the plaintiff, for that plaintiff knew the food or drugs had problems in advance but still made the transaction."¹⁰³ Hitherto, China had established its legal system combing mechanisms at different levels to protect consumers from fakes. Manufacturing, selling, or transferring counterfeits could now breach a series of laws, including acts and state or local level administrative regulations. Among all kind of laws with regards to consumer protection, the *Law on Protection of Consumer Rights and Interests of the People's Republic of China* is at the center.¹⁰⁴ One important feature of the legal system on consumer protection in China is the availability of punitive damages. Through the application of multiple punitive damages, consumers can bring civil lawsuits against counterfeit suppliers. While there were debates around the properness of allowing additional compensation in civil lawsuits, the necessity of entitling consumers to sue for punitive damages against business operators in accordance with the law has been widely accepted.¹⁰⁵

¹⁰² The Supreme People's Court of the People's Republic of China 最高人民法院, 最高人民法院关于审理食品药品纠纷案件适用法律若干问题的规定 [Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases Involving Food and Drug Disputes], released on 13 January 2014, accessed July 19, 2018. <http://www.court.gov.cn/fabu-xiangqing-6042.html>.

¹⁰³ *Ibid.* See also commentary by judges of the PRC Supreme People's Court, Yongjian Zhang (张勇健), Xinwen Cheng (程新文), Jinxin Zhang (张进先) and Yuying Wang (王毓莹), 《关于审理食品药品纠纷案件适用法律若干问题的规定》的理解与适用 [Understanding and Application of Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases Involving Food and Drug Disputes], *People's Jurisprudence* 人民司法 3 (2014): 15-18.

¹⁰⁴ See *supra* explanation in Section 1.3.1.

¹⁰⁵ Lixin Yang (杨立新), "王海现象"的民法思考——论消费者权益保护中的惩罚性赔偿金 [Civil Ponderation over Wang-hai Phenomenon], *Hebei Law Science* 河北法学 5 (1997): 1-9. Yide Ma (马一德), 消费者权益保护专论 [Monograph on Protection of Consumers' Rights and Interests] (Beijing: Falv chubanshe, 2016), 213-217. Shiyuan Han (韩世远), 消费者合同三题: 知假买假, 惩罚性赔偿与

2.1.4 The Wanghai phenomena and the unexpected spread of fake-hunters

While legal mechanisms became available for consumers to fight against counterfeit products and fraudulent business practices, it proved problematic that most fake-hunting consumer lawsuits have been raised by fake-hunters (*Da-jia-ren*).¹⁰⁶ Fake-hunters refer to those who frequently buy counterfeit products and then claim or file a lawsuit against the seller aiming at multiple-time compensation corresponding to punitive damage.¹⁰⁷ The first person who tried to claim punitive damage for buying counterfeits and won compensation was Hai Wang (Wanghai).¹⁰⁸ Wanghai first got inspired by Article 49 of the Consumer Protection Law (1993) and tried to examine its applicability.

In the spring of 1995, Wanghai bought one pair of Sony's earphones that he considered to be fakes, and he confirmed with Sony's branch that the earphones were fakes. Then he bought another ten pairs of the same earphones and claimed two-time compensation against the shopping mall, according to Article 49 of the PRC Consumer Protection Law. The shopping mall agreed to repay the money for the first pair of earphones and make an extra compensation of 200 *yuan*, but refused to pay anything for the later ten pairs.¹⁰⁹ Later, Wanghai continued his fake-hunting practice.

合同終了[Three Questions on Consumer Contract: Intentional Purchase of Fakes, Punitive Damage and Termination of Contracts], *Journal of Law Application* 法律适用 10 (2015): 87-92.

¹⁰⁶ Chao Ma (马超), 消费维权诉讼呈爆发式增长态势 [Consumer Redress Lawsuits are Rocketing], *Legal Daily* 法制日报, 17 March 2016. See also Qixiang Sun (孙麒翔), and Feiyue Shi (石飞月) (18 March 2017), 2016 年消费者维权诉讼数据报告发布 [Release of 2016 Report on Consumer Redress Lawsuits Data], accessed July 19, 2018. <http://www.bbtnews.com.cn/2017/0318/185537.shtml>.

¹⁰⁷ LixinYang (杨立新), “王海现象”的民法思考——论消费者权益保护中的惩罚性赔偿金 [Civil Ponderation over Wang-hai Phenomenon], *Hebei Law Science* 河北法学 5 (1997): 1-9.

¹⁰⁸ Weihai Chu (褚玮海), 论我国《消法》惩罚性赔偿的制度缺陷: 确定性——从王海知假买假案说起 [On the Institutional Problem of Uncertainty of Punitive Damage in Our Consumer Law], *Modern Business* 现代商业 30 (2007): 280-281.

¹⁰⁹ *Ibid.*

Although he was not always successful when claiming for punitive damages, many sellers paid him.¹¹⁰

Wanghai's success attracted increasing imitators and followers, and civil lawsuits became frequent.¹¹¹ As a result, the spread of such lawsuits afterwards was also named after him as the "Wanghai Phenomenon."¹¹² Punitive damage lawsuits brought by fake-hunters increased rapidly, after *Food Safety Law* (2009) introducing a ten-time punitive damage and the PRC Consumer Protection Law (2013 amendment) raised the punitive damages from double to triple compensation.¹¹³

2.2 Court decisions on fake-hunters

The spread of the *Wanghai Phenomena* raised the question of whether punitive damages can be awarded to fake-hunters in civil lawsuits. On one hand, fake-hunters' claims for punitive damages have been approved by the court to a large extent.¹¹⁴ On the other hand, fake-hunters' claims also were rejected for their intentional purchase of counterfeits.¹¹⁵ In judicial practice, the court decisions show divergence in reasoning with regards to the ordering of punitive damages in consumer cases, in particular in fake-hunting cases.¹¹⁶ Judges of the people's court do not create

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² “王海现象” in Chinese.

¹¹³ Jie Chen (陈婕) (15 March 2017), “职业打假人” 提起诉讼案件激增 知假买假是否受法律保护? [Fake-hunters Increasing Rapidly: Should Law Protect Intentional Counterfeits Purchase?], accessed July 19, 2018. <http://news.163.com/17/0315/01/CFHHTT6G00018AOP.html>.

¹¹⁴ *Ibid.* See also Qixiang Sun (孙麒翔), and Feiyue Shi (石飞月) (18 March 2017), 2016 年消费者维权诉讼数据报告发布 [Release of 2016 Report on Consumer Redress Lawsuits Data], this report shows that more than 80% of the fake-hunting punitive damage lawsuits were supported by the courts in 2016. accessed July 19, 2018. <http://www.bbtnews.com.cn/2017/0318/185537.shtml>.

¹¹⁵ *Ibid.* See also Xiaoqin Xu (徐晓琴), Jinli Liu (刘金丽), and Xiaoxiang Yuan (袁晓翔) (26 April 2017), 人民法院报: 知假买假还是消费维权? [People's Court Daily: Intentional Counterfeits Purchase or Consumer Redress?], accessed July 19, 2018. <http://cqfy.chinacourt.org/article/detail/2017/04/id/2823919.shtml>.

¹¹⁶ Qiang Ma (马强), 消费者权益保护法惩罚性赔偿条款适用中引发问题之探讨——以修订后的我国《消费者权益保护法》实施一年来之判决为中心 [Issues on Application of Punitive Damage Rule in the Law on the Protection of Consumer Rights and Interests], *Political Science and Law 政治与法律* 3

law.¹¹⁷ In civil disputes, judges primarily mediate between the parties, and decide the case in accordance with the current law if civil mediation is unsuccessful.¹¹⁸ However, the criteria for application have not been unified in the past decades. To illustrate the divergent attitudes towards fake-hunting lawsuits, this section selected three cases: Case 1 and Case 2 represent two situations with regards to fake-hunters. Case 3 is one directive case released by Supreme People's Court in 2014.¹¹⁹

2.2.1 *Shuwei Chen vs. Huarun-Wanjia Life Supermarket (Guangzhou) Co., Ltd. (2006)*¹²⁰

(2016): 140-148. Huiqiang Xing (邢会强), 美国惩罚性赔偿制度对完善我国市场监管法的借鉴 [Experiences from Punitive Damage System of the United States on Improving Market Laws in China], *Law Science 法学* 10 (2013): 44-50.

¹¹⁷ See *supra* Section 1.3.1, the judicial interpretations issued by the PRC Supreme People's Court have expansive influence in the judicial practice. Whilst whether the Supreme Court's judicial interpretations can be considered as formal or official legal resource remains controversial, they are frequently referred to in judicial decisions.

The legal effect of judicial interpretations of the Supreme People's Court is granted by the Standing Committee of the National People's Congress. According to the "Decision on Strengthening Legal Interpretation Work" of the National People's Congress Standing Committee in 1981.

Regarding the legal effects of the Supreme People's Court judicial interpretations, some considers it as "customary law." See Shibing Cao (曹士兵), 最高人民法院裁判、司法解释的法律地位 [The Status of Decisions and Judicial Interpretations of Supreme People's Court], *China Legal Science 中国法学* 3 (2006): 175-181. Differently, some considers judicial interpretations of the Supreme People's Court can be considered as formal legal resource and are prior to the application of administrative rules. See Shiyuan Han (韩世远), 消费者合同三题: 知假买假, 惩罚性赔偿与合同终止 [Three Questions on Consumer Contract: Intentional Purchase of Fakes, Punitive Damage and Termination of Contracts], *Journal of Law Application 法律适用* 10 (2015): 87-92.

¹¹⁸ Article 9 of the PRC Civil Procedure Law stipulates that "When a people's court hears a civil case, it shall conduct mediation according to the principles of voluntariness and lawfulness; if the mediation fails it shall be decided in a timely manner." Some consider mediation by the court is a necessary proceeding before trial, see Ling Zhang (张灵) and Yi Zhang (张毅), 法院调解的概念和地位辨正 [The Concept and the Status of the Court Mediation], *Jurists' Review 法学家* 4 (1999): 66-72. Contrarily, the court mediation is considered not have to be necessary proceeding with exception of divorce cases, as court mediation should be subjected to party autonomy. See Xin Li (李昕), 法院调解: 制度而非原则 [Judicial Mediation: A System rather than a Principle], *Journal of Law Application 法律适用* 10 (2006): 31-33.

¹¹⁹ This directive case will be mentioned in the following section as well. Here, the introduction of this case is mainly for the purpose of illustrating the whole picture.

¹²⁰ See (2006) 穗中法民一终字第 277 号 [No.277 Final Civil Decision of the First Civil Division of Guangzhou Intermediate People's Court of Guangdong Province (2006)]. Case resource: Zhenmin Wang (王振民), and Ge Wu (吴革) eds., 消费者权益保护及产品责任指导案例与审判依据 [Directive Cases and Judgement Basis on the Protection of Consumer Rights and Interests and Product Liability], (Falv chubanshe, 2011), 85-88. Also see database of pkulaw.cn 北大法宝, accessed July 19, 2018. http://www.pkulaw.cn/case/payz_1970324837084258.html?match=Exact.

This case is concerning the applicable conditions of punitive damages under Article 49 of the PRC Consumer Protection Law (1993). According to the judgement in this case, if the plaintiff knows already that the products are with flaws (fakes in general sense) but still purchases, the business operator does not constitute fraud under the Article 49 of the PRC Consumer Protection Law (1993) and therefore the plaintiff should not receive punitive damages.¹²¹ In this case, the plaintiff was Shuwei Chen (X), and the defendants included Huarun-Wanjia Life Supermarket (Guangzhou) Co., Ltd. (Y1) and Hubei Shendan Healthy Food Co., Ltd. (Y2).

The facts of this case were not complicated. In 2002, Y2 received five food certification licenses of “Certified China Green Food Product” for five particular duck egg products (a1, a2, a3, a4 and a5). In 2005, X bought five sets of duck egg products (b1, b2, b3, b4 and b5) produced by Y2 at the supermarket of Y1. X found b1 and b2 used the certifications for a1 and a3. Also, b3, b4 and b5 shared the same certification for a2. X then brought a lawsuit against Y1 and Y2 for punitive damage in accordance with the Article 49 of the PRC Consumer Protection Law (1993), as the defendants supplied products which were counterfeits with green food trademarks. Meanwhile, during the proceeding of the first trial, Y2 presented evidence that X was a regular fake-hunter, with materials showing that X had been filing another lawsuit before another district court with the same reason against Y2.

There were mainly two issues in this case. The first issue was whether X was deceived by Y or not. The second issue was whether Y1 and Y2 should pay punitive compensation to X. The district court rejected the claims of the plaintiff. The court considered that X was a regular fake-hunter, and he chose the products that abused green food trademarks to buy and sue the

see also (2015)渝五中法民终字第 05228 号[No.05288 Final Civil Decision of the Fifth Intermediate People's Court of Chongqing City (2015)].

¹²¹ Zhenmin Wang (王振民), and Ge Wu (吴革) eds., 消费者权益保护及产品责任指导案例与审判依据 [Directive Cases and Judgement Basis on the Protection of Consumer Rights and Interests and Product Liability], (Falv chubanshe, 2011), 85-88.

suppliers Y1 and Y2. Therefore, X was not deceived when he made the purchase, and therefore cannot be recognized as a victim under the tort by Y1 and Y2. Since X was not harmed by fraud, he was not able to receive multiple-compensation according to *Measures on the Implementation of Consumer Protection Law of Guangdong Province*. Therefore his claim for compensation was rejected. Meanwhile, as Y1 and Y2 supplied products which abused the green food trademarks, which was illegal, the court sent judicial advice to the responsible administrative organs, and X could also make a report to the government.

Subsequently, after X appealed to the higher people's court, the appellate court maintained the decision of the first trial and rejected the claims of the plaintiff. The appellate court confirmed the facts proceeded in the first trial and further evidence to confirm that X was a regular fake-hunter. According to Article 49 of the PRC Consumer Protection Law (1993), "A business operator that conducts fraudulent acts in providing a commodity or a service shall increase the compensation for losses of the consumer, at the request of the consumer. The amount of the increased compensation shall be equal to the price of the commodity purchased or the fee for the service." Regarding the definition of fraud, according to Article 68 of the *Judicial Opinion on the Implementation of the General Principles of Civil Law (1988)* released by Supreme People's Court, "If a party intentionally informs the other party of a false situation or deliberately conceals the true situation and induces the other party to make a wrong intention, it may be deemed fraudulent."

Therefore, there are two conditions for a consumer to claim compensation against the business operator in accordance with Article 49 of the PRC Consumer Protection Law (1993): (1) the business operator intentionally informed the other party of a false situation or deliberately concealed the true situation; or (2) the consumer purchased the product or received services from the business operator. In this case, Y2 illegally abused the certification of green food on other products; however, X had participated in lawsuits against Y2 several times and can be deemed a regular

fake-hunter. X knew already or was supposed to know the green food trademark abuse of Y2. Since X bought the products knowing already the problems with the products, and was not induced to buy, his claim did not meet the conditions of Article 49 of the PRC Consumer Protection Law. In conclusion, the decision made in the first trial was maintained, and the claims of the plaintiff were rejected.

In this case, the key issue was “fraudulent act.” The court did not directly deny plaintiff of being a consumer for X was a fake-hunter. However, the court rejected his claim for knowing already and therefore not induced by fraud.¹²²

2.2.2 Jinlong Zheng vs. Chengdu Ailian Supermarket Co., Ltd. (2011)¹²³

This case concerns the applicable conditions of punitive conditions under the PRC Food Safety Law (2009). According to the judgement in this case: (1) actual damage is not required for the consumer to claim ten-time punitive damage in accordance with Article 96 of the PRC Food Safety Law (2009); (2) the burden of proof regarding the intention of the business operators should rest on the business side; (3) the definition of consumer should not be limited to consumption purposes but should be interpreted broadly; (4) expired foods should be deemed as not meeting food safety

¹²² Sometimes the court directly denied the consumer identity of fake-hunters. See (2013) 迎民初字第 00086 号 [No.00086 Civil Decision of the Yingze District People’s Court of Taiyuan City, Shanxi Province]. Case resource, China Judgement Online, accessed June 19, 2018. <http://wenshu.court.gov.cn>.

¹²³ See (2010) 金牛民初字第 3951 号民事判决书 [No.3951 Civil Decision of Jinniu District People’s Court of Chengdu City, Sichuan Province (2010)] and (2011) 成民终字第 1921 号民事判决书 [No.1921 Final Civil Decision of Chengdu Intermediate People’s Court of Sichuan Province (2011)]. See also Changjun Wang (王长军), and Guo Wang (王果), 消费者主张十倍赔偿的构成要件 [Legal Requirements for Consumers to Claim for Ten-Time Punitive Damages], *People Judiciary 人民司法* 4 (2012): 76-80. For a similar position, see (2014) 穗中法民二终字第 1788 号 [No. 1788 Final Civil Judicial Decision of the Intermediate People’s Court of Guangzhou City, Guangdong Province (2014)], (2017) 粤 01 民终 11108 号 [No. 11108 Final Civil Decision of the Intermediate People’s Court of Guangzhou City, Guangdong Province (2017)], and (2018) 京 02 民终 132 号 [No.132 Final Civil Judicial Decision of the Second Intermediate People’s Court of Beijing City (2018)]. Case resource, China Judgement Online, accessed June 19, 2018. <http://wenshu.court.gov.cn>.

standards in order to fully protect the interests of consumers and safeguard the food market.¹²⁴ In this case, the plaintiff was Jinlong Zheng (X), and the defendant was Chengdu Ailian Supermarket Co., Ltd. (Y).

On 19 July 2010, X bought some food products for 384.9 *yuan* (CHY), out of which 349 *yuan* was for expired food products (mainly walnuts and sunflower seeds) at Y' supermarket. X claimed that he bought food products at the supermarket of Y for an estimated 400 *yuan*, but found them expired when he ate them that evening. Subsequently, X made a complaint to the administrative organ (local department of State Administration of Industry and Commerce) and claimed compensation against Y. Y admitted to selling expired food products but refused to compensate. Therefore, X sued before the court and claimed 510 *yuan* for accommodation fees and transportation, and 3,490 *yuan* for 10-time compensation of the price.

The defendant Y argued that X did not eat the food products or suffer any physical damage or property loss, thus he did not meet the requirements for ten-time compensation according to the PRC Food Safety Law (2009). Moreover, Y had negligence in management and failed to clear out the expired products but without an intention to sell expired products deliberately; therefore, Y should not incur punitive damages. Furthermore, X bought five packages of dried walnuts for 310 *yuan*. An ordinary consumer would not buy such an amount without checking the due date, nor would he or she buy if the product had expired. Instead, X asked for ten-time compensation immediately after he passed the cashier. X made the purchase targeting ten-time punitive damages, and thus X should not be deemed a consumer.

There were three issues in this case. The first issue was whether selling expired food products violates the PRC Food Safety Law (2009). The second issue was whether Y was

¹²⁴ *Ibid.*

intentionally selling expired food products. The third issue was how to define consumer. The fourth issue was whether an actual damage is a necessary prerequisite for 10-time punitive damage.¹²⁵

In the first trial, the district court ordered that Y should pay X for 3490 *yuan* within 10 days from the date when the verdict was legally effective, with other claims of X rejected. First, the Article 28 of the PRC Food Safety Law (2009) provided the categories of foods which ought to be prohibited to produce and supply, and foods that exceed the shelf life belonged to these categories. Thus, Y's selling expired food constituted a violation of the PRC Food Safety Law (2009).

Moreover, according to Article 96 of the Food Safety Law (2009), consumers may claim for ten-time punitive damages if the business operator produces or supplies foods that do not meet food safety standards. Y was a professional business operator, thus Y was supposed to identify the potential damage in case Y would not clear out the expired foods timely. However, Y showed an indirect intention by allowing the occurrence of damage, and therefore should be deemed knowing already. Regardless of the purpose being consumption or claiming for compensation, as long as X bought foods at the supermarket of Y, X should be deemed a consumer. The intention of X would not make a difference to Y's behavior of selling expired foods illegally. Therefore, X's claim for ten-time punitive damage should be supported. Nevertheless, X's claim for compensation to other expenses cannot be approved for lack of proof.

The appellate court dismissed the appeal upheld by Y. In this case, the district court took an objective standard for the certification of the consumer, without judging the subjective purpose of the purchase, nor considering the issue of fake-hunting.¹²⁶ Rather, both the district court and the

¹²⁵ *Ibid.*

¹²⁶ Contrarily, in some situation the court rejected the claim for punitive damages for no actual damages. See (2014) 珠中法民二终字第 504 号 [No.504 Final Civil Decision of the Intermediate People's Court of Zhuhai City, Guangdong Province (2014)]. Case resource, China Judgement Online, accessed July 19, 2018. <http://wenshu.court.gov.cn>.

appellate court supported the consumer with the position of “fully protecting the interests of consumers and safeguard the safety of food market.”

2.2.3 *Yinshan Sun vs. Nanjing Oushang Supermarket Co., Ltd. (2012)*¹²⁷

This case is the No. 23 Directive Case released by the Supreme People’s Court in 2014. Consumers who purchase foods that do not meet food safety standards can require sellers or producers to pay ten times the price for compensation under the PRC Food Safety Law (2009) or to pay compensation in accordance with other compensation standards stipulated by law, regardless whether the consumer knows at the time of purchase the food does not meet the safety standards. In this case, the plaintiff was Yinshan Sun (X), and the defendant was Nanjing Oushang Supermarket Co., Ltd. (Y).

On 1 May 2012, plaintiff X purchased 15 packages of “Yutu Brand” sausages at the Y’ supermarket, and 14 packages of them worth 558.6 *yuan* were expired. After X finished payment at the cashier, he went directly to the information desk to claim compensation, but the negotiation went unsuccessful. Afterwards, he brought a lawsuit to the court and claimed 10-time compensation for the price of the purchased 14 packages of sausages for 5,586 *yuan*.

The issues in this case includes: whether X is a consumer; whether Y was selling foods that were known to be inconsistent with food safety standards; and whether Y should pay ten times punitive compensation.

The district court ordered that he defendant Y should reimburse the plaintiff X 5,586 *yuan* within 10 days from the date when the verdict was legally effective. (After the verdict was handed down, both parties did not appeal and the verdict had taken legal effect.)

¹²⁷ See (2012)江宁开民初字第 646 号民事判决书 [No.646 Civil Judicial Decision of Jiangning District People’s Court of Nanjing City, Jiangsu Province (2012)], this case is the No.23 Directive case released by the Supreme People’s Court on January 26, 2014. Accessed July 19, 2018. <http://www.court.gov.cn/shenpan-xiangqing-13326.html>.

First, Article 2 of the PRC Consumer Protection Law (2009) stipulates that consumers need to purchase, use, or receive services for their daily consumption. Consumers' rights and interests are protected by this law or other relevant laws and regulations. The consumer is a concept which is opposite to the concept of business operator. As long as the purchase, use of goods, or services in market transactions is for the needs of individuals and families, rather than for production, business, or professional activities, the buyers should be identified as consumers.

In this case, both the plaintiff and the defendant agreed with the fact that X purchased sausages from Y's supermarket. X did not use the purchased sausages for re-selling operations. Y also did not provide evidence that its purchase of goods was for production and operation. When X claimed for punitive damages for what he purchased had exceeded the shelf-life, he was exercising his lawful rights. Therefore, Y argued that X's "buying fakes for claims" was not an effective defense to deny X of being a consumer.

Second, Article 3 of the PRC Food Safety Law (2009) stipulates: "Business operators of food production and management shall engage in production and business activities in accordance with laws, regulations and food safety standards, be responsible to society and the public, ensure food safety, accept social supervision, and assume social responsibilities." Moreover, Item 8, Article 28 of this law stipulates that foods exceeding shelf life are prohibited from being produced or supplied. Food sellers have the statutory obligation to ensure food safety and should dispose of foods that do not meet the safety standards. As a food seller, Y should store foods in accordance with the requirements of ensuring food safety, conduct timely checks of the foods for sale, and clean up the foods that exceed their shelf lives. However, Y still put expired "Yutu Brand" sausages on the shelves and sold them. As a result, Y failed to fulfill their obligations by selling foods which did not meet food safety standards.

Third, the first paragraph of Article 96 of the Food Safety Law (2009) provided the ten-time punitive damages. When the business operator sells food that is known to be inconsistent with safety standards, consumers can claim compensation for damages and receive ten times the price of commodity they purchased or service they received for compensation, or they can claim only ten times the price for compensation. In this case, X only asked Y to pay ten times the price of compensation. As for the defendant, Y argued that the plaintiff knew that the food was expired and purchased for the purpose of seeking benefits; he should not be compensated ten times. However, the aforementioned law stipulated that the consumer was entitled to ten times the payment price as compensation. To claim for punitive compensation is based on lawful rights and the law does not impose restrictive provisions on the consumer's subjective shopping motives, so the court cannot support Y's argument. In this case, the Supreme People's Court showed a supportive position towards the intentional purchase of fakes and claim for punitive damages.

2.3 The fake-hunting lawsuits dilemma

This section is aimed at demonstrating how fake-hunters have caused a dilemma for different enforcement agencies, in particular judicial courts. In other words, while the legislative purpose of punitive damages in consumer law was to punish the business operators and prevent similar incidents from occurring again, both the administrative and judicial enforcement agencies started to challenge the properness of supporting the claims of fake-hunters in the face of fake-hunting lawsuits.

Viewed from the case analysis, divergences appeared among judicial decisions regarding how to decide punitive damage cases brought by fake-hunters. Sometimes the court approved the claims of the fake-hunters, while other times rejected them. First part will analyze the difficulties for the court in deciding fake-hunting lawsuits (2.3.1). In response to the unevenness of enforcement in

local courts, the Supreme People's Court released directive cases and judicial interpretations in order to unify the fragmentations. Notwithstanding, the rocketing increase of fake-hunting lawsuits caused a growing resistance inside the court system (2.3.2). In addition, challenges also arose from the administrative organs against fake-hunters (2.3.3).

2.3.1 Difficulties for the court in deciding fake-hunting lawsuits

The selected cases in the previous section illustrated a rough picture of the situation for courts to decide consumer lawsuits brought by fake-hunters. At the same time, the cases also raised questions concerning the applicable conditions of punitive damages under particular laws. Specifically, (1) how the “consumer” should be defined and (2) whether punitive damages can be awarded in the case of the intentional purchase of fakes. Moreover, the divergence between supportive and opposite attitudes towards fake-hunters can also be observed from judicial decisions made by different courts.

Above all, conditions for ordering punitive damage under current legal provisions are complex. Before the PRC Food Safety Law introduced ten-time punitive damages in 2009,¹²⁸ the PRC Consumer Protection Law only provided equivalent punitive damages.¹²⁹ In this situation, the primary issues included (1) whether the plaintiff, being a fake-hunter, can be deemed a consumer, and (2) whether punitive damage can be ordered in case of fake-hunting, as shown in Case 1 earlier.

¹²⁸ Article 96 of the PRC Food Safety Law (2009) stipulates that, “*Whoever violates the provisions of this Law and causes personal, property or other damages shall be liable for compensation in accordance with the law. Against those producing foods that do not meet food safety standards or selling foods that are known to be inconsistent with food safety standards, consumers may, in addition to claiming compensation for losses, the consumer may claim against producer or seller for 10 times the price for compensation.*”

¹²⁹ See Article 49 of the PRC Consumer Protection Law (1993 and 2009). See also *supra* discussion in Section 2.1.2 and 2.1.3.

The first problem for the court is whether fake-hunters are consumers.¹³⁰ This question has its roots in how the PRC Consumer Protection Law defines the consumer. According to Article 2 of the PRC Consumer Protection Law, “Consumers need to purchase, use, or receive services for their daily consumption. Their rights and interests are protected by this Law; if not provided for in this Law, they are subject to other relevant laws and regulations.” China takes a positive determination by using “daily consumption” as the judging criterion. As a result, opinions separate on what is daily consumption.¹³¹

Some consider the court should apply experience to solve the difficulties with fake-hunting lawsuits,¹³² yet this is highly demanding for local judges to judge by subjective intentions of the buyer. On one hand, evidence can prove a fake-hunter is absolutely not buying for personal consumption but merely for claim. For instance, a fake hunter may regularly file lawsuits against the same company or many companies; otherwise he or she may directly go to claim for compensation after payment, as illustrated in the cases above. On the other hand, to lineate between fake-hunters and ordinary consumers can be extremely controversial. For example, sometimes a fake-hunter may work on his or her own, and sometimes the fake-hunter may ask other people to do the same thing.¹³³ Therefore, for judges to directly reject the claims brought by fake-hunters through denying their consumer identity can be difficult.

¹³⁰ Jin Sun (孙晋), and Yuan Zhong (钟原), “知假买假”消费者身份的司法认定——基于 91 份判决的实证分析 [Judicial Determination of Consumer Identity for People Buying Known Fake Products: An Empirical Analysis Based on 91 Judgments], *Law and Modernization* 法治现代化研究 4 (2017): 119-131. Further analysis will be provided in *infra* discussion of Chapter VI.

¹³¹ Yide Ma (马一德), 消费者权益保护专论 [Monograph on Protection of Consumers' Rights and Interests] (Beijing: Falv chubanshe, 2016), 40-44.

¹³² Jin Sun (孙晋), and Yuan Zhong (钟原), “知假买假”消费者身份的司法认定——基于 91 份判决的实证分析 [Judicial Determination of Consumer Identity for People Buying Known Fake Products: An Empirical Analysis Based on 91 Judgments], *Law and Modernization* 法治现代化研究 4 (2017): 119-131.

¹³³ For instance, the plaintiff of selected Case 1 also participated in multiple consumer lawsuits, all claiming for punitive damage, and acted as plaintiff or litigation agent for others.

Currently, despite strong demand from both judicial practitioners and academic observers to clarify the definition of the consumer, especially in the scope of daily consumption, the legislative workgroup set aside this issue when Consumer Protection Law was last amended in 2013.¹³⁴ The explanation from the legislative work group¹³⁵ decided that fake-hunter issues needed further observation in practice, and left it to the judicial and administrative enforcement agencies to decide.¹³⁶

The second problem is concerning the applicable conditions of punitive damages under the PRC Food Safety Law¹³⁷ and the PRC Consumer Protection Law. The *Jinlong Zheng vs. Chengdu Ailian Supermarket Co., Ltd. (2011)* case showed the application of punitive damages in food safety cases. First, the court decided that as long as the buyer does not purchase for resale, the buyer's consumer identity is assured. Moreover, as long as the business operator side can be proved at fault, the business side should burden the liability for punitive damages. In addition, the court posited that actual damage is not required to claim for punitive damages. Meanwhile, sometimes the court rejected punitive claims in similar situations.¹³⁸ For instance, some courts hold opposite positions from those displayed in the *Jinlong Zheng vs. Chengdu Ailian Supermarket Co., Ltd. (2011)* case

¹³⁴ Dongming Jia (贾东明) ed., 中华人民共和国消费者权益保护法解读 [Explanations on the Law on the Protection of Consumer Rights and Interests of People's Republic of China] (Zhongguo fazhi chubanshe, 2013), 5-13.

¹³⁵ As the Explanation was release by the Office for Civil Law of Legislative Affairs Commission, NPC Standing Committee. The Legislative Affairs Commission is the Standing Committee's legislative body. It has the Administrative Office, the Office for Criminal Law, the Office for Civil Law, the Office for Economic Law, the Office for State Law, the Office for Administrative Law, the Office for Recording and Examining Laws, and the Research Office, accessed July 19, 2018. <http://www.npc.gov.cn>.

¹³⁶ Dongming Jia (贾东明) ed., 中华人民共和国消费者权益保护法解读 [Explanations on the Law on the Protection of Consumer Rights and Interests of People's Republic of China] (Zhongguo fazhi chubanshe, 2013), 12.

¹³⁷ Article 96 of the PRC Food Safety Law (2009) stipulates that, “Whoever violates the provisions of this Law and causes personal, property or other damages shall be liable for compensation in accordance with the law. Against those producing foods that do not meet food safety standards or selling foods that are known to be inconsistent with food safety standards, consumers may, in addition to claiming compensation for losses, the consumer may claim against producer or seller for 10 times the price for compensation.”

¹³⁸ See (2014) 珠中法民二终字第 504 号 [No.504 Final Civil Decision of the Intermediate People's Court of Zhuhai City, Guangdong Province (2014)]. Case resource, China Judgement Online, accessed June 19, 2018. <http://wenshu.court.gov.cn>. The situation is not “same” because in this case the issued product was not expired but there was no information of expiration date on the package.

above, considering (1) the business operators' intention in providing foods that do not meet safety standards and (2) actual damages to the consumer are necessary for claiming punitive damages.¹³⁹

The third problem is concerning the relations between the PRC Food Safety Law and the PRC Consumer Protection Law with regards to punitive damages, and the relations between the PRC Food Safety Law and the PRC Consumer Protection Law can be optional.¹⁴⁰ In different words, the plaintiff may choose between the PRC Food Safety Law and the PRC Consumer Protection Law, in the situation of food safety cases.

Moreover, some considers that the PRC Food Safety Law does not require the plaintiff to be deceived.¹⁴¹ In this sense, it is unclear whether fake-hunters can be awarded punitive damages based on fraudulent acts under the PRC Consumer Protection Law, in particular after the Supreme People's Court released the No.23 Directive Case (*Yinshan Sun vs. Nanjing Oushang Supermarket Co., Ltd. in 2012*) and the judicial interpretation titled the *Provisions on the Legal Applications Regarding Cases of Food and Drug Safety* in 2013.¹⁴² The No.23 directive case demonstrated that regardless whether the consumer knows at the time of purchase the food does not meet the safety standards or not, the people's court will support the consumer's claims for punitive damages.¹⁴³

¹³⁹ *Ibid.*

¹⁴⁰ Wentao He (何文涛), “舌尖上的安全”十倍惩罚性赔偿的适用条件 从一起销售不符合安全标准的食品案谈起 [Safety on the Tongue: Applicability of Ten-Time Punitive Damages—Based on a Case of Non-Conforming Food], published on October 25, 2016 at www.Chinacourt.org 中国法院网, accessed July 19, 2018. <https://www.chinacourt.org/article/detail/2016/10/id/2324174.shtml>.

¹⁴¹ Lixin Yang (杨立新), 商品欺诈惩罚性赔偿责任适用范围之我见 [Opinion on the Application of Punitive Damage for Commodity Fraud], *Jiangnan Tribune* 江汉论坛 1 (2017): 114-120. Yongjian Zhang (张勇健), Xinwen Cheng (程新文), Jinxin Zhang (张进先), and Yuying Wang (王毓莹), 《关于审理食品药品纠纷案件适用法律若干问题的规定》的理解与适用 [Understanding and Application of Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases Involving Food and Drug Disputes], *People's Judicature* 人民司法 3 (2014): 15-18. Qisheng Wang (王其生), 消费者请求惩罚性赔偿的条件 [Conditions for Consumers to Claim for Punitive Damage], *People's Judicature (Case)* 人民司法 (案例) 32 (2016): 67-69.

¹⁴² The PRC Supreme People's Court 最高人民法院, 最高人民法院关于审理食品药品纠纷案件适用法律若干问题的规定 [Provisions on the Legal Applications Regarding Cases of Food and Drug Safety], released on 13 January 2014, accessed July 19, 2018. <http://www.court.gov.cn/fabu-xiangqing-6042.html>.

¹⁴³ The Supreme People's Court of the People's Republic of China, “No.23 Directive case released by the Supreme People's Court,” accessed July 19, 2018. <http://www.court.gov.cn/shenpan-xiangqing-13326.html>.

Article 3 of the above-mentioned judicial interpretation stipulates that in the situation of a dispute over the quality of food or drugs where the purchaser claims rights against the producer or seller, if the producer or seller makes a counter argument by claiming the purchaser knows the quality of the food or the drug already before buying, the people's court does not support it.¹⁴⁴

With regards to this Article 3, some consider its applicability should apply only to food and drugs cases.¹⁴⁵ On the contrary, some argued that this rule can be applicable to all cases of consumer disputes, including fake-hunting cases.¹⁴⁶ Some also consider the application should be case by case, distinguishing between common purchaser and “professional” fake-hunters. In the case of professional fake-hunters, the court should apply the relative provisions under the PRC Contract Law and the PRC Product Liability Law.¹⁴⁷ In the *Shuwei Chen vs. Huarun-Wanjia Life Supermarket (Guangzhou) Co., Ltd. (2006)* case, the court rejected the claims of the plaintiff for the fake-hunter was not induced by fraud of the business operator and therefore did not meet the conditions of punitive damages. Meanwhile, some consider that the people's court should interpret the applicable conditions in a broad way for the purpose of consumer protection in other case.¹⁴⁸ For instance, some courts “believe that in order to fully protect the rights of consumers and purify the market environment, a broad understanding of daily consumption should be made. Under normal circumstances, shoppers should be identified as consumers and can claim punitive damages. Their

¹⁴⁴ *Ibid.*

¹⁴⁵ Lixin Yang (杨立新), 商品欺诈惩罚性赔偿责任适用范围之我见 [Opinion on the Application of Punitive Damage for Commodity Fraud], *Jiangnan Tribune* 江汉论坛 1 (2017): 114-120.

¹⁴⁶ Qisheng Wang (王其生), 消费者请求惩罚性赔偿的条件 [Conditions for Consumers to Claim for Punitive Damage], *People's Judicature (Case)* 人民司法 (案例) 32 (2016): 67-69. See also, Renyu Li (李仁玉), and Chao Chen (陈超), 知假买假惩罚性赔偿法律适用探析 [Analysis on Whether Punitive Damage is Applicable to Buying Known Fake Products], *Law Science Magazine* 法学杂志 1 (2015): 48-58.

¹⁴⁷ Yongjian Zhang (张勇健), Xinwen Cheng (程新文), Jinxin Zhang (张进先) and Yuying Wang (王毓莹), 《关于审理食品药品纠纷案件适用法律若干问题的规定》的理解与适用 [Understanding and Application of Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Cases Involving Food and Drug Disputes], *People's Judicature* 人民司法 3 (2014): 15-18.

¹⁴⁸ See (2015) 渝五中法民终字第 01829 号 [No.01829 Final Civil Decision of the Fifth Intermediate People's Court of Chongqing City (2015)], accessed July 19, 2018. <http://wenshu.court.gov.cn>.

knowing that there is a problem with the product and still making a purchase does not affect the right to claim (for punitive damages).”¹⁴⁹

To summarize, court decisions showed inconsistency in ordering punitive damages under consumer law. On one hand, this inconsistency is due to the lack of unified understanding to the applicable conditions of punitive damages, especially in terms of fake-hunting.¹⁵⁰ On the other hand, sometimes the court relied on the policy preference of consumer protection to fill the gap of interpretation, which added to the uncertainty in the enforcement. As a result, conflicted judgements appeared concerning the application of punitive damages under either the PRC Consumer Protection Law or the PRC Food Safety Law. Despite the Supreme People’s Court released judicial interpretations and the directive case No.23, the ambivalence remains on the applicable conditions of punitive damages, especially in fake-hunting lawsuits.

2.3.2 Changing attitude inside the court system

In response to the confusion of local judges, some higher courts released some directives for unifications. However, those regional juridical directives caused tension with the Supreme People’s Court, and therefore raised another round of debate. The Supreme People’s court released the *Provisions on the Legal Applications Regarding Cases of Food and Drug Safety* in 2013.¹⁵¹ The provisions provided the ten-time punitive damage in Article 15 and the buyer’s awareness of the problematic food or drug does not affect his or her right to claim for punitive damages against the vender (Article 3). Moreover, in the No.23 Directive Case (released on 29 January, 2014) on

¹⁴⁹ *Ibid.*

¹⁵⁰ For a similar position, see Shiyuan Han (韩世远), 消费者合同三题: 知假买假, 惩罚性赔偿与合同终止 [Three Questions on Consumer Contract: Intentional Purchase of Fakes, Punitive Damage and Termination of Contracts], *Journal of Law Application* 法律适用 10 (2015): 87-92. For detailed analysis see *infra* discussion in Chapter VI.

¹⁵¹ See the PRC Supreme People’s Court 最高人民法院, 最高人民法院关于审理食品药品纠纷案件适用法律若干问题的规定 [Provisions on the Legal Applications Regarding Cases of Food and Drug Safety], released on 13 January 2014, accessed July 19, 2018. <http://www.court.gov.cn/fabu-xiangqing-6042.html>.

Yinshan Sun vs. Nanjing Oushang Supermarket, the Supreme People's Court also showed a supportive attitude towards intentional purchases of counterfeits or fake-hunting.¹⁵² As presented in the judgment, consumers who purchase foods that do not meet the food safety standards require sellers or producers to pay ten times the price for compensation in accordance with the provisions of the PRC Food Safety Law, or to pay compensation in accordance with other compensation standards stipulated by law, regardless of whether the buyers knew that the food was not safe at the time of purchase.¹⁵³ With the Provisions and Directive Case, there has been a rapid increase of fake-hunting cases. Against this background, the lower courts started to reconsider how to control the punitive damage cases filled by fake-hunters.

On 25 March 2016, the Higher People's Court of Chongqing also released the *Reply to Questions of Several Issues Concerning the Trial of Consumer Rights Dispute Cases*.¹⁵⁴ According to Chongqing Higher People's Court, "People who know that there are quality problems in goods or services and still purchase them are consumers. However, if the person knows that the goods or services have quality problems, and he or she still pursues punitive damages, the people's court will not support that case because it violates the principle of good faith (with exceptions otherwise provided in laws, administrative regulations and judicial interpretations)."¹⁵⁵ Later, on 6 December 2016, The 27th Trial Committee was convened by the Higher People's Court of Jiangsu Province to conduct a special discussion on a number of issues in the trial of consumer rights dispute cases. In the "Summary of the Discussion of Several Issues Concerning the Trial of Consumer Rights

¹⁵² See the PRC Supreme People's Court 最高人民法院, 指导案例 23 号: 孙银山诉南京欧尚超市有限公司江宁店买卖合同纠纷案 [Directive Case No.23: Yinshan Sun vs. Nanjing Oushang Supermarket on Contract Disputes], released on 29 January 2014, accessed July 19, 2018. <http://www.court.gov.cn/shenpan-xiangqing-13326.html>.

¹⁵³ *Ibid.*

¹⁵⁴ See the Higher People's Court of Chongqing 重庆市高级人民法院, 重庆市高级人民法院关于审理消费者权益保护纠纷案件若干问题的解答 [Reply to Questions of Several Issues Concerning the Trial of Consumer Rights Dispute Cases], released on 25 March 2016, accessed July 19, 2018. <http://www.cqfygzfw.com/court>.

¹⁵⁵ *Ibid.*

Protection Disputes” the Higher People’s Court of Jiangsu Province also showed a negative opinion toward fake-hunters, and put strict constraints on awarding punitive damages.¹⁵⁶

From 2014 to 2016, increasing consumer lawsuits raised the attention of local courts, as a large percent of the cases were brought by fake-hunters clearly aiming for punitive damage awards. The attempts of local courts to limit the abusive lawsuits were strongly criticized by consumer protectionists and other advocates of punitive damage lawsuits.¹⁵⁷ Yet, in 2017, there was a fundamental change in the position of Supreme People’s Court, represented by the explanations in a reply letter to the suggestions made by National People’s Congress deputies.¹⁵⁸ In this official letter, the Supreme People’s Court made corrective statements to its previous judicial interpretation on punitive damage of food and drug safety cases in 2013.

The Supreme People’s Court at first emphasized that the judicial interpretation of 2013 was released against the social background of frequently occurring serious food and drug safety incidents which were dangerously impeding the public health, and was a special policy in that particular context. At that time, the Supreme People’s Court mentioned the negative impacts of

¹⁵⁶ See the Higher People’s Court of Jiangsu Province 江苏省高级人民法院, 江苏省高级人民法院关于审理消费者权益保护纠纷案件若干问题的讨论纪要 [Summary of the Discussion of Several Issues Concerning the Trial of Consumer Rights Protection Disputes], released on 6 December 2016, accessed July 19, 2018. <http://www.baotoulawyer.com/info/978.jsp>.

¹⁵⁷ Reported by Huichun Liu (刘回春) (13 June 2016), 法学专家: “知假买假”不违反诚信原则符合法律规则 [Legal Professionals: Fake-Hunting Does Not Violate the Principle of Good Faith], *China Quality* 中国质量万里行, accessed July 19, 2018. <http://www.315online.com/survey/348414.html>.

¹⁵⁸ See, the PRC Supreme People’s Court 最高人民法院, 最高人民法院办公厅对十二届全国人大五次会议第 5990 号建议的答复意见 [Supreme People’s Court Reply Letter to the No. 5990 Suggestion made by National People’s Congress Deputies], released on 19 May 2017, accessed July 19, 2018. <http://www.chinaiprlaw.cn/index.php?id=4792>.

Regarding the legal effect of this reply letter, it remains unclear. In principle, this reply letter is not official legal resource for judicial decision. In judicial practice, this letter has been referred to by the defendant (business operator being sued for punitive damage) in court debate, as supplementary evidence of Supreme People’s Court opinion, but the court did not refer to this letter directly. See China court online, 11 月 10 日 14 时, 海淀法院审理 “称食品保质期超国标 消费者起诉十倍赔偿” 案 [14:00 on 10 November 2017, Haidian District People’s Court of Beijing Judging on 10-time Punitive Damage Case], accessed July 19, 2018. <https://www.chinacourt.org/chat/chat/2017/11/id/48538.shtml>.

Meanwhile, this letter has been referred to in rejecting the claim for “reasonable expense in legal redress” by local court in the judgment of (2017)豫 0105 民初 14653 号 [No.14653 Civil Decision of Jinshui District People’s Court of Henan Province]. Accessed July 9, 2018. <http://wenshu.court.gov.cn>.

fake-hunters' abuse of judicial proceedings, and clarified that the application of the Supreme People's Court's judicial interpretation of 2013 should be restricted and not extended to consumption areas other than food and drugs. Most crucially, the Supreme People's Court declared that they do not support this kind of model that "uses evil to punish evil and quenches thirst with poison."¹⁵⁹ Such strong wording showed that the Supreme People's Court had changed their standpoint profoundly.

