



Teaching Consumer Law *Part Three*

By Alvin C. Harrell*

I. Introduction

On May 18-20, 2006, under the direction of Professor Richard Alderman, Program Chair and Director of the Center for Consumer Law, the University of Houston Law Center presented the third bi-annual Conference on Teaching Consumer Law (2006 Conference), a unique event bringing together a world-wide group of participants to discuss important issues and emerging developments in consumer law. Similar to previous years,¹ this article reports on the presentations at the 2006 Conference and attempts to summarize some of the many salient points of interest.

As usual, some qualifications and disclaimers are in order. The author has attempted to relate the content and flavor of the various presentations. Thus the article does not necessarily reflect your author's view on any particular issue. Yet, as with any such report, this article has been filtered through your author's perceptions of the messages being delivered by the speakers. Thus the article also may not fully or adequately represent the views of the speakers being reported. The article reflects a good faith effort to capture the spirit of the 2006 Conference, but the reader should seek independent verification from individual Conference speakers before relying on any of their views as expressed herein.

The challenge of this task can be seen in the tremendous scope

and variety of the views and legal systems represented at the 2006 Conference. Perspectives from all over the world, representing very diverse opinions and approaches to consumer protection, are represented. Some of the best-known academics and practitioners in consumer protection law, of every generation and background, participated, both as faculty and attendees. The common theme of the 2006 Conference was consumer redress. Although other issues of broad relevance were also discussed. For example, issues relating to the scope and nature of consumer law and remedies in the context of a law school course and curriculum have a broader importance relating to the role and direction of consumer law in society as a whole, and in the larger international community. These issues were discussed both broadly and in detail at the 2006 Conference.

Once again, Professor Alderman (now Dean Alderman, see below) and the sponsoring organizations (the University of Houston, the Center for Consumer Law, and the National Association of Consumer Advocates) are to be congratulated for successfully bringing together this world-wide group of speakers and attendees, with extensive expertise and experience across this entire area of law, to discuss cutting-edge issues relating to the development, teaching, and future of consumer law. The author hopes that this article will help convey the thrust of the 2006

Conference proceedings, so as to share more broadly the resulting insights into the future of consumer law.

As an additional bonus, the 2006 Conference was a site for the announcement that Professor Ray Nimmer was being named Dean of the University of Houston Law Center, with Program Chair Richard Alderman to serve as Associate Dean. At approximately 3:00 p.m. on the first day of the 2006 Conference, the appointments of Deans Nimmer and Alderman were announced, and Dean Nimmer joined Dean Alderman at the reception and dinner for the 2006 Conference participants following the first day's proceedings. Once again, the dinner and reception were held at the law offices of James Moriarity and sponsored by the National Association of Consumer Advocates.

The 2006 Conference participants were obviously pleased with the appointments of Deans Nimmer and Alderman, as there can be few if any leadership teams with such academic, administrative, and commercial and consumer law reputations, and none with a better balance in those reputations, anywhere in academia. In these appointments, the University of Houston Law Center and the Center for Consumer Law gained new prominence, and the result is a credit to the law school, Deans Nimmer and Alderman, and the academic disciplines of commercial and consumer law. The author is pleased to join the other 2006 Conference participants in extending congratulations to Ray and Richard, and the University of Houston.

II. The Role of Teaching Materials

A. History

Dee Pridgen of the University of Wyoming, coauthor of a well-known Consumer Law casebook, began the 2006 Conference by describing the history of Consumer Law as a course and Consumer Law casebooks, and providing a look to the future. She noted that the first real Consumer Law course books were not published until the late 1960s and early 1970s, beginning with Homer Kripke's in 1968 (published by NYU); other publications were mostly limited to chapters in books on related topics. Kripke published his book again in 1970 (by West); this (along with the enactment of the federal Consumer Credit Protection Act (CCPA) in 1969) unleashed a wave of publications in the 1970s: the Greenfield casebook came out in 1973; Professor Alderman published his in the mid-1970s; the *Nutshell* appeared in 1976. There was a second wave in the 1980s: Spanogle & Rohner (adding Pridgen in 1991 and now also Sovern); Miller & Clark in 1980 (later becoming Miller & Harrell and then Miller, Harrell & Morgan, and now Miller, Harrell, Morgan and Eric Johnson with assistance from Lee Peoples, O.C.U. Associate Director of the Law Library-- in the forthcoming new edition).