2.3.3 Challenge from administrative organs

Administrative organs started to resist the fake-hunters as well. In particular, widespread debate regarding the *Regulation on the Implementation of Consumer Protection Law* drafted by the former State Administration for Industry and Commerce of the People's Republic of China (SAIC) represents the tension between the law and administrative enforcement agencies. On 5 August, 2016, the State Council released the *Regulation on the Implementation of Consumer Protection Law (First Draft, or Draft for Public Comment)* drafted by the SAIC and called for public comment.¹⁶⁰ The second article of this draft provided that: "The rights and interests of consumers when purchasing or using commodities or receiving services as consumer needs for daily use shall be protected by this regulation. However, natural persons, legal persons or other organizations that purchase counterfeits intentionally for profit shall not be protected according to this regulation."¹⁶¹ This provision was considered to deprive fake-hunters of the right to claim for punitive damage, and raised hot debate immediately.¹⁶²

¹⁵⁹ 饮鸩止渴 in Chinese. *ibid.*

¹⁶⁰ See State Administration of Industry and Commerce 国家工商总局, 消费者权益保护法实施条例 (征求意见稿) [Regulation on the Implementation of Consumer Protection Law (Draft for Public Comment)], released on 5 August 2016. Accessed July 19, 2018. http://www.gov.cn/xinwen/2016-08/05/content_5097833.htm.

¹⁶¹ *Ibid.*

¹⁶² Reported by Rongjian Yang (杨荣坚), 职业打假该不该受《消法》保护广受关注 [Whether Professional Fake-Hunting Should be Protected under the Consumer Protection Law Raised Wide

On one hand, the regulation was considered as an appropriate response to the excessive claims of fake-hunters.¹⁶³ After the amendment of punitive damage came into force, there was an unexpected increase of consumer lawsuits for multiple-compensation. However, a large percent of those cases were filed by fake-hunters as previously stated. Fake-hunters not only brought an increasingly heavy burden to the supervisory authorities, but also put great pressure on business operators.¹⁶⁴ Some commentators criticized malicious fake-hunting as “*pengci*,” which literally means “touch porcelain,” but basically means faking an accident to claim for compensation.¹⁶⁵ The SAIC regulation of 2016 therefore reflected the resistance against fake-hunters from administrative organs.

Meanwhile, opposition against the Regulation of SAIC was prevailing. As most fake-hunters made claims against business operators who actually sell counterfeits or products with problems in labels or advertisement, fake-hunters are not breaking the law in most occasions.¹⁶⁶ Some argued that even though fake-hunting lawsuits may generate moral risks, the fake-hunters still should be supported because they have positive effects of purifying the market.¹⁶⁷ Some argue that the illegal practice of fake-hunters is exceptional, and such illegal fake-hunting should be regulated

Concern], *Chinese Quality News* 中国质量新闻网, released on 25 August 2016. Accessed on July 19, 2018. http://www.cqn.com.cn/zgzlb/content/2016-08/25/content_3327319.htm. See also Guodong Yang (杨国栋), 扬子晚报: 不保护 “职业打假” 是法治倒退 [Yangtze Evening: Failure to Protect Professional Anti-Counterfeiting Practice Is A Regress of the Rule of Law], first published at *Yangtze Evening* 扬子晚报 on 15 August 2016, forwarded by People.cn 人民网. Accessed on July 19, 2018. <http://opinion.people.com.cn/n1/2016/0815/c1003-28636236.html>.

¹⁶³ Xiao Lao (老笑), 应全面叫停牟利性职业打假 [For-Profit Fake-Hunting Should Be Stopped], *Economic & Trade Update* 时代经贸 20 (2017): 51-53.

¹⁶⁴ Qibo Jin (金齐波), 企业登记和职业打假行政复议诉讼猛增亟须应对 [Urgent Need to Response to the Rocketing Increase of Administrative Review Proceedings on Business Registration and Professional Anti-Counterfeiting], *Research on China Market Supervision* 中国市场监管研究 5 (2017): 54-55.

¹⁶⁵ Chuan Shi (石川), 人民网评: 恶意打假与碰瓷何异? [People.cn Comment: Is Malicious Fake-Hunting Different from *Pengci*?], released on 26 July 2016, accessed July 19, 2018. <http://opinion.people.com.cn/n1/2016/0726/c1003-28586649.html>.

¹⁶⁶ Reported by Huichun Liu (刘回春) (13 June 2016), 法学专家: “知假买假” 不违反诚信原则符合法律规则 [Legal Professionals: Fake-Hunting Does not Violate the Principle of Good Faith], *China Quality* 中国质量万里行, accessed July 19, 2018. <http://www.315online.com/survey/348414.html>.

¹⁶⁷ *Ibid.*

in enforcement rather than be banned at legislative level.¹⁶⁸ In addition, in the case of malicious fake-hunting or blackmailing, the business operators can make a counter claim or lawsuit for compensation of tort.¹⁶⁹

Despite the hot debate, there is a crucial problem that the SAIC regulation of 2016 obviously conflicts with the provisions in the PRC Consumer Protection Law, and therefore violates the PRC Legislative Law.¹⁷⁰ According to the PRC Consumer Protection Law, the rights and interests of consumers when purchasing or using commodities or receiving services as consumers need for daily use shall be protected by this law or other relevant laws and regulations (Article 2). As a statute law enacted by the National People's Congress Standing Committee, the Law is prior to the administrative regulation drafted by SAIC in legal effect. The second article of the Regulation clearly changed the scope of consumer protection defined by the Law, which led to the invalidity of this provision.

Later the SAIC submitted a revised draft (the Second Draft, or Draft for Deliberation), which changed the wording of Article 2 from “for profit” into “for the purpose of profit.”¹⁷¹ There seems to be a subtle distinction between the two terms. “*For profit*” literally means for the purpose of making a profit in terms of business, while “*for the purpose of profit*” refers to a subjective

¹⁶⁸ Fengyi Zhang (张枫逸), 法制日报: 消法实施条例不应一概排斥职业打假 [Legal Daily: Regulations on the Implementation of the Consumer Protection Law should not Exclude Professional Anti-Counterfeiting], *Legal Daily* 法制日报, released on 16 August 2016, accessed July 19, 2018. <http://opinion.people.com.cn/n1/2016/0816/c1003-28639346.html>.

¹⁶⁹ Lixin Yang (杨立新), 商品欺诈惩罚性赔偿责任适用范围之我见 [Opinion on the Application of Punitive Damage for Commodity Fraud], *Jiangnan Tribune* 江汉论坛 1 (2017): 114-120.

¹⁷⁰ Qingfeng Wang (王庆峰), 南方日报: 职业打假还没到退场的时候 [Nanfang Daily: It is not yet the Time for Fake-Hunters to Leave], *Nanfang Daily* 南方日报, released on 11 November 2016, accessed July 19, 2018. <http://opinion.people.com.cn/n1/2016/1118/c1003-28877942.html>.

¹⁷¹ Chinalaw.gov.cn 中国政府法制信息网, 中华人民共和国消费者权益保护法实施条例 (送审稿) [The PRC Regulations on the Implementation of the PRC Law on Protection of Consumer Rights and Interests], released on 16 November 2016 and due 16 December 2016, accessed July 19, 2018. <http://zqyj.chinalaw.gov.cn/readmore?listType=1&id=1488>.

intention with a derogatory sense in Chinese.¹⁷² After all, the change of terms hardly added to validity of this provision, and consequently, the draft seems to have been put onto the shelf.¹⁷³

2.4 The enforcement gap of punitive damages

The previous section demonstrated the dilemma caused to enforcement agencies due to fake-hunters. As a result, there is a gap between legislation and its enforcement with regards to consumer protection through punitive damages. The gap between legislation and enforcement requires a further analysis of the fake-hunting lawsuits dilemma. To solve the enforcement gap, the key question is what has caused the gap between legislation and its enforcement. This section contrasts the opinions of advocates (2.4.1) and the dissenting opinions from the Supreme People's Court (2.4.2). In the end, what lies behind this gap is a divergence in views of consumer protection and consumer rights (2.4.3). The key piece is the notion of “consumer in contract,” which means that the focus on the private rights of consumers is insufficient on the side of advocates of fake-hunters.

2.4.1 Advocates of market regulation through fake-hunting

There are two points standing for a broad application of punitive damages in fake-hunting lawsuits. Above all, proponents say fake-hunters are consumers, too. Moreover, they argue that people should consider the positive effects of the fake-hunting phenomenon in a structural perspective. First, many advocates consider that the definition of “consumer” does not exclude fake-hunters. As mentioned above in Section 2.3.1, the scope of “daily consumption” in Article 2 of the PRC Consumer Protection Law remains unclarified.¹⁷⁴ Some already pointed out that

¹⁷² 谋利 and 牟利 in Chinese.

¹⁷³ Up to the present, this Regulation has not been officially published yet

¹⁷⁴ Dongming Jia (贾东明) ed., 中华人民共和国消费者权益保护法解读 [Explanations on the Law on the Protection of Consumer Rights and Interests of People's Republic of China] (Zhongguo fazhi chubanshe, 2013), 12. There have been theories of “purpose” “function” and “feature of commodity or

fake-hunters are not consumers because they are not buying fakes for the purpose of “daily consumption.”¹⁷⁵ Meanwhile, advocates consider that from a perspective of consumer protection, as long as the transaction is not made for commercial purposes, the buyer should be deemed a consumer.¹⁷⁶

Second, advocates consider fake-hunters provide positive effects in market regulation. The most intense field of confrontation might be whether fake-hunters should be allowed to take advantage of the punitive damage system to make profits.¹⁷⁷ Some argued that fake-hunters can easily make a fortune with the punitive damage rule because the malpractice of businesses so commonly exists.¹⁷⁸ Therefore, instead of being regulated, the consumers should be encouraged to benefit from fake-hunting.¹⁷⁹ Moreover, some considers that although to allow fake-hunters to benefit from punitive damages may generate moral risks, the value of market regulation in promoting fake-hunting weighs more.¹⁸⁰

In a word, the advocates of awarding punitive damages to fake-hunters mainly have two main arguments. First, to award punitive damages to fake-hunters is possible in accordance with the

service” regarding how to define “daily consumption,” but no consensus has been reached. The *Explanation* concluded that the judgment should be case-by-case according to the discretion of judges.

¹⁷⁵ Huixing Liang (梁慧星), 消费者权益保护法第 49 条的解释与适用 [Interpretation and Application of Article 49 of the Consumer Protection Law], 《复印报刊资料(民商法学)》 [Copy resource of Civil and Commercial Law] 6 (2001): 89. (Forwarded from Renyu Li (李仁玉), and Chao Chen (陈超), 知假买假惩罚性赔偿法律适用探析 [Analysis on Whether Punitive Damage is Applicable to Buying Known Fake Products], *Law Science Magazine* 法学杂志 1 (2015): 48-58).

¹⁷⁶ See (2012)江宁开民初字第 646 号民事判决书 [No.646 Civil Judicial Decision of Jiangning District People’s Court of Nanjing City, Jiangsu Province (2012)]. This case was selected as the No.23 Directive Case and released by the Supreme People’s Court. Accessed July 19, 2018. <http://www.court.gov.cn/shenpan-xiangqing-13326.html>.

¹⁷⁷ Shan He (河山), 消费者权益保护法诠释 [Law on Consumer Right and Interests] (Falv chubanshe, 2014), 34-37.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*

¹⁸⁰ Lixin Yang (杨立新), “王海现象”的民法思考—论消费者权益保护中的惩罚性赔偿金 [Civil Ponderation over Wanghai Phenomenon—on the Punitive Damage in Consumer Protection], *Hebei Law Science* 河北法学 5 (1997): 1-9.

legal provisions.¹⁸¹ Second, to award punitive damages to fake-hunters can generate positive policy effects. The fake-hunters will not breach the law as long as they do not deceive or blackmail the business operator.¹⁸² After all, the business operator should be punished if they breach the law and harm consumers.¹⁸³

2.4.2 Gradually increased resistance from the court system

In previous scholarly debate, the judicial practice of local courts has largely been neglected. Most of the focus has been on the “fake-hunter” itself as a phenomenon, while what judicial courts have been troubled with is not noticed enough. Above all, the attitude change of the court system needs more attention. Since punitive damage was introduced in 1993 with the enactment of the PRC Consumer Protection Law, fake-hunting lawsuits started to cause a divergence among the courts. However, under the prevailing influence of the advocates of punitive damages, this divergence has not been noticed enough. 24 years after the punitive damage statute was introduced, the Supreme People’s Court finally commented that to expect fake-hunters to help regulate the market is just like to drink poison to quench thirst.¹⁸⁴ The “medicine” to the legislator turned out to be the “poison” to the court.¹⁸⁵ Furthermore, how could fake-hunting lawsuits be a “poison” in the court’s view? The Supreme People’s Court gave three reasons.

¹⁸¹ With regards to more variations of interpretation to justify the fake-hunters, see *infra* discussion in Chapter VI.

¹⁸² Reported by Huichun Liu (刘回春) (13 June 2016), 法学专家：“知假买假”不违反诚信原则符合法律规则 [Legal Professionals: Fake-Hunting does not Violate the Principle of Good Faith], *China Quality* 中国质量万里行, accessed July 19, 2018. <http://www.315online.com/survey/348414.html>.

¹⁸³ Shan He (河山), 消费者权益保护法诠释[Law on Consumer Right and Interests] (Falv chubanshe, 2014), 34-37.

¹⁸⁴ See, the PRC Supreme People’s Court 最高人民法院, 最高人民法院办公厅对十二届全国人大五次会议第 5990 号建议的答复意见[Supreme People’s Court Reply Letter to the No. 5990 Suggestion made by National People’s Congress Deputies], released on 19 May 2017, accessed July 19, 2018. <http://www.chinaiprlaw.cn/index.php?id=4792>.

¹⁸⁵ According to Shan He, who is one main founder *the Law on Protection of Consumer Rights and Interests of People’s Republic of China*, “There is a common saying among people in our country, “Ten for One Loss,” which means if the seller gives one less than he should, he has to make a compensation of ten-time of the loss. This is people’s wisdom against the sellers’ cheating in giving less to the buyers. The

First, according to Article 55 of the PRC Consumer Protection Law, in the area of ordinary consumer products, the precondition for consumers to obtain punitive damages is the operator's fraud.¹⁸⁶ Fraud in civil law, in accordance with Article 68 of Supreme People's Court *Judicial Opinion on the Implementation of the General Principles of Civil Law*, should be intended to inform the consumer of a false situation or deliberate concealment of the actual situation. For fake-hunters, they are obviously not deceived by fraud of the business operator.

Second, fake-hunters proved hardly effective in cracking down the fakes.¹⁸⁷ The targets of profit-making fake-hunting are mainly large-scale supermarkets and enterprises, mainly focusing on product identification and description. However, those for-profit fake-hunters have no obvious effect on counterfeit products that are truly harmful to the market, in particular non-standard small-scale business entities.

Third, judicial practice showed a trend toward commercialization of fake-hunting and more and more professional fake-hunters and fake-hunting companies emerged.¹⁸⁸ Their motivation is not to purify the market, but to claim for punitive damages for their own profit, or even blackmail the business. The malicious practice of fake-hunters seriously violates the principle of good faith, ignoring the authority of the judiciary and wasting judicial resources, and the court do not support this kind of governance model that uses evil to punish evils and quench thirst with poison.”

The above opinion of the Supreme People's Court basically encompassed the main justifications that stand against fake-hunting lawsuits.¹⁸⁹ Among these three, the second one is

theorized product of this experience is punitive damage, which can be called the panacea for the problem of fakes.” See Shan He (河山), 论“缺一赔十”的惩罚性赔偿思想 [On the Punitive Damage Sprit of “Ten for One Loss”], *Journal of Law Application* 法律适用 8 (1993): 12-13.

¹⁸⁶ *Supra* note 158.

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ In the same letter, it was also addressed that the area of food and drugs has particular significance regarding people's lives and health. Regarding issues outside the food and drugs area, fake-hunting lawsuits should be in principle restricted. See *supra* note 158. For further analysis at interpretation level, see *infra* discussion in Chapter VI.

questioning the function of fake-hunting lawsuits by the court system. The first and third ones conveyed the real “pain” of the judges. On one hand, the law encourages individuals to punish the sellers for lying; on the other hand, the Law allows the buyers to “lie” (if fake-hunting is supported). Consequently, the punitive damage rule in the Consumer Protection Laws created a gap between legislation and enforcement.

2.4.3 The missing piece is the focus on the *private rights* of consumers

There are two features with regards to the enforcement of consumer protection through civil litigation in China. First is the availability of punitive damage; that is, the consumer may claim additional compensation more than his or her actual loss under particular conditions. Second, to award punitive damages to those who buy fakes that they already know can be in high frequency up to the present. Regarding the first issue, discussion in previous sections already proved the necessity and positive effects of punitive damages.¹⁹⁰ The controversy is whether fake-hunters can be awarded punitive damages,

The main confrontations are at three aspects perceiving from the divergence between the advocates and revised position of the Supreme Court with regards to fake-hunters. First is the definition of consumer. Second is the interpretation on the requirements in relative articles with regards to punitive damages, such as the construction of “fraudulent act”. Third is the policy reference on market regulation and consumer protection.¹⁹¹ Nevertheless, the dilemma of fake-hunters in China is beyond the issue of interpretation or policy reference. Modern consumer law has been developed to rectify the disadvantageous position of the consumer.¹⁹² Meanwhile, the consumer can be in a disadvantageous situation not only due to disorder of the market but also

¹⁹⁰ See *supra* analysis in Section 2.1.3.

¹⁹¹ See *supra* analysis in 2.4.1 and 2.4.2.

¹⁹² David Oughton and John Lowry, *Textbook on Consumer Law (2nd edition)* (Blackstone Press Limited, 2000), 16-19.

compared with the powerful counterparty in a contract.¹⁹³ Many advocates of fake-hunting lawsuits have ignored that the consumer is not only a participant of economic life, but also one party of a consumer contract.¹⁹⁴ Therefore, the core of the current dilemma for fake-hunting lawsuits in China is not limited to the interpretation of “consumer” or “fraud.” Rather, the crucial issue is what the legal basis is for fake-hunters to claim and receive punitive damages.

In this sense, what is missing is the focus on the *private rights* of consumers. Specifically, while punitive damage was introduced to function as a “punishment” for fraudulent practices of business operators,¹⁹⁵ the precondition to perform this punishment to the wrongdoers in the market is the purchase, transaction, or a consumer. However, the private rights of the fake-hunter are not violated by the business operator, since the fake-hunter knows already that the product is problematic. Thereto, to justify the basis for the fake-hunter to be awarded a financial reward is insufficient. There is a missing notion of “consumer in contract” in the arguments of advocates who support fake-hunting punitive damage lawsuits. The concept of “consumer in contract” here is used to address that the fake-hunters do not meet the conditions to receive punitive damage as a civil remedy, and therefore they are not “consumers” in essence.

¹⁹³ *Ibid.* See also Geraint Howells, Iain Ramsay and Thomas Wilhelmsson, “Consumer Law in Its International Dimension” in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson with David Kraft (eds.), *Handbook of Research on International Consumer Law* (Edward Elgar, 2010), 10-13.

¹⁹⁴ For this position, it is argued that the PRC Consumer Protection Law is centered on consumer contract by providing “daily consumption” in Article 2. See Huixing Liang (梁慧星), 消费者权益保护法第49条的解释与适用[Interpretation and Application of Article 49 of the Consumer Protection Law], 《复印报刊资料(民商法学)》 [Copy resource of Civil and Commercial Law] 6 (2001): 89. (Forwarded from Renyu Li (李仁玉), and Chao Chen (陈超), 知假买假惩罚性赔偿法律适用探析 [Analysis on Whether Punitive Damage is Applicable to Buying Known Fake Products], *Law Science Magazine* 法学杂志 1 (2015): 48-58).

¹⁹⁵ Shishi Li (李适时) ed., 中华人民共和国消费者权益保护法释义(最新修正版)[Explanations of the Law on Protection of Consumer Rights and Interests the People’s Republic of China (Latest revised edition)] (Beijing: Falv chubanshe, 2013), 260-262. See also Shan He (河山), 论“缺一赔十”的惩罚性赔偿思想 [On the Punitive Damage Sprit of “Ten for One Loss”], *Journal of Law Application* 法律适用 8 (1993): 12-13. And Shan He (河山), 消费者权益保护法诠释 [Law on Consumer Right and Interests] (Falv chubanshe, 2014), 23-24 and 192-194.

Up to the present, the previous discussion has not put enough focus on the private rights of consumers with regards to punitive damages. In some cases, some argue that although fake-hunters are *not* consumers, their claims for punitive damage should be supported for the good sake of market order.¹⁹⁶ Therefore, to reconsider what profoundly led to the current divergence in viewing consumer protection and consumer rights becomes necessary. Moreover, how to solve the dilemma with fake-hunters is a significant issue at stake as well.

To summarize, fake-hunting lawsuits dilemma raised questions at two levels: first, whether the fake-hunters should be awarded punitive damages; and second, whether punitive damage is an eligible instrument to enforce consumer protection. Policy makers and advocates have been expecting that punitive damage can improve the enforcement of consumer protection by encouraging each consumer to become the enforcer of the law.¹⁹⁷ However, concerning the inconsistency in judicial practice and divergence in scholarly opinions, whether this legal system is enforced in a desirable manner turned to be highly questionable.

2.5 Summary

Since the PRC Consumer Protection Law came into force in 1993, fake-hunters appeared across the country using the punitive damage rule in the law for multiple-compensation. The legislative purpose was to impose punishment onto the wrongdoing business operators. Since the system encourages each consumer to become the enforcer of consumer law, some argue that

¹⁹⁶ For instance, it is argued that even fake-hunters are not considered as consumers, the “good” fake-hunters’ claim for punitive damage against the fraudulent behaviors of the business should be supported. See Lixin Yang (杨立新), 商品欺诈惩罚性赔偿责任适用范围之我见 [Opinion on the Application of Punitive Damage for Commodity Fraud], *Jiangnan Tribune* 江汉论坛 1 (2017): 114-120. Lixin Yang (杨立新), “王海现象”的民法思考—论消费者权益保护中的惩罚性赔偿金 [Civil Ponderation over Wanghai Phenomenon], *Hebei Law Science* 河北法学 5 (1997): 1-9.

¹⁹⁷ Shan He (河山), 消费者权益保护法诠释 [Law on Consumer Right and Interests] (Falv chubanshe, 2014), 23-24 and 192-194.

fake-hunters are fighters against counterfeits and other fraudulent business practices.¹⁹⁸ However, the spread of fake-hunting lawsuits started to raise increasing doubts, and caught the administrative and judicial enforcement agencies in a dilemma of whether the court should continue to award punitive damages in fake-hunting lawsuits. The fake-hunting lawsuits dilemma demonstrated a gap between consumer law and its enforcement, with regards to enforcing consumer protection through the system of punitive damages.

The lacking of the focus on private rights of consumers stays behind this gap in the previous debate. Policy maker and advocates has been considering punitive damage as legal instrument for a regulatory purpose. Meanwhile, the focus on private rights is insufficient. To put it differently, since private rights are the basis for consumers to claim and receive punitive damage as a remedy in a civil lawsuit, the fake-hunters are not “consumers in contract” from a perspective of private rights, since their rights are not violated by the business operator. In the end, to eliminate the current inconsistencies, to reconsider the purpose and function of punitive damages in enforcing consumer protection with the focus on the private rights of the consumers is necessary. Subsequently, Chapter III is going to investigate why the focus on private rights of consumers is lagged-behind. Chapter IV will explore how to rectify the current situation through a comparative analysis.

¹⁹⁸ *Ibid.*

Chapter III: Private Rights Require More Emphasis in the Enforcement of Consumer Protection

The previous chapter showed the gap between legislation and enforcement with regards to enforcing consumer protection with punitive damages. This chapter first investigates how the debate between economic law and civil law departments has contributed to a divergence in the understanding of consumer protection through punitive damages (3.1) and the nature of consumer rights in China (3.2). Then it introduces the historical roots for this tension inside the consumer law system between economic law and civil law (3.3). The last section demonstrates problems in the enforcement of consumer protection due to the insufficient focus on the private rights of consumers, as influenced by the tension between economic law and civil law (3.4).

3.1 Different perspectives on the nature of consumer law

First of all, in China, the characterization of consumer law had been under debate for decades, and the characterization of consumer law remains unclear. In particular, the conflicts between civil law department and economic law *departments* constitute the main confrontation.¹⁹⁹ This section is going to demonstrate how the tension has contributed the divergence in characterizing consumer law and the nature of punitive damage system with regards to consumer protection.

3.1.1 Consumer law as economic law

In China, the law on consumer protection has long been categorized under the economic law discipline. This section introduces the common theories regarding consumer law within the

¹⁹⁹ “*Bu men fa*” 部门法 in Chinese. For detailed explanation on “the department theory of law” 部门法学. The department theory of law was developed from the system theory of law in the Soviet Union and was popular in socialist countries. See *infra* Section 3.3.2.

perspective of economic law. In general, economic law scholars widely consider consumer law as the law for market regulation under the framework of economic law.²⁰⁰ According to Zixuan Yang's book, economic law regulates particular *economic* relations, and consumer law is a general term for the legal regulation of *economic* relations that occurs during the process of protecting consumer rights and interests.²⁰¹ Consumer law is an important department of market regulation law.²⁰² In addition, consumer law is closely associated with anti-monopoly law and anti-unfair competition law; however, consumer law emphasizes the direct protection of consumers as a special market entity.²⁰³

Moreover, economic law theories are deeply influenced by Marxist political economy theory in China.²⁰⁴ According to the classical Marxist political economy theory, *economic law* is the law under which the state intervenes in the domestic economy.²⁰⁵ Some argued the Marxist theory constructs the legal basis of economic law upon the mutual responsive relationships between economic foundations and the superstructure including legal and political systems.²⁰⁶

Therefore, the theory that defines consumer protection law as economic law is focusing on state intervention.²⁰⁷ From the perspective of economic law, consumer law reflects state protection for the consumer and the state intervention on to the social and economic life of the citizens.²⁰⁸ Furthermore, with social economic relations work being the foundations of the legal systems, laws

²⁰⁰ Dated 2017, most textbooks of economic law studies includes consumer protection law. See Shouwen Zhang (张守文), *经济法学(第三版)* [Economic Law Studies (3rd edition)] (Zhongguo renmin daxue chubanshe, 2016), 270-272. Also Duojun Qi (漆多俊), *经济法基础理论(第五版)* [Foundational Theories on Economic Law] (Falv chubanshe, 2017), 241. Zixuan Yang (杨紫煊), and Jie Xu (徐杰) eds., *经济法学(第七版)* [Economic Law Studies (7th edition)] (Beijing daxue chubanshe, 2015), 160-179 ; He Huang (黄河), and Xingyun Wang (王兴运) eds., *经济法学(第三版)* [Economic Law Studies (3rd edition)] (Zhongguo zhengfa daxue chubanshe, 2016), 164-187.

²⁰¹ Zixuan Yang (杨紫煊), and Jie Xu (徐杰) eds., *经济法学(第七版)* [Economic Law Studies (7th edition)] (Beijing daxue chubanshe, 2015), 10 and 161-162.

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ *Supra* note 201, p10.

²⁰⁵ Changqi Li (李昌麒), *经济法—国家干预经济的基本法律形式* [Economic Law—the Fundamental Legal Approach of State Intervention in Economy] (Sichuan renmin chubanshe, 1995), 122-125.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ *Supra* note 205, p52.

on consumer protection are regulating social economic relationships and highly responsive to the social economic life.²⁰⁹ Finally, consumer protection law pursues substantive social justice through protecting consumers from being harmed due to their vulnerabilities.²¹⁰

To summarize, from an economic law perspective, consumer law belongs to economic law and shares the same foundations with market regulation law.²¹¹ Consumer law starts from consumer interests and provides special protection for consumers considering their vulnerability, which reflects state intervention in economic life.²¹² The principal purpose of consumer law is to maintain the integral economic order of the society.²¹³

3.1.2 Consumer law as civil law

As demonstrated above, from an economic law perspective, consumer law is for market regulation and represents state intervention. On the contrary, some scholars argue that consumer law should be considered as civil law, represented by Yanfang Zhang and Lixin Yang. On one hand, both of them classify consumer law as a special section of civil law. On the other hand, they have different opinions with regards to how to develop the system of consumer law.

First, as to the characterization of consumer law, both Zhang and Yang argue that consumer law belongs to civil law.²¹⁴ Specifically, both Zhang and Yang emphasize the nature of consumer law to be private law and the civil relations are between equal parties.²¹⁵ Zhang perceives

²⁰⁹ *Supra* note 205, p52-53.

²¹⁰ *Ibid.*

²¹¹ *Supra* note 201, p162.

²¹² Bo Wang (王博), 消费模式变革下的消费者保护法研究 [A Study on Consumer Protection Law under the Reform of Consumption Model] (Dongbei caijing daxue chubanshe, 2017), 36-40.

²¹³ *Ibid.*

²¹⁴ Yanfang Zhang (张严方), 消费者保护法研究 [A Study on Consumer Protection Law] (Falv chubanshe, 2003), 138-139. Lixin Yang (杨立新), 我国《民法总则》规定消费者概念的重要价值 [The Important Value of Provision of the Concept of Consumer in General Principles Part of the Civil Code of China], *Law Science Magazine* 法学杂志 5 (2017): 1-9.

²¹⁵ Yanfang Zhang (张严方), 消费者保护法研究 [A Study on Consumer Protection Law] (Falv chubanshe, 2003), 564-565. Lixin Yang (杨立新), Lixin Yang (杨立新), 我国《民法总则》规定消费者

the business-consumer relations as civil relations between equal parties, and considers that consumer law is a special form of civil law and develops to obtain substantive equality.²¹⁶ In this sense, Zhang objects to the economic law perspective of consumer law. Furthermore, Zhang also disagrees that the relations between consumers and business are “unequal.”²¹⁷ For Zhang, the purpose of consumer law is to retrieve the supposed-to-be equality between the business operator and the consumer, and therefore the essence of consumer law is still between *equal* parties.²¹⁸

Yang also takes consumer protection law as civil law. Yang considers the nature of the legal relationship between the business operator and the consumer is a transactional relationship, which is a horizontal legal relationship between equal civil subjects.²¹⁹ Moreover, the PRC General Provisions of Civil Law went into effect on 1 October 2017.²²⁰ Article 128 stipulates that “...the law provides special provisions for the protection of the civil rights of minors, the elderly, disabled persons, women, consumers, in accordance with its provision.” This Article is a joint provision on

概念的重要价值 [The Important Value of Provision of the Concept of Consumer in General Principles Part of the Civil Code of China], *Law Science Magazine* 法学杂志 5 (2017): 1-9.

²¹⁶ Yanfang Zhang (张严方), 中国消费者保护法立法的未来走向 [The Future Direction of Chinese Consumer Protection Legislation], *Journal of Graduate School of Chinese Academy of Social Sciences* 中国社会科学院研究生院学报 1 (2006): 91-97.

²¹⁷ *Ibid.* This argument is opponent to Huixing Liang’s statement that “the relations between the consumer and the producer are unequal,” see Huixing Liang (梁慧星), 消费者运动与消费者权利 [Consumer Movement and Consumer Rights], *Science of Law (Journal of Northwest University of Politics and Law)* 法律科学 西北政法学院学报 5 (1991): 39. In Liang’s context, consumer rights should be considered differently from conventional civil rights, since consumers are the weaker party in the relations between “the producer” and the consumer; therefore a titling protection over the consumer is necessary.

²¹⁸ *Ibid.* From this perspective, Zhang also considers that consumer law should balance the interests between the business operator and the consumer, as consumer law should not be consider as merely protection on the consumer side.

²¹⁹ Lixin Yang (杨立新), 我国《民法总则》规定消费者概念的重要价值 [The Important Value of Provision of the Concept of Consumer in General Principles Part of the Civil Code of China], *Law Science Magazine* 法学杂志 5 (2017): 1-9.

²²⁰ The National People’s Congress of the PRC, The General Provision of Civil Law of the People’s Republic of China, accessed July 19, 2018.

http://www.npc.gov.cn/npc/xinwen/2017-03/15/content_2018907.htm.

the special protection of civil rights of vulnerable groups.²²¹ According to this article, Yang argues that the attribution of consumer law should be civil law.²²²

According to Yang, although there are some administrative rules inside, the most basic content of the PRC Consumer Protection Law is to provide the rights of consumers and the obligations of business operators, and stipulate specific rules for the protection of consumer rights during the transaction process.²²³ The rules of leaning protection over consumers do not change the horizontal relations into vertical relations, and therefore the PRC Consumer Protection Law still belongs under civil rules in nature.²²⁴ In addition, Yang thinks not only the PRC Consumer Protection Law but also the PRC Law on Food Safety and the PRC Law on Advertisement belong to private law as well. Yang believes that the application problems in consumer disputes are because laws on consumer protection are not recognized as special laws of civil law. Based on the PRC General Provisions of Civil Law, those laws on consumer protection could be consistent with civil law, and could have better performance.²²⁵

Second, their opinions are divergent at legislation level. According to Zhang, the consumer protection legal system is insufficient, and a reframe is necessary.²²⁶ To be specific, rules of consumer law should be divided into three categories: “consumer policy law,” “consumer contract law” and “consumer security (safety) law.”²²⁷ Zhang believes the law concerning these three categories should be characterized as civil law, and the PRC Consumer Protection Law is a special law of civil law. Zhang also argues that the consumer policy law is different from economic law or

²²¹ Shishi Li (李适时) ed., 中国人民共和国民法总则释义[Explanations on The General Provision of Civil Law of the People’s Republic of China] (Falv chubanshe, 2017), 402-403.

²²² Lixin Yang (杨立新), 我国《民法总则》规定消费者概念的重要价值 [The Important Value of Provision of the Concept of Consumer in General Principles Part of the Civil Code of China], *Law Science Magazine* 法学杂志 5 (2017): 1-9.

²²³ *Ibid.*

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ Yanfang Zhang (张严方), 消费者保护法研究 [A Study on Consumer Protection Law] (Falv chubanshe, 2003), 556-568.

²²⁷ *Ibid.*

administrative law and in essence should be considered as intervention of public power into private relations. Therefore, consumer law should be included into civil law system.²²⁸ Moreover, consumer contract is a special form of civil contract, and consumer contract law is a special law of contract law, and the consumer safety law is a special law of tort law.²²⁹ Over all, Zhang considers consumer law as private law in essence and should apply the principle of party autonomy. To the contrary, Yang thinks highly of the PRC General Principle of Civil Law, and considers it a great improvement to incorporate the concept of “the consumer” into civil law.²³⁰ In this sense, civil law principles can be undoubtedly applicable to consumer disputes.²³¹ Therefore, Yang does not mention an integral system of consumer law to be necessary.

In the end, in a civil law perspective, consumer law is a special part of civil law. At the same time, both scholars went a little bit far in their argument regarding the characterization of consumer law. In other words, if civil law is sufficient for consumer protection, might the necessity of consumer law become diminished? Nevertheless, the essence of their ideas is the counter argument against those who insist consumer law is economic law.²³²

3.1.3 Divergence in characterizing punitive damage in consumer law

The debate between the economic law school and civil law school on the nature of consumer law is one principal reason for the divergence in characterizing punitive damages in consumer law. On one hand, some consider punitive damage as liability of economic law; on the

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ Lixin Yang (杨立新), 我国《民法总则》规定消费者概念的重要价值 [The Important Value of Provision of the Concept of Consumer in General Principles Part of the Civil Code of China], *Law Science Magazine* 法学杂志 5 (2017): 1-9.

²³¹ *Ibid.*

²³² This situation is exactly affected by the department theory of law, which will be clarified in *infra* Section 3.3.2. In addition, Yang and Zhang have slight difference in terms of focus. Yang sees consumer law from the viewpoint of civil law, and thinks that to incorporate consumer law into civil law will solve the inconsistencies in legal application. Meanwhile, Zhang focuses on the integrity of consumer law as a system, and therefore proposes to reframe the legislation on consumer protection.

other hand, some argue that punitive damage is a liability of civil law. From an economic law perspective, punitive damage is a legal liability under economic law on the side of business operators.²³³ Concerning the purpose and function of punitive damage in consumer law, economic law scholars consider that punitive damage is not compatible with either public law or civil law, and therefore only suits the theory of economic law in terms of market regulation.²³⁴ Moreover, some argue that punitive damage is in nature a financial reward system rather than a system of punishment.²³⁵

Notwithstanding, civil law scholars commonly perceive punitive damage as a civil liability by.²³⁶ From a civil law perspective, punitive damage does not independently exist; rather, it is an additional liability based on the civil relations between the consumer and the business operator.²³⁷ In this sense, the awarding of punitive damages should be in accordance with civil law principles

²³³ Fuhai Jin (金福海), 论惩罚性赔偿责任的性质 [On the Nature of Punitive Damage Liability], *Legal Forum* 法学论坛 3 (2004): 59-63. Xiaomin Sun (孙效敏), 奖励制度与惩罚性赔偿制度之争——评我国《侵权责任法》第 47 条 [The Debate between Rewarding System and Punitive Damage System—A Comment on the Article 47 of the PRC Tort Liability Law], *Political Science and Law* 政治与法律 7 (2010): 89-97.

²³⁴ Fuhai Jin (金福海), 论惩罚性赔偿责任的性质 [On the Nature of Punitive Damage Liability], *Legal Forum* 法学论坛 3 (2004): 59-63.

²³⁵ Xiaomin Sun (孙效敏), 奖励制度与惩罚性赔偿制度之争——评我国《侵权责任法》第 47 条 [The Debate between Rewarding System and Punitive Damage System—A Comment on the Article 47 of the PRC Tort Liability Law], *Political Science and Law* 政治与法律 7 (2010): 89-97.

²³⁶ Huixing Liang (梁慧星) 消费者权益保护法第 49 条的解释与适用 [Interpretation and Application of Article 49 of the Consumer Protection Law], 《复印报刊资料(民商法学)》 [Copy resource of Civil and Commercial Law] 6 (2001): 89. (Forwarded from Renyu Li (李仁玉), and Chao Chen (陈超), 知假买假惩罚性赔偿法律适用探析 [Analysis on Whether Punitive Damage is Applicable to Buying Known Fake Products], *Law Science Magazine* 法学杂志 1 (2015): 48-58.) Lixin Yang (杨立新), “王海现象”的民法思考——论消费者权益保护中的惩罚性赔偿金 [Civil Ponderation over Wanghai Phenomenon—on the Punitive Damage in Consumer Protection], *Hebei Law Science* 河北法学 5 (1997): 1-9. Also Lixin Yang (杨立新), 商品欺诈惩罚性赔偿适用范围之我见 [Opinion on the Application of Punitive Damage for Commodity Fraud], *Jiangnan Tribune* 江汉论坛 1 (2017): 114-120. Shiyuan Han (韩世远), 消费者合同三题: 知假买假, 惩罚性赔偿与合同终止 [Three Questions on Consumer Contract: Intentional Purchase of Fakes, Punitive Damage and Termination of Contracts], *Journal of Law Application* 法律适用 10 (2015): 87-92.

²³⁷ Yide Ma (马一德), 消费者权益保护专论 [Monograph on Protection of Consumers' Rights and Interests] (Beijing: Falv chubanshe, 2016), 228-229. Lixin Yang (杨立新), 商品欺诈惩罚性赔偿适用范围之我见 [Opinion on the Application of Punitive Damage for Commodity Fraud], *Jiangnan Tribune* 江汉论坛 1 (2017): 114-120.

instead of economic law.²³⁸ Up to the present, there has been no straightforward proof to define which law the liability of punitive damage belongs to. With the PRC General Provisions of Civil Law promulgated in 2017, “punitive damage” was incorporated in Article 179 on civil liabilities. Article 179 only lists out eleven categories of possible forms to perform civil liability, leaving “punitive damage” in the second clause by stipulating: “where the law provides for punitive damages, it shall be in accordance with its provisions.”²³⁹

Accordingly, the liability of punitive damages is one special form of loss compensation, and should be applied in accordance to relative legal provisions, for instance, under the PRC Consumer Protection Law, PRC Food Safety Law or the PRC Tort Liability Law.²⁴⁰ In articles of these legal acts, the estimated function of punitive damage is mainly a punishment to business operators for illegal misconducts.²⁴¹ In the end, with the tension between economic law and civil law, ambivalence remains with regards to the nature of punitive damage. On one hand, articles on punitive damages in the PRC Consumer Protection Law and PRC Food Safety Law have been frequently applied along with relative civil rules, as presented in Chapter II. On the other hand, divergence in the understanding of punitive damage in consumer protection remains in scholarly debate.

3.2 Split understandings on the nature of consumer rights

The previous section illustrates the divergence in the characterization of punitive damage due to the tension between economic law and civil law. However, the divergence is more profoundly

²³⁸ *Ibid.*

²³⁹ The Article 179 of the PRC General Provision of Civil Law (2017).

²⁴⁰ Shishi Li (李适时) ed., 中华人民共和国民法总则释义[Explanations on The General Provision of Civil Law of the People’s Republic of China] (Falv chubanshe, 2017), 559-560. See also Lixin Yang (杨立新), 民法总则 (第二版) [General Provisions of Civil Law (2nd edition)] (Falv chubanshe, 2017), 288-289.

²⁴¹ Shishi Li (李适时) ed., 中华人民共和国消费者权益保护法释义(最新修正版) [Explanations of the Law on Protection of Consumer Rights and Interests the People’s Republic of China (Latest revised edition)] (Beijing: Falv chubanshe, 2013), 260-262.

reflected in the way of perceiving the nature of consumer rights. As introduced in Chapter I, the PRC Consumer Protection Law has provided nine categories of consumer rights.²⁴² Most studies agree on that consumer rights refer to a bunch of rights that are granted to consumers considering the disadvantaged position of the consumer.²⁴³ Meanwhile, there is a split understanding of consumer rights as either “collective rights” or “private rights” in the previous discussion.

3.2.1 Consumer rights as collective rights

The theories on economic law vary among schools in China. Those who agree on the economic law nature of consumer protection law commonly identify consumer rights as collective rights.²⁴⁴ Moreover, they characterized consumer rights as being different from scattered individual rights protected by civil law.²⁴⁵ Civil law regulates the legal relationship between the parties of equal status; on the contrary, consumer rights are established on the theory of inequality and vulnerability.²⁴⁶ Therefore, consumer rights are different from civil rights in essence.²⁴⁷

3.2.2 Consumer rights as private rights

²⁴² See *supra* discussion in Section 1.3.2.

²⁴³ See also, Mingyue Xu (许明月), and Changqi Li (李昌麒) eds., 消费者保护法(第四版) [Consumer Protection Law (4th edition)] (Falv chubanshe, 2014), 70. Xingyun Wang (王兴运), 消费者权益保护法 [The Law on Protection of Consumer Rights and Interests] (Beijing daxue chubanshe, 2015), 55-59. Huixing Liang (梁慧星), 消费者运动和消费者权利 [Consumer Movements and consumer rights], in Huixing Liang (梁慧星), 中国民法经济法诸问题 [Issues on Chinese Civil Law and Economic Law] (Zhongguo fazhi chubanshe, 1999), 252-263.

²⁴⁴ Duojun Qi (漆多俊), 经济法基础理论(第五版) [Foundational Theories on Economic Law] (Falv chubanshe, 2017), 241.

²⁴⁵ *Ibid.*

²⁴⁶ Mingyue Xu (许明月), and Changqi Li (李昌麒) eds., 消费者保护法(第四版) [Consumer Protection Law (4th edition)] (Falv chubanshe, 2014), 70. See also Huixing Liang (梁慧星), 消费者运动和消费者权利 [Consumer Movements and consumer rights], in Huixing Liang (梁慧星), 中国民法经济法诸问题 [Issues on Chinese Civil Law and Economic Law] (Zhongguo fazhi chubanshe, 1999), 252-263.

²⁴⁷ Huixing Liang (梁慧星), 消费者运动和消费者权利 [Consumer Movements and consumer rights], in Huixing Liang (梁慧星), 中国民法经济法诸问题 [Issues on Chinese Civil Law and Economic Law] (Zhongguo fazhi chubanshe, 1999), 252-263. See also Xingyun Wang (王兴运), 消费者权益保护法 [The Law on Protection of Consumer Rights and Interests] (Beijing daxue chubanshe, 2015), 55-63.

Contrary to economic law scholars, some perceive consumer rights as private rights. For instance, Yanfang Zhang argues that consumer rights are civil rights, which belong to private rights.²⁴⁸ Zhang objects to the opinion that consumer rights are based on economic law; rather, consumer rights are based on civil law.²⁴⁹ Zhang's focus is on the equal relations between the consumers and the business operator. Since both the consumer and the business operator are equal subjects of civil law, the rights of consumers are based on the civil relations, and therefore constitute private rights.²⁵⁰

3.2.3 Consumer rights as “collective rights” or “private rights”

Are consumer rights collective rights or private rights? There is a clear divergence in defining consumer rights. This divergence has its embeddedness in the separation of economic law and civil law in China. On one hand, consumer law in China has conventionally been established under the framework of economic law, with defining consumer rights centered on economic relations as collective rights, or public rights.²⁵¹ Meanwhile, from a civil law perspective, consumers are individuals in equal civil relations with the business operator, and consumer rights are private rights in nature.²⁵²

Moreover, the split understanding is not limited to the separation between economic law and civil law. Rather, whilst all commentators' arguments are to some extent associated with “consumer rights,” most of them do not realize a gap among their discourses.²⁵³ Specifically, those

²⁴⁸ *Supra* note 226, p138-139.