Some of the reasons for the increase in publications are clear: The Truth in Lending Act (TILA) as part of the CCPA and other federal law; an active Federal Trade Commission (FTC); state Unfair and Deceptive Acts and Practices (UDAP) and mini-FTC Acts; expanding case law; and the rise of the consumer movement. Along with these developments came an increase in law school courses, covering some two-thirds of the schools by the late 1970s, followed by a decline after the 1980's deregulation, but now holding steady. The 1980's case books are now in their third, fourth, and fifth editions; there has also been spillover into breakout courses such as consumer bankruptcy, electronic commerce, products liability, etc.

B. Approaches

1. Introduction

Jeff Sovern and Michael Greenfield discussed the challenges and alternative approaches of the case books. Gene Marsh discussed the issue of balance and perspective in an academic setting, and David Lander described an innovative

interdisciplinary approach.

2. Jeff Sovern

Professor Sovern (St. John's University School of Law, Queens, New York) is the new co-author for the formerly Spanogle, Rohner & Pridgen book (now to be Spanogle, Rohner, Pridgen & Sovern), which is in the process of being updated from the 1991 edition. New consumer issues since 1991 mandate the update, and Professor Sovern is working with Professors Spanogle, Rohner, and Pridgen to include new topics, such as:

- the Internet;
- predatory lending;
- telemarketing;
- identity theft;
- electronic commerce, *e.g.*, spam and phishing;
- yo-yo vehicle sales;
- privacy; and
- yield-spread premiums.

Professor Sovern also noted a list of new statutes and regulations to be covered *e.g.*: the CANSPAM Act; Gramm-Leach-Bliley; the FACT Act; the 1996 changes to the Fair Credit Reporting Act; HOEPA; the Telemarketing and Consumer Fraud and Abuse Prevention Act; the Telemarketing Sales and Rule and "Do Not Call"/ "Do Not Fax" requirements; the Fair Debt Collection Practices Act; Check 21; and various privacy and predatory lending rules including state statutes and FTC interpretations/enforcement actions. He mentioned other areas that were already important in 1991, and continue to be so but deserve updating, including: fraud; UDAP statutes; the FTC Act; and sales warranties. He indicated that the new edition may cut back some coverage on usury and public enforcement. New chapters will focus on privacy and predatory lending. The new privacy chapter includes materials on: solicitations; online privacy; and the sale of consumer information. The new predatory lending chapter will be a capstone chapter, covering, *e.g.*: the limits of HOEPA; state law; preemption; assignees; and the FTC credit practices rule. The new chapters will emphasize the use of problems and consumer testimony.

Professor Sovern noted that some students think the consumer law course is disjointed, covering a mishmash of "greatest hits," *i.e.*, issues not covered elsewhere. To some extent this is true, and inevitable; it is the nature of the subject matter. But this fact, which makes the course so difficult to teach because there is such diversity (and detail) in the applicable laws and so little in the way of a comprehensive theme, also makes the course valuable to the students and difficult to learn by self-study. It is likely the only opportunity the students will have to study and understand this area of law as a whole, with the perspective that entails; this perspective is probably essential in order to allow the students to understand and apply the constituent parts of consumer law in ways that recognize the relation of the parts to one another.

3. Michael Greenfield

Professor Greenfield, of Washington University in St. Louis and the author of a well-known Consumer Law case book, addressed the larger picture of teaching the course and selecting materials. Should one focus on law, or the law and something else? The latter is the trend--but is this appropriate or just an excuse to de-emphasize the law? The law can be difficult, and therefore de-emphasis is tempting. If one chooses to focus on law, should it be state or federal law? Should this depend on the mission of the school, *e.g.*: national or state? How about International issues? Credit issues or other consumer law issues?