²⁴⁹ *Supra* note 226, p564-566.

²⁵⁰ *Ibid.*

²⁵¹ Duojun Qi (漆多俊), *经济法基础理论(第五版)* [Foundational Theories on Economic Law] (Falv chubanshe, 2017), 241.

²⁵² *Supra* note 226, p564-566.

²⁵³ For a similar viewpoint, see Hao Zhou (周皓), and Naixin Chen (陈乃新), 论消费者权利的两重性 [On Dual Nature of Consumers' Rights], *Journal of Xiangtan University(Philosophy and Social Sciences)* 湘潭大学学报(哲学社会科学版) 6 (2003), 84-86. It is pointed out in their work that consumer rights can be both civil rights and economic rights. Meanwhile, they consider punitive damage lawsuits as in

who strongly support the extensive application of punitive damages against consumer fraud and fakes for the purpose of consumer rights, actually refer to the collective rights or interests of consumers as a whole.²⁵⁴ Meanwhile, those who consider the fake-hunters winning of punitive damages as “unfair” or “illegal enrichment,” are focusing on the rights associated with consumer identity individually based on each transaction.²⁵⁵

Due to this implicit split understanding of consumer rights, although there seems to be conflicting attitudes, they failed to persuade each other in terms of how to protect “consumer rights.” For instance, some who try to justify the legitimacy of fake-hunters to be awarded punitive damages argued that as long as the gain belongs to *the consumer*, it would be a triumph for *the consumer*; therefore it is absolutely not illegal enrichment.²⁵⁶ On the contrary, opponents may argue that fake-hunting lawsuits violate the principle of good faith and should not be promoted,²⁵⁷ which in fact denies fake-hunters of being consumers since their rights as *a consumer* were not harmed by fraud in the particular transaction.

In conclusion, the conventional wisdom that supporting fake-hunters in the name of consumer rights primarily considers consumer rights as collective rights. Meanwhile, opponents showed strong doubts regarding the justice and good faith in terms of individual rights, from a perspective of contractual fairness which rooted in the citizen law spirit of modern civil law. Under

essence for public interests and therefore should be justified under economic law, which is different from the position of present writer.

²⁵⁴ For instance, Yurong Sun (孙玉荣), 民法上的欺诈与《消费者权益保护法》第49条之适用[Fraud of Civil Law and the Application of Article 49 of the Law on Protection of Consumer Rights and Interests], *Journal of Law Application* 法律适用 4 (2005): 88-89.

²⁵⁵ See Renyu Li (李仁玉), and Chao Chen (陈超), 知假买假惩罚性赔偿法律适用探析 [Analysis on Whether Punitive Damage is Applicable to Buying Known Fake Products], *Law Science Magazine* 法学杂志 1 (2015): 48-58. In this article, the writers consider that “modern consumer law is based on identification of specific consumer identity” and stand opposite to fake-hunting with focus on legal relations in consumer transaction.

²⁵⁶ Shan He (河山), 消费者权益保护法诠释 [Law on Consumer Right and Interests] (Falv chubanshe, 2014), 23-24 and 34-37.

²⁵⁷ Renyu Li (李仁玉), and Chao Chen (陈超), 知假买假惩罚性赔偿法律适用探析 [Analysis on Whether Punitive Damage is Applicable to Buying Known Fake Products], *Law Science Magazine* 法学杂志 1 (2015): 48-58.

such split perspectives, the policy preference of punitive damage instruments to protect consumer rights ran into resistance from the enforcement agencies that had been troubled by the fake-hunter disputes.

3.3 Historical roots of the economic-civil law debate

After reviewing the tension between economic law and civil law in China with regards to consumer law and consumer rights, one might ask: why does this tension exist in China? This section is going to investigate the historical roots of the economic-civil law debate in China. As a matter of fact, the above-mentioned divergence is rooted back as early as the policy preparation stage of the economic reforms of the late 1970s.²⁵⁸ Along with the discussion around the direction of economic transformation, extensive debate arose regarding what law, i.e. economic law or civil law, should be used to support the reform policy.²⁵⁹ In this section, first the development of civil law will be introduced to set the background (3.3.1); then the evolution of the tension between economic law and civil law will be demonstrated (3.3.2). In the end, the epochal peculiarities of the PRC Consumer Protection Law of 1993 are summarized in 3.3.3.

3.3.1 Development of civil law in China

The development of civil law in Chinese modern history has never been smooth. The process of civil law drafting in China can be characterized by several milestones from a historical perspective. In general, Chinese civil law has been deeply affected by continent European civil law theories, especially German ones, and China transplanted the principal concepts, legislative system, and fundamental mechanisms from German civil law.²⁶⁰ Before the establishment of the People'

²⁵⁸ Huixing Liang (梁慧星), 梁慧星谈民法 [Liang Huixing's Talking about Civil Law] (Beijing: Renmin fayuan chubanshe, 2017), 14-15.

²⁵⁹ *Ibid.*

²⁶⁰ Huixing Liang (梁慧星), see *supra* note 258, p3-9.

Republic of China, efforts had been engaged to introduce civil law since as early as the late Qing dynasty in 1907.²⁶¹ The drafting up of the civil law code took two years, and the *Draft Civil Law of the Qing* is considered as the starting point in the history of the Chinese civil law.²⁶² Although this draft went to abortion with the demise of the Qing rulers, it was through this draft that the civil law theories of continent Europe, especially Germany, were introduced to China.²⁶³

The first civil law code in Chinese history was the *Civil Law of China* enacted by the government of the Republic of China in 1931, but it was abolished after the establishment of the People's Republic of China in 1949. From 1949 to 1979, there have been several rounds of civil law code drafting, yet none of the drafts entered into force due to political activities.²⁶⁴ After the Third Plenary Session of the 11th Central Committee, the left-leaning policy-making was adjusted and China started to implement policies on opening up and economic reform.²⁶⁵ Against such background, to establish a proper legal system to support the economic transformation became an urgent issue on the agenda.

At the crossroads of China's economic reform, legal scholars showed divergent anticipation to the future direction of China's economy.²⁶⁶ In 1979, a profound debate on "Economic – Civil law" started and lasted until seven years later.²⁶⁷ The key conflicting issue of the Economic-Civil law debate was fundamentally related to the political economy of the socialist market system.²⁶⁸ The economic law group believed that China should continue onto the planned economy system, and therefore an administratively centralized regulating system would suit such an

²⁶¹ Huixign Liang (梁慧星), *民法学说判例与立法研究* [Studies on Theories, Cases and Legislation of Civil Law] (Falv chubanshe, 2003), 62.

²⁶² *Ibid.*

²⁶³ *Ibid.*

²⁶⁴ Huixign Liang (梁慧星), see *supra* note 261, 64-65.

²⁶⁵ *Ibid.*

²⁶⁶ Huixign Liang (梁慧星), see *supra* note 258, 14-15.

²⁶⁷ *Ibid.* See also Huixign Liang (梁慧星), *中国民法经济法诸问题* [Issues on Chinese Civil Law and Economic Law] (Zhongguo fazhi chuban she, 1999), 329.

²⁶⁸ Huixign Liang (梁慧星), see *supra* note 258, 14-15.

economic policy.²⁶⁹ On the contrary, the civil law scholars correctly seized the trend of China's economic development and proposed theories that support an economic system with a focus on commodity transactions, as in 1992 China finally confirmed the direction of economic reform as towards a socialist market economy.²⁷⁰ At last, civil law prevailed over economic law and became the fundamental law for the economic reforms and opening market of China. While civil law rules established during late 1970s to 1980s remained imperfect in many aspects, they were designed to support the economic reform from a planned economy to a socialist market economy.²⁷¹

3.3.2 The tension between economic and civil law departments

Along with economic reform in China, the tension between these two departments remains intense. This tension is mainly due to the influence of department theory of law. The *department* theory of law was developed from the *system* theory of law in the Soviet Union and was popular in socialist countries.²⁷² The basic argument is that a legal *system* is the unity of laws within one country; legal norms are classified into departments, and all departments of law constitute a system of the domestic laws.²⁷³ Under this theory, each department has its particular “objectives of adjustment” and “methods of adjustment.”²⁷⁴

The most serious problem is that the department theory of law classified legal norms into “departments” with highly ambiguous criteria, which blurred the distinction between public law and

²⁶⁹ *Ibid.* See also Huixing Liang (梁慧星), 中国民法经济法诸问题 [Issues on Chinese Civil Law and Economic Law] (Zhongguo fazhi chubanshe, 1999), 329.

²⁷⁰ *Ibid.*

²⁷¹ Huixing Liang (梁慧星), 民法学说判例与立法研究 [Studies on Theories, Cases and Legislation of Civil Law] (Falv chubanshe, 2003), 66.

²⁷² Cheng Liu (刘诚), 部门法理论批判 [Criticism on the Department Theory of Law], *Hebei Law Science* 河北法学 21 (2003): 10-22. Duojun Qi (漆多俊), 经济法基础理论(第五版) [Foundational Theories on Economic Law] (Falv chubanshe, 2017), 100-102.

²⁷³ Cheng Liu (刘诚), 部门法理论批判 [Criticism on the Department Theory of Law], *Hebei Law Science* 河北法学 21(2003): 10-22.

²⁷⁴ *Ibid.* According to the same author, the conceptual system of the department theory of law is full of ambiguities, which led to fruitless debate between different departments of law.

private law.²⁷⁵ For instance, administrative law and administrative procedural law are classified into the same department. What exactly constitutes a “department” remains unclear. Furthermore, there is hardly convincing explanation of why both civil liabilities and administrative liabilities are applicable in terms of departments such as labour law, environment law, and consumer law.²⁷⁶ These “departments” are in fact crossing fields of both administrative and private law; however, the classification under the department theory of law fragmented the internal consistencies and led to controversies in not only judicial practice but also academic studies.

According to the department theory of law, economic law and civil law are two distinct departments. Most economic law studies consider the “objective of adjustment” of economic law to be economic relations, contrary to civil law which focuses on legal relations between equal parties of fictional persons.²⁷⁷ This classification created a tension between economic law studies and civil law studies and led to fruitless conflicts between departments.²⁷⁸ Under the influence of the department theory of law, the characterization of consumer law has long been unsettled, and the split understanding on the scope of consumer rights has been ignored by commentators.²⁷⁹

3.3.3 The PRC Consumer Protection Law was a product of the time

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ See *supra* discussion in Section 3.1.1.

²⁷⁸ Cheng Liu (刘诚), see *supra* note 273. The recent studies on the civil law classification of consumer law still shows implicit opponents against economic law side, see *supra* discussion in Section 3.1.2.

²⁷⁹ See *supra* discussion in Section 3.1.3 and 3.2.3. See also Cheng Liu (刘诚), *supra* note 273. In addition, while China has no longer applies the legal theories of Soviet Union, the influence of the department theory of law is still deeply embedded in the legal institutes of universities or colleges. Recently in China, a new approach termed the “theory of field law” has been developed by a group of economic law scholars in Renmin University, which attempts to overcome constrains of department theory of law and demonstrate new possibilities of cross-field legal studies. See Jianwen Liu (刘剑文), 论领域法学：一种立足新兴交叉领域的法学研究范式 [The Theory of Field Law—One Kind of Legal Research Paradigm based on Emerging Crossed Areas], *Journal of Political Science and Law* 政法论丛 5 (2016): 3-16.

In 1993, the PRC Consumer Protection Law was enacted and became the foundation of the Chinese consumer protection law system. The PRC Consumer protection Law consists of all the fundamental blocks of consumer protection legal structures, including the consumer rights declaration, state responsibility, obligations of the business operators, consumer organizations, dispute resolution and legal liabilities.²⁸⁰ This Law (1) provided a comprehensive framework on consumer protection; (2) emphasized state responsibility; (3) pursued compliance through obligatory provisions and sanctions; and (4) introduced punitive damages. This law had great influence on following consumer legislation. Meanwhile, due to the tension between economic law and civil law, whether consumer law in China belongs to civil law or economic law remains unsettled, and this debate led to controversies at different aspects.

The PRC Consumer Protection Law was enacted against a special economic and political background. Since the late 1970s and 1980s, the economic reforms and opening-up policy largely freed businesses from the centralized economic plans and activated market prosperity. Specifically, businesses were no longer affiliations of the state organs, but started to have their own independent legal and economic status.²⁸¹ At the same time, businesses were chasing profits despite the socialist aspect of the domestic economy.²⁸² Moreover, since China was just at the starting point of economic development, consumers hardly had any awareness of their rights or competence to protect themselves when they were harmed by problematic products or services.²⁸³ Against this background, consumer law constituted a crossing area of economic law and civil law.²⁸⁴ Since consumer

²⁸⁰ Considering the PRC Consumer Protection Law has constructed a comprehensive system on building blocks of consumer protection, this law is more like a code rather than merely a statute.

²⁸¹ Mingyue Xu (许明月), and Changqi Li (李昌麒) eds., 消费者保护法(第四版) [Consumer Protection Law (4th edition)] (Falv chubanshe, 2014), 17-18.

²⁸² *Ibid.*

²⁸³ Mingyue Xu (许明月), and Changqi Li (李昌麒) eds., see *supra* note 281, p18-19

²⁸⁴ Similar position, Mingyue Xu (许明月), and Changqi Li (李昌麒) eds., see *supra* note 281, p44-45. Li and Xu consider consumer law may regulate both equal relations between the business operator and the consumer, and unequal legal relations among the state, the business operator and the consumer. They mainly focus on the integrity of consumer law.

protection law was developed during the early transformation period of the opening up and economic reform, China's consumer protection law inevitably contains characteristics of both economic law and civil law. Nevertheless, some already argued that consumer law should not be restricted to one particular department.²⁸⁵

Furthermore, the coexistence of two different approaches inside the system of consumer protection law contributed to the enforcement gap between the legislative purpose of consumer protection through punitive damage lawsuits and its enforcement. Specifically, due to the imbalance caused by the tension between economic law and civil law, the ambivalence between collective rights and private rights in consumer protection remains unsolved. As a result, the discussion concerning fake-hunting issues has been complicated up to the present day.

3.4 Necessity of allocating more focus on private rights of consumers

Through a historical review, there is not only a divergence in characterizing punitive damage in consumer law but also a split understanding of consumer rights. Along with the tension between economic law and civil law, the focus on the private rights of consumers proved insufficient. On one hand, policy makers and advocates view punitive damage as one important enforcement instrument of consumer protection in China, in addition to the improvements in substantive law.²⁸⁶ Meanwhile, most attention has been put on the regulatory aspects of punitive damage while the other aspects of private remedy have not been addressed enough. Moreover, lacking focus on the private rights of consumers has already generated problems in practice. First, the overlooking of private rights caused inconsistency in the legal application of punitive damages, which has been

²⁸⁵ *Ibid.* See also, Huixing Liang (梁慧星), 消费者法及其完善 [Consumer Law and Its Development], *Industrial and Commercial Administration* 工商行政管理 21 (2000): 13-15.

²⁸⁶ Shan He (河山) 论“缺一赔十”的惩罚性赔偿思想 [On the Punitive Damage Spirit of “Ten for One Loss”], *Journal of Law Application* 法律适用 8 (1993): 12-13. Yide Ma (马一德), 消费者权益保护专论 [Monograph on Protection of Consumers' Rights and Interests] (Beijing: Falv chubanshe, 2016), 211-217.

demonstrated in the fake-hunting lawsuits dilemma. Second, neglect of private rights of consumers has impeded the improvement of consumer redress. Therefore, to enhance consumer protection in China requires more focus on how to enforce the private rights of consumers.

3.4.1 Dual aspects of punitive damage in Chinese consumer law

Due to the peculiarities of consumer protection legislation in China, there are two aspects of market regulation and private remedy in the enforcement of Chinese consumer law. This duality is largely due to the influence of economic law theories on consumer protection. Chinese economic law theories emphasize the importance of the function of the state; therefore, the enforcement of consumer rights also reflects state intervention into the domestic market order and economic relationships.²⁸⁷ In particular, public remedy is a main feature of economic law, which has also been included in the system of consumer protection law.²⁸⁸ For instance, the *Law on Protection of Consumer Rights and Interests* provided not only civil liabilities of business operators in terms of illegal practice, but also administrative and criminal liabilities.²⁸⁹ If the business operators fail to fulfill the obligations provided in the law or violate the compulsory rules, harming the legitimate rights and interests of consumers, they ought to burden the legal liability and face administrative sanctions or criminal penalties.²⁹⁰

The system of punitive damage is also a representation of such duality.²⁹¹ However, the emphasis has been on market regulation for the sake of public interests or collective consumer rights.

²⁸⁷ Changqi Li (李昌麒), *经济法—国家干预经济的基本法律形式* [Economic Law—the Fundamental Legal Approach of State Intervention in Economy] (Sichuan renmin chubanshe, 1995), 52.

²⁸⁸ Duoqun Qi (漆多俊), *经济法基础理论* (第五版) [Foundational Theories on Economic Law] (Falv chubanshe, 2017), 241.

²⁸⁹ See Chapter Seven on Legal Liabilities of the PRC Consumer Protection Law.

²⁹⁰ Mingyue Xu (许明月), and Changqi Li (李昌麒) eds., see *supra* note 281, p44-45.

²⁹¹ Hao Zhou (周皓), and Naixin Chen (陈乃新), 论消费者权利的两重性[On Dual Nature of Consumers' Rights], *Journal of Xiangtan University(Philosophy and Social Sciences)* 湘潭大学学报(哲学社会科学版) 6 (2003), 84-86.

The problem is this approach neglected the necessary justification for individuals to get financial remedies in civil lawsuits.²⁹² According to advocates of fake-hunters, fake-hunters' claims for punitive damage should be supported for the good sake of the public. However, the legal ground for fake-hunters to claim and receive this monetary reward is not sufficient.

Specifically, some argued that the claim for punitive damage is based on a right of economic law and for the public interest, and this right is different from the right to claim compensation based on contract or tort under civil law.²⁹³ However, viewed from the legislative system, to consider that right to claim punitive damage under the PRC Consumer Protection Law, the PRC Food Safety Law and the PRC Tort Liability Law should all be classified as a right under economy law seems difficult. Furthermore, even the right to claim punitive damage can be separated from civil rights and considered as a right for the public interests, the standing to sue for public interests is limited to particular bodies under particular circumstances according to current law.²⁹⁴ In this sense, the fake-hunter is not entitled to the standing to bring a lawsuit based on such a right.

Moreover, some think the punitive damage system in Chinese law is in essence a reward system under economic law, rather than the exemplary compensation system in common law.²⁹⁵ In this sense, the punitive damage is a reward to those who actively participate in market regulation to fill the gap left by government supervision.²⁹⁶ Nevertheless, there is no legislative proof to back up the argument that this is a reward system. Despite the scholarly debate concerning the frictions between punitive damage and conventional civil law theories, punitive damage system in China was

²⁹² Renyu Li (李仁玉), and Chao Chen (陈超), 知假买假惩罚性赔偿法律适用探析 [Analysis on Whether Punitive Damage is Applicable to Buying Known Fake Products], *Law Science Magazine* 法学杂志 1 (2015): 48-58.

²⁹³ Hao Zhou (周皓), and Naixin Chen (陈乃新), *supra* note 291.

²⁹⁴ Article 55 of the PRC Civil Procedure Law.

²⁹⁵ Xiaomin Sun (孙效敏), 奖励制度与惩罚性赔偿制度之争——评我国《侵权责任法》第 47 条 [The Debate between Rewarding System and Punitive Damage System—A Comment on the Article 47 of the PRC Tort Liability Law], *Political Science and Law* 政治与法律 7 (2010): 89-97.

²⁹⁶ *Ibid.*

established as a form of exemplary compensation, especially concerning consumer protection.²⁹⁷

While motivating the people to become enforcers of the law belongs to the legislative purpose and practical function,²⁹⁸ punitive damage is not a financial reward system in nature.

Therefore, the legal basis to claim and receive punitive damage remains rooted in private rights instead of the public interest, and the aspect of punitive damage as a private remedy requires more attention. However, while punitive damage has become an important system to improve consumer protection, in particular as private enforcement of consumer law,²⁹⁹ the private rights of consumers were neglected. Furthermore, lack of attention over private rights of consumers has already generated problems in practice. One outstanding issue is the inconsistency in judicial enforcement, represented by the fake-hunting lawsuits dilemma. One another fundamental issue at stake is concerning consumer redress through group litigation.

3.4.2 Inconsistency in the application of punitive damages

The overlook of private rights caused divergence in applying punitive damages in consumer lawsuits. First, some consider consumer law, in particular the PRC Consumer Protection Law, to be independent from the civil law theory system.³⁰⁰ Meanwhile, others think the interpretation of fraudulent acts under the PRC Consumer Protection Law should be consistent with

²⁹⁷ Shan He (河山), 论“缺一赔十”的惩罚性赔偿思想 [On the Punitive Damage Sprit of “Ten for One Loss”], *Journal of Law Application* 法律适用 8 (1993): 12-13. Shishi Li (李适时) ed., 中华人民共和国消费者权益保护法释义(最新修正版) [Explanations of the Law on Protection of Consumer Rights and Interests the People’s Republic of China (Latest revised edition)] (Beijing: Falv chubanshe, 2013), 260-262.

²⁹⁸ Nianbing Chen (陈年冰), 我国惩罚性赔偿制度研究 [Research of the Punitive Damages System in China], Doctoral dissertation of Shandong University, online published in 2014, accessed July 19, 2018. <http://gb.oversea.cnki.net>.

²⁹⁹ Yide Ma (马一德), see *supra* note 237.

³⁰⁰ Yurong Sun (孙玉荣), 民法上的欺诈与《消费者权益保护法》第49条之适用[Fraud of Civil Law and the Application of Article 49 of the Law on Protection of Consumer Rights and Interests], *Journal of Law Application* 法律适用 4 (2005): 88-89.

the civil law theory.³⁰¹ Due to the divergence in the interpretation of consumer law, the application of punitive damage generated inconsistency among different court decisions.³⁰² Provided the cases are based on legal relations between the consumer and the business operator, the inconsistency in judicial enforcement can be solved at the legislative or interpretative level.³⁰³ However, since not all theories have reached a consensus that the private rights of consumers constitute the legal basis for remedy, the conflicts generated in legal application.³⁰⁴

In addition, overlooking the private rights of consumers also restrained the development of legal protection for consumers in transactions. For instance, while some argue that the PRC Consumer Protection Law should be based on consumer transaction and legal application in consumer disputes should take consumer contract in consideration.³⁰⁵ Nevertheless, people's recognition on the notion of consumer in contract is still limited.³⁰⁶ Therefore, while people's attention is largely attuned to fake-hunting, the focus on how to support consumers to enforce their private rights in civil proceedings remains insufficient.

3.4.3 Neglect of private rights impeded the improvement of consumer redress

Another problem due to the neglect of private rights is that public interest and private interests have been blurred in the enforcement of consumer protection. In other words, ignoring the

³⁰¹ Shiyuan Han (韩世远), 消费者合同三题: 知假买假, 惩罚性赔偿与合同终止 [Three Questions on Consumer Contract: Intentional Purchase of Fakes, Punitive Damage and Termination of Contracts], *Journal of Law Application* 法律适用 10 (2015): 87-92.

³⁰² See *Supra* section 2.2 and 2.3.

³⁰³ Heng Deng (邓恒), 探求惩罚性赔偿的实质意义 审视职业打假人的法律地位 [On Punitive Damage and Professional Fake-Hunters], *People's Court Daily* 人民法院报, published on 12 April 2017, accessed July 19, 2018. <http://gb.oversea.cnki.net>.

³⁰⁴ See *supra* discussion in Section 2.2 and 2.3.

³⁰⁵ Huixing Liang (梁慧星), 消费者权益保护法第 49 条的解释与适用 [Interpretation and Application of Article 49 of the Consumer Protection Law], 《复印报刊资料(民商法学)》 [Copy resource of Civil and Commercial Law] 6 (2001): 89. (Forwarded from Renyu Li (李仁玉), and Chao Chen (陈超), 知假买假惩罚性赔偿法律适用探析 [Analysis on Whether Punitive Damage is Applicable to Buying Known Fake Products], *Law Science Magazine* 法学杂志 1 (2015): 48-58).

³⁰⁶ Xiaoxia Liu (刘晓霞), 试论消费者合同及立法模式选择 [On Consumer Contract and Legislation Model], *Knowledge Economy* 知识经济 22 (2011): 24-25.

weakness of consumers as individuals also resulted in the neglect of their lack of power in the redress process, which led to imbalanced enforcement mechanisms focusing on public interests. In particular, the most outstanding problem is with the consumer collective redress system in China.

In 2012, along with the amendment to the PRC Civil Procedure Law a new civil proceeding of public interest litigation was introduced; then in 2013 the PRC Law on Protection of Consumer Rights and Interests was amended and granted the standing to sue to consumer associations.³⁰⁷ When the interests of mass consumers are damaged or in danger of being damaged, qualified consumer associations are granted the standing to bring a lawsuit to the people's court on behalf of the consumers.³⁰⁸ However, since this standing is a collective redress mechanism, this new proceeding is not applicable for aggregated compensatory claims.³⁰⁹ In addition, in previous cases consumer associations directly participated, the claims were primarily injunctive (Table 3.4.3).

Public interest litigation marked a great development with regards to consumer protection through civil procedure in China,³¹⁰ Notwithstanding, with regards to consumer collective redress, the core value of this procedure is to protect “public interests,” and not for redressing private interests of consumers as individuals.³¹¹ For individual consumers to seek remedy, they still have to rely on conventional approaches, which have been insufficient.³¹² Some had argued that “public

³⁰⁷ Article 55 of the PRC Civil Procedure Law and Article 47 of the PRC Law on Protection of Consumer Rights and Interests.

³⁰⁸ *Ibid.*

³⁰⁹ The Supreme People's Court Interpretation limited the scope of the claims in public interest proceeding to “*stopping the infringement, removing the obstruction, eliminating the danger, and apologizing for the misconduct, etc.*” against the defendant. See Article 13 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Consumer Civil Public Interests Lawsuits (effective from May 1, 2016).

³¹⁰ Tao Wang (王涛), 我国消费民事公益诉讼与私益诉讼的关系 [Relations between Public-Interest Litigation and Private-Interest Litigation in China], *Legality Vision 法制博览* 14 (2017): 64-66.

³¹¹ Zhengyong Wang (王政勇), 消费公益诉讼的司法理念及特殊审判规则的构建 [The Idea of Consumer Public Interest Litigation and Construction of Special Judging Rules] *Journal of Law Application 法律适用* 1 (2014): 86-91.

³¹² Zhongshun Huang (黄忠顺), 消费者集体性损害赔偿诉讼的二阶构造 [Two-stage Litigation Structure of Consumer Group Action for Damage Compensation], *Global Law Review 环球法律评论* 5 (2014): 64-82.

interest litigation” does not equal “collective litigation,”³¹³ yet a compensatory collective redress proceeding led by consumer groups remains absent. While the position addressing “public interests” of consumer group litigation has prevailed, people need to note the private interests of consumers and distinguish from collective or public interests.

Time	Plaintiff	Defendant	Issue	Claim
March 2017	Consumer Association of Guangdong Province ³¹⁴ (Suggested by Prosecuting Office)	Liu etc.	Food fraud	Punitive damage
September 2016	Consumer Association of Jiangsu Province	Nanjing Water Group	Unfair standard clause	Injunction
August 2016	Consumer Association of Jilin Province (Suggested by Prosecuting Office)	Han etc.	Food fraud	Injunction
July 2016	China Consumer Association	LOVOL	Product standard and recall	Injunction
July 2015	Shanghai Consumer Council	OPPO, SUMSUNG	Information disclosure and customer service	Injunction
December 2014	Consumer Association of Zhejiang Province	Shanghai Railway Bureau	Unfair standard clause	Injunction

Table 3.4.3. Group litigations brought by consumer associations in China since 2013³¹⁵

Source: Wenjia Sun

³¹³ *Ibid.*

³¹⁴ This case will further be introduced in Chapter VII.

³¹⁵ The cases presented in the table are typical cases widely reported. Meanwhile, the total number of cases will be more since there will be no verdict or judgement if the plaintiff withdraw the case.

3.5 Summary

This chapter mainly demonstrated why the focus on private interests is insufficient concerning punitive damages in consumer protection, and what consequences this lack has caused to consumer law enforcement in practice. First, the analysis demonstrated that debate centers around whether consumer law should be classified as economic law or civil law. In different perspectives, characterization of punitive is also divergent. (3.1). Moreover, the divergence is more profoundly reflected by the split understanding of consumer rights as either collective rights or private rights (3.2). The difference in defining consumer rights as either collective rights or private rights has affected commentators' understanding towards consumer protection and punitive damage; yet this implicit divergence has hardly been addressed in previous rhetoric of consumer law.

Second, this chapter also investigated the historical roots of this tension between economic law and civil law (3.3). The economic-civil law debate can be dated back to the time of economic reform. Moreover, another important fact that contributed to the continuing of the conflict has been the influence of the department theory of law. Finally, the PRC Consumer Protection Law is a product of that time. While that legislation marked a historical improvement and has been the foundation of consumer protection in China, it contains a lot of ambiguities, which subsequently added to inconsistencies in judicial practice.

Third, the enforcement strategy of consumer protection in China showed a focus on the collective rights rather than private rights of consumers (3.4). More attention should be assigned to the dual aspects of market regulation and private remedy inherent in the punitive damage system. Moreover, the methods of private enforcement, including punitive damage and collective redress, are targeted more at market regulation than improving the redress of individual consumers. Consequently, the enforcement of consumers' private rights remains largely overlooked. In

conclusion, to retrieve the focus on the private rights of consumers and make improvements at interpretation level and institution level proved increasingly necessary.

Chapter IV: The Enforcement of the Private Rights of Consumers: the Japanese Example

Chapter III presented the tension between economic law and civil law inherent in the system of consumer law in China. Moreover, lacking the focus on private rights of the consumers has not only caused inconsistency in the application of punitive damages, but also impeded the improvement of consumer redress.

The task of this chapter is to investigate how to enhance the enforcement of consumer protection focusing on the private rights of consumers. To provide suggestions for China, this chapter applies a comparative analysis and takes Japan as a model. After introducing the legal development of consumer protection (4.2) and the legal system supporting consumers to enforce their rights (4.3), the author contrasts China with Japan (4.4). The last section points out that for China, to merely stress the necessity of focusing on the private rights of consumers is not sufficient, but that legal improvement should be made at different levels for consumers to enforce their rights.

4.1 To approach China's problem in a comparative perspective

There are two reasons for choosing Japan to compare with China. Generally speaking, the civil law systems of China and Japan both belong to the continental civil law family. Japanese civil law also has deep roots in German civil law. China largely borrowed from Germany for building the domestic civil law, and was also profoundly influenced by Japanese civil law.³¹⁶ The conceptual consistency of their civil law can be the basis of compatibility. Therefore, in this study, Japan is an appropriate object of comparative analysis to investigate and learn from. Moreover, and even more importantly, China borrowed many legal mechanisms from Japan in several legal fields through

³¹⁶ Huixing Liang (梁慧星), 梁慧星谈民法 [Liang Huixing's Talking about Civil Law] (Beijing: Renmin fayuan chubanshe, 2017), 7-9.

legal assistance projects, including civil procedural law, consumer protection law, and administrative law and civil law.³¹⁷

4.2 Legal development of consumer law in Japan

This section is going to set the background of legal development on consumer protection in Japan. From a historical perspective, there are many similarities in terms of consumer problems that one can find in both societies. At the same time, the social background and theoretical foundations for consumer protection legislation are different. Through a comparative analysis, this section illustrates the main factors that affect legislation on consumer protection. This part of analysis will demonstrate both the early theories and the recent development with regards to consumer problems.

4.2.1 Consumer problems in Japanese context

In Japan, the spread of consumer problems dates back to the 1950s.³¹⁸ Some research further divided the post-war history of consumer problems and legislation into several periods according to the economic situation.³¹⁹ In each period, consumer problems showed different characteristics along with economic development. Accordingly, the legislation on consumer protection also developed with the growth of consumer society and logical development of consumer problems. For the purposes of comparison, this section divides the post-war periods of consumer

³¹⁷ According to the reports of Ministry of Justice of Japan, Japan have been contributing on legal assistance with the legal development mainly through recommendations or counselling since 2006. Legal experts from Japan have participated research meetings or seminars with regards to the legal amendments of China at various fields, including the amendment of civil procedural law, administrative procedural law, consumer protection law, secession law and the forth. See the page of Ministry of Justice of Japan, accessed July 19, 2018. http://www.moj.go.jp/housouken/housou_houkoku_china.html.

³¹⁸ Atsushi Omura (大村敦志), 消費者法〔第4版〕[Consumer Law (4th edition)] (Yuhikaku, 2011), 6.

³¹⁹ For instance, see Masahiro Saito (斎藤雅弘), 第1章 消費者問題と消費者法[Chapter I Consumer Problem and Consumer Law], in Japan Federation of Bar Associations ed., 消費者法講義〔第4版〕[Lectures on Consumer Law (4th edition)] (Nippon Hyoron Sha, 2013), 14-16.

protection into three: the post-war reconstruction period, economic growth period, and post-bubble period.

In the post-war reconstruction period (1945-1960s), consumer problems were closely associated with people's lives. Repeated food safety incidents caused wide-spread damage to mass consumers at that time. The seriousness of food and drug problems raised increased social attention.³²⁰ Housewives formed associations and conducted series of campaigns against the irresponsibility of large companies.³²¹ Their active social movement greatly promoted policy making and legislation to enforce the minimum safety requirements of food.³²²

In the period of economic growth (1960-1980s), in addition to product quality and safety, problems appeared at various aspects of consumer transactions, including labelling, advertisement, and monopoly prices.³²³ With the maturity of the domestic consumer society, consumer problems started to be identified in a genuine sense.³²⁴ During the bubble economy period, consumer problems were mainly centered on all kinds of malpractice of marketing or fraudulent businesses.³²⁵ After the Basic Consumer Protection Act was enacted in 1968, laws to protect consumer rights continued to be legislated on various aspects of consumer transactions, and large amounts of

³²⁰ For instance, Morinaga milk incident (1955) and fraud beef can incident (1960). See Takako Nishimura (西村多嘉子), 現代消費者問題に関する制度設計の基礎視角[Fundamental Perspective of Institution Design on Modern Consumer Problem], in Seikou Go (呉世煌), and Takako Nishimura (西村多嘉子) eds., 消費者問題[Consumer Affairs] (Keio University Press, 2005), 8-9.

³²¹ *Supra* note 319, p14-16.

³²² Takako Nishimura (西村多嘉子), Chika Fujii (藤井千賀) and Katsuko Morimiya(森宮勝子) eds., 法と消費者[Law and Consumer] (Keio University Press, 2010), 29-30. See also Hiroshi Hanzawa (半沢広志), 経済成長と「消費者の権利」の進展 [Economic Growth and Development of Consumer Rights] in Kokumin Seikatsu Center (国民生活センター) ed., 戦後消費者運動史[History of Post-War Consumer Movement] (Okurasho Press, 1997), 66-104.

³²³ *Supra* note 319, p14-16.

³²⁴ *Ibid.*

³²⁵ *Ibid.*

regulations and so-called industry laws were passed to deal with commonly existing unscrupulous business practices.³²⁶

After the collapse of the bubble (1990s), deregulation became the mainstream policy in order to activate domestic industries for economy recovery.³²⁷ At the same time, consumer fraud targeted aged people. Mass consumer torts and other new-type consumer problems increasingly called for state intervention in consumer protection.³²⁸ Consumer problems associated with an information society also became outstanding.³²⁹ In spite of the deregulatory policy environment, efforts have been made to empower consumers to redress their damages through civil law mechanisms both in substantive and procedural aspects. For instance, the Consumer Contract Law was enacted with favorable provisions in order to adjust the disadvantageous status of consumers.³³⁰ Furthermore, collective redress mechanisms were introduced in civil proceedings for the collective enforcement of consumer rights.³³¹

Overall, consumer problems in Japan shared some general features with consumer problems in other capitalist economies, including inequalities in information and bargaining power, disadvantage in damage redress, and vulnerability as human beings.³³² Meanwhile, there are specific characteristics in the consumer protection movement of Japan. For instance, at the initial stage of promoting consumer protection legislation, the housewife associations played a significant role.

³²⁶ Takako Nishimura (西村多嘉子), 現代消費者問題に関する制度設計の基礎視角[Fundamental Perspective of Institution Design on Modern Consumer Problem], in Seikou Go (呉世煌), and Takako Nishimura (西村多嘉子) eds., 消費者問題[Consumer Affairs] (Keio University Press, 2005), 8-9.

³²⁷ *Supra* note 319, p14-16.

³²⁸ *Ibid.*

³²⁹ *Ibid.*

³³⁰ Jisuke Nagao (長尾治助), Kunihiro Nakata (中田邦博), and Naoko Kano (鹿野菜穂子) eds., レクチャー消費者法〔第5版〕 [Lecture Consumer Law (5th edition)] (Houritsu Bunka Sha, 2011), 83-92.

³³¹ *Ibid.* S See also Hiroshi Nonoyama (野々山宏), 消費者被害の法的救済制度——消費者裁判手続特例法と他の訴訟制度との比較 [Legal System of Redressing Consumer Damage—Comparison between Special Act on Consumer Collective Redress and Other Litigation Proceedings] (Kokumin Seikatsu (Web version), July 2014): 1-5, accessed July 19, 2018. http://www.kokusen.go.jp/wko/pdf/wko-201407_01.pdf.

³³² *Supra* note 319, p21-24.

With increased recognition of consumer interests, consumer protection changed from an administratively centered approach to a private law focused approach.³³³

In addition, the public-private dichotomy played an important role in the early rhetoric of Japan in analysis of consumer problems. In early theories, the governance of consumer problems was understood through a three-pillar structure, which represented the idea of responsibility distribution in dealing with consumer problems among consumers, business operators and the government or the state.³³⁴ Specifically, consumers are supposed to perform their duty of care when purchasing or using a certain product or receive a particular service; businesses should take the necessary responsibility in production and supply; and the government is responsible for granting licenses to particular business operators (administrative duty in a narrow sense) or make legislative improvements (administrative duty in a broad sense).³³⁵

Meanwhile, since consumer problems have structural reasons rooted in the economic and social context, the rebalance of the responsibilities among the three pillars became necessary.³³⁶ From this perspective of responsibility distribution, discussions on consumer problem governance further developed in two directions: consumer protection through public law and consumer protection through private law.³³⁷ The public-private dichotomy is basically a starting point rather than the end, as consumer problems represent crossing fields between classically divided public law

³³³ See Tsuneo Matsumoto (松本恒雄), 消費者保護政策の方向性 [The Direction of Consumer Protection Policy], in Y.Sato (佐藤祐介), and K. Matsuoka (松岡勝実) eds., 消費者市民社会の制度論 [Consumer Citizenship and Law] (Seibundoh, 2010), 3-21. Meanwhile, from a broader perspective, Matsumoto divided the development of consumer policy in Japan into three periods: (1) the first wave in 1960s was “hard law era,” during which consumer policy was centered on administrative regulation; (2) the second wave in 1990s was “civil rule era,” during which judiciary was the primary approach; (3) and the third wave since 2000s was “soft law era,” which focuses on the function of market in improving compliance of business corporations. The key point is the transition from administration centered regulatory policy to a civil law focused remedial strategy.

³³⁴ Zentaro Kitagawa (北川善太郎), and Shogo Oikawa (及川昭伍) eds., 消費者保護法の基礎 [Foundations of Consumer Protection Law] (Seirin Shoin, 1977), 10-12.

³³⁵ *Ibid.*

³³⁶ *Ibid.*

³³⁷ For instance, in Zentaro Kitagawa (北川善太郎), and Shogo Oikawa (及川昭伍) eds., 消費者保護法の基礎 [Foundations of Consumer Protection Law], (Seirin Shoin, 1977), 28-44 and 45-57. Consumer and consumer problem were analyzed under public law system and private law system.

and private law, and the solution to those problems frequently calls for combining legal mechanisms. Consumer problems occurred in a special historical period, and consumer law was also a historical product along with the development of consumer society and targeted at the resolution of consumer problems.³³⁸

4.2.2 General features of consumer law

Along with the evolution of consumer problems, consumer law also gradually developed in terms of quantity and integrity. In Japanese consumer law studies, the features of consumer law have been summarized by Omura as: (1) problem-oriented; (2) being an interdisciplinary area; and (3) being “contemporary law.”³³⁹ Above all, consumer law can be an accumulation of all kinds of administrative or legislative rules, judicial decisions and academic theories in response to various consumer problems which have appeared since the 1960s.³⁴⁰ Subsequently, in order to approach consumer problems, various legal methods were necessary; therefore, consumer law is characterized as an interdisciplinary area of different legal fields.³⁴¹ In addition, consumer law also contains the characteristic of “contemporary law.”³⁴² Specifically, the way of thinking inherent in legal methods concerning consumer problems turned out to be different from the conventional “modern law” approach with regards to the state, the person, and the law (disputes).³⁴³

Since the early period of consumer law development in Japan, consumer law showed the above-mentioned features. In early rhetoric, consumer damages were perceived as structural

³³⁸ *Supra* note 319, p13-14.

³³⁹ Atsushi Omura (大村敦志), 消費者法〔第4版〕[Consumer Law (4th edition)] (Yuhikaku, 2011), 12. “Contemporary law” here is used as translation to [現代法] in Japanese while “modern law” refers to [近代法] in Japanese.

³⁴⁰ *Ibid.* See also Kunihiro Nakata (中田邦博), 消費者法とはなにか[What is Consumer Law], in Kunihiro Nakata (中田邦博), and Naoko Kano (鹿野菜穂子) eds., 基本講義消費者法〔第2版〕[Basic Lecture of Consumer Law (2nd edition)] (Nippon Hyoron Sha, 2016), 2-6.

³⁴¹ *Ibid.*

³⁴² *Ibid.*

³⁴³ *Ibid.*

problems. From a structural perspective, the problem that consumers suffer from damages is not an independent social or legal issue, but rather has its embeddedness in the modern social-economic context.³⁴⁴ Therefore, dealing with consumer problems requires collective efforts combining different approaches to protect consumers from damages and support them for redress.³⁴⁵

In consequence, the policy making and legislation regarding consumer problems in Japan primarily takes a functional approach for the purpose of preventing or redressing consumer damages with multi-level legal methods.³⁴⁶ Therefore, “consumer protection law” in Japan may refer to all kinds of legal methods and techniques dealing with consumer problems. In fact, to keep the system of consumer protection law unclosed can largely bring convenience and feasibility to both legislation and legal studies.³⁴⁷ This functional approach also prevailed in early consumer law studies in Japan. In particular, Kitagawa coined the term of an “opening system” in consumer law by defining it as an open system that can respond to social reality with more feasibility by linking various legal technics and institutions to solve problems in a more effective way.³⁴⁸ Regarding the scope of consumer law, Kitagawa identified consumer protection law as an integral legal field.³⁴⁹ There are recent studies focusing on the distinct characteristics inherent in all consumer protection laws, represented by Omura’s views.³⁵⁰ Taking the structural perspective to perceive consumer problems and functional approach to improving consumer protection, recent studies further investigated the core values and characteristics of consumer law, as the following section will show.

³⁴⁴ Shogo Oikawa (及川昭伍), 消費者被害の特質と類型[Features and Classifications of Consumer Damage], in Zentarō Kitagawa (北川善太郎), and Shogo Oikawa (及川昭伍) eds., 消費者保護法の基礎[Foundations of Consumer Protection Law] (Seirin Shoin, 1977), 6-7.

³⁴⁵ *Ibid.*

³⁴⁶ *Supra* note 319, p13-14.

³⁴⁷ *Ibid.*

³⁴⁸ Zentarō Kitagawa (北川善太郎), 消費者法のシステム[The System of Consumer Law] (Iwanami Shoten, 1980), 3

³⁴⁹ *Ibid.*

³⁵⁰ *Supra* note 339, p20-28.

4.2.3 Basic principles of consumer law

The integrity of consumer law raised the question that whether people can theorize some basic principles of consumer law.³⁵¹ On one hand, since consumer law is problem-oriented, one particular problem can be directed to a certain solution through a particular approach; on the other hand, if there are basic principles governing such particular approaches, the direction becomes visible when new problems appear.³⁵² In Japanese consumer law rhetoric, Omura was the one who provided a thorough analysis on the basic principles of consumer law. According to Omura, the basic principles of consumer law include three main component elements: the consumer (and also the business operator), the state, and the law.³⁵³

Above all, consumer law was developed in response to consumer problems, and therefore the concept of “consumer” is of key significance.³⁵⁴ In modern private law, the subjects of transactions have been considered as “persons” with freedom to enter into a contract (the principle of freedom of contract). Moreover, in modern public law, the objects of administration have been considered as “citizens,” and the task of administration is to maintain the security of citizens.³⁵⁵ However, with the appearance of consumer society, the “consumer” and “business operator” can no longer be equally considered as “persons” and transaction rules in response to the peculiarities between them became necessary. Since “consumer” can no longer be perceived as “person” or “citizen” in a general sense, the abstraction of the concept of “consumer” became necessary, and the definition of consumer became the fundamental issue of consumer law.³⁵⁶

The second key element in consumer law is the role of the state. Since the 1960s, theories on *welfare state* became predominant, which emphasized the role of the state in economic

³⁵¹ *Supra* note 339, p18.

³⁵² *Ibid.*

³⁵³ *Supra* note 339, p19-20.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*

intervention and domestic redistribution.³⁵⁷ Under welfare state theories, the focus of consumer policy was to “protect” the consumers as “the weak.”³⁵⁸ After the 1980s, state interventionism under welfare state theories raised criticism and advocates for a *small state* increased under the influence of neo-liberalism theories.³⁵⁹ Meanwhile, since market failure still exists, the role of the state (over the economy and society) should not be eliminated. Rather, the focus of the post-welfare state on consumer policy is supposed to be “consumer support.”³⁶⁰

The third factor of basic principles of consumer law is “law,” and Omura has provided a thorough analysis on what can be included (*droit* and *non-droit*).³⁶¹ From a problem-oriented perspective, the concept of the “*droit* and *non-droit*” can be useful in terms of consumer disputes resolution.³⁶² Moreover, the framework of “soft law and hard law” is also useful in approach consumer problems.³⁶³

In addition to the three factors, beyond the consumer law in a narrow sense, the resources of the basic principles of consumer law may encompass constitutional theories and other social norms.³⁶⁴ Based on the analysis on the component factors and resources, the content basic principles of consumer law should cover: (1) the reasons for the existence of consumer law, in other words, the necessity and legitimacy of consumer law; and (2) the forms of consumer law in existence, which

³⁵⁷ *Supra* note 339, p29-30.

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.* In relation with how the essence of “consumer support” is reflected in contemporary consumer protection legislation, see discussion on special legislation for consumer protection outside civil law code. See Osamu Morita (森田修), 民法典と個別政策立法——<支援された自律>の概念によるエスキース [The Civil Law Code and Special Policy Legislation—the Esquisse from the Concept of Supported Autonomy], in Masahiko Iwamura (岩村正彦) et al. eds. 岩波講座現代の法 4 政策と法 [Iwanami Lectures on Contemporary Law 4: Policy and Law] (Iwanami Shoten, 1998), 111-140. See also Osamu Morita (森田修), 契約規範の法学的構造 [Legal Structure of Contractual Provisions] (Shojihomu, 2016), 12-38.

³⁶¹ *Supra* note 339, p30-31.

³⁶² *Ibid.*

³⁶³ *Ibid.*

³⁶⁴ *Supra* note 339, p32-36.

principally refer to the function and topology of consumer law.³⁶⁵ In a word, Omura's analysis on the basic principles of consumer law provided a comprehensive discussion on the normative foundations of consumer law, and provided a systematic perspective to study consumer law. The analysis of Omura illustrated the theoretical framework of consumer law studies in Japan as well.

4.3 Legal system supporting consumers to enforce their private rights

In Japan, consumer problems generate around transactions with business operators, and the consumer contract has been one of the fundamental issues in consumer law.³⁶⁶ The main focus of the consumer contract legal system is to deal with the structural disparity in the quality and quantity of information and negotiating power between consumers and business operators.³⁶⁷ For this purpose, legal systems have been established to empower consumers in terms of the consumer contract and damage redress. With regards to the relations between consumer law and civil law, there are discussions on consumer contract legal system as well.³⁶⁸ From a private law perspective, consumer contract *private* laws are legal rules that support consumers to realize private autonomy and protect consumers from unfavorable results due to their unreasonable decision.³⁶⁹

Meanwhile, this section is not limited to a private law perspective. This section is going to introduce the legal system in Japan that supports consumers to enforce their lawful rights, in particular private rights, for the purpose of presenting an example for China. With the focus on how

³⁶⁵ *Supra* note 339, p37-39.

³⁶⁶ *Supra* note 339, p53. See also Masahiro Saito (斎藤雅弘), 第2章 消費者契約の過程 1——契約の成立と意思表示の瑕疵 [Chapter 2 Process of Consumer Contract—Formation of Contract and Defective Manifestation of Intention], in Japan Federation of Bar Associations ed., 消費者法講義〔第4版〕 [Lectures on Consumer Law (4th edition)] (Nippon Hyoron Sha, 2013), 30.

³⁶⁷ Article 1 of Consumer Contract Act of Japan. See also Keizo Yamamoto (山本敬三), 消費者契約法の意義と民法の課題 [The Significance of Consumer Contract Act and Tasks for Civil Law], 民商法雑誌[Civil and Commercial Law Journal] 123 (4-5) (2001): 505-550.

³⁶⁸ Yutaka Yamamoto (山本豊), 消費者契約私法のアイデンティティ——一般契約法と消費者契約法[The Identity of Consumer Contract Private Law—General Contract Law and Consumer Contract Law], 現代消費者法[Modern Consumer Law] 1 (2008): 57-66.

³⁶⁹ *Ibid.*

consumers are supported to enforce their rights, this section chooses the Consumer Contract Act of Japan as its main object, and allocates emphasis on both substantive rules and procedural rules (i.e. consumer group litigation) developed from this Act.³⁷⁰

4.3.1 Legislation on the Consumer Contract Act

There were two factors behind the legislation on the consumer contract in Japan. One was from inside, which is the necessity to protect consumer interests in transactions.³⁷¹ The other was from outside, which was the international forces of deregulation.³⁷² Therefore, the purpose of the Consumer Contract Act also covers two aspects.

In 2000, the Consumer Contract Act was enacted, and the Act became effective on 1 April 2001.³⁷³ Article 1 of the Consumer Contract Act of Japan stipulates that the purpose of this law is to protect the interests of consumers, and thereby contribute to the stabilization and improvement of the general welfare and lives of the citizens and to the sound development of the national economy, in consideration of the disparity in the quality and quantity of information and negotiating power between consumers and business operators.³⁷⁴ This article shows the legislative purpose, theoretical basis, and also methods of this Act.

³⁷⁰ Regarding consumer rights in Japanese consumer law rhetoric, see Katsumi Yoshida (吉田克己), 消費者の権利をめぐって[An Essay on Consumer Rights], *Shohishaho-kenkyu* 6 (Tokyo: Shinzansha, 2016): 15-54.

³⁷¹ Jisuke Nagao (長尾治助), Kunihiro Nakata (中田邦博), and Naoko Kano (鹿野菜穂子) eds., レクチャー消費者法第5版 [Lecture Consumer Law (5th edition)] (Houritsu Bunka Sha, 2011), 69-71.

³⁷² Makinori Goto (後藤巻則), Masahiro Saito (斎藤雅弘), and Seiji Ikemoto (池本誠司), 条解消費者三法[Explanations Article by Article of Three Laws on Consumer Protection] (Koubundou, 2015), 1-2

³⁷³ After enacted, the Consumer Contract Act has been amended in 2006, 2008, 2016. The amendment in 2006 and 2008 mainly focused on consumer group litigation. In 2016, the substantive amendment was made, and the latest version has come into force since 3 June 2017. Makinori Goto (後藤巻則), Masahiro Saito (斎藤雅弘), and Seiji Ikemoto (池本誠司), 条解消費者三法[Explanations Article by Article of Three Laws on Consumer Protection] (Koubundou, 2015), 1.

³⁷⁴ Article 1 of Consumer Contract Act of Japan.

First, the legislative purpose of Consumer Contract Law was to protect consumers' interests centered on the freedom of choice in consumer transactions.³⁷⁵ To protect consumers' interests requires respect of consumer sovereignty in consumer transactions.³⁷⁶ Moreover, according to the theory behind the law, the enforcement of consumer rights in the consumer transaction should focus on market mechanisms, rather than state intervention.³⁷⁷ The serious situation of consumer disputes reflected that the transactional environment for consumers was far from satisfactory, which added to the urgency for solutions at legislative level.³⁷⁸

The theoretical basis of the Consumer Contract Law lies in the disparity between the quality and quantity of information and the negotiating power between consumers and business operators.³⁷⁹ A conventional civil law approach takes contracts to be between equal parties, following the principle of freedom of contract.³⁸⁰ The contract should be strictly performed, under the notion of *pacta sunt servanda*.³⁸¹ However, the status has become “unequal” due to the gap between a consumer and the business operator in the access to information and bargaining power.³⁸² Legal institution also became necessary along with modification of the principle of private autonomy, in respect to the inequalities between the consumer and the business operator.³⁸³

³⁷⁵ Seiichi Ochiai (落合誠一), 消費者契約法 [Consumer Contract Law] (Yuhikaku, 2001), 48-49.

³⁷⁶ *Ibid.*

³⁷⁷ *Ibid.*

³⁷⁸ *Ibid.*

³⁷⁹ Seiichi Ochiai (落合誠一), 消費者契約法 [Consumer Contract Law] (Yuhikaku, 2001), 48-49. See also Keizo Yamamoto (山本敬三), 消費者契約法の意義と民法の課題 [The Significance of Consumer Contract Act and Tasks for Civil Law], 民商法雑誌[Civil and Commercial Law Journal] 123 (4-5) (2001): 505-550.

³⁸⁰ Takeshi Sakuma (佐久間毅), 民法の基礎 1 総則 [第 4 版] [Elements of Civil Law I—General Provisions (4th edition)] (Yuhikaku, 2018), 42-43.

³⁸¹ Takao Yamada (山田卓生), Hiroshi Kochi (河内宏), Masaaki Yasunaga (安永正昭), and Miyohiko Matsuhisa (松久三四彦), 民法 I 総則 [第 4 版] [Civil Law I General Provisions (4th edition)] (Yuhikaku, 2018), 109-110.

³⁸² Takeshi Sakuma (佐久間毅), 民法の基礎 1 総則 [第 4 版] [Elements of Civil Law I—General Provisions (4th edition)] (Yuhikaku, 2018), 199-201.

³⁸³ Jisuke Nagao (長尾治助), Kunihiko Nakata (中田邦博), and Naoko Kano (鹿野菜穂子) eds., レクチャー消費者法第 5 版 [Lecture Consumer Law (5th edition)] (Houritsu Bunka Sha, 2011), 69-71.

Second, legislation on consumer contract also marks a transformation of consumer protection strategy towards self-reliance.³⁸⁴ Before the 1990s, the governance of consumer problems was mainly through administrative control onto industries.³⁸⁵ With the promotion of deregulation, *ex ante* regulation was reduced to encourage both businesses and consumers to participate in the market with more freedom.³⁸⁶ Against such background, the spirit of Consumer Contract Act was to provide support to consumers to enforce their rights themselves.³⁸⁷ In addition, in 2004, the former Basic Consumer Protection Act (1968) of Japan was amended and the title was changed into the Basic Consumer Act. Article 1 of the Basic Consumer Act also emphasized that the focus of consumer policy was changed from “protection” of consumers to eliminating the “disparities” between the consumer and the business operator.³⁸⁸ In summary, the legislation on consumer contract in Japan attempted to improve consumers’ disadvantageous situation in transaction, with a focus on the power-balance between the consumer and the business side in the contract. On one hand, the inequalities in consumer contract were recognized to justify empowerment to consumers. At the same time, the enforcement of consumers’ rights and interests required voluntary efforts from consumers.³⁸⁹

³⁸⁴ Makinori Goto (後藤卷則), Masahiro Saito (斎藤雅弘), and Seiji Ikemoto (池本誠司), 条解消費者三法[Explanations Article by Article of Three Laws on Consumer Protection] (Koubundou, 2015), 13. See also Shoji Kawakami (河上正二) et al., 消費者契約法——立法への課題 [Consumer Contract Law: the Tasks for Legislation] 別冊 NBL 54 (Shojihomu Kenjyukai, 1999), 6-9.

³⁸⁵ See Tsuneo Matsumoto (松本恒雄), 消費者保護政策の方向性 [The Direction of Consumer Protection Policy] in Y.Sato (佐藤祐介) and K. Matsuoka (松岡勝実), 消費者市民社会の制度論 [Consumer Citizenship and Law] (Seibundoh, 2010), 3-21.

³⁸⁶ Shoji Kawakami (河上正二) et al., 消費者契約法——立法への課題 [Consumer Contract Law: the Tasks for Legislation] 別冊 NBL 54 (Shojihomu Kenjyukai, 1999), 1-7.

³⁸⁷ *Ibid.*

³⁸⁸ Miyashita, Shuichi (宮下修一), 消費者契約法とは何か [What is consumer contract law] *Kokumin Seikatsu* (Web version) 63 (October 2017): 38-41. Accessed July 19, 2018. http://www.kokusen.go.jp/wko/pdf/wko-201710_16.pdf

³⁸⁹ See Clause 2, Article 3 of Consumer Contract Act, which stipulates that “Consumers entering into Consumer Contracts shall endeavor to actively use the information provided by Business Operators and to understand their rights and duties and other matters set forth in Consumer Contracts.”

4.3.2 Consumer empowerment with the consumer contract

In general, the Consumer Contract Act is aimed at providing relief for consumers in terms of unnecessary or unbeneficial contracts, with legal mechanisms that are more accessible compared with conventional civil rules.³⁹⁰ Only if the law can protect consumers' rights and interests in transactions, the security and prosperity of national economy can be realized.³⁹¹ The framework of the Consumer Contract Act of Japan consists of five parts. The first part contains general provisions on purpose and scope; the second part is on the process of contract formation; the third part is about invalidity of unfair terms; the fourth part is the function of consumer organizations, in particular collective redress; and the last part includes miscellaneous rules and penal rules.

First, as demonstrated in the section above, the purpose of the Consumer Contract Act is mainly to identify the disparity in the quality and quantity of information and negotiating power between consumers and business operators, and therefore to rectify this disparity (Article 1). Except for labor contracts, this Act is applicable to all kinds of consumer contracts between the consumer and business operator (Article 2 and Article 48). The term "Consumer" means an individual who is not a party to a contract as a business enterprise or for the purposes of a business enterprise, and the term "business operator" means a corporation or association, or an individual who becomes a party to a contract as a business enterprise or for the purposes of a business enterprise (Article 2).

Second, improvement has been made concerning the consumer's right on rescission of contract in case of improperly solicitation upon entering a contact. This part is provided from Article 4 to Article 7 in the Consumer Contract Act. When consumers enter a contract without a true will due to disparities in information and bargaining power, it is difficult to be exempted from performing the contract according to the *Civil Law Code of Japan*. Specifically, invalidity of

³⁹⁰ Kazuo Shinomiya (四宮和夫), and Yoshihisa Nomi (能見善久) eds., 民法総則 [第9版] [General Provisions of Civil Law (9th edition)] (Koubundou, 2018), 278-279.

³⁹¹ Seiichi Ochiai (落合誠一), 消費者契約法 [Consumer Contract Law] (Yuhikaku, 2001), 48-49.

contract is limited to miscomprehension (Article 95 of the *Civil Law Code of Japan*), and rescission of contract is strictly limited to fraud (Article 96 of the *Civil Law Code of Japan*) and coercion (Article 96 of the *Civil Law Code of Japan*).³⁹²

Applying civil law rules for invalidity of contract and rescission of contract, however, is generally difficult.³⁹³ The main reason is that both miscomprehension and fraud are based on the “theory on declaration of intention.”³⁹⁴ For instance, rescission of contract for “fraud” requires: (1) the counterparty was intentionally conducting a fraudulent act; (2) the declarant fell into miscomprehension; (3) there is a causal relation between the declarant’s miscomprehension and the fraudulent act of the counterparty; (4) the counterparty’s fraudulent act was illegal; and (5) the counterparty had the “intention of making the declarant fall into miscomprehension” and the “intention of making the declarant present his or her will based on the miscomprehension.”³⁹⁵

In consumer disputes, the burden of proof on the consumer side proved heavy.³⁹⁶ To apply the rule of miscomprehension to invalidate a contract is not easy either, especially for consumers.³⁹⁷ Before the enactment of the Consumer Contract Act, consumers may apply for the principles of good faith and expansion of miscomprehension in judicial practice. Moreover, Japan introduced the

³⁹² Planning Office of Consumer Affairs Agency (消費者庁企画課) ed., 逐条解説・消費者契約法〔第3版〕 [Explanation Article by Article on Consumer Contract Law (3rd edition)] (Shojihomu, 2018), 2-3.

³⁹³ *Ibid.*

³⁹⁴ Hiroshi Nonoyama (野々山宏), 第4章消費者契約法[Chapter 4 Consumer Contract Act], in Japan Federation of Bar Associations ed., 消費者法講義第4版 [Lectures on Consumer Law (4th edition)] (Nippon Hyoron Sha, 2013), 82-83.

³⁹⁵ *Ibid.* See also, Sakae Wagatsuma (我妻栄), Toru Ariizumi (有泉亨), Makoto Shimizu (清水誠) and Teruaki Tayama (田山輝明), 我妻・有泉コメンタール民法——総則・物権・債権〔第5版〕 [Wagatsuma-Ariizumi Commentary on Civil Law—General Provisions· Real Rights· Claims (5th edition)] (Heibunsha, 2018), 205-207. Akio Yamanome (山野目章夫), 民法概論1 民法総則[General Discussion on Civil Law 1 General Provisions of Civil Law] (Yuhikaku, 2017), 212-215. Jisuke Nagao (長尾治助), Kunihiro Nakata (中田邦博), and Naoko Kano (鹿野菜穂子) eds., レクチャー消費者法第5版 [Lecture Consumer Law (5th edition)] (Houritsu Bunka Sha, 2011), 75.

³⁹⁶ Jisuke Nagao (長尾治助), Kunihiro Nakata (中田邦博), and Naoko Kano (鹿野菜穂子) eds., レクチャー消費者法第5版 [Lecture Consumer Law (5th edition)] (Houritsu Bunka Sha, 2011), 75.

³⁹⁷ Masahiro Saito (斎藤雅弘), 第2章 消費者契約の過程1——契約の成立と意思表示の瑕疵 [Chapter 2 Process of Consumer Contract—Formation of Contract and Defective Manifestation of Intention], in Japan Federation of Bar Associations ed., 消費者法講義〔第4版〕 [Lectures on Consumer Law (4th edition)] (Nippon Hyoron Sha, 2013), 49.

cooling-off system to help consumers with the difficulties of proof.³⁹⁸ However, it remained highly insufficient in consideration of the gap between the consumer and the business operators.³⁹⁹

Against this background, the Consumer Contract Act improved empowerment to the consumer, in particular this law incorporated articles that are more favorable to the consumer on rescission of contract.⁴⁰⁰ To be specific, a consumer may rescind the manifestation of his or her intention to offer or accept a consumer contract for the improper behavior of the business operator when soliciting the consumer to enter into such a consumer contract. The business operator's misconducts that may cause a rescission of contract by the consumer primarily including: (1) misrepresentation concerning important matters; (2) providing conclusive evaluations of future prices, amounts of money that a consumer should receive in the future and other uncertain items subject to future change with respect to goods, rights, services and other matters that are to be the subject of a consumer contract; (3) causing the consumer to be distressed, based on which the consumer manifested the intention to offer or accept the relevant consumer contract; and (4) soliciting the consumer for an excessive amount of commodities or services (Article 4).⁴⁰¹

While the business operator's intention of making the consumer be under a mistaken understanding is required in some cases, the burden of proof has been largely mitigated.⁴⁰² For instance, the second clause of this article stipulates that a consumer may rescind the manifestation of his or her intention to offer or accept a consumer contract if a business operator represents only the advantages of an important matter or a matter related thereto but intentionally omits disadvantageous facts when soliciting the consumer to enter a contract. Regarding the "intention" of the business operator, to prove business operator's understanding on the "existence of disadvantageous facts" to

³⁹⁸ *Ibid.*

³⁹⁹ *Ibid.*

⁴⁰⁰ *Supra* note 392, p110-112.

⁴⁰¹ Kazuo Shinomiya (四宮和夫), and Yoshihisa Nomi (能見善久) eds., 民法総則〔第9版〕 [General Provisions of Civil Law (9th edition)] (Koubundou, 2018), 281-285. The fourth situation of "excessive amount" is lately introduced with the 2016 amendment to Consumer Contract Act of Japan.

⁴⁰² *Supra* note 392, p132-134.

the consumer will be sufficient.⁴⁰³ Further proof on the business operator's subjective intention is not necessary, otherwise the purpose to ease consumers' burden will be null.⁴⁰⁴

The Consumer Contract Act also incorporates articles on invalidity of unfair terms. The function of this part is to invalidate the clauses that one-sidedly impair the rights of the consumer in standard consumer contracts.⁴⁰⁵ Article 8 stipulates the nullity of clauses which exempt a business operator from liability for damages; Article 9 is on the nullity of clauses that stipulate the amount of damages to be paid by consumers; Article 10 stipulates the nullity of clauses that impair the interests of consumers unilaterally, which is a general provision for the situation out of what has been provided in Article 8 and Article 9.⁴⁰⁶

Furthermore, the Consumer Contract Act of Japan established consumer group litigation. An amendment to the Consumer Contract Act of 2006 introduced injunction proceedings by qualified consumer organizations on behalf of mass consumers against improper persuasion, which is associated with rescission of contract, and unfair contract terms which are associated with the invalidity of contract clauses under the Consumer Contract Act.⁴⁰⁷ Overall, the Consumer Contract Act of Japan established special rules to retrieve substantive justice in the consumer contract, both on the formation process and the contents of contracts, and to rectify the insufficiency of civil law rules and to empower consumers in transactions.⁴⁰⁸ The Consumer Contract Act was developed based on Japanese civil law, and to a large extent revised the rigidity of the intention theory in the field of consumer transactions.

⁴⁰³ Consumer Problem Countermeasure Committee (消費者問題対策委員会) of Japan Federation of Bar Associations ed., *コメンタール消費者契約法* [第2版増補版] [Commentary on Consumer Contract Act (2nd augmented edition)] (Shojihomu, 2015), 81.

⁴⁰⁴ *Ibid.* In addition, the 2016 amendment to Consumer Contract Act added “gross negligence” to “intention,” which further mitigated the application in the benefits of the consumer.

⁴⁰⁵ *Supra* note 392, p190-191.

⁴⁰⁶ *Ibid.*

⁴⁰⁷ *Supra* note 392, p278-286.

⁴⁰⁸ Takeshi Sakuma (佐久間毅), *民法の基礎 1 総則* [第4版] [Elements of Civil Law I—General Provisions (4th edition)] (Yuhikaku, 2018), 199-202.

4.3.3 Consumer empowerment with damage redress

Consumer damages are often small in volume, wide in scale and difficult to be redressed.⁴⁰⁹ Consumers are in a disadvantageous position not only along with the contract, but also in the process of redress. The disparity in the bargaining power between the consumer and business operator also impedes consumers from recovering their damages.⁴¹⁰ As a result, consumers just let the matter drop in many cases.⁴¹¹ Consumer group litigation was first introduced in 2006 and the standing to demand injunctions was granted to qualified consumer organizations. This right to demand an injunction is an entitlement directly provided by substantive law.⁴¹² Through injunctive consumer group litigation, it became possible to suspend illegal acts by business operators before the damage occurred or before the damage expanded.⁴¹³ Therefore, this proceeding also was expected to rectify consumers' disadvantageous position in the market and protect consumers' collective interests.⁴¹⁴ An amendment in 2008 expanded the application of injunctive proceedings along with the amendment of the *Act against Unjustifiable Premiums and Misleading Representations* and the *Act on Specified Commercial Transactions*.⁴¹⁵ In 2013, the revised the *Food Labelling Act* also

⁴⁰⁹ Yukitaka Sasaki (佐々木幸孝), 第 18 章 消費者紛争解決手続[Chapter 18 Consumer dispute resolution procedures], in Japan Federation of Bar Associations ed., 消費者法講義第 4 版[Lectures on Consumer Law (4th edition)] (Nippon Hyoron Sha, 2013), 471-473.

⁴¹⁰ Consumer Institution Office of Consumer Affairs Agency (消費者庁消費者制度課) ed., 一問一答・消費者裁判手続特例法[Q and A on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers] (Shojihomu, 2014), 1-2.

⁴¹¹ *Ibid.*

⁴¹² Kazuhiko Yamamoto (山本和彦), 消費者と民事手続法 [Consumer and Civil Procedural Law], in Kunihiko Nakata (中田邦博), and Naoko Kano (鹿野菜穂子) eds., 基本講義消費者法〔第 2 版〕[Basic Lecture of Consumer Law (2nd edition)] (Nippon Hyoron Sha, 2016), 298-299.

⁴¹³ Consumer Problem Countermeasure Committee (消費者問題対策委員会) of Japan Federation of Bar Associations ed., コメントール消費者契約法〔第 2 版増補版〕[Commentary on Consumer Contract Act (2nd augmented edition)] (Shojihomu, 2015), 285-286.

⁴¹⁴ Masahiro Saito (斎藤雅弘), 第 2 章消費者契約の過程 1——契約の成立と意思表示の瑕疵 [Chapter 2 Process of Consumer Contract—Formation of Contract and Defective Manifestation of Intention], in Japan Federation of Bar Associations ed., 消費者法講義第 4 版[Lectures on Consumer Law (4th edition)] (Nippon Hyoron Sha, 2013), 56-57.

⁴¹⁵ *Supra* note 392, p288-290.

incorporated the right of qualified consumer organizations to demand injunctions against mislabeling.⁴¹⁶

Notwithstanding, how to redress consumers' damage that already occurred is another task, since injunctive consumer group litigation functions to suspend illegal acts in the future. In 2013, Japan introduced a special civil proceeding for monetary compensation of mass consumers help consumers with difficulties in recovering their loss through civil lawsuits individually.⁴¹⁷ As a result of this action, specialized qualified consumer organizations now had the standing to bring a lawsuit on behalf of mass consumers to redress their damages associated with the contract (Article 1 of the *Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers*).

The unique feature of this proceeding is it takes a “two-stage” procedure.⁴¹⁸ The first stage is “Action for Declaratory Judgment on Common Obligations,” and the second stage is “Simple Determination Proceedings” (Article 2). In the first stage of proceedings, where property damage is incurred by a considerable number of consumers in connection with the consumer contract, specialized qualified consumer organizations can bring an action seeking a declaratory judgment whereby the company has an obligation to pay money to these consumers based on factual and legal causes common to these consumers (Article 3). At the first stage of action, consumers do not have to participate in the proceeding, nor do they need to burden the risk of losing the case.⁴¹⁹ After confirming the obligation of the business operator in the first stage, consumers can choose to join the

⁴¹⁶ *Ibid.*

⁴¹⁷ Consumer Problem Countermeasure Committee (消費者問題対策委員会) of Japan Federation of Bar Associations ed., *コメンタール消費者裁判手続特例法*[Commentary on Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers] (Minjihou Kenkyukai, 2016), 1-2 and 36-37.

⁴¹⁸ Kazuhiko Yamamoto (山本和彦), *消費者と民事手続法*[Consumer and Civil Procedural Law], in Kunihiko Nakata (中田邦博), and Naoko Kano (鹿野菜穂子) eds., *基本講義消費者法〔第2版〕* [Basic Lecture of Consumer Law (2nd edition)] (Nippon Hyoron Sha, 2016), 394-311.

⁴¹⁹ *Ibid.*

proceedings of the second stage (opt-in).⁴²⁰ Since the primary obstacle for consumers is to redress lies in the business operator's demands for monetary compensation, this two-stage proceeding contributes to ease such difficulties at the procedural level.⁴²¹ There is no perfect system, but the model of Japan provides experiences for China to review its own consumer law system and enforcement strategy. As demonstrated in previous chapters, the legal system addressing private rights and interests in China is insufficient.⁴²² In this sense, Japan is a model from China to reconsider how to improve consumer protection with a focus on consumer rights.

4.4 Contrasting China with Japan on consumer protection legislation

Following the introduction of a legal system that supports consumers to enforce their rights in Japan, this section is going to investigate the insufficiency of China's legal system on consumer protection. In a comparative perspective, there are both similarities and differences between Japan and China on consumer protection legislation. On one hand, consumer problems presented similarities in two societies; on the other hand, the difference of legal foundations resulted in the divergence of consumer protection legislation and enforcement (4.4.1). Moreover, China has the problems of fragmentation in legislation and imbalance in enforcement (4.4.2 and 4.4.3). To rectify the current insufficiency, legal systems addressing private rights of consumers are necessary. Overall, China needs to make improvements with regards to consumer protection at the institution level.

4.4.1 Consumer problems as universal phenomena

⁴²⁰ Consumer Institution Office of Consumer Affairs Agency (消費者庁消費者制度課) ed., 一問一答・消費者裁判手続特例法[Q and A on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers] (Shojihoumu, 2014), 4 and 9-10.

⁴²¹ *Ibid*, p4.

⁴²² See *supra* discussion in Section 3.1.3 and 3.4.

China shares similarities in the pattern of consumer problems with Japan in terms of the emergence of consumer damages, characteristics of consumer problems, and the vulnerability of consumers. Such similarities also proved that consumer problems are universal phenomena with industrialization in either developed country or developing country.⁴²³ Above all, the emergence of consumer damages in China proved similar with Japan. After China changed from a planned economy to a market economy, business operators were largely freed from the administrative control of the government.⁴²⁴ The liberalization of the economy generated great economic growth and contributed to increases in employment and greater prosperity. Meanwhile, as market regulations remain under-developed, consumers became the main victims of malpractice of the business operators.⁴²⁵

Furthermore, the evolution of consumer problems proved to have similar patterns in both societies. The mass damage caused by food safety and product quality first raised extensive attention over the seriousness of consumer problems was in common in both Japan and China, which promoted the legislation on industry regulation and consumer protection. Subsequently, with economic growth and technological development, growing new types of consumer damages appeared and the government needed to respond at multiple levels. In addition, as consumers are always under higher risks of being harmed and in a disadvantageous status to bargain, inequalities between businesses and consumers exist regardless of the economic system being capitalistic or socialistic.⁴²⁶ Therefore, whilst researchers in China frequently put socialist characteristics of the

⁴²³ Antônio Herman Benjamin, “Consumer protection in Less-Developed Countries: the Latin American Experience,” in Iain Ramsay (ed.), *Consumer Law in the Global Economy: National and International Dimensions* (Ashgate and Dartmouth, 1997), 49-71.

⁴²⁴ Huixing Liang (梁慧星), 中国产品责任法——兼论假冒伪劣之根源和对策 [Product Liability Law of China: on The Particular Source and Solutions to the Fake and Shoddy Products], *Law Science* 6 (2001): 38-44.

⁴²⁵ *Ibid.*

⁴²⁶ Huixing Liang (梁慧星), 消费者运动与消费者权利 [Consumer Movement and Consumer Rights], in Huixing Liang (梁慧星), 民法学说判例与立法研究 [Studies on Theories, Cases and Legislation of Civil Law] (Falv chubanshe, 2003), 252-263.

economic system as the foremost premise to policy or legal analysis, consumer problems did generate in this socialist market due to the structural vulnerability of consumers as well.⁴²⁷

Notwithstanding, the causal reasons for widespread of consumer problems somehow differ in the two economies. In Japan, studies showed that the centralization of capital and monopoly of market resulted in huge disparities between consumers and businesses.⁴²⁸ In China, the situation was more complex. For centuries China was an agriculture-centered society and transformed into a market economy without enough time for commercial practices to develop. Therefore, unlike in Japan, large corporations were at first the target of criticism for consumer damage; in China it was not only the big industries, but also nearly all the other business operators conducting illegal or fraudulent practices.⁴²⁹

4.4.2 Fragmentation in the legislation on consumer protection in China

Compared with Japan, the public-private division was not distinct in tradition in China.⁴³⁰ Rather, there was a decades-long debate between economic law and civil law under the influence of the department theory of law. Currently, the consumer protection legislation remains fragmented. The following analysis will demonstrate the reasons through a comparative perspective.

First of all, the citizen law foundations were not well established in China when the Consumer Protection Law was enacted. At the time when consumer problems started to occur, Japan had already established a comprehensive legal system, taking the modern citizen law theory as its

⁴²⁷ *Ibid.*

⁴²⁸ Atsushi Omura (大村敦志), 消费者法 [第4版] [Consumer Law (4th edition)] (Yuhikaku, 2011), 4-5.

⁴²⁹ Huixing Liang (梁慧星), 中国产品责任法——兼论假冒伪劣之根源和对策[Product Liability Law of China: on The Particular Source and Solutions to the Fake and Shoddy Products], *Law Science 法学* 6 (2001): 38-44.

⁴³⁰ Huixing Liang (梁慧星), 社会主义市场经济与民事立法[Socialist Market Economy and Civil Legislation], in Huixing Liang (梁慧星), 民法学说判例与立法研究[Studies on Theories, Cases and Legislation of Civil Law] (Falv chubanshe, 2003), 54-55. The objection against public-private division of law was from a perspective of class theory. With disciplinary development in the field of law, “public law” and “private law” started to repeatedly appear in legal rhetoric.

basis.⁴³¹ Japanese theorists took consumer law as an *unclosed* system: an opening system that including various legal approaches to fulfill the functional target of consumer protection.⁴³² Based on the existed legal foundations, the primary task developing consumer law was to incorporate policy objectives such as consumer protection into special legislation, otherwise to modify conventional civil law approaches to respond to newly generated consumer problems.⁴³³

On the contrary, at the turning point of economic and social transformation, there was not much of a foundation for China to build on.⁴³⁴ Rather, the seriousness of social problems urged the government to respond in a powerful way with high efficiency.⁴³⁵ The practical situation partially led to the endorsement of punitive damages. However, it was still highly controversial in other jurisdictions and with little legal debate in China at that time.⁴³⁶ In addition, the intellectual transformation of modifying economic liberalism with more positive state intervention for social welfare was not typical in China. Rather, since China confirmed socialism as the underlying foundation to the superstructure, many theorists argued that the state had the responsibility to intervene into the market to maintain economic order.⁴³⁷ Therefore, in the context of China, consumer protection law, especially the PRC Consumer Protection Law, has long been perceived as economic law by observers.⁴³⁸

⁴³¹ See *supra* analysis in Section 4.2.

⁴³² Zentarō Kitagawa (北川善太郎), 消費者法のシステム [The System of Consumer Law] (Iwanami Shoten, 1980), 3.

⁴³³ See *supra* analysis in Section 4.2. See also Osamu Morita (森田修), 民法典と個別政策立法——<支援された自律>の概念によるエスキース[The Civil Law Code and Special Policy Legislation—the Esquisse from the Concept of Supported Autonomy], in Masahiko Iwamura (岩村正彦) et al. eds., 岩波講座現代の法4 政策と法 [Iwanami Lectures on Contemporary Law 4: Policy and Law] (Iwanami Shoten, 1998), 111-140. See also Osamu Morita (森田修), 契約規範の法学的構造[Legal Structure of Contractual Provisions] (Shojihomu, 2016), 12-38.

⁴³⁴ See *supra* discussion in Section 3.3.

⁴³⁵ Shan He (河山), 论“缺一赔十”的惩罚性赔偿思想[On the Punitive Damage Sprit of “Ten for One Loss”], *Journal of Law Application* 法律适用 8 (1993): 12-13.

⁴³⁶ *Ibid.*

⁴³⁷ See *supra* discussion in Section 3.3.

⁴³⁸ See *supra* discussion in Section 3.1.

Overall, China and Japan differ largely in their perspectives of consumer protection law. Due to the divergence in legal characterization, the development of consumer law as a system rendered different results in the two jurisdictions. Specifically, although China has introduced various legal instruments, those laws remain systematically fragmented. This fragmentation is largely due to the gap between economic law and civil law, which is foremost represented by the fake-hunting lawsuits dilemma.⁴³⁹ Moreover, Japan developed a private law approach centered on consumer contract to protect consumer rights and interests in transactions; in China the focus on how to support consumers to enforce their private rights still remains insufficient.⁴⁴⁰

4.4.3 Experiences from Japan on enhancing the enforcement of consumer rights

In addition to fragmentation at legislation, the enforcement of consumer rights in China proved imbalanced as well.⁴⁴¹ The enforcement of consumer rights in Japan manifests some characteristics that may provide experiences for China. First, one main feature of consumer law in Japan is the focus on “supporting” consumers to enforce their rights. The legal system that supports consumers to enforce their rights is centered on consumer contract. Consumer Contract Act identified the disparity in the quality and quantity of information and negotiating power between consumers and business operators, and established special civil rules in order to rectify the substantive inequalities in the consumer contract.

Second, group litigation led by consumer organizations is one particular improvement. With focus on the difficulties for individual consumers to enforce their rights, consumer organizations have been participating in consumer protection for long time. One recent development is that both injunctive and compensatory consumer collective redress have been established in Japan.

⁴³⁹ See *supra* discussion in Section 3.3.

⁴⁴⁰ See *supra* discussion in Section 3.1.

⁴⁴¹ See *supra* discussion in Section 3.4.

Injunctive proceedings in consumer group litigation focuses on the diffuse interests of mass consumers in the market who are being harmed or under the risk of being harmed by particular business operators; the compensatory proceedings aims to collectively redress the damage of scattered consumers' private interests.⁴⁴²

In addition, consumer law in Japan developed based on the conventional public-private law division, yet at the same time being problem-oriented and interdisciplinary.⁴⁴³ Market regulation is mainly conducted through public law, in particular administrative management and industry-based regulation.⁴⁴⁴ Private law has been the principal approach for the redress of private damages. In particular, the Consumer Contract Act of Japan supports consumers to enforce their rights and seek redress.⁴⁴⁵ Therefore, the enforcement of consumer rights in Japan basically follows a public-private legal approach and therefore has avoided the economic-civil law inconsistencies in China.

In view of the development of the legal system on consumer protection in Japan, China needs to change the perspective from market regulation to rights of enforcement. To support consumers to enforce their rights is the fundamental feature of Japanese approach of consumer protection. Moreover, from the perspective of rights enforcement, group litigation led by consumer organizations encompasses not only injunctive proceedings but also compensatory mechanisms. In addition, the legal mechanism that Japan has developed based on their public-private law division with the focus on a private law approach can also help China to reconsider the problem of tension between economic law and civil law.

⁴⁴² See *supra* explanation in 4.3.3. In addition, since Japan is strict on the public-private law division, punitive damage is not included in compensation. See Masato Dogauchi (道垣内正人), 外国判決のうち、懲罰的損害賠償の支払いを命じた部分の執行（消極）[Enforcement of foreign judgement concerning the part on punitive damage (negative)], 私法判例リマークス[Remarks on Private Law Cases]18 (1999): 156.

⁴⁴³ See *supra* analysis in Section 4.2.

⁴⁴⁴ See *supra* explanation in Section 4.3.

⁴⁴⁵ *Ibid.*

In conclusion, the private-rights focused Japanese example can be a model for China. The enforcement strategy of consumer protection in China has been subjected to a focus on public interests or the collective rights of consumers, which resulted in the problems with application of punitive damages.⁴⁴⁶ Overall, China needs to improve the current legal system and refocus on the private rights of consumers. The key task for China is to develop its legal system to support consumers to enforce their private rights.

4.5 Direction for the enforcement of consumer rights in China

The previous section demonstrated that China needs to improve their current enforcement strategy of consumer protection. The enforcement dilemma of fake-hunting lawsuits shows that the lack of focus on the private rights of consumers has caused problems in enforcement of consumer protection through civil proceedings.⁴⁴⁷ The model of Japan represents how Japan avoids the inconsistency and fragmentation in legislation and enforcement. This section is targeted at elaborating the main issues which are at stake in China and require improvement. First, to locate the emphasis on the private rights of consumers is necessary (4.5.1). Furthermore, Chinese policy makers and observers need to reconsider the purpose and function of punitive damages in consumer law (4.5.2). The last section concludes that legal improvement needs to be made to support consumers to enforce their private rights, at both the interpretative level and the institutional level (4.5.3).

4.5.1 Focusing on the private rights of consumers

Although there is a split understanding of consumer rights between collective rights and private rights, many agree with that consumer rights are human rights. Under the protection of

⁴⁴⁶ See *supra* discussion in Section 3.4.

⁴⁴⁷ See *supra* discussion in Section 2.4.

constitution, consumers enjoy fundamental rights for subsistence and development.⁴⁴⁸ Meanwhile, protection on individual consumers in China has long been insufficient for lacking the focus on private interests.⁴⁴⁹ The problem not only lies in the fake-hunter dilemma, but also in other fields of consumer problems, including consumer credit, consumer service contracts, and financial consumer fraud.⁴⁵⁰ Despite the extensiveness of consumer problems around transactions, attention on the private rights of individual consumers in contract and redress remain insufficient.⁴⁵¹ Therefore, to improve consumer protection requires the focus to be on the private rights of consumers.

In addition, not only the regulators but also the business operators have not put enough attention on private rights of consumers. For decades, the state has located consumers at the position to be protected, while the education to inform consumers of how to protect themselves or how to redress their damages remains largely insufficient.⁴⁵² As a result, business operators have been taking advantage of the incompetence of consumers in redressing their damages. Therefore, China needs to allocate more focuses on the private rights of consumer and rectify the inequalities between business side and consumer side.⁴⁵³

In the development of consumer contract legislation in Japan, civil law rules are insufficient in consideration of the disparity in quality and quantity of information and bargaining power between consumers and business operators.⁴⁵⁴ With a focus on the private rights of consumers, people start to think further about how to support the consumer in redress. In the case of Japan, consumer contract legal system is of great significance to set the foundations for further

⁴⁴⁸ *Ibid.*

⁴⁴⁹ As presented in the *supra* Section 1.3.

⁴⁵⁰ *Ibid.*

⁴⁵¹ *Ibid.*

⁴⁵² Qianqian Cheng (程倩倩), 消费者教育的法律促进机制研究 [A Study on Legal Promotion Mechanism of Consumers' Education], Master degree thesis of Southwest University of Political Science and Law, published online at www.cnki.cn as No.11 (2017), accessed July 19, 2018.

⁴⁵³ Yanfang Zhang (张严方), 消费者保护法研究[A Study on Consumer Protection Law] (Falv chubanshe, 2003), 558-560. Zhang argues that one-sidedly protection on consumer side broke the balance between the parties of contract in an equal civil relation, and in support of party autonomy.

⁴⁵⁴ See *supra* analysis in Section 4.2 and 4.3.

development of consumer protection, and consumer group litigation system plays an important role in empowering consumers to enforce their rights.

In the end, China needs to change the focus from market regulation for public interests to supporting the consumers to enforce their private rights. After all, not only “ideal market” but also “ideal contract” is indispensable for the market economy development in China.⁴⁵⁵ China has long been emphasizing market regulation; nevertheless, the macro-level economy is founded upon the accumulation of transactions at the micro-level. With economic growth and social transformation, consumer transactions have been playing an increasingly significant role in the domestic economy of China. As legal scholars in Japan have noted when the Consumer Contract Act of Japan was enacted, the security and prosperity of national economy can be achieved only if the legal system can protect the private rights and interests of consumers in transaction.⁴⁵⁶

4.5.2 Rethink the purpose and function of punitive damages

The purpose and function of punitive damages also requires reconsideration with regards to consumer protection. Consumer protection does not equal market regulation. To put it in different words, the fake-hunting lawsuits dilemma in fact revealed that most consumers are still not empowered enough to enforce their rights, so fake-hunters became outstanding. Therefore, instead of justifying the behavior of fake-hunters, the fundamental issue at stake is rather on how to protect the rights of the consumers in general.

The current controversy regarding the purpose and function of the punitive damage system is largely due to neglecting the significance of consumers’ private rights.⁴⁵⁷ Punitive damage system

⁴⁵⁵ Geraint Howells, Iain Ramsay and Thomas Wilhelmsson, “Consumer Law in Its International Dimension,” in Geraint Howells, Iain Ramsay and Thomas Wilhelmsson with David Kraft (eds.), *Handbook of Research on International Consumer Law* (Edward Elgar, 2010), 1-17.

⁴⁵⁶ Seiichi Ochiai (落合誠一), 消費者契約法 [Consumer Contract Law] (Yuhikaku, 2001), 50-51.

⁴⁵⁷ See *Supra* discussion in Section 2.4.

established a special liability for business operators under strong regulatory purpose.⁴⁵⁸ Meanwhile, in the field of consumer law, punitive damage has not proved sufficient as a regulatory instrument.⁴⁵⁹ China needs to rethink the function of punitive damage on consumer protection punitive damage and adjust the mixture of regulatory and remedial enforcement in the application of punitive damages.

In the end, to emphasize the significance of private rights of consumers concerning punitive damages will fill both the gap between legislation and enforcement and the gap between lawful rights and actual remedy for consumers. China should protect the consumer against misconducts of business operators and support the consumer to redress damages in care their rights are violated with effective legal systems. Meanwhile, the court should be cautious in ordering punitive damages, and fake-hunters should not be awarded punitive damages since their rights are not violated.⁴⁶⁰ Therefore, to rethink the purpose and function of punitive damage can also be helpful to solve current problems with fake-hunting lawsuits dilemma in China.

4.5.3 Supporting consumers to enforce their private rights with legal improvements

So far, the general analysis has presented the problem with legislation and enforcement on consumer protection in China. To deal with the current problem, China needs to not only allocate more focuses on private rights of the consumers, but also make rectifications in legal institution. Chapter III already demonstrated two approaches to supporting consumers to enforce their rights in response to the current problems.⁴⁶¹ Subsequently, investigation is necessary on how to solve the problems with inconsistency in punitive damage application and imbalance between public rights and private rights in consumer protection.

⁴⁵⁸ See *infra* discussion in Chapter V.

⁴⁵⁹ *Ibid.*

⁴⁶⁰ See *Supra* discussion in Section 2.4.

⁴⁶¹ See *supra* Section 3.4.2 and 3.4.3.

First, to solve the inconsistency in interpretation is of foremost significance considering the unevenness of enforcement in judicial practice. In particular, the debate around the relations between fraudulent acts in consumer law and fraud in civil law has been the most controversial field.⁴⁶² Up to the present, the debate has been interrupted by policy preferences with regards to punitive damage and fake-hunters.⁴⁶³ However, policy preferences should not prevail over legal application, and therefore one important task is to clarify the ambivalence in interpretation.⁴⁶⁴

Second, policy makers and observers need to identify the duality of consumer rights. Consumer law mechanisms have displayed an imbalance in the protection of consumer rights.⁴⁶⁵ Specifically, the current consumer protection mechanism focuses more on the “public interest” aspect of consumer rights, while the private rights of the individual consumer has been largely ignored.⁴⁶⁶ Taking the latest resources of public interest litigation, this study will also analyze the problems with consumer collective redress in China.⁴⁶⁷

In addition, the consumer contract system plays an important role in the enforcement of consumer rights under Japanese consumer law. This study does not attempt to give a very detailed discussion on all the theories and mechanisms regarding the consumer contract. Notwithstanding, future studies may need to develop the related substantive and procedural rules under the scope of a consumer contract system. Overall, the consumer contract is the basis for consumer transactions, and the legal system on consumer contract is crucial to protect consumer rights and interests. China needs to establish a consumer contract legal system for the purpose of enhancing the enforcement of consumer rights.