Professor Greenfield noted that the Kripke books focused on credit only, but today the trend is broader, including private and public law, insurance, intellectual property, sales of goods, residential leases, etc. (sometimes including even issues beyond

traditional consumer law). Poverty Law is one common approach. An emerging approach is to cover the most common types of consumer transactions from an interdisciplinary perspective. These approaches cause the students to focus on specific transactions and to bring into the analysis all applicable rules and considerations, which otherwise may be studied separately and in isolation. This approach transforms consumer law into a truly capstone course. This is a realistic approach rather than the more typical law school academic approach. But there is a risk that this expansion of the subject matter may crowd-out some important but less popular issues and considerations.

To what extent should the course focus on hot-button issues? Answer: Just the right amount (the Goldilocks rule). Hot issues sometimes fade. One should not waste too much time on passing fads, but timely issues are interesting for the students (and teacher) and it is important to keep the course up-to-date. Professor Greenfield also noted that there are some timeless issues that always need to be included, to some extent. These include the theoretical unpinning of consumer remedies; as well as the traditional and most common causes of action.

As to the future, the fundamentals remain: teach the principles and then pose problems. But this can be mixed with new approaches, e.g., a master problem, used through-out the course.² For example, a car sales transaction includes some thirty-two transaction documents, including the application, retail installment sales contract, etc. A sample car sales transaction can then be used to create a master problem as a capstone to each course segment. This can be integrated through-out the case book. Another potential example is a predatory home improvement loan.

4. Gene Marsh

Professor Marsh teaches at the University of Alabama School of Law, and has written on consumer law developments in Alabama and nationally, as well as the subject of maintaining balance in law teaching.³ Consumer cases in Alabama became part of a well-known political struggle. Professor Marsh related the recent history of the Alabama Supreme Court: first controlled by Democrats, resulting in large verdicts; it is now controlled by Republicans and there has been a backlash. Consumer cases thus were a political battleground; but how much of the resulting politics should be allowed in class? A danger is that an effort to make it "interesting" to the teacher and students will turn into teaching one-sided politics. This does not comport with fundamental academic principles. Professor Marsh stressed that it is important to make some effort to be balanced. For example, the professor should attempt to include the economics of the industry, and disclose his or her biases.

Your author would like to note that sometimes this is harder than it sounds. Confronting our biases, and overcoming them, even when we want to, is challenging and the classroom offers a tempting target for a political crusader. Fortunately, perhaps, the students have biases of their own, and these may be as deeply imbedded as ours and may help the students critically examine what they hear. Moreover, balance in the classroom does not require abandonment of the professor's beliefs or, e.g., abandoning a consumer protection focus. But in the classroom a bit of balance and disclosure are in order. For example, a predatory loan scenario can be balanced by noting the beneficial aspects of other, comparable transactions and the costs to consumers of many remedial policies and proposals. As another example, later in the 2006 Conference Professor Kurt Eggert opined that the costs of securitization may outweigh its benefits to consumers (see *infra* Part VIII.); a fair question but it requires a balanced

consideration of the costs and benefits. This is an inherent part of the basic academic environment. It is not something that professors always like to hear (and it goes against the advocacy posture so ingrained in legal practice). But this is something that distinguishes (or should distinguish) academia from the practice of law, so Professor Marsh's comments were an important addition to the 2006 Conference.

5. David Lander

David Lander practices with Thompson Coburn in St. Louis and is a veteran adjunct and full-time academic. He harkened back to Kripke, suggesting a focus on credit transactions but with an interdisciplinary, holistic approach. Students should understand that there has been a revolution in the way consumer credit is funded, through securitization and the secondary markets, with a resulting significant expansion in the availability of credit. Teaching should not ignore the beneficial aspects of this or the perspective of industry: The supply of credit has been vastly increased and its costs reduced. But securitization is a fundamentally different business model as compared to portfolio lending; and there has been an impact on the economics of subprime lending. (See also *infra* Part VIII.) Demand side growth has also occurred, fueled by the demise of usury regulation; related issues include: the psychology of credit cards; macro-economic effects; and home-equity extraction.

A Consumer Law course can combine TILA coverage with financial literacy. Ronald Mann's article describes how credit cards began as a payment system, then moved to a credit system.⁴ This has had a significant impact on society. Consideration of these broader issues may lead to the use of consumer law materials to generate new types of courses.

Professor Lander noted another continuing issue in teaching in this area of law: How do you structure the inevitable combination of consumer law and commercial law, e.g., payments systems issues, which involve maybe sixty percent commercial law and forty percent consumer law matters, including both federal and state law, each component of which is individually challenging and in the aggregate even more so? The author confronts this each year, in a separate three-hour course on payments systems, which is more than many schools offer but itself is never enough. Arnold Rosenberg and Gene Marsh articulated similar concerns during the 2006 Conference. Professor Lander suggested using a "monster" credit card problem as a sample scenario to illustrate the applicable laws and issues.

III. The Impact of Consumer Bankruptcy

A. Jean Braucher

Professor Braucher (University of Arizona, James E. Rogers College of Law) served as Moderator and first speaker for this segment. She described a forthcoming new book, Braucher &



White, *Consumer Credit and Consumer Bankruptcy*. This book illustrates the new role of bankruptcy as a subset of consumer law, representing some of the most potent consumer remedies. The new book focuses on two things: (1) teaching consumer law in bankruptcy; and (2) teaching bankruptcy in consumer law. Every commercial law course can (and probably should) integrate issues relating to consumer law, *e.g.*, payments systems, secured transactions, sales and leases, bankruptcy, remedies, electronic commerce. Consumer law issues permeate, and can be easily introduced into, all of these subjects. Of course, as pointed out by Michael Greenfield and Gene Marsh in preceding segments, the professor should be careful not to overlook teaching the underlying law in all of this; but often this underlying law can be illustrated best in consumer scenarios.

Professor Braucher noted that bankruptcy lawyers often are a gateway to consumer law cases involving non-bankruptcy issues and remedies (*e.g.*, under the TILA). For example, a consumer who is suffering financially, and responds to a bankruptcy lawyer's advertisement, may also be the victim of a predatory lending scheme. The ways that bankruptcy law can help, and may interrelate with other consumer remedies, represent an important capstone in commercial and consumer education. But this raises another issue for the Consumer Law course: How does one fit it all in? Professor Braucher introduced the next speaker to address this issue.

B. Jason Kilborn

Professor Kilborn teaches at the University of North Dakota School of Law in Grand Forks. He described how to integrate issues relating to bankruptcy and consumer law, as well as comparative law. He reiterated that bankruptcy is inherently a consumer protection course. He added that a European law perspective can provide further insight. The U.S. 2005 Bankruptcy Code amendments (BAPCPA) have made it more complex, and teaching bankruptcy is now more difficult due to the added detail in the law.

Professor Kilborn suggested a solution: Don't be so concerned with the complexities and details. Such a focus is counterproductive--there is too much to cover. Instead, he suggested using a theoretical policy perspective throughout the course. The author finds this intriguing, and perhaps to some extent inevitable, for the reasons noted by Professor Kilborn. For example, the author has chosen not to spend much time on the details of the new "means test" provided under the BAPCPA in Bankruptcy Code section 707, in the Consumer Bankruptcy course at Oklahoma City University School of Law, relying instead on the students to read about it in a hand-out. It is not an easy decision, but the law is too complex to be adequately covered in part of a semester. Consumer Law teachers have long confronted similar issues with the TILA. Caution is warranted, however, to be sure this does not go too far, converting the course into merely the philosophy of law or a discussion of general jurisprudence. Of course, there is a place in the curriculum (and every course) for legal philosophy, but there is also plenty of traditional doctrinal substance left for the Consumer Law course (even excluding the unnecessary detail), and there is no need to abandon teaching the law entirely.

Professor Kilborn noted that consumer bankruptcy picks up where consumer law leaves off, both in the classroom and in practice. Enforcement of creditor remedies often leads to bankruptcy, where in turn other consumer issues may be triggered. A comparative law view further reveals that many consumers have no ability to pay--European systems often are more explicit in recognizing this. These systems largely have moved from a focus on "you owe" to "what can you pay?" In the U.S., where that perspective is lacking, bankruptcy shifts the leverage back to

the consumer. Creditor responsibility thus gets more attention outside bankruptcy in Europe, but in the U.S. bankruptcy helps redress the balance.