⁴⁶² See *supra* Section 2.2.

⁴⁶³ See *supra* Section 2.4.3

⁴⁶⁴ See *infra* discussion in Chapter VI.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ See *supra* Section 3.4.3.

⁴⁶⁷ See *infra* discussion in Chapter VII.

4.6 Summary

This chapter demonstrated how China should make legal improvement in order to support consumers to enforce their private rights. At the beginning, Japan was introduced for the purpose of comparative analysis. Japan is in general a civil law jurisdiction, and shares conceptual compatibility with China. Moreover, Japan has been treated as a model in legal studies in many fields in China, in particular, in the field of civil law and civil procedural law (4.1). In this sense, Japan is an appropriate object for comparative study. The following two sections illustrated the general picture of consumer protection development and the legal system centered on consumer transactions in Japan. During the development of consumer protection and consumer law, there was a firm citizen law basis for consumer law to develop from, and structural perspectives to approach the solution to consumer problems (4.2). Moreover, Japan developed consumer contract legal system and group litigation system led by qualified consumer organizations with a focus on the private rights of consumers (4.3).

For the purpose of exploring what is necessary for China to improve, China was contrasted with Japan with regards to consumer protection legislation and enforcement (4.4). While consumer problems in the two societies share similarities (4.4.1), from analysis of the legislation and enforcement structure, it turned out that consumer protection in China contains problems including fragmentation in legislation and imbalance in enforcement (4.4.2 and 4.4.3). In the end, the author suggests the eligible direction for China to enhance consumer protection (4.5). First, to retrieve the focus of private rights of consumers in consumer protection is necessary (4.5.1). Moreover, the emphasis of enforcement strategy should be revised from primarily focusing on market regulation to rights enforcement, in particular with regards to punitive damages (4.5.2). Finally, at institutional level, China needs to develop legal systems to support consumers to enforce their rights at both interpretation and institutional levels (4.5.3).

Part II Proposals for China to Enhance Consumer Protection

Part I has addressed the necessity of changing the focus from market regulation to the enforcement of consumer rights, in order to enhance consumer protection in China. Specifically, the previous chapters also pointed out the significance to focus on the private rights of consumers and make necessary improvement to support consumers to enforce their rights. Following the general analysis in Part I, this part is aimed to elaborate on the main approaches to protecting the private rights of consumers in transactions, and shed light on how to enhance consumer protection in China.

China introduced punitive damages in 1993 with the purpose of consumer protection through market regulation. In practice, however, how effective punitive damages have been in consumer protection remains questionable. Chapter V is going to demonstrate the gap between the regulatory purpose of punitive damage system and its actual effects in judicial enforcement. With the materials of fake-hunting lawsuits, Chapter V will present that punitive damages in China should be applied as civil remedy for consumer redress rather than an instrument for market regulation.

Chapter VI is going to clarify the conditions of punitive damages application under Chinese consumer law at the interpretative level. As Part I already manifested, private rights to claim constitute the necessary legal grounds for civil remedy. The inconsistency in enforcement due to fake-hunting lawsuits dilemma is corresponded with lacking of focus on private rights of consumers. Contrary to the conventional wisdom emphasizing public interests or the collective rights of consumers, this chapter is going to argue that the court should not award punitive damages to fake-hunters.

Whilst Chapter VI is aimed at solving the enforcement inconsistency at the interpretative level, Chapter VII will investigate the problems with applying punitive damages for consumer

protection at the institution level. Recent judicial decisions that approved punitive damage in consumer public interest litigation raised doubts at various aspects, and also reflected insufficiencies of collective redress system in China. To enhance the enforcement of consumers' private rights, the author suggests that China should entitle qualified consumer organizations with the standing to sue for monetary compensation in collective redress proceedings.

Chapter V: Apply Punitive Damages as Civil Remedy in Consumer Lawsuits

This chapter is concerning how to reconsider the purpose and function of the punitive damage system in Chinese consumer protection. The primary purpose for China to incorporate punitive damages into the PRC Consumer Protection Law in 1993 was to regulate the malpractices of business operators.⁴⁶⁸ However, the punitive damage system proved insufficient as a regulatory instrument for consumer protection in China. In this chapter, the present author suggests that China should revise the focus to the private rights of consumers and apply punitive damages for civil remedy.⁴⁶⁹

This chapter consists of four sections. The first section presents the peculiarities with punitive damage in China (5.1). Through further investigation, the following section will display that punitive damage system is insufficient as a regulatory instrument for consumer protection (5.2). Moreover, the ambivalences for the court in ordering punitive damages in fake-hunting lawsuits have caused unevenness and uncertainties (5.3). In the end, instead of insisting on the regulatory dimension of punitive damages, the remedial aspect of punitive damages needs more emphasis (5.4).

5.1 China introduced punitive damages for consumer protection

To begin with, this section is going to introduce some background information about punitive damages. As a matter of fact, punitive damages were incorporated in the PRC Consumer Protection Law of 1993 (effective on January 1, 1994). The main purpose of introducing punitive

⁴⁶⁸ See *intra* explanation in 6.1.3. Shan He (河山), 消费者权益保护法诠释 [Law on Consumer Right and Interests] (Falv chubanshe, 2014), 23-24 and 34-37.

⁴⁶⁹ Currently, the path-dependency of Chinese consumer law development has resulted in a mixture of regulatory enforcement and remedial enforcement of consumer protection. For details, see *supra* discussion in Section 3.4.2.

damages was to meet the urgent social needs of consumer protection.⁴⁷⁰ Since the punitive damage system is originally a common law mechanism, punitive damage system constitutes a unique part in Chinese law.⁴⁷¹ In the following sections, the author will present a short introduction to the development of punitive damages, and the peculiarities of punitive damages in China.

5.1.1 The concept and origin of punitive damages

Above all, punitive damages are additional compensation. Punitive damages, or exemplary damages, mean that the plaintiff can obtain additional compensation in addition to actual losses when the defendant commits harm to the plaintiff in a willful, wanton, reckless, malicious, oppressive, or brutal manner.⁴⁷² Punitive damage system is originated from common law, and in fact, the concept of punitive damages in the United States, Canada, Australia and New Zealand has its roots in 18th century English law.⁴⁷³ Basically, punitive damages are intended to deter the defendant and others from conducting similar practices which formed the basis of the lawsuit.⁴⁷⁴ Previous study pointed out five special functions of punitive damages, including education, retribution, deterrence, compensation, and law enforcement.⁴⁷⁵ Other researcher summarized that punitive damages have at least seven purposes: (1) punishing the defendant; (2) deterring the defendant from repeating the offense; (3) deterring others from committing an offense; (4) preserving the peace; (5)

⁴⁷⁰ Shan He (河山), 论“缺一赔十”的惩罚性赔偿思想 [On the Punitive Damage Sprit of “Ten for One Loss”], *Journal of Law Application* 法律适用 8 (1993): 12-13. Shishi Li (李适时) ed., 中华人民共和国消费者权益保护法释义(最新修正版) [Explanations of the Law on Protection of Consumer Rights and Interests the People’s Republic of China (Latest revised edition)] (Beijing: Falv chubanshe, 2013), 260-262.

⁴⁷¹ Helmut Koziol and Vanessa Wilcox (eds.), *Punitive Damages: Common Law and Civil Law Perspectives*, (Springer-Verlag/ Wien, 2009), 7-8.

⁴⁷² Kenneth R. Redden, *Punitive Damages*, (The Michie Company Law Publishers, 1980), 23. See also, Helmut Koziol and Vanessa Wilcox (eds.), *Punitive Damages: Common Law and Civil Law Perspectives*, (Springer-Verlag/ Wien, 2009), 7 and 155.

⁴⁷³ Helmut Koziol and Vanessa Wilcox (eds.), *Punitive Damages: Common Law and Civil Law Perspectives*, (Springer-Verlag/ Wien, 2009), 7-8.

⁴⁷⁴ *Ibid.* Kenneth R. Redden, *Punitive Damages*, (The Michie Company Law Publishers, 1980), 23-24.

⁴⁷⁵ David G. Owen, “A Punitive Damages Overview: Functions, Problems and Reform,” *Villnova Law Review* 39 (1994): 363-413.

inducing private law enforcement; (6) compensating victims for otherwise uncompensable losses; and (7) paying the plaintiffs attorneys' fees.⁴⁷⁶

Meanwhile, punitive damages have raised controversies and criticisms.⁴⁷⁷ For instance, punitive damages may generate the risk of double punishment for the same crime, unjust enrichment to the plaintiff, uncertainty due to vagueness of standards, or problems with constitutionality.⁴⁷⁸ Punitive damages generally do not apply to breach of contract, but are more applicable to tort.⁴⁷⁹ However, in Canada and the United States, punitive damages have been applied for breach of contract.⁴⁸⁰ Punitive damages have been the subject of constant debate since this concept was first developed.⁴⁸¹ Despite the controversies, the punitive damage system expanded to more and more jurisdictions, and many civil law countries started to be interested in it as well.

5.1.2 Resistance and mitigation in civil law jurisdictions

Unlike the common law system, civil law jurisprudence usually disapproves punitive damages.⁴⁸² One primary reason is that punitive damages have been considered inconsistent with the distinction between public law and private law.⁴⁸³ For instance, German courts generally refuse to enforce the United States style punitive damages for public policy (*ordre public*) matter;⁴⁸⁴ similarly, Japanese courts do not approve of punitive damages, and rejected their enforcement for

⁴⁷⁶ Dorsey D. Jr. Ellis, "Fairness and Efficiency in the Law of Punitive Damages," *Southern California Law Review* 56 (1982): 1-78.

⁴⁷⁷ Kenneth R. Redden, *Punitive Damages*, (The Michie Company Law Publishers, 1980), 33-41. See also, David G. Owen, "A Punitive Damages Overview: Functions, Problems and Reform," *Villnova Law Review* 39 (1994): 363-413. John Calvin Jeffries, Jr, "A Comment on the Constitutionality of Punitive Damages," *Virginia Law Review* 1 (1986): 139-158.

⁴⁷⁸ *Ibid.*

⁴⁷⁹ Laurence P. Simpson, "Punitive Damage for Breach of Contract," *Ohio State Law Journal* 2 (1959): 284-288, accessed July 19, 2018. <http://hdl.handle.net/1811/68162> accessed July 19, 2018. See also, *Robinson Helicopter Company, Inc. v. Dana Corporation* (22 Cal. Rptr. 3d 352), decided on 23 December 2004, available at <https://caselaw.findlaw.com/ca-supreme-court/1175967.html> accessed July 19, 2018.

⁴⁸⁰ *Ibid.* For Canada, see *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595, 2002 SCC 18. Accessed July 19, 2018. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1956/index.do>

⁴⁸¹ Kenneth R. Redden, *Punitive Damages*, (The Michie Company Law Publishers, 1980), 33.

⁴⁸² Helmut Koziol, "Punitive Damages - A European Perspective," *Louisiana Law Review* 68 (2008): 741-764.

⁴⁸³ *Ibid.*

⁴⁸⁴ Helmut Koziol and Vanessa Wilcox (eds.), *Punitive Damages: Common Law and Civil Law Perspectives*, (Springer-Verlag/ Wien, 2009): 75-76.

violating (domestic) public policy.⁴⁸⁵ Recently, the attitudes of the two legal systems towards the punitive damages are moving from the two extremes to the middle.⁴⁸⁶ Courts in the United States have been putting restraints on the application of punitive damages, while in civil law jurisdictions some opinions on the recognition and enforcement of foreign punitive damage judgement have loosened.

The softened attitude from some civil law jurisdictions is not a surprise in two aspects. The first reason is the need for global harmonization with regards to enforcement of foreign judicial decisions.⁴⁸⁷ The second is from the perspective of domestic policy concerns. For instance, scholars in Japan have already suggested introducing multiple-compensation in particular field such as consumer protection.⁴⁸⁸ In the end, while the system of punitive damages has not been widely accepted by civil law jurisdictions up to the present, the punitive damage system still influences many countries. In particular, China is also one of the countries that adopted punitive damages.

5.1.3 Punitive damages for consumer protection in China

The punitive damage system in China has its peculiarities. To illustrate the picture of punitive damage in China, this part will introduce the development of punitive damages in China, including their estimated function and the provisions on punitive damages in current legislation. First of all, punitive damages were introduced to China with the enactment of the PRC Consumer

⁴⁸⁵ Masato Dogauchi (道垣内正人), 外国判決のうち、懲罰的損害賠償の支払いを命じた部分の執行 (消極) [Enforcement of foreign judgement concerning the part on punitive damage (negative)], 私法判例リマークス [Remarks on Private Law Cases] 18 (1999): 156.

⁴⁸⁶ Shishi Li (李适时) ed., 中华人民共和国消费者权益保护法释义 (最新修正版) [Explanations of the Law on Protection of Consumer Rights and Interests the People's Republic of China (Latest revised edition)] (Beijing: Falv chubanshe, 2013), 273.

⁴⁸⁷ Cedric Vanleenhove, "A Normative Framework for the Enforcement of U.S. Punitive Damages in the European Union: Transforming the Traditional '¡No Pasarán!'" (February 10, 2017), *Vermont Law Review* 41 (2016): 347-403, accessed July 19, 2018. <https://ssrn.com/abstract=2915209>.

⁴⁸⁸ Masahiro Saito (斎藤雅弘), 第5章 消費者取引と不法行為 [Chapter 5 Consumer transaction and tort], in in Japan Federation of Bar Associations ed., 消費者法講義 [第4版] [Lectures on Consumer Law (4th edition)] (Nippon Hyoron Sha, 2013), 127-131.

Protection Law in 1993. There was a particular background of consumer damages due to widespread business malpractices behind the enactment of the PRC Consumer Protection Law.⁴⁸⁹ The primary purpose of introducing punitive damages in China was consumer protection.⁴⁹⁰ Moreover, incorporating punitive damages in consumer law was inspired by one conventional idea of “ten times punishment for one fake.”⁴⁹¹ This folk saying was a commercial slogan which means that the seller promises to compensate ten times the price if he deceives the buyer.⁴⁹² Therefore, the introduction of punitive damages in China was not merely a legal transplantation.⁴⁹³

Meanwhile, there were opponent opinions against introducing punitive damages in China. For instance, Yan Xiao argued that punitive damages are not compatible to the legal system of China, and would infringe on the enforcement power of administrative organs and judicial institutions.⁴⁹⁴ Differently, Fuhai Jian considered that since punitive damages cannot fit with either civil law or criminal law, they should be incorporated as special system under economic law.⁴⁹⁵ Despite that initial justification on the legitimacy of punitive damages in China was not perfectly sufficient, punitive damages have been generally considered as a *status quo* after the PRC Consumer Protection Law became effective, and its necessity and significance for consumer protection became

⁴⁸⁹ See *supra* discussion in Section 2.1 and Section 3.3.

⁴⁹⁰ Shan He (河山), “On the Punitive Damage Sprit of *Ten for One Loss*”[论“缺一赔十”的惩罚性赔偿思想], *National Judges College Law Journal* 8 (1993): 12-13. *Law on Consumer Right and Interests* [消费者权益保护法诠释], (Law Press China, 2014), 23-24 and 34-37.

⁴⁹¹ [假一罚十][假一赔十], *ibid.*

⁴⁹² Shan He (河山), 论“缺一赔十”的惩罚性赔偿思想[On the Punitive Damage Sprit of “Ten for One Loss”], *Journal of Law Application* 法律适用 8 (1993): 12-13. Shan He (河山), 消费者权益保护法诠释 [Law on Consumer Right and Interests] (Falv chubanshe, 2014), 23-24 and 34-37.

⁴⁹³ Weiguo Wang (王卫国), 中国消费者保护法上的欺诈行为与惩罚性赔偿 [Fraudulent Practice and Punitive Damage in Consumer Protection Law of China], *Law Science* 法学 3 (1998): 22-28.

⁴⁹⁴ Yan Xiao (萧燕), 惩罚性赔偿——消费者权益保护中的一个误区 [Punitive Damage—A Misunderstanding in Consumer Protection], *Governance Studies* 治理研究 1 (1997): 64-67.

⁴⁹⁵ Fuhai Jin (金福海), 论惩罚性赔偿责任的性质 [On the Nature of Punitive Damage Liability], *Legal Forum* 法学论坛 3 (2004): 59-63.

increasingly accepted afterwards.⁴⁹⁶ Currently, the prevailing theory perceives punitive damage liability as a lawful liability, and the consumer is entitled the right to claim for punitive damages by the law.⁴⁹⁷ In general, many agree with that the application of punitive damage is consistent with civil law.⁴⁹⁸

Regarding the function of punitive damages, scholars have different opinions, yet they basically follow conventional ideas, including compensation, deterrence, punishment, and encouragement.⁴⁹⁹ To summarize, the functions of punitive damages are from the side of the infringed party and the other side of the infringer.⁵⁰⁰ Therefore, in Chinese consumer law, the functions of punitive damages are mainly at two aspects: to compensate the infringed party (the consumer) and to punish or deter the infringer (the business operator). In addition, punitive damages can function as a motivation for private enforcement of economic regulation.⁵⁰¹ For instance, Shan He argued that punitive damages can encourage each consumer to become a “fighter” against fakes, which is the primary function of punitive damage.⁵⁰² If consumers can voluntarily participate in the monitoring and regulation over the market, the government can save financial resource and then consumers deserve the multiple-compensation as a reward.⁵⁰³ At the legislative level, China has

⁴⁹⁶ Lixin Yang (杨立新), 商品欺诈惩罚性赔偿责任适用范围之我见 [Opinion on the Application of Punitive Damage for Commodity Fraud], *Jiangnan Tribune* 江汉论坛 1 (2017): 114-120. See also *infra* discussion in Section 6.2.

⁴⁹⁷ *Ibid.*

⁴⁹⁸ *Ibid.*

⁴⁹⁹ Yide Ma (马一德), 消费者权益保护专论 [Monograph on Protection of Consumers' Rights and Interests] (Beijing: Falv chubanshe, 2016), 202-205.

⁵⁰⁰ Nianbing Chen (陈年冰), 我国惩罚性赔偿制度研究 [Research of the Punitive Damages System in China], Doctoral dissertation of Shandong University, online published in 2014, accessed July 19, 2018. <http://gb.oversea.cnki.net>.

⁵⁰¹ Lixin Yang (杨立新), “王海现象”的民法思考——论消费者权益保护中的惩罚性赔偿金 [Civil Ponderation over Wang-hai Phenomenon], *Hebei Law Science* 河北法学 5 (1997): 1-9. 消费者合同三题: 知假买假, 惩罚性赔偿与合同终止 [Three Questions on Consumer Contract: Intentional Purchase of Fakes, Punitive Damage and Termination of Contracts], *Journal of Law Application* 法律适用 10 (2015): 87-92.

⁵⁰² Shan He (河山), 论“缺一赔十”的惩罚性赔偿思想 [On the Punitive Damage Sprit of “Ten for One Loss”], *Journal of Law Application* 法律适用 8 (1993): 12-13.

⁵⁰³ *Ibid.* See also, Shan He (河山), 消费者权益保护法诠释 [Law on Consumer Right and Interests] (Falv chubanshe, 2014), 23-24 and 34-37.

established the system of punitive damages in different laws, including the PRC Consumer Protection Law, the PRC Food Safety Law, and the PRC Tort Liability Law, as Figure 5.1.3 presents below.⁵⁰⁴

Punitive damage in Chinese law concerning consumer protection			
	Punitive damage/ Additional compensation	misconducts	Basis
Article 49 of the PRC Law on Protection of Consumer Rights and Interests (1993)	One time the purchase price of product or service	Fraudulent acts	<u>Contract/ tort</u> (unclear)
Article 96 of the PRC Law on Food Safety (2009)	Ten times of the price	Production or intentionally selling foods that do not meet food safety standards	unclear
Article 47 of the PRC Law on Tort Liability (2010)	<i>No criteria for calculation</i>	Defect known already	Tort
Article 55 of the PRC Law on Protection of Consumer Rights and Interests (2013)	Three times of the price	Fraudulent acts	Contract (unclear)
	No more than two times of the damage	Defect known already	Tort
Article 148 of the PRC Law on Food Safety (2015)	Ten times of the price or three times of the damage	With exception of flaws in labels or instructions that do not endanger consumer safety or mislead consumers	Tort

Figure 5.1.3. Punitive damage in Chinese law concerning consumer protection

(Source: Wenjia Sun)

In summary, the development of punitive damages in China has its own peculiarities. Punitive damage system is controversial in both common law and civil law jurisdictions. Meanwhile, China did not borrow this system from common law directly. Instead, there was an apparent policy objective behind the introduction of punitive damages, in particular, to punish the malpractice of

⁵⁰⁴ Regarding the interpretation issues, see *infra* discussion in Chapter VI. In addition, punitive damage rules have also been introduced in The PRC Travel Law (2013) and the PRC Trademark Law (2013 amendment).

business operators for the purpose of consumer protection. However, the questions raised by the fake-hunting lawsuits dilemma require reconsideration of conventional wisdom on the function of punitive damages.⁵⁰⁵ To put it concretely, should fake-hunting lawsuits continue to be supported, and is punitive damage really effective in market regulation are key questions.

5.2 Insufficiency of punitive damage as regulatory instrument

This section is going to show the gaps between the policy purpose of punitive damage and its real performance in terms of acting agents (5.2.1), deterrent function (5.2.2), and educational effects (5.2.3). It is going to be demonstrated that the current punitive damage rules in consumer law is insufficient for market regulation and in particular combating fakes.

5.2.1 Fake-hunters do not always combat fakes

First of all, the acting agents, in most cases the fake-hunters, have not behaved as the policy maker expected. As demonstrated in Chapter II, punitive damages have been frequently used for profit chasing rather than damage redressing, yet this phenomenon is not merely a coincidence. Rather, studies have shown that such lawsuits were following a similar style: the fake-hunters will purchase products with problems in large amount and immediately claim against supermarkets. For instance, a sample investigation displays that one restaurant company and seventeen supermarkets have confronted with fake-hunting claims for 6,022 times in total during two years from 2014 to 2016.⁵⁰⁶

⁵⁰⁵ For more details of fake-hunter dilemma, see *supra* discussion in Section 2.3.

⁵⁰⁶ See Wei Wang (王微) and Jia Li (李佳), 职业打假 拐点或将到来? [Will Fake-Hunting Come to A Turning Point?], first published on *Beijing Youth Daily* 北京青年报 on 17 October 2016. Forwarded from Baoyu Liu (刘保玉), and Zhenhua Wei (魏振华), “知假买假”的理论阐释与法律适用[Buying Fake Intentionally: Theoretical Explanation and Legal Application], *Legal Forum* 法学论坛 3 (2017): 62-73.

As a matter of fact, fake-hunters seldom go to small shops in rural places where counterfeits are most frequently merchandized.⁵⁰⁷ In the rural areas of China, the market supervision and regulation are much weaker than that in the cities; moreover, people living in such areas are usually much less equipped with the necessary knowledge and information to protect their rights and interests as consumers.⁵⁰⁸ Consequently, counterfeit consumer products or fakes are usually rife in such places. However, the fake-hunters more often target large companies and chain supermarkets for the profit associated with punitive damages.⁵⁰⁹ Therefore, fake-hunters are not always hunting for fakes. Even though fake-hunters' punitive damage lawsuits may somehow contribute to market purification, their performance in combating fakes is very limited. In conclusion, the current performance of fake-hunting lawsuits has largely deviated from the original purpose of combating fakes.

5.2.2 Low performance in terms of deterrence

Since punitive damages were introduced for the purpose of regulating the malpractices of business operators, the main function of this system was supposed to strengthen the compliance of business operators through deterrence.⁵¹⁰ However, the punitive damage system under current law does not fulfill its designed function of deterrence.

⁵⁰⁷ See *supra* note 158.

⁵⁰⁸ Yu Ma (马瑜), Haixia Li (李海霞), and Shaoying Yang (杨少英), 假冒伪劣产品充斥农村市场的法律经济学分析——基于《云南省农民消费者权益的问卷调查》的分析 [Legal-Economic Analysis on the Overwhelming of Counterfeits in Rural Markets—Based on Questionnaire Research of Consumer Rights in Yunnan Province], *Business Culture* 商业文化 1 (2012): 120-121.

⁵⁰⁹ Xiafang Zhang (张侠芳), “打假”乱象, “逼疯”商超[Fake-hunting Drives Supermarkets Mad], *Economic & Trade Update* 时代经贸 17 (2016): 16-19.

⁵¹⁰ Dongming Jia (贾东明) ed., 中华人民共和国消费者权益保护法解读 [Explanations on the Law on the Protection of Consumer Rights and Interests of People's Republic of China] (Zhongguo fazhi chubanshe, 2013), 266-285.

Some observers argue that the amount of punitive damage is too low to deter business operators.⁵¹¹ In current legislation, the calculation of punitive damage is fixed by the law, rather than according to the seriousness of the company's malpractice or its financial condition.⁵¹² Since the calculation is based on the purchase price, except of high-value commodities such as cars or personal computers, the total compensation for daily-use items is not much.⁵¹³ For instance, if a consumer finds one package of snacks he bought has passed the expiration date, he may claim for ten-time punitive damages in accordance with the PRC Food Safety Law, and if the total amount is less than 1000 *yuan*, it will be 1000 *yuan*.⁵¹⁴ For other commodities or services not in the food area, the punitive damage can be 500 *yuan* if the total amount is too small.⁵¹⁵ As a matter of fact, 500-1000 *yuan* is not a big amount to punish or deter the business operators.⁵¹⁶

Meanwhile, the reason for the weak deterrence of punitive damages is not merely the amount. Study shows that the malpractices of business operators are not frequently made public.⁵¹⁷ As mentioned in the section above, one principal motivation of fake-hunters is the financial rewards from punitive damages. In many cases, the business operator, for example, a supermarket, will settle the claim with a certain amount of money, in order to avoid going to the court or being reported on

⁵¹¹ Xiang Li (李响), 我国食品安全法“十倍赔偿”规定之批判与完善 [Criticism and Improvement on the Ten-Time Compensation in the PRC Food Safety Law], *Studies in Law and Business* 法商研究 6 (2009): 42-49. Huiqiang Xing (邢会强), 美国惩罚性赔偿制度对完善我国市场监管法的借鉴 [Experiences from Punitive Damage System of the United States on Improving Market Laws in China], *Law Science* 法学 10 (2013): 44-50. Hongmei Zhao (赵红梅), 美、德新型惩罚性赔偿对我国《消法》修订的启示 [Reference of Punitive Damages in US and Germany to the Revision of Concerning Clauses in the Consumers Protection Law of PRC], *Science of Law (Journal of Northwest University of Political Science and Law)* 法律科学(西北政法大学学报) 5 (2011): 183-190.

⁵¹² *Ibid.*

⁵¹³ Baoyu Liu (刘保玉), and Zhenhua Wei (魏振华), “知假买假”的理论阐释与法律适用[Buying Fake Intentionally: Theoretical Explanation and Legal Application], *Legal Forum* 法学论坛 3 (2017): 62-73.

⁵¹⁴ Article 148 of the PRC Food Safety Law.

⁵¹⁵ Article 500 of the PRC Consumer Protection Law.

⁵¹⁶ *Supra* note 511.

⁵¹⁷ Xiafang Zhang (张侠芳), “打假”乱象, “逼疯”商超[Fake-hunting Drives Supermarkets Mad], *Economic & Trade Update* 时代经贸 17 (2016): 16-19.

by the local media.⁵¹⁸ As a result, the malpractice of the business operator may not be effectively deterred after the settlement with the fake-hunter, nor may other consumers know about what is happening.⁵¹⁹ Thereto, while deterrence can be one important function of punitive damages, the function depends on how punitive damages work in context. In the Chinese context, punitive damages have the characteristics of being low in amount and vague in applicable condition,⁵²⁰ with the fact that many disputes were settled down privately without informing the public. As a result, despite the rapid increase of fake-hunting lawsuits motivated by the punitive damages, the deterrence effects are not obvious.⁵²¹

5.2.3 The paradox of supporting buying fakes for profit

There is an implicit paradox with regards to the educational effects of punitive damages, yet few studies have mentioned it. In fact, to encourage people to buy counterfeiting products or fakes for multiple-compensation is profoundly inconsistent with the idea of intellectual property protection.⁵²² First, if the law allows buying fakes for profit, the purpose of combating fakes becomes blurred, and this will also be inconsistent with the principle of good faith in transaction.⁵²³

One fundamental purpose in cracking down on fakes is to make people understand that to produce or

⁵¹⁸ *Ibid.*

⁵¹⁹ As the Supreme People's Court sharply pointed out, some fake-hunters were targeting the same business operator repeatedly, which partially proved that the business operator's illegal practices were not solved. While the fake-hunter may benefit, some consumers may suffer from the continuation of such situation.

⁵²⁰ Xiang Li (李响), 我国食品安全法“十倍赔偿”规定之批判与完善 [Criticism and Improvement on the Ten-Time Compensation in the PRC Food Safety Law], *Studies in Law and Business* 法商研究 6 (2009): 42-49.

⁵²¹ *Ibid.*

⁵²² As the initial target of punitive damages under consumer law was to combat fakes, it is necessary to consider more carefully about the legal relations around “fakes.” Since “fakes” is a crossing area of consumer protection and intellectual protection, either side should be taken into consideration. Due to the limitation of scope, this study will not go further deep to elaborate issues under the topic of “counterfeit governance.” However, the purpose to address the issue of intellectual property here is to attract attention on how to consider and approach the counterfeit problems in a more comprehensive and crossing-field manner.

⁵²³ See *supra* discussion in Section 2.4

trade counterfeits is *illegal*.⁵²⁴ However, if people can legally buy fakes and easily make a fortune from them, who would really wish fakes to disappear? Therefore, while punitive damages can be financial initiative for private enforcement of the law, the purpose should not be confused with means.

Furthermore, the approach of intellectual property protection deserves more attention in combating fakes. While consumers are the final victims of fakes, the rights-holders are the direct victims of counterfeiting in intellectual property cases.⁵²⁵ For instance, when someone produces, traffics, and trades counterfeiting goods and violates the rights of trademark holders, the right holder has the standing to sue against the counterfeiting operator and claim for civil compensation in terms of tort.⁵²⁶ To improve counterfeit governance, China needs to make more efforts to develop the system on intellectual property protection.⁵²⁷ Regulators and observers should notice the gaps between the purpose of punitive damages under consumer law and its real performance.

5.3 Unevenness and uncertainty in the application of punitive damages

Although punitive damage system is insufficient as a tool for market regulation, advocates of fake-hunting lawsuits may still insist that for the purpose of market purification, the court should respond in a more supportive manner to fake-hunters. Since the application of punitive damages requires going through the proceeding of civil lawsuits, the role of the court needs to be taken into

⁵²⁴ Yingfeng Li (李迎丰), 打击假冒伪劣与诚信建设[Anti-Counterfeiting and Good Faith Construction], *China-Today Forum* 今日中国论坛 6 (2012): 16-19.

⁵²⁵ Ying Zhan (詹映) and Hong Zhang (张弘), 我国知识产权侵权司法判例实证研究——以维权成本和侵权代价为中心 [An Empirical Research on IPR Infringement Judicatory Cases in China by Focusing on the Cost of IPR Protection and IPR Infringement], *Science Research Management* 科研管理 7 (2015): 145-153. Guangjun Zhao (赵广俊), Zhong Lin (林忠) and Dongchuan Zhu (朱冬传), 国外打假: 法律与消费习惯的博弈 [Overseas Anti-Counterfeiting A Game between the Law and Consumption Behavior], *China Anti-Counterfeiting Report* 中国防伪报道 9 (2014): 100-105.

⁵²⁶ *Ibid.*

⁵²⁷ *Ibid.*

consideration as well. As a matter of fact, the special plaintiff of the fake-hunter can cause problems to the court, and thus results in unevenness and uncertainty in enforcement of the law.

In this section, the present author attempts raise more attention towards the question that to what extent can the court possibly fulfill the expectations of fake-hunter advocates. At first, this section investigates the problems with deciding consumer identities by the court in fake-hunting lawsuits (5.3.1) and the controversy of perceiving fake-hunters as vulnerable (5.3.2). The last section points out the necessity to rethink about the issue of court discretion, and suggests to changing the focus of punitive damages from market regulation to civil remedy (5.3.3).

5.3.1 Difficulty in deciding upon consumer identity

The problem with the application of punitive damages in fake-hunting lawsuits is represented by the difficulties for the court to decide whether the fake-hunter is a consumer or not. Consumer rights belong to the consumers, that is, consumer rights are corresponded with the subjective identity of consumer.⁵²⁸ Present consumer law theory emphasizes that the identity of being a consumer constitutes both the necessary and sufficient conditions for enjoying these rights.⁵²⁹ To be more specific, only if someone purchases, uses commodities or receive services as a consumer, rather than for business purposes, the court may support his or her claims based on rights confirmed by consumer law. On the other hand, when consumers purchase products or receive services, the law will protect their rights. As long as someone is behaving as a consumer, he or she enjoys the lawful rights without exception.⁵³⁰ Regarding the definition of the consumer, the present law stresses the purpose should be “for daily consumption.” The Article 2 of the PRC Consumer Protection Law stipulates that “consumers need to purchase, use commodities or receive services for

⁵²⁸ Mingyue Xu (许明月), and Changqi Li (李昌麒), 消费者保护法(第四版) [Consumer Protection Law (4th edition)] (Falv chubanshe, 2014), 70.

⁵²⁹ *Ibid.*

⁵³⁰ *Ibid.*

their daily consumption. Their rights and interests are protected by this Law.” Accordingly, “for daily consumption” constitutes both the necessary and sufficient conditions for being protected under consumer protection law.⁵³¹

Meanwhile, since the law does not provide a clear scope of “daily consumption,” the court has been confronted with difficulties in deciding whether to order punitive damages in fake-hunting lawsuits. Scholarly opinions vary on defining “daily consumption” by (1) subjective purpose; (2) objective acts; (3) function of the purchased products or received service; (4) not for commercial purposes.⁵³² Nevertheless, despite the ambiguity of the consumer definition, the 2013 amendment of the PRC Consumer Protection Law maintained the previous definition and left the interpretation to court discretion for the sake of flexibility.⁵³³ Consequently, up to the present there remain no clear criteria for the court to judge the plaintiff, being a fake-hunter, as the consumer or not.

5.3.2 Controversy of perceiving fake-hunters as vulnerable

Another question troubling the judges is whether fake-hunters deserve protection under consumer law. Consumer rights are lawful rights granted to empower the consumers considering their disadvantageous position and vulnerability.⁵³⁴ This characteristic is connected with consumer identity. Since consumers are generally perceived as vulnerable and disadvantageous compared with

⁵³¹ *Ibid.*

⁵³² Yide Ma (马一德), 消费者权益保护专论 [Monograph on Protection of Consumers' Rights and Interests] (Beijing: Falv chubanshe, 2016), 40-45.

⁵³³ Shishi Li (李适时) ed., 中华人民共和国消费者权益保护法释义(最新修正版) [Explanations of the Law on Protection of Consumer Rights and Interests the People's Republic of China (Latest revised edition)] (Beijing: Falv chubanshe, 2013), p6-7.

⁵³⁴ Zhang (张守文), 经济法学(第三版) [Economic Law Studies (3rd edition)] (China Renmin University Press, 2016), 366-372. See also, Mingyue Xu (许明月), and Changqi Li (李昌麒) eds., 消费者保护法(第四版) [Consumer Protection Law (4th edition)] (Falv chubanshe, 2014), 70. Xingyun Wang (王兴运), 消费者权益保护法[The Law on Protection of Consumer Rights and Interests] (Beijing daxue chubanshe, 2015), 55-59. Huixing Liang (梁慧星), 消费者运动和消费者权利 [Consumer Movements and consumer rights], in Huixing Liang (梁慧星), 中国民法经济法诸问题 [Issues on Chinese Civil Law and Economic Law] (Zhongguo fazhi chubanshe, 1999), 252-263.

the business side, they need protection in order to adjust the inequality.⁵³⁵ Moreover, consumer rights are lawful rights, rather than confirmed by agreement in the contract, and therefore the operator's deprivation of a consumer's rights by any act will be invalid.⁵³⁶ For instance, even if the business operator attempts to eliminate the consumer's lawful rights through standard terms in their contract, the business operator cannot escape from his or her own legal liabilities that he or she is supposed to take for consumers.

Subsequently, if fake-hunters can be identified as consumers, whether the court should approve their claims in accordance to the PRC Consumer Protection Law will be a question. In most cases fake-hunters file punitive damage lawsuits at a high frequency, and are in fact well knowledgeable about their target commodities. Therefore, to take fake-hunters as vulnerable or in a disadvantageous position becomes highly controversial.⁵³⁷ Currently, there is no direct evidence that proved the subjective preference of the judges might affect the judicial decision in fake-hunting lawsuits; however, the subjective preferences of the judges to a large extent may add to the uncertainty and unevenness of enforcement.⁵³⁸

5.3.3 Rethinking the problem with court discretion

⁵³⁵ Mingyue Xu (许明月), and Changqi Li (李昌麒) eds., 消费者保护法(第四版) [Consumer Protection Law (4th edition)] (Falv chubanshe, 2014), 70. See also Huixing Liang (梁慧星), 消费者运动和消费者权利 [Consumer Movements and consumer rights], in Huixing Liang (梁慧星), 中国民法经济法诸问题 [Issues on Chinese Civil Law and Economic Law] (Zhongguo fazhi chubanshe, 1999), 252-263. Xingyun Wang (王兴运), 消费者权益保护法[The Law on Protection of Consumer Rights and Interests] (Beijing daxue chubanshe, 2015), 55-59.

⁵³⁶ *Ibid.*

⁵³⁷ The divergence among judges is never a infrequent phenomenon; rather, it widely occurs. For instance, see Heng Deng (邓恒), 探求惩罚性赔偿的实质意义 审视职业打假人的法律地位 [On Punitive Damage and Professional Fake-Hunters], *People's Court Daily* 人民法院报, published on 12 April 2017, accessed July 19, 2018. <http://gb.oversea.cnki.net>.

⁵³⁸ *Ibid.*

Considering the problems fake-hunters have brought to the court, to what extent should the judges support fake-hunting lawsuits for the good sake of “economic order”?⁵³⁹ In the context of China, the judicial court is called “*the people’s court*,” being an indispensable part of state protection on consumer rights and interests.⁵⁴⁰ To be more specific, the court should take actions for the convenience of consumers in civil proceedings. When a consumer brings a lawsuit before the court in accordance with the PRC Civil Procedure Law, the court *should* accept the case and proceed with quick response.⁵⁴¹

As a matter of fact, the court in China has been under the expectation of more than just deciding the case. Rather, the court is supposed to perform other social functions such as maintaining the harmony and serve the people as well.⁵⁴² Against this background, some observers have argued that to support the policy of consumer protection, the court should approve fake-hunters’ claims with discretion.⁵⁴³ However, without clear criteria for interpretation, to rely on the discretion of the judges will further add to the divergence among court decisions.⁵⁴⁴ Considering the practical difficulties, to locate too much emphasis on the court to realize the policy objective of market regulation, in particular through supporting fake-hunters, is highly demanding for the people’s court. Nevertheless, policy makers and commentators often neglected the difficulties of the court in making judicial decisions.⁵⁴⁵

⁵³⁹ For the arguments of the advocates of fake-hunters, see *supra* Section 2.4.1.

⁵⁴⁰ Shishi Li (李适时) ed., 中华人民共和国消费者权益保护法释义(最新修正版) [Explanations of the Law on Protection of Consumer Rights and Interests the People’s Republic of China (Latest revised edition)] (Beijing: Falv chubanshe, 2013), p158-161.

⁵⁴¹ Article 35 of the PRC Consumer Protection Law.

⁵⁴² Yueru Fan (范跃如), 司法改革背景下四级法院职能定位研究 [Study on the Function of Four Levels of Courts against the Background of Judicial Reform], *Shandong Judges Training Institute Journal* 山东法官培训学院学报 6 (2017): 42-51.

⁵⁴³ Lixin Yang (杨立新), 商品欺诈惩罚性赔偿责任适用范围之我见 [Opinion on the Application of Punitive Damage for Commodity Fraud], *Jiangnan Tribune* 江汉论坛 1 (2017): 114-120. Weihai Chu (褚玮海), 论我国《消法》惩罚性赔偿的制度缺陷:确定性--从王海知假买假案说起 [On the Institutional Problem of Uncertainty of Punitive Damage in Our Consumer Law], *Modern Business* 现代商业 30 (2007): 280-281.

⁵⁴⁴ See *supra* discussion in Section 2.2.

⁵⁴⁵ See *supra* discussion in Section 2.4.

Advocates believe it more economically efficient and effective to have fake-hunters as private regulators. However, this opinion is highly questionable. With punitive damages as financial motivation, consumers can be the fighters against the malpractice of business operators.⁵⁴⁶ Although the financial motivation of punitive damages may contribute to consumer empowerment in a positive way,⁵⁴⁷ it does not mean that the court should always support fake-hunters' claims. Anyway, efficiency is not the only consideration of punitive damage, and an expansive attitude towards punitive damage can be misleading.⁵⁴⁸ Moreover, advocates consider that to support fake-hunters will not bring harm but rather benefit the market; rather, to restrict them will only leave the benefits to business operators.⁵⁴⁹ While seemingly reasonable, this argument in fact has implicitly changed the focus of debate to the dimension of group interests. Whether fake-hunters can be supported or not should be judged from whether their claims for punitive damages can be approved according to the law.⁵⁵⁰ After all, it is not always zero-damage if the moral risk of fake-hunting is not put under control.⁵⁵¹

In conclusion, the present author takes a different perspective from the viewpoint of the fake-hunter advocates. The court should not easily adjust their decisions to the regulatory purpose,

⁵⁴⁶ Lixin Yang (杨立新), “王海现象”的民法思考—论消费者权益保护中的惩罚性赔偿金 [Civil Ponderation over Wanghai Phenomenon—on the Punitive Damage in Consumer Protection], *Hebei Law Science* 河北法学 5 (1997): 1-9. Shan He (河山), 消费者权益保护法诠释 [Law on Consumer Right and Interests] (Falv chubanshe, 2014), 34-37.

⁵⁴⁷ Nianbing Chen (陈年冰), 我国惩罚性赔偿制度研究 [Research of the Punitive Damages System in China], Doctoral dissertation of Shandong University, online published in 2014, accessed July 19, 2018. <http://gb.oversea.cnki.net>.

⁵⁴⁸ Dorsey D. Jr. Ellis, “Fairness and Efficiency in the Law of Punitive Damages,” *Southern California Law Review* 56 (1982): 1-78.

⁵⁴⁹ Shan He (河山), 消费者权益保护法诠释 [Law on Consumer Right and Interests] (Falv chubanshe, 2014), 23-24 and 34-37. Lixin Yang (杨立新), 我国消费者保护惩罚性赔偿的新发展 [The New Development of Punitive Damages for Consumer Protection in China], *The Jurist* 法学家 2 (2014): 78-90.

⁵⁵⁰ For details see *infra* discussion in Section 6.4.

⁵⁵¹ It is reported that some fake-hunters replaced the foods on the supermarket shelf with the expired foods prepared by them. See Zhaokui Yang (杨召奎), 职业打假偏航为牟利变“假打” 法律收紧迎拐点 [Professional Fake-Hunting Turned into Fake, Restrained Laws Lead to Turning Point], released on 19 November 2016 at Xinhua net, first published on *Worker Daily*, accessed July 19, 2018. http://www.xinhuanet.com/legal/2016-11/19/c_1119945080.htm.

either should they frequently expand the interpretation of the law to adapt to policy preference.⁵⁵² Furthermore, to support fake-hunting lawsuits does not always bring benefits. In consideration of problems that fake-hunting lawsuits have brought to the court and the insufficiency of punitive damage in combating fakes, the present author suggests that China to revise the focus of punitive damages on market regulation. In addition, regarding whether the court should support the claims of fake-hunters, according to previous discussion, clarification at the interpretative level will be necessary.⁵⁵³

5.4 Punitive damages in consumer law should focus on private rights of consumers

China introduced the punitive damage system for a regulatory purpose, and advocates of fake-hunting also showed more concerns on market regulation.⁵⁵⁴ Based on the analysis above, the punitive damage system under consumer law is not as sufficient as estimated to be a regulatory instrument. Thereto, the purpose of punitive damages should be revised to enhance consumer protection, and a focus on private rights of consumers is necessary.

5.4.1 Punitive damages should be recognized as civil remedy

The previous sections in this chapter manifested the insufficiency of punitive damages in market regulation with regards to consumer protection. The insufficiency can be observed from the problems that fake-hunting lawsuits brought to the court, and the gaps between the estimated function and the real performance of punitive damages.⁵⁵⁵ On the other hand, it should not be denied

⁵⁵² For similar position, see Shiyuan Han (韩世远), 消费者合同三题: 知假买假, 惩罚性赔偿与合同终止 [Three Questions on Consumer Contract: Intentional Purchase of Fakes, Punitive Damage and Termination of Contracts], *Journal of Law Application* 法律适用 10 (2015): 87-92.

⁵⁵³ See *infra* discussion in Chapter VI.

⁵⁵⁴ See *supra* discussion in Section 2.4 and 5.1.3.

⁵⁵⁵ See *supra* discussion in Section 5.2 and 5.3.

that punitive damages do provide empowerment for consumers. The point is to clarify the purpose of applying punitive damages.