C. Natalia Martin

Professor Martin described running a bankruptcy clinic: Hers is a mandatory six hour clinic at the University of New Mexico School of Law. Faculty can move back and forth between the classroom and the clinic. The clinical experience provides real world experience for faculty as well as students. She recommends that non-clinical faculty regularly offer their services to the clinic. This informs the classroom and allows the faculty to see the law apply in context. The clinic is a means to integrate various consumer laws, *e.g.*, bankruptcy, the FCRA, the FDCPA, the TILA, etc. It also helps the students (and faculty) learn important empathy skills.

D. Michael Greenfield Question

Professor Greenfield spoke up to inquire: How much of a background in bankruptcy do Consumer Law students have? Without it, can they understand the points just advocated at the 2006 Conference? Can the students integrate consumer law and bankruptcy without a thorough background in bankruptcy and the TILA? Professor Kilborn responded that the answer is to avoid the details and focus on broader, overall issues. Professor Braucher added that good bankruptcy lawyers are focused also on consumer law issues, despite the need for a streamlined bankruptcy practice. Professor Alderman suggested using guest lecturers to cover specialized areas outside the expertise of the professor.

IV. International Perspectives

A. Iain Ramsay

Iain Ramsay of Osgoode Hall Law School in Toronto, Canada served as Moderator and began the discussion by describing a global outlook. Important developments are occurring all over the world, not just in the European Union (E.U.) and U.S. Transnational case books are emerging. Clearly international issues are becoming more important, in conjunction with economic globalism, an example being the United Nations Convention on the International Sale of Goods (CISG). But this in turn raises other questions, *e.g.*: how to integrate such issues into a crowded course; and, how are these issues being handled, and taught, elsewhere in the world? The subsequent speakers addressed these and other issues.

B. Felicia Monye

Felicia Monye teaches Consumer Law at the University of Nigeria, as a member of the Faculty of Law. She reported that Consumer Law is taught in only six out of fifty-one universities in Africa. Consumer Law faculty must produce their own materials. The lack of relevant literature, the attitude of local consumers,



the prevalence of rigid legal principles, and the psychology of the local culture, all pose special challenges. Monye has introduced *A Consumer Journal*, to address this stage of economic and legal development, and she reported that interest is increasing. Moreover, the emergence of rigid legal principles is an attribute of the rule of law, and may be a sign of progress rather than the opposite; but consumers and lawyers must then learn to address grievances within that system. This illustrates the increasing importance of consumer law.

But which approach to use: Should the law regulate conduct, or the content of transactions, perhaps on the traditional European model? At what level? What of the choice between poverty and the theory of rational choice? Should it be implemented by practice or policy? By statutes? Or regulations? Or cases? Case law and regulations are underdeveloped compared to the U.S., though judicial activism seems to be growing, in an effort to overcome rigid legal principles. If constrained by those principles, this is how law develops, in the common law tradition. But many cases are unreported and this is a hurdle.

Currently there are no case books, but several textbooks and journals are available that describe cases. As cases become more important as a source of law, case reporting systems and case books will no doubt emerge (assuming that an emerging rule of law makes it worthwhile). Teaching generally focuses on practical issues of interest in consumer transactions, *e.g.*, the substantive law of contracts, sales of goods, torts, banking, insurance, etc., along with issues covering civil liability, negligence, privity, implied warranty and conditions, and civil litigation. It may be an oversimplification, but at this point the author could not help noting that it all sounds similar to the development of American law.

In her teaching, Professor Monye includes class visits to regulating agencies, discussions of Internet and international issues, illustrations of experience with shoddy products and services, and the use of problems and hypotheticals. There is no comprehensive consumer law regime or coherent body of law governing consumer transactions (again like many other jurisdictions, including the U.S.). Other problems include the inevitable divergence between legal theory and practice, redundant and conflicting laws, unreported cases, and informal and disparate regulatory decisions. (Again, these problems are not unknown elsewhere.) Professor Monye noted that it is a challenge for professors to provide a coherent presentation of all the information (welcome to the club!).