With focus on the private rights of the consumer, punitive damages can be useful as a compensatory remedy to cover consumers' litigation expense and time cost in redress. Previous research has already pointed out that the function of motivation of punitive damages should be further promoted for consumer protection.⁵⁵⁶ Specifically, considering the disparities in power and information between the consumer and business operator in transaction, it is usually time-consuming and costly for consumers to redress their damage.⁵⁵⁷ Therefore, compared with being private enforcement for market regulation, punitive damage under Chinese consumer law is more suitable to encourage consumers to redress damages by easing their reluctance and difficulties in litigation. The compensatory and motivating functions of punitive damages are more relevant in the field of consumer protection and also in line with the actual situation of China.

5.4.2 Large punitive damage awards are not feasible for Chinese courts

Regarding the insufficiency of punitive damages for deterrence, some observers argue that large punitive damage awards are necessary to strengthen the function of deterrence.⁵⁵⁸ The current maximum for punitive compensation is too low, compared to the United States, and has led to its ineffectiveness.⁵⁵⁹ However, such an opinion neglects the problem of compatibility between

⁵⁵⁶ Nianbing Chen (陈年冰), 我国惩罚性赔偿制度研究 [Research of the Punitive Damages System in China], Doctoral dissertation of Shandong University, online published in 2014, accessed July 19, 2018. <http://gb.oversea.cnki.net>

⁵⁵⁷ Zhongshun Huang (黄忠顺), 消费者集体性损害赔偿诉讼的二阶构造 [Two-stage Litigation Structure of Consumer Group Action for Damage Compensation], *Global Law Review* 环球法律评论 5 (2014): 64-82.

⁵⁵⁸ Huiqiang Xing (邢会强), 美国惩罚性赔偿制度对完善我国市场监管法的借鉴 [Experiences from Punitive Damage System of the United States on Improving Market Laws in China], *Law Science* 法学 10 (2013): 44-50. Xiang Li (李响), 我国食品安全法“十倍赔偿”规定之批判与完善 [Criticism and Improvement on the Ten-Time Compensation in the PRC Food Safety Law], *Studies in Law and Business* 法商研究 6 (2009): 42-49.

⁵⁵⁹ *Ibid.*

punitive damages and the judicial system in China. The judiciary in China fundamentally differs from that of the United States.⁵⁶⁰ For instance, in the United States, ordering punitive damage is decided by a jury, and judges have a much larger space to decide whether the amount of punitive damage is appropriate.⁵⁶¹ Conversely, judges in the people's courts of China do not create law through judgements; they decide cases according to the statutes and find the applicable rules.⁵⁶²

The problem is that legislators did not provide comprehensive legal reasoning when the punitive damage system was endorsed, either did the articles of punitive damages provided detailed instructions.⁵⁶³ Consequently, the vagueness of applicable conditions for punitive damages led to the divergence among judicial decisions from different courts.⁵⁶⁴ In order to solve the unevenness and uncertainty in enforcement, the most crucial issue is to clarify the legal basis for more consistent legal application, rather than further expanding either the amount of punitive damages or the court's discretion.

5.4.3 Seek deterrence through public enforcement

Finally, to pursue the original purpose of combating fakes requires public enforcement.⁵⁶⁵ In many occasions, the problems turned to be at the industrial level but without identification. For instance, fake-hunters often target at the problems with labels; this is not only because of fake-hunter's convenience but also due to business operators' negligence in quality control. The

⁵⁶⁰ An Wang (王安), 中美法院制度比较研究 [A Comparative Study of Court Systems in China and the United States], Doctoral Dissertation of East China Normal University, online published at www.cnki.cn No5 (2005): 78-80.

⁵⁶¹ Kenneth R. Redden, *Punitive Damages*, (The Michie Company Law Publishers, 1980), 23. See also, Helmut Koziol and Vanessa Wilcox (eds.), *Punitive Damages: Common Law and Civil Law Perspectives*, (Springer-Verlag/ Wien, 2009), 7 and 155.

⁵⁶² An Wang (王安), 中美法院制度比较研究 [A Comparative Study of Court Systems in China and the United States], Doctoral Dissertation of East China Normal University, online published at www.cnki.cn No5 (2005): 78-80.

⁵⁶³ See *supra* discussion in Section 2.3, Section 2.4 and *infra* discussion in Section 6.2

⁵⁶⁴ See *supra* discussion in Section 2.3 and *infra* discussion in Section 6.1

⁵⁶⁵ Xiaolei Pu (蒲晓磊), 假冒伪劣商品屡打不绝 [Combating against Fake and Shoddy Products Seems Endless], *Hainan People's Committee* 海南人大 9 (2017): 24-25.

Supreme People's Court has demonstrated opponent attitude towards regular claimers.⁵⁶⁶ However, the reason that they can make profit repeatedly is because the defendants did not make any change. Therefore, public enforcement at the industrial level will be more feasible compared with fake-hunting lawsuits raised by profit-driven individuals.

Meanwhile, effective public enforcement requires that the market should be under good monitoring.⁵⁶⁷ In this case, the government should guide the fake-hunters to be monitors over the market, and therefore fake-hunting lawsuits will naturally disappear.⁵⁶⁸ The state may need to improve the bounty system in order to direct current fake-hunters to voluntarily transform into "bounty hunters."⁵⁶⁹ This approach can be effective if the bounty from the government is satisfactory enough for the potential bounty hunters; however, the remaining issue is how much would be enough. Analysis on the issue of efficiency requires detailed legal-economic analysis, which this study will not go further through in this paper.

5.5 Summary

This chapter posited that China should revise the focus of punitive damages from market regulation to consumer remedy. China introduced punitive damages under the PRC Consumer Protection Law for a regulatory purpose against a special social background (5.1). The initial justifications on the legitimacy of punitive damages and compatibility with Chinese legal system were not sufficient. Notwithstanding, most have accepted that in the field of consumer protection,

⁵⁶⁶ See *supra* note 158.

⁵⁶⁷ Tsuneo Matsumoto (松本恒雄), 消費者保護政策の方向性 [The Direction of Consumer Protection Policy], in Y.Sato (佐藤祐介), and K. Matsuoka (松岡勝実) eds., 消費者市民社会の制度論[Consumer Citizenship and Law] (Seibundoh, 2010), 3-21.

⁵⁶⁸ Huixing Liang (梁慧星), 消费者权益保护法第49条的解释与适用 [Interpretation and Application of Article 49 of the Consumer Protection Law], 《复印报刊资料(民商法学)》 [Copy resource of Civil and Commercial Law] 6 (2001): 89. (Forwarded from Renyu Li (李仁玉), and Chao Chen (陈超), 知假买假惩罚性赔偿法律适用探析 [Analysis on Whether Punitive Damage is Applicable to Buying Known Fake Products], *Law Science Magazine* 法学杂志 1 (2015): 48-58).

⁵⁶⁹ *Ibid.*

punitive damages have performed positive effects (5.1.3). The problem is: how to consider the function of punitive damages in China and its future development against the background of fake-hunting lawsuits dilemma. This chapter conducted analysis in two steps to approach this question.

The first step revealed that the real performance of punitive damage in regulating the market is insufficient (5.2). The agents performing this regulatory function turned out mainly fake-hunters; however, they do not always hunt for fakes (5.2.1). Moreover, in the context of China, the deterrence function of punitive damages proved not obvious (5.2.2). In addition, from a viewpoint of counterfeit governance, to support those buying fakes for profit brings a paradox, as the ultimate goal should be educating the people about the illegality of producing and trading fakes (5.2.3).

The second step of analysis focused on the role of the people's court of China in judicial enforcement (5.3). In deciding fake-hunting lawsuits, the courts have been confronted with the difficulties in determining the consumer identity of fake-hunters and controversy in considering fake-hunters as a vulnerable group to protect (5.3.1 and 5.3.2). Without clarification on applicable conditions, unevenness and uncertainty can hardly be solved in enforcement. Concerning the issue of court discretion with regards to fake-hunting lawsuits, the court should not easily adjust the judicial decisions to the regulatory purpose; either should the court frequently expand legal interpretation to adapt to policy preference (5.3.3).

In the end, punitive damages under consumer law in China should emphasize more the aspect of civil remedy (5.4). On one hand, the positive effects of punitive damages in motivating consumers in redress should be noted and maintained in the future (5.4.1). Meanwhile, large punitive damage awards are not compatible with judicial system in China and may generate further unevenness and uncertainties in enforcement (5.4.2). Ultimately, the government should improve

public enforcement to achieve deterrence against business operators' malpractices; and subsequently fake-hunters may change their roles into social monitors (5.4.3).

Overall, while punitive damages have become a *status quo* system in China, improvement remains necessary with the focus on the private rights of consumers. The path-dependency of Chinese consumer law development has resulted in a mixture of regulatory and remedial enforcement of consumer protection.⁵⁷⁰ This chapter attempted to prove that, for China, the logical direction is to promote punitive damages as remedial enforcement of consumer rights.

⁵⁷⁰ See *supra* discussion in Section 3.4

Chapter VI: Clarify the Liability of Punitive Damages Based on Fraudulent Acts

As Part I manifested, lacking the focus on the private rights of consumers has led to the gap between legislation and its enforcement.⁵⁷¹ One direct consequence is the ambivalence with regards to the legal application of punitive damages for “fraudulent acts” under the PRC Consumer Protection Law.⁵⁷² The first clause of Article 55 does not explicitly provide the conditions for ordering punitive damages, in particular with regards to the scope of “fraudulent acts.” The former Article 49 on punitive damages for fraudulent acts did not provide the conditions either. Therefore, opinions regarding the nature of punitive damages and the interpretation on “fraudulent acts” have been divergent, both in judicial practice and academic writings.

This chapter aims to clarify the nature of punitive damage liability based on “fraudulent acts” at the interpretative level. To begin with, three cases will display where the ambiguities lie in (6.1). Then the following section will analyze scholarly debate in Chinese rhetoric around the nature of punitive damage liability (6.2). Contrary to advocates of fake-hunting lawsuits, this chapter argues that fake-hunters should not be awarded punitive damages from a perspective of private rights. In line with discussion on “fraudulent acts,” another crucial issue is whether fraudulent advertising and mislabeling should be included in terms of punitive damages application (6.3). In the end, the present author is going to provide proposals for legal improvement (6.4).

6.1 Application of punitive damages for “fraudulent acts”

Above all, this section is going to show what is controversial in punitive damages application for “fraudulent acts” under the PRC Consumer Protection Law. Currently, Clause 1,

⁵⁷¹ See *supra* discussion in Section 2.4.

⁵⁷² *Ibid.*

Article 55 of the PRC Consumer Protection Law stipulates that a business operator that conducts fraudulent acts in providing a commodity or a service should increase the compensation for losses of the consumer at the request of the consumer. The amount of the increased compensation should be three times the price of the commodity or the fee for the service; if the amount of increased compensation is less than 500 *yuan*, the amount should be 500 *yuan*.⁵⁷³ This article is an amendment to Article 49 of the PRC Consumer Protection Law of 1993, and increased the maximum of punitive damages for “fraudulent acts” from one time the price of commodity purchased or service received to three times.⁵⁷⁴ However, regarding the scope of “fraudulent acts,” there has been no consensus so far. Against this background, the three cases listed below will illustrate the situation in judicial practice.

6.1.1 *Chunsheng Liu vs. Chengdu Ailian Supermarket Co., Ltd. (2015)*⁵⁷⁵

The judgement of this case demonstrated that conviction of fraud should follow civil law in consumer lawsuits. Fake-hunters are not buying product for “daily consumption” and therefore are not consumers to be protected under the PRC Consumer Protection Law. In this case, the appellant (defendant in the original trial) was Zhejiang Zhang Hua Healthcare and Beauty Industry Co., Ltd. (Y1), and the appellee (plaintiff in the original trial) was Chunsheng Liu (X). The defendants in the original trial were Y1 and Riyueguang Branch, Chongqing Ailian Supermarket Co., Ltd. (Y2)

⁵⁷³ Clause 2, Article 55 of the PRC Consumer Protection Law stipulates that, “...If a business operator knows that there is a defect in the goods or services and still provided to the consumer, causing the death of the consumer or other victim or serious damage to the health, the victim has the right to require the business operator to compensate for losses in accordance with the provisions of articles 49 and 51 of this Law, and has the right to claim punitive damages for less than twice the losses.”

Before amendment in 2013, there was no clause 2 and the maximum for additional compensation was equal to the price of the product or serviced, according to Article 49 of the PRC Consumer Protection Law of 1993 and 2009.

⁵⁷⁴ *Ibid.*

⁵⁷⁵ Qisheng Wang (王其生), 消费者请求惩罚性赔偿的条件 [Conditions for Consumers to Claim for Punitive Damage], *People’s Judicature (Case)* 人民司法 (案例) 32 (2016): 67-69. Case resource: 重庆市第五中级人民法院(2015)渝五中法民终字第 05228 号民事判决书 [No. 05228 Final Civil Decision of the Fifth Intermediate People’s Court of Chongqing City (2015)], accessed July 19, 2018. <http://wenshu.court.gov.cn>.

On 27 October 2014, X bought one box of hair dye produced by Y1 at the supermarket of Y2, and the price was 26.8 *yuan*. The product involved in this case marked on the packaging that “Outstanding in this field,⁵⁷⁶ specially added Vitamin C, with the function of ……” X thought the labeling, instruction, and advertising were inconsistent with either national standards or the real conditions of the product, and therefore violated relevant legal provisions. According to X, Y2 failed to fulfill the obligation to review its products, and deliberately misled and induced consumers. Therefore, X demanded return of the purchase price and 500 *yuan* as punitive damages against Y1 and Y2. X also claimed compensation for transportation, loss of working time and mental damages. During the proceeding, X was found a fake-hunter who had been frequently bought Y1’s products and then filed lawsuits for punitive damages. Y1 provided related documents to prove the labeling and advertising to be authentic and not fraudulent.

The main issues in this case were: (1) whether Y2’s misconduct constituted fraud; and (2) whether X, being a fake-hunter, should be deemed consumer. In the first trial, the court decided to approve X’s claim and Y2 had to return the price of the purchased product and pay 500 *yuan* for punitive damage. Meanwhile, the court rejected X’s claims including compensation for transportation, charge for loss of working time and mental damage. The district court considered that the contract between X and Y2 was formatted with validity. The district court continued that since there was no evidence to show Y1’s product had the function displayed on the package, and the label of “outstanding in this field” was misleading, and therefore the advertising was fraudulent. Furthermore, Y2, being the distributor, did not perform its obligation to check the products it was selling, sold products with false contents in labeling, and misled the consumer to declare an intention without a true will, which constituted fraud.

⁵⁷⁶ “*Hang ye ling xian*” 行业领先 in Chinese.

However, the appellate court amended original judgement and rejected all the claims of X. According to the appellate court, after the investigation, Y2's products involved in this case met the legal standard, and did not contain misleading information. Therefore, Y2 did not constitute fraudulent advertising. Moreover, according to Article 55 of the PRC Consumer Protection Law, "fraudulent acts" of business operators are the preconditions for claiming punitive damages. According the Supreme People's Court Judicial Interpretation, "victims have to be induced to declare an intention without a true will." However, being a fake-hunter, there was no mistake in X's declaration of intention. Therefore, the business operator in this case did not constitute fraud to X, and Article 55 of the PRC Consumer Protection Law proved not applicable in this case. In addition, Article 2 of the PRC Consumer Protection Law provided that a consumer should be a person who buys products or receives services for daily consumption. The court ruled that X was a fake-hunter, and his purchase in this case was not for daily consumption but for punitive damage. Therefore X should not be deemed a consumer under the scope of the PRC Consumer Protection Law.

In this case, the appellate court amended the original findings with a contrary decision in this case. In the first trial the court thought the supermarket "did not perform the obligation to check" and therefore misled the consumer. However, the appellate court considered the existence of a miscomprehension or declaration of intention without a true will on the consumer side as necessary to claim for punitive damages. In addition, the appellate court denied the consumer identity of the plaintiff for the purpose of transaction was not for daily consumption.

6.1.2 *Wanbao Sun vs. Jinan Tianqiao Darunfa Supermarket Co., Ltd. (2014)*⁵⁷⁷

⁵⁷⁷ Case resource, 济南市天桥区人民法院 (2014) 天商初字第 433 号民事判决书[No.433 Civil Decision of Tianqiao District People's Court of Ji'nan City, Shandong Province (2014)], accessed July 19, 2018. <http://wenshu.court.gov.cn>

The judgement of this case manifested that false advertising can constitute fraud, and the business operator should burden the liability of punitive damage for conducting this fraud. The plaintiff was Wanbao Sun (X) and the defendant was Jinan Tianqiao Darunfa Supermarket Co., Ltd. (Y).

On 21 June 2014, X bought three sets of computers at the supermarket owned by Y, for 4,498 *yuan*, 4,499 *yuan* and 4,898 *yuan*. The sizes of the screens in the advertisement were 20 *cun*, 14.6 *cun* and 14 *cun*.⁵⁷⁸ X found there were no instructions with the computers and the sizes of the screens were different on the website, and considered the Y's conducts to be fraud. Then, X reported to the local branch of the State Administration of Industries and Commerce (SAIC) about Y. SAIC confirmed the actual screen sizes of the involved consumers to be 20 *inches*, 14.6 *inches* and 14 *inches*, and made an administrative penalty to Y for false advertisement. Afterwards, X brought a lawsuit before the district court for returning the price and punitive damages for three times the price of the products. Y argued that as the computers were on display (free to be checked), and "*cun*" was commonly used for "inch" in computer-related sales and that did not mislead consumers. Therefore Y did not have the intention to defraud consumers. Moreover, Y argued that X's lawsuit was for-profit and should not be supported, referring to judicial verdicts made by other people's courts which rejected fake-hunters' claims.

The main issues were: (1) whether Y's misconduct constituted fraud; and (2) whether punitive damage should be ordered to X. The district court decided that Y should return the price of the involved products and pay three times the price for punitive damage. Meanwhile, X should return the involved computers to Y.

⁵⁷⁸ "Cun" [寸] is a traditional unit of length in China, and one unit of length equals to one-third decimeter (estimated 3.33cm). In Chinese, "inch" (estimated 2.54cm) is "yingcun" [英寸]. In this case, the issue was around the confusion due to omission of one Chinese character in label.

The court thought Y's conducts constituted fraud as Y used false information in the advertisement, which misled the consumer to declare the intention without a true will. Moreover, SAIC's penalty confirmed that Y's advertisement contained false information and constituted fraud. In addition, according to Article 8 (the consumer's right to acquire true information), Article 20 (the business operator's obligation to provide full and true information), Article 40 (the consumer's right to claim for compensation when damaged due to the misconduct of the business operator), and Article 55 (punitive damage) of the PRC Consumer Law, Y should return the price of the involved products and pay three times punitive damages.

In this case, the intention of the business operator to deceive consumers was not clearly proved, yet the court approved the plaintiff's claim for punitive damages. The liability of fraud was attributed to the supermarket for fraudulent advertising. Notwithstanding, the court ordered the plaintiff to return the commodity without a claim from the parties, nor did the court rule on the termination of contract.

6.1.3 *Hai Wang vs. Hainan Yang Sheng Tang Co., Ltd. (2012)*⁵⁷⁹

The judgement of this case demonstrates that when the business operator uses improper expression for advertising and violates relevant national regulations, rescission of contract and return of the product can be possible for the consumer. Meanwhile, without sufficient proof, improper advertisement does not constitute fraud, and therefore claims for punitive damage cannot be supported. The plaintiff was Hai Wang (X). The defendants were Hainan Yang Sheng Tang Co., Ltd. (Y1) and Wan Ning Chain Business Co., Ltd. (Y2)

⁵⁷⁹ Case resource: 北京市西城区人民法院 (2012) 西民初字第 06855 号民事判决书[No.06855 Civil Decision of Xicheng District People's Court of Beijing City (2012)], accessed July 19, 2018. <http://wenshu.court.gov.cn>.

On 7 February 2012, X found “Yang Sheng Tang Natural Vitamin C” (involved product “A” in the following context) produced by Y1 at the supermarket of Y2. X considered the expression on the package of A was misleading about the function of A. X also found the license of Y1 to product A was already expired through investigating online. Moreover, there was an extra bottle of other product as a bonus inside the package of “A,” but the instruction on the package was inconsistent with the contents, as the labeling did not mention about the premium inside. Therefore, X claimed for punitive damages, loss of working time, attorney fees, and litigation cost, against Y1 and Y2 for fraudulent advertising. Y1 and Y2 defended themselves with documents to prove they did not perform fraudulent misconduct. In particular, Y1 proved that their license was already renewed but there was delay on the related government website. Y2 proved that they had full documents regarding the sales of the product involved and had already fulfilled their due diligence.

The issues in this case were whether Y1 and Y2 committed fraud and ought to pay punitive damages. For the district court, Y1 and Y2 did not commit fraud and rejected X’s claims for punitive damages and other losses. First of all, the extra product was visible inside the transparent package of A. While instructions on the package did not mention about the extra bottle of product, the labeling did not impede X’s interests as a consumer. Despite that Y1 could not fully prove the advertising license was effective when the product involved was produced, that was insufficient to prove Y1’s advertisement was fraudulent. The expression in the instructions belittled products of other producers, and violated related regulations. Therefore, X’s claim for returning the product could be approved.

In this case the main issue was whether the producer constituted fraud for providing improper information on the package. This case was decided in 2012, and there was only one clause on punitive damages for fraudulent acts of a business operator.⁵⁸⁰ In this case the claim was

⁵⁸⁰ Article 49 of the PRC Consumer Protection Law before 2013 amendment: “A business operator that conducts fraud in providing a commodity or a service shall increase the compensation for losses of the

classified to be based on tort. Furthermore, this case raised the question about whether the consumer can sue the producer directly and claim punitive damages for fraudulent advertising.

In summarizing the three cases listed above, there are lot of ambiguities in dealing with punitive damages and fraudulent acts. First, the interpretation of the “fraudulent acts” needs more clarification. For instance, the *Chunsheng Liu vs. Chengdu Ailian Supermarket Co., Ltd. (2015)* case showed two contradictory approaches between the first trial and the final decision. The lower court considered the supermarket “did not perform its obligation to check the products it was selling, sold products with false contents in labeling and misled the consumer, which constituted fraud.”⁵⁸¹ In this reasoning, either the intent of the consumer side or the criteria concerning the intent of the business side was not explicit. On the contrary, the appellate court overturned the decision of the first trial because there was no miscomprehension on the plaintiff’s side.⁵⁸² The judgement was made in accordance with the Supreme People’s Court Interpretation on fraud, while the district court did not refer to it in the first trial.⁵⁸³

Furthermore, the relation between punitive damage liability and validity of contract is not obvious. For instance, in the *Wanbao Sun vs. Jinan Tianqiao Darunfa Supermarket Co., Ltd. (2014)* case the court ordered the plaintiff to return the computer to the defendant. However, the parties did not make a claim of termination of contract. Previous studies also mentioned the divergence among judicial decisions on the termination of contract.⁵⁸⁴ Specifically, sometimes the court does not judge about the effectiveness of the contract, and then it raises the question whether the parties have to

consumer, at the request of the consumer. The amount of the increased compensation shall equal to the price of the commodity purchased or the fee for the service.”

⁵⁸¹ See the *Chunsheng Liu vs. Chengdu Ailian Supermarket Co., Ltd. (2015)* case in *supra* Section 6.1.1.

⁵⁸² *Ibid.*

⁵⁸³ In addition to legal application, the recognition on misleading information at fact level also differed between district court and appeal court.

⁵⁸⁴ Qiang Ma (马强), 消费者权益保护法惩罚性赔偿条款适用中引发问题之探讨——以修订后的我国《消费者权益保护法》实施一年来之判决为中心 [Issues on Application of Punitive Damage Rule in the Law on the Protection of Consumer Rights and Interests], *Political Science and Law 政治与法律* 3 (2016): 140-148.

continue performing their contractual duties after the punitive damage is paid.⁵⁸⁵ In other cases, the court orders the plaintiff to return the commodity to the defendant, such as the business operator, without applying the provisions in the PRC Contract Law. In that case, one may wonder what the basis for the return of commodity is. Overall, the relation between punitive damages and validity of contract is unclear in many cases.⁵⁸⁶

In addition to the above mentioned two issues, one other controversial point is the legal basis for punitive damages in Article 55. Whilst *Chunsheng Liu vs. Chengdu Ailian Supermarket Co., Ltd. (2015)* case and *Wanbao Sun vs. Jinan Tianqiao Darunfa Supermarket Co., Ltd. (2014)* case were both decided on contractual basis, *Hai Wang vs. Hainan Yang Sheng Tang Co., Ltd. (2012)* case was classified as a tort dispute. On one hand, from the structure of Article 55, to consider Clause 1 as punitive damage for breach of contract and Clause 2 for tort (see the discussion in the following section) seems possible. On the other hand, there are many opponents against this classification. The following sections 6.2 and 6.3 will analyze the scholars' opinions on how to interpret "fraudulent acts" and related issues in details.

6.2 The nature of punitive damage liability for "fraudulent acts"

In order to clarify how to interpret "fraudulent acts" under the PRC Consumer Protection Law, this section elaborates the current scholarly debate.⁵⁸⁷ The interpretation of "fraudulent acts" is not an independent task; instead, how to interpret "fraudulent acts" in the PRC Consumer Protection Law is closely associated with how to define the nature of punitive damage liability. Since the PRC

⁵⁸⁵ *Ibid.*

⁵⁸⁶ *Ibid.*

⁵⁸⁷ The conclusion will be elaborated in *infra* Section 6.4.1.

Consumer Protection Law was enacted in 1993, there has been debate around the nature of punitive damage liability.⁵⁸⁸

As demonstrated in Chapter III, there are two main perspectives in characterizing the nature of punitive damages: an economic law perspective and a civil law perspective. Furthermore, there are two different opinions inside the civil law group. Up to the present, there have been mainly three approaches to defining the liability of punitive damages in line with the interpretation of “fraudulent acts:” (1) liability under economic law; (2) civil law liability for breach of contract; and (3) civil law liability for tort. The following parts are going to elaborate the three approaches.

6.2.1 Punitive damages as an economic law liability

Contrary to those who consider the punitive damage liability as a civil law liability, some consider punitive damage in the PRC Consumer Protection Law as a special liability under economic law.⁵⁸⁹ For instance, Fuhai Jin considers that punitive damages are not compatible with either public law or civil law, and therefore only suit the theory of economic law.⁵⁹⁰ Yurong Sun thinks the application of punitive damage should not be limited to the interpretive framework of civil law, as consumer protection law is market regulation law under economic law.⁵⁹¹ For the plaintiff to claim for punitive damages in consumer lawsuits, the requirements include: the business operator had subjective fault (intentional or by negligence); fraudulent acts (being act or omission); consumer

⁵⁸⁸ See *supra* discussion in Section 3.1. Section 3.1 generally contracted the two perspectives of economic law and civil law, yet this section will provide a more detailed analysis.

⁵⁸⁹ Yurong Sun (孙玉荣), 民法上的欺诈与《消费者权益保护法》第49条之适用[Fraud of Civil Law and the Application of Article 49 of the Law on Protection of Consumer Rights and Interests], *Journal of Law Application* 法律适用 4 (2005): 88-89. Fuhai Jin (金福海), 论惩罚性赔偿责任的性质 [On the Nature of Punitive Damage Liability], *Legal Forum* 法学论坛 3 (2004): 59-63.

⁵⁹⁰ Fuhai Jin (金福海), 论惩罚性赔偿责任的性质 [On the Nature of Punitive Damage Liability], *Legal Forum* 法学论坛 3 (2004): 59-63.

⁵⁹¹ Yurong Sun (孙玉荣), 民法上的欺诈与《消费者权益保护法》第49条之适用[Fraud of Civil Law and the Application of Article 49 of the Law on Protection of Consumer Rights and Interests], *Journal of Law Application* 法律适用 4 (2005): 88-89.

suffered from damages, and causal relations between consumer's damages and fraudulent acts of the business operator.⁵⁹²

6.2.2 Punitive damages as a civil liability for breach of contract

The prevailing theory takes the punitive damage liability as a civil liability for breach of contract, and scholars taking this position include Lixin Yang, Liming Wang and Shan He.⁵⁹³ Lixin Yang argues that punitive damages for fraudulent acts under Article 55 of the PRC Consumer Protection Law (former Article 49 as well) should be a civil liability for breach of contract.⁵⁹⁴ Yang thinks that the liability of punitive damage can occur for either tort or breach of contract; nevertheless, the punitive damage rule under the PRC Consumer Protection Law occurs in the field of contract rather than tort, and therefore is a liability for breach of contract.⁵⁹⁵ In addition, Yang argues that since fraud in commodity and service transactions constitutes the breach of contract, and punitive damage for fraudulent acts under Article 55 of the PRC Consumer Protection Law is a liability for breach of contract.⁵⁹⁶

⁵⁹² *Ibid.* It turned out that Sun's theory seems to be defining punitive damage liability through a framework very similar to tort.

⁵⁹³ Lixin Yang (杨立新), "王海现象"的民法思考—论消费者权益保护中的惩罚性赔偿金 [Civil Ponderation over Wanghai Phenomenon—on the Punitive Damage in Consumer Protection], *Hebei Law Science* 河北法学 5 (1997): 1-9. Also Lixin Yang (杨立新), 我国消费者保护惩罚性赔偿的新发展 [The New Development of Punitive Damages for Consumer Protection in China], *The Jurist* 法学家 2 (2014): 78-90. Liming Wang (王利明), 惩罚性赔偿研究 [A Study of Punitive Damage], *Social Science in China* 中国社会科学 4 (2000): 112-122. Shan He (河山), 论“缺一赔十”的惩罚性赔偿思想 [On the Punitive Damage Sprit of "Ten for One Loss"], *Journal of Law Application* 法律适用 8 (1993): 12-13. 消费者权益保护法诠释 [Law on Consumer Right and Interests] (Falv chubanshe, 2014), 34-37. See also Shan He (河山), 论违约的惩罚性赔偿 [On the Punitive Damage for Breach of Contract], *Study on China Administration for Industry & Commerce* 中国工商管理研究 3 (1996): 12-14.

⁵⁹⁴ Lixin Yang (杨立新), "王海现象"的民法思考—论消费者权益保护中的惩罚性赔偿金 [Civil Ponderation over Wanghai Phenomenon—on the Punitive Damage in Consumer Protection], *Hebei Law Science* 河北法学 5 (1997): 1-9.

⁵⁹⁵ *Ibid.*

⁵⁹⁶ Lixin Yang (杨立新), "王海现象"的民法思考—论消费者权益保护中的惩罚性赔偿金 [Civil Ponderation over Wanghai Phenomenon—on the Punitive Damage in Consumer Protection], *Hebei Law Science* 河北法学 5 (1997): 1-9.

In regard to the conditions to claim punitive damages for fraudulent acts, Yang provided three requirements: (1) the parties are business operators and the consumers (2) the legal relations between the business operator and the consumer should occur in the field of consumption, which is represented by contractual relations; (3) the business operator conducts fraudulent acts when supplying commodities or services.⁵⁹⁷

Liming Wang also holds the opinion that punitive damages for fraudulent acts should be classified into liability for breach of contract.⁵⁹⁸ Similarly, Wang considers punitive damages under the PRC Consumer Protection Law (Article 49 on fraudulent acts before amendment in 2013) to be a liability for breach of contract rather than tort.⁵⁹⁹ One reason is because the PRC Contract Law provided punitive damage in terms of fraud. Business operator's misconducts of supplying fake commodities or services with flaws violate the contractual agreement and therefore constitute breach of contract.⁶⁰⁰ If the business operator's supplying fake commodities or inferior services do not cause property or physical damages to the consumer, the business operator's misconducts should not be deemed tort.⁶⁰¹

Shan He, one of the earliest advocates of introducing the punitive damage system into consumer law, thinks punitive damage for fraudulent acts is based on breach of contract as well.⁶⁰² Shan He argues that since the liability of punitive damage under the PRC Consumer Protection Law

⁵⁹⁷ *Ibid.*

⁵⁹⁸ *Ibid.*

⁵⁹⁹ Liming Wang (王利明), 惩罚性赔偿研究[A Study of Punitive Damage], *Social Science in China* 中国社会科学 4 (2000): 112-122.

⁶⁰⁰ See Lixin Yang (杨立新), “王海现象”的民法思考—论消费者权益保护中的惩罚性赔偿金 [Civil Ponderation over Wanghai Phenomenon—on the Punitive Damage in Consumer Protection], *Hebei Law Science* 河北法学 5 (1997): 1-9.

⁶⁰¹ *Ibid.*

⁶⁰² Shan He (河山), 论违约的惩罚性赔偿 [On the Punitive Damage for Breach of Contract], *Study on China Administration for Industry & Commerce* 中国工商管理研究 3 (1996): 12-14. See also Shan He (河山), 论“缺一赔十”的惩罚性赔偿思想 [On the Punitive Damage Sprit of “Ten for One Loss”], *Journal of Law Application* 法律适用 8 (1993): 12-13.

is based on contractual relations, the punitive damage liability here for fraudulent acts is a liability for breach of contract.⁶⁰³

6.2.3 Punitive damages as a civil liability of tort

On the contrary, many others take the punitive damage liability as a liability of tort.⁶⁰⁴ Theories in this position can be further divided into two groups. The difference is whether the punitive damage liability for “fraudulent acts” is a tort liability in nature, or just *can* be a tort liability. Furthermore, theories vary among observers in terms of justification. Weiguo Wang claims that the liability of punitive damages for fraudulent acts is in essence a liability of tort.⁶⁰⁵ Wang argues that consumer rights in China are “social rights” in essence and fraudulent acts in consumer law constitute one special kind of tort.⁶⁰⁶ Punitive damage system thus is a special means to deal with such special conducts of tort.⁶⁰⁷ Similarly, Yide Ma also agrees with that punitive damages for fraudulent acts are based on a liability of tort.⁶⁰⁸ However, Ma did not justify his argument from the perspective of social rights, but considers punitive damage for fraudulent acts to be a lawful liability instead of a contractual liability.⁶⁰⁹ Therefore, punitive damage liability for fraudulent acts can only be based on tort.⁶¹⁰

Li and Sato take a more flexible perspective and point out that the PRC Consumer Protection Law does not emphasize on “contract” according to the expression of “daily consumption”

⁶⁰³ *Ibid.*

⁶⁰⁴ Weiguo Wang (王卫国), 中国消费者保护法上的欺诈行为与惩罚性赔偿 [Fraudulent Practice and Punitive Damage in Consumer Protection Law of China], *Law Science* 法学 3 (1998): 22-28.

⁶⁰⁵ *Ibid.*

⁶⁰⁶ *Ibid.*

⁶⁰⁷ *Ibid.* As to the scope of fraudulent act, the SAIC *Measures* can be referred to; neither the subjective factor of the business operator nor the consumer is required.

⁶⁰⁸ Yide Ma (马一德), 消费者权益保护专论 [Monograph on Protection of Consumers’ Rights and Interests] (Beijing: Falv chubanshe, 2016), 220-235.

⁶⁰⁹ *Ibid.*

⁶¹⁰ *Ibid.*

in Article 2.⁶¹¹ They consider that Article 55 contains the possibility for the court to interpret punitive damages for fraudulent acts as a liability of tort.⁶¹² In addition, Li and Sato also argue that if interpreted broadly, tort can occur along with the formation of contract.⁶¹³ This idea is in line with some other ideas in Chinese rhetoric concerning liability of *culpa in contrahendo*. In China, *culpa in contrahendo* is a special civil liability that occurs along with the formation of contracts, referring to the situation where the contract party failed to perform his or her lawful obligations based on good faith principles.⁶¹⁴ The conventional theory takes the liability of *culpa in contrahendo* as a civil liability independent from the liability of tort or breach of contract.⁶¹⁵

Meanwhile, the liability of *culpa in contrahendo* can be a liability of tort in general sense.⁶¹⁶ Guangxin Zhu argues that punitive damage liability for fraudulent acts should be a liability

⁶¹¹ Shigang Li (李世刚), and Takahiro Sato (佐藤孝弘), 中国消费者权益保护分野における懲罰的損害賠償制度の新たな動向～『消費者保護法』第55条の適用に関して～[New Development of Punitive Damage in Consumer Protection Field of China: Concerning the Application of Article 55 of the PRC Law on Protection of Consumer Rights and Interests], *Kokusai Shoji Homu* [国際商事法務] 3 (2017): 337-346. Contrarily, Huixing Liang (梁慧星) considers Article 2 limited the scope to “consumer contract” by the expression of “purchasing products or receiving services.” See Huixing Liang (梁慧星) 消费者权益保护法第49条的解释与适用 [Interpretation and Application of Article 49 of the Consumer Protection Law], 《复印报刊资料(民商法学)》 [Copy resource of Civil and Commercial Law] 6 (2001): 89. (Forwarded from Renyu Li (李仁玉), and Chao Chen (陈超), 知假买假惩罚性赔偿法律适用探析 [Analysis on Whether Punitive Damage is Applicable to Buying Known Fake Products], *Law Science Magazine* 法学杂志 1 (2015): 48-58).

⁶¹² *Ibid.*

⁶¹³ Shigang Li (李世刚), and Takahiro Sato (佐藤孝弘), 中国消费者权益保护分野における懲罰的損害賠償制度の新たな動向～『消費者保護法』第55条の適用に関して～[New Development of Punitive Damage in Consumer Protection Field of China: Concerning the Application of Article 55 of the PRC Law on Protection of Consumer Rights and Interests], *Kokusai Shoji Homu* [国際商事法務] 3 (2017): 337-346. However, different from Japanese law, the “tort” occurs during the preparation to the formation of contract is considered as the liability of “*culpa in contrahendo*”[缔约过失责任]; however, it has been argued that it is possible to consider the liability of “*culpa in contrahendo*” as tort liability in a broad sense. See Yong Liu (刘勇), “欺诈”的要件重构与立法课题--以民法典的编纂为背景 [Reform and Legislative Task of “Fraud”—against the Background of Civil Law Codification], *Journal of Southeast University (Philosophy and Social Science)* 东南大学学报(哲学社会科学版) 5 (2016): 63-71.

⁶¹⁴ Article 42 and 43 of the PRC Contract Law.

⁶¹⁵ *Ibid.* See also Zhongyuan Li (李中原), 缔约过失责任之独立性质疑 [Questioning the Independence of *culpa in contrahendo*], *Legal Science* 法学 7 (2008): 132-144.

⁶¹⁶ *Ibid.*

of *culpa in contrahendo*.⁶¹⁷ For Shiyuan Han, punitive damage liability is a “lawful liability” in case the business operator conducted fraudulent acts before the contract is formed.⁶¹⁸ Han thinks punitive damages to be based on a lawful liability in terms of legal effects. That is, punitive damage liability is an additional liability directly assigned by law.⁶¹⁹ Therefore, either liability of *culpa in contrahendo* argued by Zhu, or “lawful liability” held by Han is in essence a liability of tort from the perspective of “lawful liability.”

The diversity in the understanding of punitive damages has not only resulted from the tension between economic law and civil law, but also due to theoretical diversity along with the development of punitive damages. As opinions on the nature of punitive damages for fraudulent acts under the PRC Consumer Protection Law remain varied, the interpretation of “fraudulent acts” has not reached consensus either.

6.3 Problems with awarding punitive damages for fraudulent acts

This section is focusing on the problems with interpretation of “fraudulent acts” under the PRC Consumer Protection Law. In line with the analysis on how the court should order punitive damages for “fraudulent acts,” the second crucial issue is whether fake-hunters can receive punitive damages in this situation. In addition, whether fraudulent advertising and mislabeling should be covered by “fraudulent acts” under the PRC Consumer Protection Law is another importance point.⁶²⁰ The following analysis starts with introducing the current debate around how to define “fraudulent acts” in China (6.3.1). Subsequently, the next part will demonstrate the problem with

⁶¹⁷ Guangxin Zhu (朱广新), 惩罚性赔偿制度的演进与适用 [The Evolution and Application of the System of Punitive Damages], *Social Sciences in China* 中国社会科学 3 (2014): 104-124.

⁶¹⁸ Shiyuan Han (韩世远), 消费者合同三题: 知假买假, 惩罚性赔偿与合同终止 [Three Questions on Consumer Contract: Intentional Purchase of Fakes, Punitive Damage and Termination of Contracts], *Journal of Law Application* 法律适用 10 (2015): 87-92.

⁶¹⁹ *Ibid.*

⁶²⁰ Yide Ma (马一德), 消费者权益保护专论 [Monograph on Protection of Consumers' Rights and Interests] (Beijing: Falv chubanshe, 2016), 181-182.

whether fake-hunters can receive punitive damages for “fraudulent acts” under the PRC Consumer Protection Law (6.3.2). The last part will analyze the applicable conditions for punitive damages with regards to fraudulent advertising (6.3.3).

6.3.1 Interpretation of “fraudulent acts” from conflicting perspectives

Above all, the most crucial issue is how to interpret “fraudulent acts,” and what law can be a valid resource for the court in legal application. Currently, the *General Principles of Civil Law of the People’s Republic of China*⁶²¹ and the *Contract Law of the People’s Republic of China* both stipulate the effects of fraud; while “fraudulent acts” are provided in the PRC Consumer Protection Law. However, the requirements to constitute fraud or “fraudulent act” are not explicitly stated. Regarding the interpretation, opinions can be generally divided into two groups which are in conflict with each other.

First, some argue that the court should interpret “fraudulent acts” strictly in accordance with civil law rules and judicial interpretations of Supreme People’s Court.⁶²² As detailed definition is not provided under the PRC Consumer Protection Law, the interpretation on “fraudulent acts” should follow Article 68 of the *Judicial Opinion on Implementation of General Principles of Civil Law* released by Supreme People’s Court: “If a party intentionally informs the other party of a false situation or deliberately conceals the true situation and induces the other party to make a mistake in

⁶²¹ After amendment in October 2017, the present Act is the *PRC General Provisions of Civil Law*.

⁶²² Huixing Liang (梁慧星), 消费者权益保护法第 49 条的解释与适用 [Interpretation and Application of Article 49 of the Consumer Protection Law], 《复印报刊资料(民商法学)》 [Copy resource of Civil and Commercial Law] 6 (2001): 89. (Forwarded from Renyu Li (李仁玉), and Chao Chen (陈超), 知假买假惩罚性赔偿法律适用探析 [Analysis on Whether Punitive Damage is Applicable to Buying Known Fake Products], *Law Science Magazine* 法学杂志 1 (2015): 48-58). Shiyuan Han (韩世远) 消费者合同三题: 知假买假, 惩罚性赔偿与合同终止 [Three Questions on Consumer Contract: Intentional Purchase of Fakes, Punitive Damage and Termination of Contracts], *Journal of Law Application* 法律适用 10 (2015): 87-92., Qiang Ma (马强), 消费者权益保护法惩罚性赔偿条款适用中引发问题之探讨——以修订后的我国《消费者权益保护法》实施一年来之判决为中心 [Issues on Application of Punitive Damage Rule in the Law on the Protection of Consumer Rights and Interests], *Political Science and Law* 政治与法律 3 (2016): 140-148..

the declaration of intention, it may be deemed fraudulent.”⁶²³ In this case, fake-hunters obviously do not meet the requirements to be awarded punitive damages since the mistake in the declaration of intent does not exist.⁶²⁴

On the contrary, some hold the opinion that the interpretation of “fraudulent acts” does not have to be restricted in line with the judicial interpretation of Supreme People’s Court.⁶²⁵ Regarding the definition of “fraudulent acts”, many studies refer to the administrative regulation of the former State Administration of Industry and Commerce (SAIC) concerning “fraudulent acts.”⁶²⁶ The *Measures of Penalties against Infringement upon Consumers’ Rights and Interests* (effective on March 15, 2015 issued by SAIC) has listed out the conducts of business operators that constitute “fraudulent acts.”⁶²⁷ Many agree with that in judicial practice the court can refer to this list in deciding punitive damages for “fraudulent acts.”⁶²⁸

⁶²³ Shiyuan Han (韩世远) 消费者合同三题：知假买假，惩罚性赔偿与合同终止 [Three Questions on Consumer Contract: Intentional Purchase of Fakes, Punitive Damage and Termination of Contracts], *Journal of Law Application* 法律适用 10 (2015): 87-92. Qiang Ma (马强), 消费者权益保护法惩罚性赔偿条款适用中引发问题之探讨——以修订后的我国《消费者权益保护法》实施一年来之判决为中心 [Issues on Application of Punitive Damage Rule in the Law on the Protection of Consumer Rights and Interests], *Political Science and Law* 政治与法律 3 (2016): 140-148.

⁶²⁴ Shiyuan Han (韩世远) 消费者合同三题：知假买假，惩罚性赔偿与合同终止 [Three Questions on Consumer Contract: Intentional Purchase of Fakes, Punitive Damage and Termination of Contracts], *Journal of Law Application* 法律适用 10 (2015): 87-92.

⁶²⁵ Lixin Yang (杨立新), 商品欺诈惩罚性赔偿责任适用范围之我见 [Opinion on the Application of Punitive Damage for Commodity Fraud], *Jiangnan Tribune* 江汉论坛 1 (2017): 114-120.

⁶²⁶ Before *Measures of Penalties against Infringement upon Consumers’ Rights and Interests* (2015), SAIC had issued the *Measures of Penalties against Fraudulent Acts to Consumers* in 1996. Article 2 of the 1996 Measures provided that, “*The fraudulent acts in this Measure refer to the fact that when business operators provide commodities (hereinafter referred to as commodities, including services) or services, they use false or other unfair means to deceive or mislead consumers and damage the legitimate rights and interests of consumers.*” In Article 3 and 4 of 1996 Measures, 13 categories of “fraudulent acts” were listed out, with 4 additional situations that the business operator also ought to bear the liability for conducting fraudulent acts.