Limitations on the effectiveness of consumer redress in Africa include poverty, unemployment, low wages, privatization and commercialization policies, and the overlapping functions of regulating agencies. Despite this, the Consumer Law course enrollment has increased dramatically, currently at 360 students at the University of Nigeria in an elective course. In the author's view, this enrollment, and the other developments described by Professor Monye, cannot be taken as anything but a hugely encouraging sign regarding the prospects for consumer law, consumerism, and economic development in Africa, despite the challenges she noted. The signs of legal progress seem unmistakable.⁵

From the perspective of a U.S. lawyer, it is striking how many of Professor Monye's issues sound familiar (though it appears there is more student interest in Nigeria than in Oklahoma City). All countries must confront, on an ongoing basis, the basic choice between private judicial remedies (on the common law model)

Limitations on the effectiveness of consumer redress in Africa include: poverty; unemployment; low wages; privatization and commercialization policies; and the overlapping functions of regulating agencies.

versus public (regulatory) enforcement (on the E.U. model). There is also a continual choice between rules of law and administrative action. Highly developed countries, including the U.S. and the E.U. countries, wrestle with these issues continually. Again, it is part of what makes consumer law important. Of course there is a mixture of remedies and policies in virtually all countries, but the content of the mix is always at issue, and it appears the challenge has become universal.

C. Martina Rojo

Professor Rojo of the Universidad del Salvador School of Law in Buenos Aires, Argentina spoke and provided a Latin American perspective. Argentina

has had a comprehensive consumer protection law since 1993. Argentina is a civil law country, and thus provides an interesting comparison to the common law model. The law mandates consumer education. But consumer protection remedies are still weak. Businesses are bureaucratic and not responsive to consumers, though some are now creating "consumer attention departments." The nature of the civil law discourages the development of case law to supplement the enacted codes and regulations.

Efforts are continually being made to incorporate consumer education in classes at primary and secondary schools. Regulating agencies do not have the resources or powers of, say, the FTC, but non-government consumer groups are active. Legal education is focused toward business lawyers, lecture is the primary method, and many professors are practicing lawyers. They are knowledgeable but focused on sharing their knowledge on how the law works, rather than using more cutting-edge or philosophical methods. Consumer law is not considered a separate discipline, but is treated as an appendix to other courses, *e.g.*, contracts and legal economics. Professor Rojo opined that this needs to change, but clearly this is a different challenge in a civil law country where reported case law cannot be a source for establishing an evolution of private remedies outside the structure of statutes and regulations.

D. Christine Riefa

Christine Riefa of Brunel University, West London, U.K., spoke on the laws of the U.K. and France. One common problem is that consumers are often unaware of their rights. But law school consumer law courses are popular, though often combined with other courses. The place in the curriculum is uncertain, as is the place in the segmentation of the civil law. Consumer law codes exist but generally constitute a codification of existing law, and are not well integrated into other law. The method of teaching is largely lecture, plus seminars with case studies and problems. The law-in-context method is increasing somewhat in popularity. In the U.K., consumer education is more advanced, as is consumer regulation and enforcement. This includes regulation by central authorities (such as the DTI, OFT, and NCC), local authorities, and E.U. directives. While still a common law jurisdiction, the U.K. has moved toward the French administrative model.

In France, consumer associations are active in regulation and litigation, and administrative consumer regulation is extensive. In contrast, the U.K. still favors individual rather than group remedies; courts and ADR are more popular. It appears this is an inevitable distinction between the civil law and common law models.

"Consumer Direct" is a U.K. Internet service, designed to connect consumers to their private remedies. Moreover, E.U. "fair deal" and social justice concepts are being proposed.

Problems in both the U.K. and E.U. include fragmentation of the law and remedies. French law clearly has a regulatory enforcement focus; in contrast, the U.K. has a contract law focus with an emphasis on private remedies (again it is a matter of the common law versus the civil law). The U.K. is moving toward the E.U. approach, as consumer law is “rationalized” in an effort to reduce fragmentation. The results are uncertain but current efforts are focused on building a more unified regulatory enforcement approach. Again, this is strikingly similar to developments elsewhere, including the U.S.⁶

E. Iain Ramsay

Iain Ramsay concluded this segment by summarizing some common themes: Consumer law is more widely taught to undergraduates outside the U.S.; substantive safety and product quality issues are more directly covered outside U.S. (where there is an emphasis on private remedies such as breach of warranty); a common problem everywhere is to provide legal coherence; regulatory enforcement and “soft law” are more important in the E.U.; U.S. and Canadian students, lawyers, and consumers are more interested in private litigation and remedies rather than regulatory enforcement of public remedies. Everywhere Consumer Law is a capstone law school course incorporating material from other courses.