⁶²⁷ The *Measures of Penalties against Infringement upon Consumers’ Rights and Interests* issued by SAIC (effective 15 March 2015) further expanded the scope of “fraudulent acts” in 1996 Measures and increased administrative sanctions.

⁶²⁸ Lixin Yang (杨立新), 商品欺诈惩罚性赔偿责任适用范围之我见 [Opinion on the Application of Punitive Damage for Commodity Fraud], *Jiangnan Tribune* 江汉论坛 1 (2017): 114-120. Yang also argues fake-hunters should be allowed through flexible application through the discretion of judges.

Nevertheless, some are against the approach of defining “fraudulent acts” in court reasoning according to such administrative regulations.⁶²⁹ Above all, this approach avoids judgment upon subjective factors, such as intent of the parties, in the dispute.⁶³⁰ Furthermore, the SAIC Measures were administrative regulations, which are to guide administrative authorities to regulate business operators. In other words, while the court may refer to Measures, such Measures are not official legal resource for judicial decision.⁶³¹ In addition, the Measures of SAIC are inferior to Judicial Interpretations of Supreme People’s Court in terms of legal effect; therefore to broaden the interpretation of fraud according to the Measures is inappropriate.⁶³²

To summarize, the main problem under debate is what law can be a valid resource to interpret “fraudulent acts.” On one hand, some argue that only civil rules, including the Supreme Court Judicial Interpretations are applicable in judging upon fraudulent acts. On the other hand, some consider that the administrative regulations released by the SAIC can also be used in judicial practice. This conflict is not only due to a divergent understanding to the applicability of different legal resources, but also reflects the tension in understanding consumer protection in terms of collective rights and private rights.

6.3.2 Punitive damage awards for fake-hunters

Currently, there are mainly three approaches to considering whether fake-hunters should be awarded punitive damages based on “fraudulent acts”: (1) fake-hunters are not consumers; (2) the business operator’s misconducts do not constitute “fraudulent acts”; (3) the premises are not fully fulfilled. The first approach is to judge whether fake-hunters are consumers or not. For instance, for

⁶²⁹ Shiyuan Han (韩世远) 消费者合同三题：知假买假，惩罚性赔偿与合同终止 [Three Questions on Consumer Contract: Intentional Purchase of Fakes, Punitive Damage and Termination of Contracts], *Journal of Law Application* 法律适用 10 (2015): 87-92.

⁶³⁰ *Ibid.*

⁶³¹ *Ibid.*

⁶³² *Ibid.*

some scholars, fake-hunters are in nature not consumers.⁶³³ While the Direct case No. 23 released by the Supreme People's Court demonstrated that whether the plaintiff already knew the flaws of the commodities would not affect his or her standing to claim for punitive damages, they argue that this directive does not apply to the situation of "fraudulent acts" under the PRC Consumer Protection Law.⁶³⁴ Meanwhile, for other observers, except fake-hunting companies, all natural persons can be deemed consumers for the purpose of consumer protection.⁶³⁵

Second, depending on how to define the "fraudulent acts," the business operator's misconducts may not constitute fraud and therefore they would not be liable for punitive damages. For instance, whether the plaintiff has to prove the existence of a malicious intention on the side of business operator can make a difference.⁶³⁶ Moreover, whether the business operator's conducts constitute fraud will also depend on whether the court interpret "fraudulent acts" strictly according to civil rules including Supreme People's Court's judicial interpretations, or follow the "black list" of administrative regulations in a broader way.⁶³⁷

The third approach is to judge upon the premises for awarding punitive damages for fraudulent acts. For instance, fake-hunters are not deduced by fraudulent acts of the business operator, nor is there any actual loss for fake-hunters. Since there is no causal relation between the loss of fake-hunters and business operator's fraudulent acts, fake-hunters do not to satisfy the premises to claim for compensation.⁶³⁸ However, the problem of divergence exists at each point. For instance, some consider that the plaintiff should prove the existence of mistake in his or her

⁶³³ Shiyuan Han (韩世远), 消费者合同三题: 知假买假, 惩罚性赔偿与合同终止 [Three Questions on Consumer Contract: Intentional Purchase of Fakes, Punitive Damage and Termination of Contracts], *Journal of Law Application* 法律适用 10 (2015): 87-92.

⁶³⁴ *Ibid.*

⁶³⁵ Yide Ma (马一德), 消费者权益保护专论 [Monograph on Protection of Consumers' Rights and Interests] (Beijing: Falv chubanshe, 2016), 46-47.

⁶³⁶ Lixin Yang (杨立新), 商品欺诈惩罚性赔偿责任适用范围之我见 [Opinion on the Application of Punitive Damage for Commodity Fraud], *Jiangnan Tribune* 江汉论坛 1 (2017): 114-120.

⁶³⁷ See *supra* discussion in Section 6.3.1.

⁶³⁸ Yide Ma (马一德), 消费者权益保护专论 [Monograph on Protection of Consumers' Rights and Interests] (Beijing: Falv chubanshe, 2016), 227-229.

declaration of intention to be caused by the business operator's fraudulent acts.⁶³⁹ On the contrary, some argue that whether the plaintiff is deduced or not does not matter as long as the business operator supplies commodities which are fakes or services that do not fulfill the conditions in their preexisted contractual agreement.⁶⁴⁰ In the end, it remains highly complicated to judge whether fake-hunters should be awarded punitive damages according to the current discussion.

6.3.3 Fraudulent advertising and “fraudulent acts” in punitive damage lawsuits

In line with the debate on the scope of “fraudulent acts,” one more controversial issue is whether a consumer may claim for punitive damages for fraudulent advertising. In Chinese legislation, legal provisions concerning “fraudulent advertising” are diverse. Currently in China, fraudulent advertising is mainly regulated under the PRC Anti-Unfair Competition Law, the PRC Food Safety Law, and the PRC Advertising Law.⁶⁴¹ In the PRC Advertising Law, false advertising means advertisements that use false or misleading content to deceive or mislead consumers.⁶⁴² The PRC Advertising Law also provided civil liability with regards to consumer protection.⁶⁴³ In addition to the PRC Advertising Law, there are other laws containing the rules on fraudulent or

⁶³⁹ For instance, the latest opinion of the Supreme People's Court presented in the public letter. See *supra* note 158 in Section 2.4.2.

⁶⁴⁰ Shan He (河山), 论“缺一赔十”的惩罚性赔偿思想 [On the Punitive Damage Sprit of “Ten for One Loss”], *Journal of Law Application* 法律适用 8 (1993): 12-13. And Shan He (河山), 消费者权益保护法诠释 [Law on Consumer Right and Interests] (Falv chubanshe, 2014), 23-24.

⁶⁴¹ *Ibid.*

⁶⁴² Article 28 of the PRC Advertisement Law (effective on 1 September 2015). False advertising includes (1) The goods or services do not exist; (2) The product's performance, function, place of production, use, quality, specifications, composition, price, producer, expiration date, sales status, honor, etc., or the content, provider, form, quality, price of the service, Information such as sales status, awards, etc., as well as promises and other information related to goods or services are inconsistent with the actual situation and have a material effect on the purchase behavior; (3) Use as proof materials such as scientific research results, statistical data, investigation results, abstracts, quotations, etc. that are imaginary, falsified or cannot be verified; (4) Fictitious use of goods or the effect of receiving services; and (5) Misleading or misleading consumers in other situations with false or misleading content.

⁶⁴³ Article 56 of the PRC Advertisement Law (effective on 1 September 2015) stipulates: “...in violation of the provisions of this Law through publication of false advertising, deception, misleading consumers, so that the legitimate rights and interests of consumers who purchase goods or receive services are harmed, the advertiser shall bear civil liability according to law.”

misleading advertisement. For instance, Articles 20 and 45 of the PRC Consumer Protection Law; Articles 9 and 24 of the PRC Anti-Unfair Competition Law; Article 59 of the PRC Product Liability Law, and Article 222 of the PRC Criminal Law Code.⁶⁴⁴

In terms of fraudulent or misleading advertisement, the applicability of punitive damage based on “fraudulent acts” under Article 55 is not clear.⁶⁴⁵ Notwithstanding, with regards to fraudulent advertising, the distinction between “consumer in contract” and “consumer in market” is necessary.⁶⁴⁶ From the perspective of the private rights of consumers, the application of punitive damages for “fraudulent advertising” may follow the same rules with regards to application of punitive damages for “fraudulent acts.” Therefore, whether fraudulent advertising can be included in “fraudulent acts” can be transferred to the question of under what conditions fraudulent advertising can be considered as “fraudulent acts”. The legal relations among the parties are based on consumer transactions (for instance, producer-distributer-consumer), as Figure 6.3.3 below demonstrates.

⁶⁴⁴ Yide Ma (马一德), 消费者权益保护专论 [Monograph on Protection of Consumers’ Rights and Interests] (Beijing: Falv chubanshe, 2016), 183-184. The wordings vary among articles, including, [虚假宣传] [虚假广告] [引人误解的宣传], all to some extent mean fraudulent or misleading advertising.

⁶⁴⁵ *Ibid.*

⁶⁴⁶ Meanwhile, from the perspective of “consumer in market,” fraudulent advertising can be considered to infringe the rights and interests of unspecific consumers in general. Regarding whether punitive damages are useful to protect consumers against fraudulent advertising in general, see discussion in *infra* Section 6.4.2.

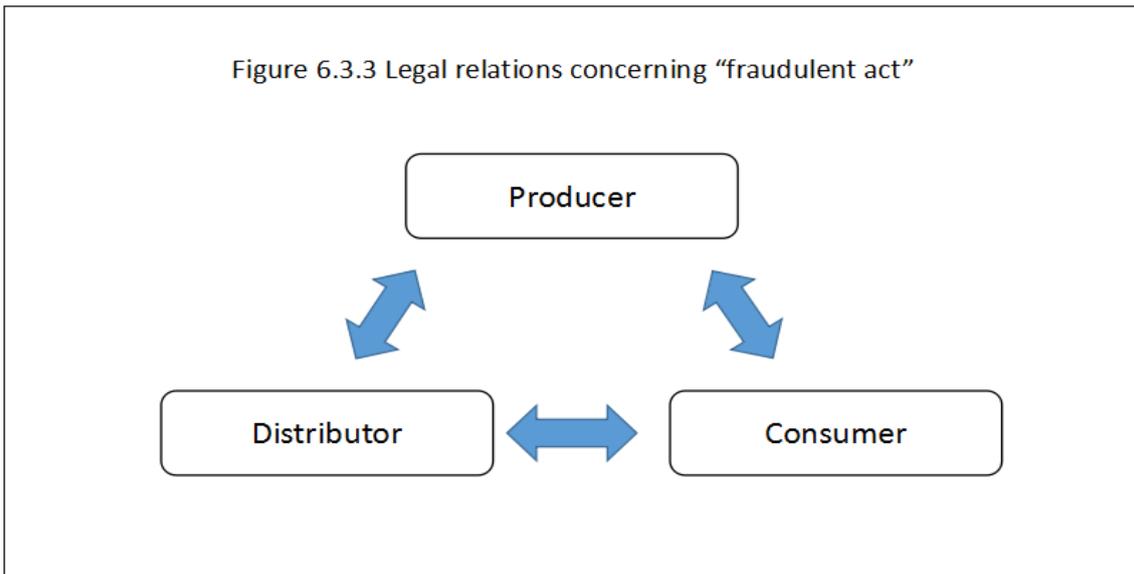


Figure 6.3.3 Legal relations concerning fraudulent acts

(Source: Wenjia Sun)

This part takes the model of commodity transaction for example, and therefore refers to the PRC Product Liability Law.⁶⁴⁷ As can be seen from Figure 6.3.3, legal relations exist among three main parties: the consumer, the distributor (for instance, the supermarket), and the producer. In principle, the producer bears product liability for his product to consumers according to the PRC Product Liability Law.⁶⁴⁸ In the case that the consumer suffers physical or monetary loss due to the defects in the product, the producer ought to burden strict liability for tort.⁶⁴⁹ The distributor—the supermarket in the above-mentioned cases—should bear warranty against defects based on the contract with the consumer.⁶⁵⁰ The producer should bear contractual obligations to the distributor.⁶⁵¹ As the sale-contract is between the distributor (for instance, the supermarket) and the consumer, the

⁶⁴⁷ Disputes regarding fraudulent advertising can be associated with either commodities or services. In terms of services, since there is no producer of a particular product, the disputes is principally between consumer and the supplier.

⁶⁴⁸ Article 40 to Article 46 of the PRC Product Liability Law (2009).

⁶⁴⁹ Article 41 of the PRC Product Liability Law (2009).

⁶⁵⁰ Article 40 of the PRC Product Liability Law (2009).

⁶⁵¹ *Ibid.*

distributor ought to burden the punitive damage liability if it conducts fraud in selling its products to the consumer.⁶⁵²

Based on the legal relations in transaction, a consumer can claim punitive damages against the producer for fraudulent advertising. Moreover, the producer can become the supplier if the consumer enters into a contract with the producer directly. In this case, the producer not only has to bear the product liability for defects, but also the punitive damage liability for fraud in accordance with Clause 1 of Article 55 under the PRC Consumer Protection. Meanwhile, the producer may burden punitive damages for tort according to Clause 2 of Article 55 under the PRC Consumer Protection or Article 148 of the PRC Food Safety Law.⁶⁵³

The above analysis is not attempting to define the relations between “fraudulent advertising” and “fraudulent acts” as two groups of concepts. Rather, the analysis aims at demonstrating the specific conditions under which the punitive damages for “fraudulent acts” are applicable when the consumer sues against either the distributor or the producer for “fraudulent advertising.” With a focus on private rights of consumers, the court needs to decide the applicability of punitive damages for fraudulent advertising based on specific legal relations in consumer transactions. Nevertheless, question remains whether to regulate false advertising through punitive damages for “fraudulent acts” is the most appropriate approach.

6.4 Protect consumers against fraudulent acts with focus on private rights

The three sections above have demonstrated the situation and problems with the interpretation of “fraudulent acts” under the PRC Consumer Protection Law. To clarify how to

⁶⁵² Clause 1, Article 55 of the PRC Consumer Protection Law.

⁶⁵³ Article 6 of the PRC Tort Liability Law, “(1) if an actor infringes other people’s civil rights due to fault, he shall bear the tort liability. (2) If it is presumed in the law that the perpetrator is at fault, the perpetrator cannot assume that he is not at fault, and shall bear tort liability.” Article 7 stipulates that, “A person infringes the civil rights of others, regardless of whether the infringer has any fault or not, if the law stipulates that he shall bear tort liability, the law shall be followed.”

award punitive damages for fraudulent acts under Article 55 of the current PRC Consumer Protection Law, two steps of analysis are necessary: the first step is to define the nature of punitive damage liability (6.4.1), and the second step is to clarify whether the court should order punitive damages to fake-hunters for “fraudulent acts” under the PRC Consumer Protection Law (6.4.2). In addition, to rely on fake-hunter is insufficient to solve the problems of fraudulent advertising, and to encourage consumer associations to bring injunctive lawsuits against business operators can be an alternative to punitive damage approach (6.4.3).

6.4.1 Punitive damage liability for “fraudulent acts” is a civil liability of tort

Despite the divergence in perspectives as demonstrated in section 6.2, punitive damages under Article 55 of the PRC Consumer Protection Law for “fraudulent acts” are based on a civil liability of tort.⁶⁵⁴ First, punitive damage liability is a liability of civil law. Some consider punitive damage as an economic law liability, arguing that the punitive damage system is not compatible with conventional civil law theories, and consumer law is in nature economic law.⁶⁵⁵ However, as Chapter III already demonstrated, the liability of punitive damage is one special form of loss compensation.⁶⁵⁶ The court needs to order punitive damages in accordance to relative legal provisions, including the PRC Consumer Protection Law, the PRC Food Safety Law and the PRC Tort Liability Law.

Second, contrary to the prevailing opinion that considers punitive damage as liability for breach of contract, the present author agrees with the viewpoint that the liability of punitive damage

⁶⁵⁴ Yide Ma (马一德), 消费者权益保护专论 [Monograph on Protection of Consumers’ Rights and Interests] (Beijing: Falv chubanshe, 2016), 220-235.

⁶⁵⁵ See *supra* discussion in Section 6.2.1.

⁶⁵⁶ Shishi Li (李适时) ed., 中华人民共和国消费者权益保护法释义(最新修正版) [Explanations of the Law on Protection of Consumer Rights and Interests the People’s Republic of China (Latest revised edition)] (Beijing: Falv chubanshe, 2013), 260-262.

is in nature a civil liability of tort.⁶⁵⁷ On one hand, many consider punitive damage liability under the first clause of Article 55 under the PRC Consumer Protection Law to be a “lawful liability” for breach of contract. This liability does not generate from contractual agreement but directly provided by the law. Therefore, as a “lawful liability,” the liability of punitive damage should be considered as a liability for tort since it is not for illegal enrichment or *Negotiorum gestio*.⁶⁵⁸

In addition, even for breach of contract, the focus of punitive damage is to punish the malicious intention of the business operators. In this case the fraudulent acts of business operators are violating the consumer’s freedom to enter a contract with his or her true will, and therefore a tort in essence.⁶⁵⁹ In a word, the punitive damage liability is a civil liability rather than economic law liability in accordance with the legislative consistency and preexisting judicial cases. Moreover, this civil liability of exemplary compensation is based on tort in nature rather than for breach of contract.

6.4.2 Fake-hunters should not be awarded punitive damages

With regards on how to award punitive damages based on fraudulent acts under the PRC Consumer Protection Law, clarification is necessary to solve the inconsistencies. In judicial practice, court decisions showed divergence in terms of punitive damage lawsuits, especially in fake-hunting cases. While fake-hunters caused the application dilemma, punitive damages have been under the expectation to empower consumers to achieve redress.⁶⁶⁰ Therefore, the crucial issue is whether

⁶⁵⁷ Yide Ma (马一德), 消费者权益保护专论 [Monograph on Protection of Consumers’ Rights and Interests] (Beijing: Falv chubanshe, 2016), 223-226.

⁶⁵⁸ *Ibid.*

⁶⁵⁹ *Ibid.* In addition, the “tort” occurs during the preparation to the formation of contract is considered as the liability of “*culpa in contrahendo*” [缔约过失责任] in China, which is also possible to be understood as tort in general sense, for instance, in Japanese Law. See Yong Liu (刘勇), “欺诈”的要件重构与立法课题--以民法典的编纂为背景 [Reform and Legislative Task of “Fraud”—against the Background of Civil Law Codification], *Journal of Southeast University (Philosophy and Social Science)* 东南大学学报(哲学社会科学版) 5 (2016): 63-71.

⁶⁶⁰ Shigang Li (李世刚), and Takahiro Sato (佐藤孝弘), 中国消费者权益保护分野における懲罰的損害賠償制度の新たな動向～『消費者保護法』第55条の適用に関して～[New Development of Punitive Damage in Consumer Protection Field of China: Concerning the Application of Article 55 of the

fake-hunters should receive punitive damages. However, as previous sections demonstrated, despite the current efforts on clarifying the conditions for awarding punitive damages, the issue remains highly complicated. To decide whether the court should award punitive damages to fake-hunters, more profound justification is necessary.

As Chapter II mentioned, concerning the gap between the legislative purpose and the judicial enforcement in practice, what has been neglected is the focus on private rights of consumers. From the perspective of private rights, fake-hunters' rights are not violated in fake-hunting cases. Moreover, while punitive damage system was introduced for a regulatory purpose, it is a civil remedy system in nature.⁶⁶¹ Therefore, there is no legal basis for fake-hunters to receive such civil remedies since their rights are not violated by the business operator.

Furthermore, the definition of “the consumer” should not directly affect the judgement of punitive damages. With regards to the definition of “daily consumption,” some argue that according to the Directive Case No.23 of the Supreme People’s Court, the subjective condition of the plaintiff (for instance, fake-hunters usually already know the flaws or problems of the commodity but still purchase) does not affect the fake-hunters’ standing to sue, except those conduct fake-hunting lawsuits as an enterprise.⁶⁶² Since the legislative purpose of the punitive damage rule in consumer law is to enhance consumer protection, the scope of “daily consumption” should be understood in a broad way.⁶⁶³ Nevertheless, even fake-hunters can be perceived as consumers in a broad sense, there is a lack of legal basis for them to receive punitive damages as a civil remedy.

Overall, there are mainly three key factors regarding the interpretation of “fraudulent act” under the PRC Consumer Protection Law in terms of punitive damages. Punitive damage under the

PRC Law on Protection of Consumer Rights and Interests], *Kokusai Shoji Homu* [國際商事法務] 3 (2017): 337-346.

⁶⁶¹ See *supra* discussion in Section 5.4.1.

⁶⁶² Yide Ma (马一德), 消费者权益保护专论 [Monograph on Protection of Consumers’ Rights and Interests] (Beijing: Falv chubanshe, 2016), 45-47.

⁶⁶³ *Ibid.*

Article 55 is a special form of compensation based on a lawful civil liability of tort. Moreover, from a perspective of private rights, fake-hunters should not be awarded punitive damages, since their rights are not violated in the transaction with the business operator they sue against. In the end, even fake-hunters could be consumers in a broad sense the court does not necessarily have to order punitive damages to them according to the actual situations.

6.4.3 Encourage injunctive group litigation against fraudulent advertising

The final question in this chapter is whether punitive damage mechanism is sufficient to protect consumers against fraudulent practices of business operators. With a focus on civil remedy, the present author suggests that injunctive group litigation can be more useful than fake-hunting lawsuits to regulate the false advertising and mislabeling. While the punitive damage system may support consumers in enforcing their rights with a financial motivation, the remedy is effective only if consumers bring the dispute before the court by themselves. As fraudulent advertising can be an infringement to consumers' rights in general,⁶⁶⁴ injunction lawsuits can be used in suspending the damage or prevent the current situation from getting worse. In other jurisdictions, injunctive group litigations have been widely adopted in the field of advertising. For instance, Japan introduced injunctive consumer group litigation in 2006 in the *Consumer Contract Act of Japan*.⁶⁶⁵ In 2008 the application of injunctive proceedings was expanded along with the amendment of the *Act against Unjustifiable Premiums and Misleading Representations* and the *Act on Specified Commercial*

⁶⁶⁴ Yanyan Li (黎燕燕), Ni Yang (杨妮), and Jin Chai (柴进), 论虚假广告对消费者权益的侵害 [The Infringement of Consumer Rights by False Advertising], *Juridical Science Journal* 法学杂志 6 (2003): 15-16.

⁶⁶⁵ See *supra* discussion in Section 4.3.

Transactions of Japan.⁶⁶⁶ Later, the revised *Food Labelling Act* also incorporated the right of qualified consumer organizations to demand injunctions against mislabeling in 2013.⁶⁶⁷

China introduced public interest litigation in 2013, and qualified environment and consumer organizations were granted the standing to sue.⁶⁶⁸ In the consumer protection field, qualified consumer associations can bring injunctive lawsuits against business operators when mass consumer interests are being harmed or under the risk of being harmed by the malpractice of business operators.⁶⁶⁹ Contrary to consumer associations, fake-hunters are characterized by randomness and are profit-driven.⁶⁷⁰ Fake-hunters tend to repeatedly sue against the same supermarket or same commodities of the same producer,⁶⁷¹ and this phenomenon proved that fake-hunters failed to stop the fraudulent acts of business operators. In conclusion, instead of fake-hunters, China needs to encourage consumer associations to bring injunctive lawsuits against fraudulent advertising.

6.5 Summary

This chapter investigated how to award punitive damages for “fraudulent acts.” First, case studies presented current ambiguities in legal provisions (6.1). From the overview of the three selected cases, there are lots of ambiguities with punitive damage and fraudulent act. To solve the ambiguities, clarification is necessary regarding how to interpret the “fraudulent acts” under the PRC Consumer Protection Law. Second, this chapter also elaborated scholarly debate around the nature of

⁶⁶⁶ Planning Office of Consumer Affairs Agency (消費者庁企画課) ed., 逐条解説・消費者契約法〔第3版〕 [Explanation Article by Article on Consumer Contract Law (3rd edition)] (Shojihomu, 2018), 287-290.

⁶⁶⁷ *Ibid.*

⁶⁶⁸ Article 55 of the PRC Civil Procedure Law.

⁶⁶⁹ Article 55 of the PRC Civil Procedure Law, and article 47 of the PRC Consumer Protection Law.

⁶⁷⁰ Baoyu Liu (刘保玉), and Zhenhua Wei (魏振华), “知假买假”的理论阐释与法律适用[Buying Fake Intentionally: Theoretical Explanation and Legal Application], *Legal Forum* 法学论坛 3 (2017): 62-73. See also *infra* discussion in Section 6.3.

⁶⁷¹ See the People’s Supreme Court, *supra* note 158.

punitive damage liability for “fraudulent act” (6.2). The review of the current scholarly debate demonstrated the divergence between economic law perspective and civil law perspective. Moreover, even within the civil law field, positions are different, in particular, between contract theory and tort theory with regards to the nature of punitive damages under Clause 1, Article 55 in the PRC Consumer Protection Law.

Thirdly, in line with the analysis of the nature of punitive damage liability, this chapter elaborated the problems with awarding punitive damages for “fraudulent act” (6.3). The main purpose of this section was to demonstrate the insufficiency of current approaches. Finally, with a focus on the private rights of consumers, the present author provides proposals for legal improvement at three main aspects (6.4). Above all, punitive damage is a civil liability of tort (6.4.1). Moreover, contradictory with conventional wisdom, fake-hunters should not be awarded punitive damage from a perspective of private rights (6.4.2). In the end, legal improvements concerning fraudulent advertising are necessary as well. China should encourage injunctive group litigation to suspend the business operators’ malpractice of false advertising (6.4.3).

Chapter VII: Address the Private Rights of Consumers in Collective Redress Mechanism

Chapter VI mainly suggested what kind of legal improvements should be made at the interpretative level with a focus on the private rights of consumers. Subsequently, this chapter is going to make proposals at the institution level. For this purpose, this chapter deals with the development of consumer collective redress mechanisms. Consumer associations have been very important agencies to enforce consumer protection in China. However, collective consumer redress system in China has reflected an imbalance between protecting public interests and private interests of consumers.

This chapter will start from the latest court decisions that approved punitive damage in public interest litigation brought by the people's procuratorate and consumer associations (7.1). The following section is going to analyze the problems with the current approach (7.2). The third section aims to demonstrate the necessity of focusing on the weaknesses of individual consumers in civil redress (7.3). In conclusion, compensatory collective redress should be established in order to support consumers to enforce their private rights (7.4).

7.1 Incorporation of punitive damage in public-interest litigation

In China, public interest litigation was introduced in the environmental and consumer law fields in 2013.⁶⁷² Recently, there are judicial decisions that approved punitive damages in public interest litigation. To set the stage, this section introduces the legal background and latest cases. Although many commentators applauded for the court decisions that awarded punitive damages in consumer public interest litigation, many questions still remain unsolved.

⁶⁷² Article 55 of 2012 amendment of the PRC Civil Procedure Law (effective on 1 January 2013).

7.1.1 Chinese court approved punitive damage in public-interest litigation

The 2012 amendment of the PRC Procedure Law (effective on 1 January 2013), introduced public interest litigation. According to Article 55 of the PRC Civil Procedure Law, (the first paragraph), in the case of environmental pollution, infringement of the legitimate rights and interests of numerous consumers and other acts that harm public interests, organizations that entitled the standing by the law may bring a lawsuit of public interests before the people's court. The 2017 amendment added a second paragraph to Article 55 which affirmed that the People's Procuratorate may support public interest litigation or bring a public interest lawsuit before the court after going through pretrial proceedings.⁶⁷³ In consumer law, moreover, Article 47 of the PRC Consumer Protection Law provided that the China Consumer Association and consumer associations established in provinces, autonomous regions and municipalities directly under the central government may bring a public interest lawsuit before the people's court when the lawful rights and interests of numerous consumers are being infringed or in the danger of being infringed (2013 amendment). According to this article, the total number of consumer associations qualified for public interest litigation in China is 32, including the China Consumer Association and 31 provincial level consumer associations.⁶⁷⁴

In the past five years since public interest litigation was introduced to the consumer law field, qualified consumer associations have brought some injunctive lawsuits. However, in 2017, the Consumer Association of Guangdong Province claimed for punitive damages in public interests

⁶⁷³ The second paragraph, Article 55 of the PRC Civil Procedure Law (Published on 27 June 2017 and effective from 1 July 2017) stipulates that: *"The people's procuratorates found that in the performance of its duties, the actions that undermine the protection of the ecological environment and resources, food and drug safety infringement of the legitimate rights and interests of many consumers, and other acts that harm public interests, if no agency or organization as prescribed in the preceding paragraph or an agency or organization prescribed in the preceding paragraph does not initiate a lawsuit, it may file a lawsuit in a people's court. Where an organ or organization as prescribed in the preceding paragraph files a lawsuit, the people's procuratorate may support the prosecution."*

⁶⁷⁴ Shishi Li (李适时) ed., 中华人民共和国消费者权益保护法释义(最新修正版) [Explanations of the Law on Protection of Consumer Rights and Interests the People's Republic of China (Latest revised edition)] (Beijing: Falv chubanshe, 2013), 219-222.

litigation and the court approved the claims. Before the Consumer Association of Guangdong Province succeed in the public interests litigation, the local municipal People's Procuratorate had acted as plaintiff of the public interest litigation and claimed for punitive damages against the defendant, who had been sentenced to a criminal penalty for counterfeiting table salt. The following sections will demonstrate the cases that approved punitive damage in public interests litigation in China.

7.1.2 The People's Procuratorate of Guangzhou City, Guangdong Province vs. Liu (2017)⁶⁷⁵

The judgment of this case manifested that business operator who infringed the interests of mass consumers can be ordered to pay punitive damages in public interests litigation brought by the people's Procuratorate. The plaintiff in this case was the Municipal People's Procuratorate of Guangzhou City, Guangdong Province (X), and the defendant was Liu (Y).

The plaintiff in this case had mainly two claims. First, the court should order the defendant to pay a compensation of 1,200,000 *yuan* which equaled ten times the price of counterfeit salt that Y had produced and sold (to be paid by the court to the State Treasury). Second, the defendant should make an apologetic statement to the public. Against the claims of the plaintiff, the defendant made defense of three points. First, there were necessary parties that need to be added into proceeding (distributors: A and B). Second, there was no evidence to show that the defendant Y's production of fake and inferior salt caused substantial infringement to consumers. Third, the calculation of the amount of compensation in the claims of this case required a clear quantity and price of counterfeit salt that actually had been sold. However, there was no relevant evidence to prove the amount of compensation to be correct.

⁶⁷⁵ Decided on 14 March 2018, case resource: 广东省广州市中级人民法院 (2017) 粤 01 民初 383 号民事判决书 [No.383 Civil Decision of the Intermediate People's Court of Guangzhou City, Guangdong Province (2017)], accessed July 19, 2018. <http://wenshu.court.gov.cn>.

During the trial, the court found the following facts. Since June 2016, Y had been producing counterfeit salt and wholesaling it to A, B, and others. On October 18, 2016, during the production of false salt, Y was captured by civilian police, and a total of 6.42 *tons* of fake salt products, semi-finished products, packaging materials, and production tools were seized. After quality inspection, the counterfeit salt produced by Y failed to meet the quality standards of GB5461-2000. Guangzhou City has been implementing a policy to prevent disease due to lack of iodine since the 1980s. One main approach is to promote iodized salt. If people eat non-iodized salt, the body will have an inadequate intake of iodine, causing iodine deficiency disorders. Sometimes iodine deficiency may cause severe diseases. When Y was interrogated by the police, he confessed that he produced fake salt of “XX” brand and sold at least 100 *tons* for 1,200 *yuan* per *ton*.

On August 7, 2017, the Guangzhou Baiyun District People’s Court issued a criminal judgment and sentenced Y to three years’ imprisonment and a fine of 80,000 *yuan*. The criminal judgment had taken legal effect. On April 1, 2017, the People’s Procuratorate of Guangzhou City, Guangdong Province issued the Prosecution Proposal to the Consumer Association of Guangdong Province, and proposed the Consumer Association of Guangdong Province to initiate public interest litigation against Y for Y’s above-mentioned violation of the lawful rights and interests of consumers. On April 21, 2017, the Consumer Association of Guangdong Province replied and declined to bring a lawsuit against Y. On 13 April, 2017, the People’s Procuratorate made a public notice to ask authorities or relevant organizations that have the right to initiate lawsuits to file civil public interests litigation. After this court accepted the case on October 26, 2017, it also made a public notice about the case acceptance. However, until the court session, no competent authority or social organization applied to participate in the case.

The main issues in this case included: (1) whether additional parties should be added; (2) how to determine the quantity and total amount of fake salt sold by Y; (3) whether Y should bear a

civil tort liability; (4) how to determine the amount of compensation; (5) whether Y should bear a civil liability of public apology.

After trial, the court ordered that the defendant Y should pay punitive damages of 1.12 million *yuan* to the court within 10 days from the effective date of this judgment, and the court would transfer the amount to the state treasury. Moreover, the defendant Y should issue an apologetic statement with contents approved by this court on television media at the provincial level or above, and in a national newspaper within 10 days from the effective date of this judgment. In addition, the case acceptance fee was 14,560 *yuan*, which should be burdened by defendant Y.

The reasoning of the court is as bellow. According to Clause 2, Article 55 of the PRC Civil Procedure Law, the People's Procuratorate was the appropriate plaintiff to bring a public interests lawsuit in this case. During the announcement period, this court did not receive any application for lawsuits from other organs or social organizations that could file a lawsuit according to law. Therefore, the plaintiff had lawful standing and this court supported it.

First issue was whether additional parties should be added to the proceeding. Clause 1, Article 2 of the Supreme People's Court *Provisions on Several Issues Concerning the Application of Law in the Trial of Food and Drug Disputes Cases* has stipulated that due to the existence of quality problems in foods and medicines causing consumer damage, consumers may separately sue or simultaneously prosecute sellers and producers. The second paragraph also has stipulated that if consumers only prosecute sellers or producers, the people's courts may add relevant parties to participate in the proceedings if necessary. In Y's criminal proceedings, Y stated that his production of fake salt was sold to outsiders such as A and B. However, plaintiff X's claim in this case was for punitive damages, for ten-times the price of the total amount of fake salt, rather than general compensatory damages.

The second point was how to determine the quantity and total amount of fake salt sold by Y. According to Article 9 of the *Supreme People's Court's Several Provisions on Civil Litigation Evidence*, the facts confirmed by the people's court with legally effective judgments do not require proof by the parties, unless the parties have evidence to the contrary. In Y's criminal proceedings, Y confessed that the production and sales of fake salt was at least 100 *tons*, and it was 1,200 *yuan* per *ton*. The legally effective criminal judgment also affirmed Y's production and a total of more than 100 *tons* of fake salt were sold. Attorneys argued that the total quantity and amount was less but did not provide sufficient evidence. Therefore Y's sales of fake salt should be calculated as 100 *tons* and the total price of sales should be calculated as 120,000 *yuan*.

The third point was whether Y should bear a civil liability of tort. This court considered that, counterfeiting salt not only constituted a crime but also tort on civil law. Moreover, although expert testimony and other evidence clarified that consumers would experience iodine deficiency symptoms after long-term consumption of non-iodized salt for six months, it takes [took] long time before the consumer may show symptoms of iodine deficiency. According to this court, this potential harm was also objectively present as a result of a tort. Although there was no consumer claiming rights against Y, the objectively existing damage should not be ignored. The origin of this damage was in the production and sales of fake salt by Y. The court continued that, food infringement was a special kind of tort. According to Article 148 of the PRC Food Safety Law and related judicial interpretations, consumers who buy [bought] foods that do [did] not meet safety standards can claim for return of price and ten-time punitive damage even if the foods were not consumed and they caused no actual damage. Even if no consumers brought lawsuits against Y, Y cannot be exempted from the tort liability. Therefore, Y should bear civil liability in this case.

The fourth point was how to determine the amount of compensation. According to Article 14 of the Supreme People's Court's *Provisions on Several Issues Concerning the Application of Law*

in the Trial of Food and Drug Disputes Cases, the court thought that Y should simultaneously bear civil liability, administrative liability and criminal liability for his criminal acts. Regarding calculation of punitive damages, according to the relevant provisions of the PRC Law on Administrative Punishments and other laws, administrative regulations and judicial interpretations, when administrative fines and criminal penalties are [were] concurring, the principle of light penalties for discounting in heavy penalties is [was] generally adopted in order to reflect the modesty of punishment and avoid excessive punishment. Punitive damages, administrative fines, and criminal fines are [were] all punitive claims; but punitive damages are [were] private law claims, while administrative fines and criminal fines are [were] public law claims. In this case, Y produced more than 100 *tons* of fake salt and sold it. There was no evidence to prove that some of it was returned or recalled. The total value of the goods should be calculated based on 100 *tons*, which cost 120,000 *yuan*. According to the law, Y should bear punitive damages ten times the total price for 1, 200, 000 *yuan*.

Regarding where the punitive damages should go, the court believed that the vast number of good-natured consumers would not save their receipts of a pack of salt for potential litigation purposes. Since no consumer had filed a civil private lawsuit by the time of the trial, it would not happen in the future. In this case the court agreed with the public interest litigation plaintiff's request, that to transfer of civil punitive damages directly to the state treasury would be more in line with the actual situation. In this way, the nature of the civil punitive damages involved in the case was transformed and was in fact similar to the administrative fines and penalties, and should be determined in the same way as when the administrative fines and criminal fines were competed. Therefore, the criminal fines of 80,000 *yuan* that Y was sentenced to should be deducted from the civil punitive damages of 1.2 million *yuan*, and therefore Y ought to pay 1.12 million *yuan* for civil punitive damages.

The fifth point was whether Y should bear a civil liability to make an apologetic public statement. Y produced and sold fake salt and infringed the legitimate rights and interests of many unspecified consumers. According to the Supreme People's Court's *On Several Issues Concerning the Application of Law in the Trial of Consumer Civil Public Interests Lawsuit*, Y should make apologies to the public.

This case is not the first case in which the People's Procuratorate brought a public interest lawsuit and claimed for punitive damages.⁶⁷⁶ Notwithstanding, this case became a precedent for the following cases in Guangdong Province. As the next case will display, punitive damages were all approved in the afterwards public interests litigation brought by the Consumer Association of Guangdong Province with the support of the Municipal People's Procuratorate of Guangzhou City.

7.1.3 Consumer Association of Guangdong Province vs. Shi and Hong (2017)⁶⁷⁷

The judgment of case showed that business operator who infringed the interests of mass consumers can be ordered to pay punitive damages in public interest litigation brought by people's Procuratorate. The plaintiff in this case was the Consumer Association of Guangdong Province (X), and the defendants were Shi and Hong (Y1 and Y2). Moreover, the Municipal People's Procuratorate of Guangzhou City, Guangdong Province (Z) participated the proceeding as the party supporting for prosecution.⁶⁷⁸

⁶⁷⁶ The first judgement approved punitive damage in public interest litigation on food safety was made on December 8, 2017. See the Supreme People's Procuratorates website, accessed July 19, 2018. http://www.spp.gov.cn/spp/zd gz/201803/t20180302_368568.shtml.

⁶⁷⁷ Decided on 24 April 2018, case resource: 广东省广州市中级人民法院 (2017) 粤 01 民初 386 号民事判决书[No. 386 Civil Decision of the Intermediate People's Court of Guangzhou City, Guangdong Province (2017)], accessed July 19, 2018. <http://wenshu.court.gov.cn>.

⁶⁷⁸ The principle of support for prosecution is one important rule according to Article 15 of the PRC Civil Procedural Law stipulates that, "If the civil rights and interests of the state, a collective, or an individual have been infringed, a state organ, public organization, enterprise, or institution may support the injured unit or individual to initiate legal action in a people's court."

Claims of the plaintiff were: (1) the court should order the two defendants to bear a compensation of 13,300 *yuan*, which should be escrowed by the court, and should be paid by the court to the state treasury after statute of limitations ran out; (2) the defendants should make a public apology in the news media at or above the provincial level; (3) the two defendants should be jointly liable for the above request; (4) the two defendants should burden all the litigation costs of the case. In this case, the defendants agreed with the facts investigated and claims of the plaintiff.

The Guangzhou Municipal People's Procuratorate of Guangdong Province issued a prosecution support statement saying that the two defendants breached a series of legal acts by selling counterfeit salt. Their misconducts infringed the legal rights and interests of numerous unspecified consumers, seriously endangered the safety of consumers, and harmed the public interests. In order to safeguard the legitimate rights and interests of consumers and protect the public interests, the Guangzhou Municipal People's Procuratorate of Guangdong Province specifically supports the plaintiff side's Guangdong Provincial Consumer Commission to initiate consumer civil public interest litigation according to Article 55 of the PRC Civil Procedure Law.

The court confirmed basic facts of this case as below. On 25 June 2015, Y1 bought 35 boxes of common table salt (refined iodized salt) of brand "xx," and then the salt was sold at the shop operated by Y1. On June 26, the public security authorities captured two defendants and seized a batch of the salt mentioned above. After quality test of samples, the salt was found to be counterfeit. Moreover, iodine was not found in the salt sample during the quality inspection, and the sample salt did not meet the requirements of GB26878-2011 National Standard for Food Safety. Guangzhou City has been implementing a policy to prevent disease due to lack of iodine since the 1980s. One main approach is to promote iodized salt. If people eat non-iodized salt, the body will have an inadequate intake of iodine, causing iodine deficiency disorders. Sometimes iodine deficiency may cause severe diseases. Y1 and Y2 were interrogated by the police of the Yuexiu

Branch of the Guangzhou Public Security Bureau. They confessed that Y1 purchased 35 boxes of salt from Y2 and then sold to an unspecified number of consumers.

On May 30, 2016, the Baiyun District People's Court of Guangzhou City issued a criminal judgment and determined that the aforementioned acts of Y1 and Y2 all constituted the sale of foods that did not meet the safety standards. Y1 was sentenced to one year imprisonment, suspended for two years, and fined 10,000 yuan; Y2 was sentenced to one year imprisonment, suspended for two years, and fined 10,000 yuan. The judgment had taken legal effect. On April 7, 2017, the People's Procuratorate of Guangzhou City, Guangdong Province issued the Prosecution Proposal to the plaintiff, and proposed the plaintiff to initiate public interest litigation on the defendant's above-mentioned violation of the lawful rights and interests of consumers. After accepting the case on October 26, 2017, this court also made an announcement about the case acceptance. However, until the court session, no competent authority or social organization applied to participate in the proceeding.

After trial, the court ordered that the defendants Y1 and Y2 together should issue a courtesy apologetic statement to the public within 10 days from the date when this judgment enters into force. In addition, the case acceptance fee of 132.5 *yuan* ought to be burdened by the defendants.

The reasoning of the court is as below. First, according to Article 55 of the PRC Civil Procedure Law, and Article 47 of the PRC Consumer Protection Law, the Consumer Association of Guangdong Province was an appropriate plaintiff to bring public interests litigation against Y1 and Y2. Second, this court supported the plaintiff's opinion that the two defendants should bear civil tort liability. (Reasoning is the same as that in the case of *the People's Procuratorate of Guangzhou City, Guangdong Province vs. Liu (2017)* demonstrated above) The two defendants sold at least 35 boxes of fake salt. There was no evidence to prove that some were returned or recalled. The total price of

38 *yuan* per box was calculated to be 1,330 *yuan*, and they should be punished according to law by paying 10 times the total price. Therefore the amount for punitive damage was 13,300 *yuan*. The 13,300 *yuan* that the two defendants must pay for civil punitive damages could be deducted from the fine of 20,000 *yuan* they were sentenced to. Then the two defendants no longer had to pay civil punitive damages. (Reasoning is the same as that in the case of *the People's Procuratorate of Guangzhou City, Guangdong Province vs. Liu (2017)* demonstrated above)

In this case, despite X suggested the court to keep the punitive damages until the statute of limitations ran out, the court believed that to transfer the civil punitive damages directly to the state treasury would be more in line with the actual situation. In addition, public apology should be approved according to Article 13 of the *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Consumer Civil Public Interests Lawsuits*. In the end, according to Article 8 of the PRC Tort Liability Law, the court affirmed the joint liability of the defendants, as the act of selling fake salt was jointly implemented by the two defendants together.

Subsequently, with support from the People's Procuratorate of Guangzhou City, the Consumer Association of Guangdong Province brought other three lawsuits against salt counterfeiting criminals to the intermediate court, and claimed for punitive damages in all of these cases.⁶⁷⁹ The intermediate court approved the claims in these cases, and observers commentated that these cases marked an important movement for consumer protection.⁶⁸⁰

⁶⁷⁹ Weiqi He (何伟奇) (7 May 2018), 广东省消委会在公益诉讼中首提惩罚性赔偿获法院支持 [First Punitive Damage Claims were Approved by the Court in Public Interest Litigation Brought by Consumer Association of Guangdong Province], published on cnr.cn[央广网], accessed on July 19, 2018. http://www.cnr.cn/gd/gdkx/20180507/t20180507_524225111.shtml. accessed July 19, 2018. <http://wenshu.court.gov.cn>

⁶⁸⁰ Qian Liu (刘倩) (8 May 2018), 广东省消委会诉假盐案一审胜诉 赔偿性消费公益诉讼在粤获突破 [Consumer Association of Guangdong Province Won the First Trial against Salt Counterfeiting Group, a Break-Through of Compensatory Public Interest Litigation in Guangdong], first published on *Nanfang Daily*, accessed on July 19, 2018. http://law.dzshbw.com/2018/tebiebaodao_0508/129118.html.