V. Consumer Damages

A. Introduction

University of Houston Professor of Law Joseph Sanders served as moderator of this segment and introduced the subject of damages. After brief comments he introduced and turned the podium over to Professor Marder.

B. Nancy S. Marder

Chicago-Kent Professor of Law Nancy Marder spoke next, on damages in consumer cases, asking: where are we now, and where are we going? She opined that the civil jury system is under attack—damage caps and issue preclusion are examples. The popular account blames juries. But juries are just trying to do a good job so what additional tools do they need?

Medical malpractice is a focal point (often termed a “crisis”). Common allegations include frivolous lawsuits and excessive damage awards. But only about three percent of federal cases go to trial. Although jury trials are rare, the awards are often modest. Medical malpractice and product liability cases receive a disproportionate amount of attention. The jury system is not at fault, but solutions often target juries, *e.g.*, caps on noneconomic damages, taking issues away from juries. The theory behind these solutions is that only economic harm is readily determinable; but caps affect only non-frivolous cases. Professor Marder also addressed issue preclusion: forty-two states restrict the types of cases juries can hear. Moreover, jury awards are subject to judicial review. One challenge is to make the public aware of these facts and safeguards in order to avoid headlines based on aberrational awards.

Jury instructions are another safeguard, though instructions on damages are often vague and difficult for a jury to understand. This is long-time problem, dating back to the Nineteenth Century. The jurors’ oath is another safeguard. Possible solutions include special verdicts with interrogatives, and discretionary guideposts based on awards in past comparable cases.

C. Joseph Sanders

Professor Sanders addressed many of the same issues, including potential solutions designed to improve damages in jury cases. He noted that juries have a hard time determining appropriate damages. These are inherently difficult issues.⁷ Empirical research indicates that there is considerable variance of awards within categories -- this is called horizontal inequity.

For example, damages for an accidental drowning in a given jurisdiction have ranged from zero to \$137,000.

Studies indicate that considerable horizontal inequity exists. Other types of fact-finders do somewhat better. Why? Jurors lack anchors, and repeat experience, allowing litigants to create artificial anchors, causing confusion as between the related issues of duty, causation, and damages.

Possible solutions include: using past jury awards as anchors (*e.g.*, as guidelines, or ranges); using sample scenarios (miniature fact patterns similar to the case, with sample awards); and more systematic judicial review (possibly with a system of guidelines).

Why has there been so little success with reform to date? Some success has been achieved, *e.g.*, involving mass torts where the inequity is most obvious. Elsewhere, damage caps are easier to understand and sell politically. Do damage caps encourage settlements? A variance reduction makes it easier to value the case. Caps alone may not. But there is no use whining about the press—their job is to tell about the outliers. It is better to focus on reducing the outliers.

Another proposal is to use a Workers Compensation analogy -- trading certainty for coverage, reducing the costs of litigation, and in the process helping to resolve the tort wars. But the goal should be to reduce the variance, not the mean.

VI. The FTC – A Conversation with Lee Peeler

A. Introduction

This was a presentation chaired by Wayne State University Law Professor, and former FTC General Counsel, Stephen Calkins, interviewing Lee Peeler, Deputy Director of the FTC Bureau of Consumer Protection, on forty-plus years of FTC consumer protection. Salient points include the following.

B. 1960s – The Little Old Lady of Pennsylvania Avenue

- 1965: The Supreme Court decides the *Mary Carter Paints* case: “Buy one, get one free.”
- 1964: The Cigarette Rule adopted (using a broad view of unfairness).
- 1969: The Nader Report issued.
- 1969: The American Bar Association Report on the FTC.