7.2 Problems with punitive damage in public interest litigation

According to the PRC Civil Procedure Law and the PRC Consumer Protection Law, consumer associations are granted the standing to bring public interests litigation before the people's court. While the court approved the claims for punitive damages in the recent public interests lawsuits, there remain controversies at various aspects. This section will show the problems with the scope of claims and *res judicata* reflected in the judgement. Moreover, the previous cases also proved a dilemma in refunding the consumers with the amount of punitive damages. This dilemma in turn shows that the purpose of ordering punitive damage in consumer public interest litigation is ambivalent in court decisions.

7.2.1 Standing to sue and scope of claim

In principle, to bring a lawsuit before the people's court, the plaintiff has to demonstrate to the court sufficient connection with the case, in other words, a "direct interest."⁶⁸¹ In the cases above, either the people's procuratorate or the consumer association was not the direct victim of the infringement acts of the salt counterfeiting criminals; however, those parties were granted automatic standing by the law for public interest litigation. Therefore, the people's procuratorate and the consumer association had the standing in each of their cases displayed in the previous sections.

However, the scope of the claims was questionable, in particular with regards to punitive damages. Claims for punitive damages are not explicitly provided for in present legislation with regards to public interest litigation. The articles in the PRC Civil Procedure Law and the PRC Consumer Protection Law granted standing to the people's procuratorate and qualified consumer

⁶⁸¹ Article 119 of the PRC Civil Procedure Law stipulates that : *"To bring a civil lawsuit before the court should meet the following conditions:(1) The plaintiff is a citizen, legal person or other organization that has a direct interest in the case; (2) there is a clear defendant; (3) There are specific lawsuit requests and facts and reasons; (4) Belonging to the jurisdiction of the people's court to handle civil lawsuits and the people's courts of the people's courts."*

organizations to sue for public interests, and provided the conditions for them to proceed.⁶⁸² According to the Supreme People’s Court’s judicial interpretation, the plaintiff in the public interests litigation may claim for “stopping the infringement, removing the obstruction, eliminating the danger, and apologizing for the misconduct, *etc.*” against the defendant.⁶⁸³ Moreover, if the business operator attempts to exclude or limit the consumer’s rights, reduce or eliminate the business operator’s liability and aggravate the consumer’s liability with methods such as standard terms, notifications, statements and notices, the appropriate plaintiff can bring public interests lawsuits before the people’s court and the people’s court can support the claim of invalidating those restrictive methods.⁶⁸⁴

Therefore, regarding the scope of claims in public interest litigation, punitive damages cannot be directly estimated from the current legal provisions. On the other hand, some argue that expansive interpretation of the term “*etc.*” in the article could justify the claim for punitive damage in public interest litigation.⁶⁸⁵ Notwithstanding, the court decisions directly approved the claim without judging upon the scope of claims of the plaintiff, which blurred the doubts on the scope of the claim.⁶⁸⁶

7.2.2 *Res judicata*

Furthermore, the effect of *res judicata* was highly blurred in the above-demonstrated cases. “*Res judicata*” is the Latin term for “a matter [already] judged,” which basically means the court will

⁶⁸² Article 55 of the PRC Civil Procedure Law and Article 47 of the PRC Consumer Protection Law.

⁶⁸³ Article 13 of the Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Trial of Consumer Civil Public Interests Lawsuits (effective from 1 May, 2016).

⁶⁸⁴ *Ibid.*

⁶⁸⁵ Wenhui Liu (刘文晖) (23 May 2018), 惩罚性赔偿能否成为公益诉讼利剑 问题在实践中显现 [Can punitive Damages become a Sword for Public Interest Litigation? Problems Appeared in Practice], from jcrb.com [正义网], accessed July 19, 2018.

http://news.jcrb.com/jxsw/201805/t20180523_1869747.html

⁶⁸⁶ *Ibid.*

not reconsider the same matter again.⁶⁸⁷ The *res judicata* for public interest proceedings is provided by the judicial interpretation of the Supreme People's Court. After the judicial decision of consumer civil public interest litigation becomes effective, if other authorities or social organizations qualified as plaintiffs bring a consumer civil public interest litigation for the same infringement, the people's court will not accept it.⁶⁸⁸

Meanwhile, after the court have affirmed some facts in a consumer public interest litigation already and the judicial decision entered into force, if a consumer who was harmed by the same infringement act of the business operator brings a lawsuit, both parties do not have to prove the facts again, except that parties have different opinions about the facts and can provide evidence to deny the previously affirmed facts.⁶⁸⁹ In addition, after the court affirmed the illegal acts in consumer civil public interest litigation and the judicial decision entered into force, if a consumer who was harmed by the same infringement acts brings a lawsuit against the business operator, the consumer may apply the judicial findings of the public interest litigation in his or her proceeding directly. In this case, the court can support the plaintiff except that the defendant can provide contradictory evidence to reverse the previous conclusion.⁶⁹⁰

Over all, the consumer can apply the factual judgment of former public interest consumer litigation in his or her proceedings afterwards for individual redress. However, the court in the cases listed above believed that the vast number of "good-natured" consumers would not keep the receipt for the purchase of a pack of salt for potential litigation purpose, and no consumer might bring such a lawsuit in the future. The opinion of the court left doubts about the possibility for consumers to

⁶⁸⁷ Currently the application rule of *res judicata* in civil proceedings is provided in Article 247 of the Interpretation the Supreme People's Court on Application of the PRC Civil Procedure Law (2015).

⁶⁸⁸ Article 15 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Consumer Civil Public Interests Lawsuits (effective from 1 May, 2016).

⁶⁸⁹ Article 16 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Consumer Civil Public Interests Lawsuits (effective from 1 May, 2016).

⁶⁹⁰ *Ibid.*

claim for damages after the decision of the public interests litigation enter into effect. For instance, if a consumer who bought several packages or more of the counterfeit salt accidentally saw the judgement and wanted to seek redress, would it be possible for the defendant to defense with that he already paid punitive damages in public interest litigation and no longer had to bear any liability for other infringed parties? Otherwise, would it be possible that the defendant still has to pay compensation for actual loss of the consumer, yet punitive damages could be exempted? The present judgements did not show any instructive indications about these possible issues.⁶⁹¹

7.2.3 Dilemma of refunding

The third problem is the dilemma of refunding. From the judgements, the court considered it unnecessary to exhaust the statute of limitations for individual consumer claims, and the civil punitive damages had to be transferred to the state treasury. Meanwhile, there have already been worries about how to respond to consumers' potential claims in the future.⁶⁹² For some observers, where the punitive damages should go depends on the position of the consumer association in the proceeding: if the consumer association is standing for the state, the confiscated amount should be transferred to the state treasury and is for public use; if the consumer association is on the behalf of consumers, the consumers should have the right to receive their part after the plaintiff (the consumer association) wins the lawsuit.⁶⁹³

However, there is a dilemma with regards to refunding to the consumers: if the confiscated amount as punitive damage is considered refundable, then the claim becomes private, and the

⁶⁹¹ In addition, from the provisions on the scope and res judicata in the interpretations of the Supreme Court, it can be observed that the estimated application of consumer public interest litigation has been injunction (see *supra* discussion in Section 3.4). However, ambiguities generated from the unpredicted incorporation of punitive damage by the court cannot be ignored.

⁶⁹² Wenhui Liu (刘文晖) (23 May 2018), 惩罚性赔偿能否成为公益诉讼利剑 问题在实践中显现 [Can Punitive Damages Become a Sword for Public Interest Litigation? Problems Appeared in Practice], from jrb.com [正义网], accessed July 19, 2018.

http://news.jrb.com/jxsw/201805/t20180523_1869747.html

⁶⁹³ *Ibid.*

consumer association will lose the standing to sue for “public interest.” Since the people’s Procuratorate belong to public authority while consumer associations are not, to distinguish the situation between *the People’s Procuratorate of Guangzhou City, Guangdong Province vs. Liu* case and *the Consumer Association of Guangdong Province vs. Shi and Hong* case is necessary. So far, whilst the consumer association has not been entrusted by individual consumers with claims for compensation, it did bring public interest litigation based on the mass tort in the name of public interest; this contrast has led to the current ambivalence.

In addition, this dilemma is also due to the ambivalence of the purpose of applying punitive damages in consumer public interest litigation. The initiative of bringing public interest against food safety criminals can be dated back in 2017.⁶⁹⁴ In the case of *the Municipal People’s Procuratorate of Lichuan City, Hubei Province vs. Wu, Zhao and Huang (2017)*, the people’s Procuratorate of Lichuan City considered that the public interests remained in the situation of being infringed since there were no private claims for redress, and therefore public interest litigation was necessary to suspend and recover the public loss.⁶⁹⁵

Notwithstanding, whether the purpose of introducing punitive damages in public interest litigation is compensation, punishment, or prevention is not clear. In other words, if the purpose is to compensate consumers, then to transfer the damages amount to the state treasury would be ineffective. Meanwhile, if the purpose is to punish, the boundaries between public sanction and private sanctions become largely blurred, as the court considered that punitive damages to be equivalent with criminal penalties and administrative sanctions. If the proceeding is aimed at disgorging, or exhausting the illicit profits from the business operator, the amount to be confiscated

⁶⁹⁴ *The Municipal People’s Procuratorate of Lichuan City, Hubei Province vs. Wu, Zhao and Huang (2017)*, See the Supreme People’s Procuratorate of PRC, 检查公益诉讼典型案例[Typical Cases of Public Interest Litigation Brought by People’s Procuratorates], published on 2 March 2018, forwarded from jcrb.com [正义网], accessed July 19, 2018.
http://www.spp.gov.cn/spp/zdgz/201803/t20180302_368568.shtml

⁶⁹⁵ *Ibid.*

should be limited to the business operator's illegal gains instead of ten-time compensation.⁶⁹⁶

Overall, the current result of combining punitive damages with consumer public interest proceedings demonstrates a hybrid of the three issues above, and largely blurred the public and private aspects of consumer rights.⁶⁹⁷

7.3 Public interest vs. private interest: the gap in consumer protection

The analysis above has displayed a gap in the protection of public interests and private interests. What are the results of this gap in consumer protection, and how to improve the situation? This section first is going to demonstrate the insufficiency of current litigation mechanism for consumer redress in China (7.3.1). Then it is going to point out the necessity of developing compensatory collective redress mechanisms to fill the gap (7.3.2). In addition, since some also argue that disgorgement can be a supplement to collective redress for consumer protection, one piece of analysis is to be conducted to examine the feasibility of disgorgement in China (7.3.3).

7.3.1 Litigation mechanisms are insufficient for consumer redress

In China, consumer group litigation demonstrates a tilting focus on public interests, which is partially due to the influence of economic law.⁶⁹⁸ In judicial practice, the previous cases were mainly for injunction.⁶⁹⁹ The advocates for incorporating punitive damage in group litigation are also from the perspective of protecting public interests.⁷⁰⁰ Meanwhile, the current approach leaves a gap between the protection of public and private interests of the consumer. According to current law,

⁶⁹⁶ See the *infra* discussion in following Section 7.3.3.

⁶⁹⁷ See *supra* discussion in Section 3.4.

⁶⁹⁸ *Ibid.*

⁶⁹⁹ *Ibid.*

⁷⁰⁰ Wenhui Liu (刘文晖) (23 May 2018), 惩罚性赔偿能否成为公益诉讼利剑 问题在实践中显现 [Can Punitive Damages Become a Sword for Public Interest Litigation? Problems Appeared in Practice], from jrb.com [正义网], accessed July 19, 2018.

http://news.jrb.com/jxsw/201805/t20180523_1869747.html

consumer associations may provide advices and mediating services, but participate in litigation only in terms of public interest.⁷⁰¹ As the consumer association acts mainly for public interests, consumers have to seek redress by themselves if they have to go to the court.

For individual consumers to redress their damage through civil lawsuit there are mainly three approaches. First is the individual lawsuit.⁷⁰² Second is a joint or common lawsuit: consumers in small numbers with a common claim may join the same proceeding.⁷⁰³ Compared with business operators, consumers are usually in a disadvantageous situation in terms of information and bargaining power.⁷⁰⁴ In particular for disputes on damages of small volume, individual or common lawsuits are not sufficient for consumers to apply.⁷⁰⁵ Third is a representative lawsuit: for consumers in large numbers, they may select representatives from the group, and other members burden the results of the proceeding.⁷⁰⁶ While the representative proceeding seems to perform the function of collective redress, it is neither strongly promoted nor frequently applied for the risk of group incidents.⁷⁰⁷

Policy makers considered that punitive damages would be adequate for consumers to cover their litigation costs in individual lawsuits.⁷⁰⁸ However, punitive damages are not always sufficient

⁷⁰¹ Consumer associations may provide ADR services including Article 37 of the PRC Consumer Protection Law.

⁷⁰² Article 119 of the PRC Civil Procedure Law.

⁷⁰³ Article 52 of the PRC Civil Procedure Law.

⁷⁰⁴ Ling Wang (王玲), 我国消费者诉讼形态的类型化分析[Typical Analysis of Consumer Litigation], *Journal of Tianzhong* 天中学刊 6 (2014): 39-44.

⁷⁰⁵ *Ibid.*

⁷⁰⁶ Article 53 and 54 of the PRC Civil Procedure Law.

⁷⁰⁷ Yu Fan (范愉), 集团诉讼研究[On Group Litigation] (Beijing daxue chubanshe, 2006), 411.

Forwarded from 消费者集体性损害赔偿诉讼的二阶构造 [Two-stage Litigation Structure of Consumer Group Action for Damage Compensation], *Global Law Review* 环球法律评论 5 (2014): 64-82. Jianguo Xiao (肖建国), and Zhongshun Huang (黄忠顺), 消费公益诉讼中的当事人适格问题研究—兼评《消费者权益保护法修正案(草案)》第十九条 [Research on the Standing in Consumer Public Interest Litigation—with a Comment on the Draft of the Amendment to the PRC Law on Protection of Consumer Rights and Interests], *Journal of Shandong Police College* 山东警察学院学报 6 (2013): 5-11.

⁷⁰⁸ Shishi Li (李适时) ed., 中华人民共和国消费者权益保护法释义(最新修正版) [Explanations of the Law on Protection of Consumer Rights and Interests the People's Republic of China (Latest revised edition)] (Beijing: Falv chubanshe, 2013), 276.

to motivate consumers. The fake-hunting phenomenon shows an implicit problem of scattered damages: since mass consumer damages are often small in volume, and infringement act of the business operator is not always obvious, punitive damage approach is not sufficient.⁷⁰⁹ For instance, despite the rapid increasing of fake-hunting lawsuits in the previous years, most of them are brought by regular fake-hunters rather than ordinary consumers, which actually proved the insufficiency of the punitive damage system. Nevertheless, the gap between public interest litigation and individual consumer lawsuits has not been bridged so far.

7.3.2 Compensatory group litigation is necessary

In China, the scope of group litigation is limited to public interests, with the standing to sue limited to the people's procuratorates and 32 provincial level consumer associations, which is far from enough.⁷¹⁰ The current approach cannot substitute the function of compensatory group litigation.⁷¹¹ To fill the gap between public and private interests in consumer protection in terms of collective redress is necessary. According to conventional theories, public interest litigation is a special proceeding and should not be used to solve private disputes.⁷¹² Private damages should in principle be resolved in private proceedings, and the difficulties can be eliminated through alternative approaches, including joint lawsuits, representative proceedings, litigation fee arrangements, and litigation assistance.⁷¹³ However, in practice such mechanisms are not sufficient

⁷⁰⁹ See *supra* section 4.3.

⁷¹⁰ Zhongshun Huang (黄忠顺), 消费者集体性损害赔偿诉讼的二阶构造 [Two-stage Litigation Structure of Consumer Group Action for Damage Compensation], *Global Law Review* 环球法律评论 5 (2014): 64-82.

⁷¹¹ *Ibid.*

⁷¹² Weiping Zhang (张卫平), 民事公益诉讼原则的制度化及实施研究 [Research on Institution and Implementation of the Principles of Civil Public Interest Litigation], *Tsinghua Law Journal* 清华法学 4 (2013): 6-23.

⁷¹³ *Ibid.*

in consideration of consumers' costs and weakness of position in going to the court by themselves.⁷¹⁴ Moreover, if divided into separate stages, to incorporate compensatory proceeding into group litigation led by consumer organizations can also be compatible with Chinese civil procedure.⁷¹⁵

Unlike China, various jurisdictions have developed collective redress mechanisms for consumer protection. In the United States, class action was developed from its own social context of the 1960s.⁷¹⁶ During the past decades, class action in the United States has influenced various jurisdictions in institutional design for mass-litigation.⁷¹⁷ Nevertheless, the US-style class action has also been criticized for low recovery to class members, while the attorneys often benefit most from large-volume settlement.⁷¹⁸ In the European Union, along with the promotion of free movement in the common market, consumer protection has always been a crucial issue.⁷¹⁹ At the regional level, the *EU Commission Recommendation on 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States* was issued in 2013.⁷²⁰ The Member States need to develop domestic legal institutions following EU directives, and researchers generally agree with that group litigation can be a remedy to enforce consumer interests.⁷²¹ According to the Recommendation of 2013 mentioned-above, Member States should have collective

⁷¹⁴ Ling Wang (王玲), 我国消费者诉讼形态的类型化分析[Typical Analysis of Consumer Litigation], *Journal of Tianzhong* 天中学刊 6 (2014): 39-44.

⁷¹⁵ Zhongshun Huang (黄忠顺), 消费者集体性损害赔偿诉讼的二阶构造 [Two-stage Litigation Structure of Consumer Group Action for Damage Compensation], *Global Law Review* 环球法律评论 5 (2014): 64-82.

⁷¹⁶ Stephen C. Yeazell, "Group Litigation and Social Context: Toward a History of the Class Action," *Columbia Law Review* 6 (Oct., 1977): 866-896.

⁷¹⁷ Deborah R. Hensler, "The Future of Mass Litigation: Global Class Actions and Third-Party Litigation," *The George Washington Law Review*, Volume 79 (2011): 306-323.

⁷¹⁸ Deborah R. Hensler, Bonnie Dombey-Moore, Elizabeth Giddens, Jennifer Gross and Erik Moller, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, (RAND, 2000), 401-469.

⁷¹⁹ Thierry Bourgoignie and David M. Turbek, *Consumer Law, Common Markets and Federalism in Europe and the United States*, (Walter de Gruyter & Co., Berlin, 1986), 6-12.

⁷²⁰ 2013/396/EU, *Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law*, EUR-lex, accessed July 19, 2018. <http://data.europa.eu/eli/reco/2013/396/oj>.

⁷²¹ Astrid Stadler, "Group actions as a remedy to enforce consumer interests," in *New Frontiers of Consumer Protection: the Interplay between Private and Public Enforcement*, Fabrizio Gafaggi and Hans-W. Micklitz (eds.), (Intersentia, 2009), 305-327.

redress mechanisms available to achieve EU policy objectives, including better enforcement of European Union law, protection of consumers, improvement of access to justice, better efficiency of justice systems, avoidance of abusive litigation, and an effective right to compensation.⁷²² The Recommendation of 2013 provided for its implementation by July 2015 and for a reassessment of the collective redress landscape across the EU by 2017.⁷²³ Up to the present, a new deal for consumers has been proposed, which aims to modernize and replace *Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on Injunctions for the Protection of Consumers' Interest* (“the Injunctions Directive”).⁷²⁴ This proposed directive has been presented together with the proposal on targeted amendments to four EU consumer law Directives as part of the “New Deal for Consumers,” which is expected to improve the effectiveness of the injunction procedure and help eliminate the consequences of the infringements of Union law which affect the collective interests of consumers.⁷²⁵

In East Asia, China’s neighboring countries including Japan and South Korea both introduced compensatory group litigations. South Korea introduced class action in the security law area for financial consumers in 2005.⁷²⁶ Japan at first introduced injunctive consumer group litigation into the Consumer Contract Act.⁷²⁷ Afterwards, to improve the situation of consumer redress, a two-stage procedure was established through special legislation in 2013 and became

⁷²² *Ibid.*

⁷²³ Eva Lein et al. *State of Collective Redress in the EU in the Context of the Implementation of the Commission Recommendation*, JUST/2016/JCOO/FW/CIVI/0099. British Institute of International and Comparative Law, 2018, accessed July 19, 2018. <https://www.collectiveredress.org/newsitem/6045>.

⁷²⁴ *Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards Better Enforcement and Modernisation of EU Consumer Protection Rules*. COM/2018/0184 final - 2018/089 (COD). EUR-lex, accessed July 19, 2018. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM%3A2018%3A184%3AFIN>.

⁷²⁵ *Ibid.*

⁷²⁶ *Securities Related Class Action Act of the Republic of Korea* (effective on 1 January 2005). See Dae Hwan Chung, “Introduction to South Korea’s New Securities-Related Class Action,” *The Journal of Corporation Law* 30 (2004): 165-180, accessed July 19, 2018. heinonline.org.

⁷²⁷ See *supra* discussion in Section 4.2.3.

effective in October, 2016.⁷²⁸ To summarize, group litigation does not have to be limited to public interests. Rather, for the purpose of consumer protection, introducing compensatory group litigation can help to enhance the enforcement of consumer rights. Compensatory group litigation led by consumer associations can solve the theoretical inconsistency in current public interest proceedings, and enhance the efficiency of consumer redress.⁷²⁹

7.3.3 Disgorgement as a functional alternative to punitive damages?

In addition, some also argue that a disgorgement mechanism can be a supplement to public interest litigation for the purpose of preventing business operators from illegally profiting.⁷³⁰ Disgorgement, based on the idea of not allowing profiting by committing a wrong, exists in various jurisdictions; meanwhile, there remain diversities in the terminology, and doubts and problems with the function of disgorgement mechanisms.⁷³¹ Therefore, whether disgorgement can be effective in terms of consumer protection in China depends on the context.

In China, the court and procuratorate consider punitive damage in public interest litigation as the supplementary means “to prevent the infringer’s civil liability from falling void”; in this sense, disgorgement damages based on the illegal gains can be an alternative to punitive damages in terms of recovering the damage caused to public interest. The consumer organizations or the people’s procuratorates may bring a lawsuit against the wrongdoer for disgorging the profits gained by unlawful acts. However, the problem is with effectiveness. If the confiscated amount goes to the state treasury, the effectiveness of deterrence can be largely reduced by paying the disgorged amount

⁷²⁸ *Ibid.*

⁷²⁹ Zhongshun Huang (黄忠顺), 消费者集体性损害赔偿诉讼的二阶构造 [Two-stage Litigation Structure of Consumer Group Action for Damage Compensation], *Global Law Review* 环球法律评论 5 (2014): 64-82.

⁷³⁰ *Ibid.*

⁷³¹ See Ewoud Hondius and André Janssen (eds.) *Disgorgement of Profits: Gain-based Remedies Throughout the World*, (Springer, 2015), 471-507. The present writer takes a cautious attitude towards its necessity and feasibility for consumer protection in China.

to the state treasury, by restricting the motivation of the infringed to enforce their redress.⁷³² Present judgements of public interest proceedings in China all ordered the defendants to pay punitive damages to the state treasury. Therefore, disgorgement can be ineffective in the context of China, either.

Furthermore, disgorgement is also controversial in terms of its relations with compensatory claims of the infringer.⁷³³ In the situation of China, if disgorgement were introduced into consumer public interest litigation, it would not change the current dilemma in refunding as punitive damages. In addition, the purpose of disgorgement is more preventive rather than punitive, and therefore there is a limitation by the profits earned from unlawful infringements,⁷³⁴ which adds to the complexity regarding calculations. In conclusion, disgorgement is not necessarily beneficial for consumer protection in China. Rather, the crucial issue is to develop compensatory group litigation to enhance consumer redress.

7.4 Address private rights of consumers with collective redress mechanism

Currently, the enforcement of consumer protection demonstrated imbalance between the “public interest” and “private interests,” especially in terms of the group litigation mechanism in China. Against this background to rectify the imbalance and focus on the weaknesses of individual consumers in redress becomes necessary. Therefore, China needs to make legal improvements to enhance consumer protection. First, the enforcement of consumer protection should balance the emphasis between public interests and private interests 7.4.1). Second, the law should entitle qualified consumer associations to bring compensatory collective redress, with a focus on private

⁷³² *Ibid.*

⁷³³ *Ibid.*

⁷³⁴ *Ibid.*

rights of consumers (7.4.2). In addition, recovery system should be established for the benefit of consumer remedy (7.4.3).

7.4.1 Change the emphasis from public interest to private interest

From the recent movement in consumer redress, the lack of focus on the private rights of consumers led to the imbalanced focus on consumer rights. Not only the “public interest” but also “private interest” in consumer protection requires attention. As previous analysis manifested, redress to consumers’ private interests is in need of more efforts. The present problems in applying punitive damages in consumer public interest litigation is largely due to the blurring of private rights and interests and public interests of consumers.⁷³⁵ Therefore, this analysis attempts to propose a dual-side approach as a response.

First, consumer associations should be granted the standing to represent consumers in compensatory group litigation. From the overview of consumer collective redress in other jurisdictions, the “two-stage” model of Japan is also feasible for China.⁷³⁶ In particular, the compensatory proceeding can be established as the second stage, and consumer associations may collect the claims for consumers.⁷³⁷ Second, recovery system can be helpful to protect consumers’ rights to redress.⁷³⁸ Since neither disgorgement nor punitive damage under public interest litigation provides *insufficient* remedy to the infringed consumers, it is at stake to address the private rights of consumers and protect their access to get remedy for damages.

⁷³⁵ See *supra* discussion in Section 3.4.3.

⁷³⁶ Zhongshun Huang (黄忠顺), 消费者集体性损害赔偿诉讼的二阶构造 [Two-stage Litigation Structure of Consumer Group Action for Damage Compensation], *Global Law Review* 环球法律评论 5 (2014): 64-82.

⁷³⁷ *Ibid.* Hongmei Zhao (赵红梅), 美、德新型惩罚性赔偿对我国《消法》修订的启示 [Reference of Punitive Damages in US and Germany to the Revision of Concerning Clauses in the Consumers Protection Law of PRC], *Science of Law (Journal of Northwest University of Political Science and Law)* 法律科学(西北政法大学学报) 5 (2011): 183-190.

⁷³⁸ Yuepeng Chen (陈越鹏), 论惩罚性赔偿公益基金之构建——以法经济学为前提 [The Establishment of the Punitive Damages Community Foundation: from the Perspective of Law and Economics], *Journal of Guangdong University of Business Studies* 广东商学院学报 6 (2011): 84-90.

7.4.2 Empower consumer organizations in compensatory group litigation

Consumer organizations should be granted the standing to bring compensatory group litigation. Currently, the private rights of individual consumers have not been incorporated into group litigation by consumer associations. However, to establish the compensatory collective redress mechanism proved both practically necessary for consumer protection and theoretically possible. In practice, to achieve effectiveness of compensatory group litigation requires more participation of consumer organizations.⁷³⁹ From a functional perspective, since consumer associations have better expertise, the group litigation led by the consumer associations may effectively reduce the risks of mass affair compared with representative proceedings.⁷⁴⁰ Moreover, due to the extensiveness of consumer association networks, consumer associations have more access to the information of consumer damage which can contribute to consumer redress.⁷⁴¹ After all, consumer associations in China are funded by public finance, which adds to the reliability of litigation proceedings.⁷⁴² Overall, consumer associations in China are both functionally and financially capable of supporting consumers in civil lawsuits. In addition, to allow lower consumer associations to support consumers more actively with lawsuits may contribute to enhancing the level of consumer protection as well.⁷⁴³

7.4.3 Recovery system is necessary for consumer remedy

⁷³⁹ Leqi Du (杜乐其), 消费公益诉讼制度的局限及其矫正——《中华人民共和国消费者权益保护法》第 47 条之评析[Insufficiency and Improvement on Consumer Public Interest Litigation---on the Article 47 of the PRC Law on Protection of Consumer Rights and Interests], *Theory Monthly* 理论月刊 10 (2014): 99-105.

⁷⁴⁰ *Ibid.*

⁷⁴¹ Shishi Li (李适时) ed., 中华人民共和国消费者权益保护法释义(最新修正版)[Explanations of the Law on Protection of Consumer Rights and Interests the People's Republic of China (Latest revised edition)] (Beijing: Falv chubanshe, 2013), p220.

⁷⁴² Article 37 of the PRC Consumer Protection Law stipulates that, "... *People's governments at various levels should provide necessary financial support for consumer associations to perform their duties.*"

⁷⁴³ Yuepeng Chen (陈越鹏), 论惩罚性赔偿公益基金之构建——以法经济学为前提[The Establishment of the Punitive Damages Community Foundation: from the Perspective of Law and Economics], *Journal of Guangdong University of Business Studies* 广东商学院学报 6 (2011): 84-90.

If punitive damage is continue to be applied in public interest litigation, clarification of the legal reasoning and mechanism for refunding the consumers is necessary. In response to the dilemma in refunding, to establish foundations is one possible solution. It has already been addressed that non-profit foundations should be established to manage the amount of punitive damages confiscated from public interest proceedings.⁷⁴⁴

However, there are several issues need to be considered. First, if public interest proceedings will continue to combine punitive damages, it is necessary to clarify in terms of *res judicata*. The consumers' private claim should not be automatically replaced by the performing of consumer associations.⁷⁴⁵ Second, from the perspective of effectiveness, instead of being confiscated together with public penalties and transferring the money to the state treasury, punitive damages can be deposited or entrusted to a non-profit foundation for potential redress purpose.⁷⁴⁶ For instance, in the United States, under the *Consumer Financial Civil Penalty Fund Rule*, the Bureau of Consumer Financial Protection must deposit the civil penalty it obtains to the fund against any person in any judicial or administrative action under Federal consumer financial laws.⁷⁴⁷ Under this Act, funds in the Civil Penalty Fund can be used for payments to the victims.⁷⁴⁸ Considering the current insufficiency of individual consumer redress, the Civil Penalty Funds in the United States may shed instructions on the management of punitive damages in China.

7.5 Summary

⁷⁴⁴ *Ibid.*

⁷⁴⁵ Zhongshun Huang (黄忠顺), 消费者集体性损害赔偿诉讼的二阶构造 [Two-stage Litigation Structure of Consumer Group Action for Damage Compensation], *Global Law Review* 环球法律评论 5 (2014): 64-82.

⁷⁴⁶ Yuepeng Chen (陈越鹏), 论惩罚性赔偿公益基金之构建——以法经济学为前提 [The Establishment of the Punitive Damages Community Foundation: from the Perspective of Law and Economics], *Journal of Guangdong University of Business Studies* 广东商学院学报 6 (2011): 84-90.

⁷⁴⁷ See Consumer Financial Consumer Bureau, "Civil Penalty Fund," accessed on July 19, 2018. <https://www.consumerfinance.gov/about-us/payments-harmed-consumers/civil-penalty-fund/>

⁷⁴⁸ *Ibid.*

Due to lacking focus on the private rights of consumers, consumer protection in China turned to focus more on public interests, while the weaknesses of consumers in redress as individuals have been frequently ignored.⁷⁴⁹ This chapter is aimed at addressing the necessity to balance the emphasis between public interests and private interests of consumer protection in China, centered on collective redress mechanisms.

The first section started from the latest court decisions that approved punitive damage in public interest litigation brought by the people's procuratorates and consumer organizations (7.1). Through a review of legislation on public interests and the recent development in judicial decisions, China has allocated more emphasis on "public interests" in consumer protection. However, there are problems with the current approach with regards to the application of punitive damages (7.2). While the people's procuratorates and consumer organizations are granted the standing in public interest litigation, claims for punitive damages are not explicitly provided for by current legal provisions (7.2.1). Moreover, the *res judicata* of the court decision also raised doubts, in consideration of consumers' rights to claim in the future (7.2.2). In addition, regarding how to manage the amount of punitive damages, there has been no appropriate method and whether the confiscated amount should be refunded to consumers became a dilemma (7.2.3). The third section demonstrated the gap between public and private interests in consumer protection and the necessity of addressing the weaknesses of individual consumers in redress (7.3). Current litigation mechanisms are insufficient for consumer redress (7.3.1), and compensatory group litigation is necessary to enhance the enforcement of consumer rights (7.3.2). In the context of China disgorgement system may not satisfy the needs of consumer protection (7.3.3).

In conclusion, China needs to develop compensatory collective redress mechanism to enhance consumer protection, with a focus on private interests of consumers (7.4). First of all, the

⁷⁴⁹ See *supra* discussion in Section 3.4.

focus should not only be allocated to the aspect of “public interests,” but also private interests of consumers who are individual persons in redress (7.4.1). Subsequently, to address the private rights and interests of consumers, the law should allow qualified consumer associations to bring compensatory group litigation (7.4.2). In addition, in case China may continue to combine punitive damages with public interests litigation, a recovery system can be helpful for the benefits of consumer remedy (7.4.3).

Chapter VIII: Conclusion

The modernization of the legal system has been a crucial issue in China. However, it is too big a topic to discuss with fragmentation of legal fields and variety of research approaches. With a focus on the enforcement dilemma caused by fake-hunting lawsuits in China, this study aimed to investigate the problems, practical and theoretical, with legal development of consumer protection. Based on a literature review and case analysis, this study correlated the civil-economic law gap with the enforcement problem in Chinese context. From a comparative analysis, it concluded that China needs to focus on the private rights of consumers and establish relevant legal system that supports consumers to enforce their private rights.

8.1 Problems with consumer protection strategy in China

The “Wanghai phenomenon,” or fake-hunting lawsuits dilemma, is unique in China and has been a hot issue in consumer rhetoric for decades.⁷⁵⁰ The occurrence of this phenomenon initiated with the introduction of punitive damage in the Consumer Protection Law.⁷⁵¹ The gap in legal methodology for developing consumer protection has resulted in a widespread of conflicts.⁷⁵²

First, the fake-hunting lawsuits caused conflicts around application of punitive damages for consumer protection in China.⁷⁵³ While advocates of fake-hunters have made efforts to justify the legitimacy and benefits of fake-hunting lawsuits, their arguments are not always successful in persuading the opponents. Up to the present, there remains no consensus with regards to this dilemma. The fake-hunting lawsuits dilemma in China is not merely limited to the problem of how to interpret the law, such as “consumer” and “fraudulent acts.” Rather, the fake-hunting lawsuits

⁷⁵⁰ See *supra* discussion in Section 2.1.

⁷⁵¹ See *supra* discussion in Section 2.1.

⁷⁵² See *supra* discussion in Section 2.4.

⁷⁵³ See *supra* discussion in Section 2.4.

dilemma raised the questions of what is the profound reason behind the divergence and where consumer protection should go forward.

Second, the enforcement dilemma is underlined by tension between economic law and civil law. The gap between legislation and enforcement manifested that there is a lacking focus on the private rights of consumers from many advocates of fake-hunters.⁷⁵⁴ As a result, regulators have largely focused on the market dimension of consumer protection, rather than on the disadvantages of individual consumers in transaction and redress.⁷⁵⁵ The fundamental reason for the divergence is an implicit split understanding of consumer rights as “collective rights” or “private rights.” Moreover, behind this split understanding of consumer rights is the decades-long tension between an economic law approach and a civil law approach of consumer protection.⁷⁵⁶ This tension has its historical roots in the path-dependency of legal development of contemporary China.⁷⁵⁷

Third, focus on private rights of consumers is necessary for China to solve the inconsistency in legal application and enhance consumer protection. The neighboring country, Japan, provided a model for China to rethink about the possibility of legal institution design for consumer protection.⁷⁵⁸ Clarification between public and private law can reduce the inconsistencies at interpretation level, and collaboration among acting agencies will contribute to collective enforcement.⁷⁵⁹ China needs to allocate more focuses on the private rights of consumers. Subsequently, policy makers and observer need to reconsider the purpose of punitive damage system in consumer law and the actual effectiveness of this system in consumer protection. With a focus on the enforcement of consumers’ private rights, the current legal system requires improvement at both the interpretative level and the institution level.

⁷⁵⁴ See *supra* discussion in Section 2.4

⁷⁵⁵ See *supra* discussion in Section 3.4.

⁷⁵⁶ See *supra* discussion in Section 3.1 and 3.2

⁷⁵⁷ See *supra* discussion in Section 3.3.

⁷⁵⁸ See *supra* discussion in Section 4.1, 4.2 and 4.3.

⁷⁵⁹ See *supra* discussion in Section 4.4.

8.2 Resolve inconsistency and imbalance in present enforcement mechanisms

In response to the inconsistencies and imbalance in present enforcement mechanisms of China, this study provided proposals at three aspects for China to resolve the current problems. First, the court should apply punitive damages in the direction of remedial enforcement. Different from common law traditions, China is in general a civil law jurisdiction, though hybrid in terms of legal mechanisms in some fields. Punitive damages were first introduced in 1993 with the purpose of consumer protection through market regulation.⁷⁶⁰ Despite resistance in the early period, punitive damages have been commonly considered as *status quo* system in the field of consumer protection.⁷⁶¹ Meanwhile, punitive damage system in China proved not as effective as expected to be a regulatory instrument.⁷⁶² Rather, it will be more logical and useful to apply punitive damages mainly as a civil remedy and therefore motivate consumers to enforce their private rights.⁷⁶³ In addition, considering the compatibility between punitive damage and the judicial system in China, it is not necessarily feasible for China to introduce large punitive damage awards. Instead, public enforcement is more workable to achieve deterrence over the business operators.⁷⁶⁴

Second, to clarify the interpretation of “fraudulent act,” a focus on private rights of consumers is needed. To solve the inconsistencies in legal application requires clarification of interpretation.⁷⁶⁵ Current theories in Chinese rhetoric demonstrate great diversities regarding whether the court should award punitive damages for “fraudulent act” to fake-hunters.⁷⁶⁶ As one of the main findings of this study, the liability of punitive damages based on “fraudulent acts” under

⁷⁶⁰ See *supra* discussion in Section 5.1.

⁷⁶¹ See *supra* discussion in Section 5.1 and 6.2.

⁷⁶² See *supra* discussion in Section 5.2 and 5.3.

⁷⁶³ See *supra* discussion in Section 5.4.

⁷⁶⁴ See *supra* discussion in Section 5.4.

⁷⁶⁵ See *supra* discussion in Chapter 6.

⁷⁶⁶ See *supra* discussion in Section 6.1 and 6.2.

Article 55 of the Consumer Protection Law is in nature a civil liability of tort.⁷⁶⁷ Moreover, from a perspective of private rights of consumers, fake-hunters should not be awarded punitive damages as their rights are not violated.⁷⁶⁸ In addition, with regards to the regulation of fraudulent advertising, including misleading information, fake-hunters are too random and profit driven to be effective.⁷⁶⁹ In this situation, injunctions by consumer organizations can be a more promising alternative to punitive damage lawsuits.⁷⁷⁰

Thirdly, China needs to develop compensatory collective redress mechanism in order to improve the enforcement of consumer rights. Recent judicial decisions approved punitive damages in consumer public interest litigation. While commentators applauded for this movement, problems remain at various aspects regarding the scope of claims, *res judicata* and how to refund the consumer.⁷⁷¹ What has been neglected is that the access to redress of individual consumers need to be secured.⁷⁷² Against this background, consumer associations should be cautious to claim for punitive damages in order not to infringe the private claims of consumers.⁷⁷³ Moreover, to protect “public interests” is not the only possible function of consumer associations.⁷⁷⁴ Rather, associations should be encouraged to enhance enforcement of consumers’ rights through compensatory collective redress.⁷⁷⁵ In addition, to establish recovery system can be helpful to consumers compared with disgorgement.⁷⁷⁶ Overall, the private rights of consumers should be addressed in a more sufficient manner.⁷⁷⁷

⁷⁶⁷ See *supra* discussion in Section 6.4.1.

⁷⁶⁸ See *supra* discussion in Section 6.4.2.

⁷⁶⁹ See *supra* discussion in Section 6.3.

⁷⁷⁰ See *supra* discussion in Section 6.4.3.

⁷⁷¹ See *supra* discussion in Section 7.2.

⁷⁷² See *supra* discussion in Section 7.3.

⁷⁷³ See *supra* discussion in Section 7.4.

⁷⁷⁴ See *supra* discussion in Section 7.3.

⁷⁷⁵ See *supra* discussion in Section 7.3.

⁷⁷⁶ See *supra* discussion in Section 7.3.

⁷⁷⁷ See *supra* discussion in Section 7.4.

8.3 Remarks: Enhance consumer protection with focus on private rights of consumers

Conventional ideas of consumer protection in China have been emphasizing the public interest or collective rights. However, the private rights of consumers need more attention to enhance consumer protection. Punishment to the business operators, in particular through punitive damage, is not the ultimate purpose but only one of the means of consumer protection. Therefore, China needs to change the focus from regulating the market order to supporting consumers to enforce their rights.

Above all, to focus on the private rights of consumers is necessary for protecting consumer interests in transaction. This study demonstrated that the consumer protection in China has been focused on market regulation. At the same time, private law approach for consumer protection remains less emphasized. As a result, inconsistencies and imbalances occurred in enforcement as manifested in the fake-hunting lawsuits dilemma. To rectify this situation, “consumer in transaction” or “consumer in contract” needs to be noted through the establishment of relative legal institution with a private-rights focus.

Furthermore, the court needs to adjust the application of punitive damages to be a civil remedy. In this case, punitive damages function as compensation to the litigation cost and empower consumers in individual redress. While punitive damage was introduced in China against a particular social background with a regulatory purpose, it proved insufficient for market purification.⁷⁷⁸ In the context of China, the positive effects of punitive damages in empowering consumer should be maintained.⁷⁷⁹ Based on clarification of applicable conditions, this system can motivate and support consumers in redress, performing a compensatory function as a civil remedy.

Subsequently, consumer group litigation requires further promotion on both injunction and compensation. Injunctive consumer group litigation can help rectify consumers’ disadvantages in the market. Meanwhile, compensatory group litigation can support consumers in collective redress, and

⁷⁷⁸ See *supra* discussion in Chapter 6.

⁷⁷⁹ See *supra* discussion in Chapter 6.

empower individual consumers against difficulties and costs in lawsuits. After all, punitive damage system is not a *panacea*, but a *bandage* that tentatively bridges the gap left by the insufficiency of both public and private enforcement of consumer law. To enhance consumer protection, legal institutions for consumer protection should be improved in a way that easily accessible to every consumer and effective in the enforcement of their lawful rights. With the development of public regulation and private redress, the space for fake-hunters would be more and more limited. Nevertheless, how to protect consumer rights and interests in transactions will continue to be a significant issue in the future.

8.4 Remaining issues

There are some remaining issues which are not encompassed by this paper, yet require further exploration in the following research. The key issues include, but are not limited to: (1) consumer contract theory in general; (2) consumer education; (3) interplay between public and private enforcement; (4) counterfeit governance; and (5) disciplinary development in the consumer law field.

The first issue concerning the enforcement of consumer private rights is the consumer contract theory in general. Consumer contract system is the foundation for developing theories to protect consumers in transaction.⁷⁸⁰ This paper aimed at illustrating a general picture of enforcement strategy on consumer protection in China. While this study was not able to extend the analysis into details of theories around the consumer contract, this issue deserves comprehensive analysis to enhance the protection of consumers in transactions.

The second issue is consumer education. With the focus of supporting consumers to enforce their rights, to inform the consumers about their lawful rights and applicable legal

⁷⁸⁰ See *supra* discussion in Section 4.5.1.

mechanism is of indispensable importance. Although consumers in China enjoy the “right for education,” there is not special law on consumer education in China.⁷⁸¹ China also needs to learn from other jurisdictions and make improvements at institution level in order to enhance consumer education.⁷⁸²

Thirdly there is the interplay between public and private enforcement. Many previous studies have conducted this approach.⁷⁸³ The collaboration between administrative and judicial enforcement of law has been an important topic, not only in the field of consumer protection but also in other legal fields.⁷⁸⁴ In China, studies applying such an approach remain few and more efforts can be allocated to this topic.

Fourth is the issue of counterfeit governance. Historically, consumer protection in China has been focused on how to protect consumers from the harms of all kinds of “fakes.”⁷⁸⁵ With economic development, the scope of “fakes” also expanded from mainly defective products to all kinds of “fraudulent acts.” However, the clarified standards for legal application of punitive damages remain lagged-behind, and therefore the fake-hunting lawsuits dilemma occurred. This study mainly focused on how to rectify the problems with enforcement strategy of consumer protection, including how to clarify the applicable conditions at interpretation level.⁷⁸⁶ Meanwhile, more comprehensive analysis is necessary to elaborate the legal and social problems with counterfeit governance in order to solve the problems of fakes.

⁷⁸¹ See *supra* discussion in Section 1.3.2.

⁷⁸² Qianqian Cheng (程倩倩), 消费者教育的法律促进机制研究 [A Study on Legal Promotion Mechanism of Consumers' Education], Master degree thesis of Southwest University of Political Science and Law, published online at www.cnki.cn as No.11 (2017), accessed July 19, 2018.

⁷⁸³ Fabrizio Gafaggi and Hans-W. Micklitz, “Introduction,” in *New Frontiers of Consumer Protection: the Interplay between Private and Public Enforcement*, Fabrizio Gafaggi and Hans-W. Micklitz (eds.), (Intersentia, 2009), 1-11.

⁷⁸⁴ For instance, anti-trust law, competition law, environmental law, and the forth.

⁷⁸⁵ See *supra* discussion in Chapter 2.

⁷⁸⁶ See *supra* discussion in Section Chapter 6.

Finally there is a need for disciplinary development in the consumer law field. As investigated in the paper, the consumer law rhetoric in China has been under the influence of the department theory of law, but this influence has proven undesirable.⁷⁸⁷ In the future, studies in the consumer law field may be freed from constrains of department theory of law and focus on more crucial issues regarding consumer rights and interests.

This study only provided a small piece of analysis on consumer protection in China. Due to the limitations of time and knowledge, this study might still be insufficient in different aspects. Nevertheless, the present author hopes this analysis might provide useful information for those who have interests in Chinese law or consumer protection in China.

⁷⁸⁷ See *supra* discussion in Section 3.3.2.

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