C. Early 1970s – The Law Professors Arrive; Reform, Restructuring

- 1970: The Bureau of Consumer Protection is created.
- 1972: The Report of the National Commission on Consumer Finance.
- 1972: The *Pfizer* case establishes the Advertising Substantiation Doctrine.
- 1972: The *Sperry Hutchinson* case – the Supreme Court accepts the FTC unfairness standard.
- 1973: The *National Petroleum Refiners* case – FTC Rulemaking authority is upheld.
- 1973: The Pipeline amendments – FTC injunctive power is created.
- 1975: The FTC Holder in Due Course Rule is adopted.
- 1970s: The FTC helps implement the Fair Debt Collection Practices Act, Equal Credit Opportunity Act, Fair Credit Reporting Act and Electronic Funds Transfer Act.

D. Late 1970s Tyrannosaurus Rex of Regulatory Agencies

- 1977: The Magnuson Moss Warranty-

FTC Improvements Act.

- 1977: The Children's Advertising rulemaking.
- 1977: The Report of the Privacy Protection Study Commission.
- 1978: The Washington Post "National Nanny" editorial.
- 1979: The FTC has 1,800 employees.
- 1980: The Reauthorization "FTC Improvements Act of 1980."
- National advertising: The *Glananiak* case and class actions discourage false advertising; the FTC ban on comparative advertising is lifted.

E. Early 1980s – The Law Professors Return; More Reform, Restructuring and the Age of the Policy Statement

- 1980: The FTC Unfairness Policy Statement is issued (providing a more precise unfairness standard).
- 1983: The FTC Deception Policy Statement is issued (an even more precise unfairness standard).
- 1984: The Advertising Substantiation Policy Statement is issued.
- The Fraud Enforcement Program is created.

F. Late 1980s

- 1987: The *Kraft* case is decided, creating a standard for testing of advertising copy.
- 1989: JS&A -- the first infomercial case.
- 1989: The American Bar Association Antitrust Section Report on the FTC is issued.
- The FTC has 900 employees.
- The Republican era – the staff was horrified and scared, and there was tension. It was a time of redirection – away from consumer fraud, but then injunctive remedies were discovered as a tool against fraud, issued on an ex parte basis. The FTC Deception Statement was issued.
- 1980s – War with state attorneys general.
- End of the 1980s: The pendulum swings back toward the left.

G. 1990s Equilibrium; the Pitofsky & Bernstein Hegemony

- 1994: The Telemarketing Sales Act.
- 1994: The First FTC Reauthorization since 1980 – unfairness is codified.
- The Consumer Response Center is created.
- 1995: The Global Consumer Protection hearing.
- 1996: The first Online Privacy Report.
- 1997: The *Joe Camel* case.
- 1998: Identity Theft statute enacted.
- 1999: Report on Self Regulation in the Alcohol Advertising Industry.
- 2000: Report on Marketing of Violent Entertainment Products to Children.
- The FTC has authority to issue reports and make recommendations.

H. 2000-2005 – The Age of Do-Not-Call and Privacy

- 2001: The FTC Privacy Agenda is announced.

- 2001: The International Consumer Protection Division is created.
- 2002: The Do Not Call Rule is adopted.
- 2003: The Fair and Accurate Credit Transactions Act is enacted.
- 2003: Beales; The FTC's Use of Unfairness: The Rise, Fall and Resurrection.
- 2004: Ninetieth Anniversary of the FTC.

I. 2006 – An Electronic Marketplace

- An emphasis on privacy/data security.
- SPAM to the forefront (CAN-SPAM Act).
- Spyware issues.
- Negative-option marketing issues.
- Rebates.
- ChoicePoint (\$15 Million settlement).
- DirecTV (\$5.3 Million settlement).
- International problems – building relations with other countries

VII. Securitization

A. Christopher Peterson

Chris Peterson (University of Florida, Levin College of Law)⁸ took on the introduction of a newly-emerged topic in consumer law. He noted that securitization is a world-wide trend; it increases the capital available for consumer credit, making more credit available to consumers at lower cost; but it also creates new issues. Existing consumer laws largely predate widespread securitizations, so the law is behind the curve. Originally mortgage lending was a two-party arrangement, with portfolio lending by community depository institutions and large down payments; then mortgage lending evolved into a three-party arrangement via the secondary market, involving the FHLB system, FNMA, FHA, and Freddie Mac (as government gatekeepers); then government GSEs began securitizing the loans they purchased (creating a four-party arrangement); the current phase involves private securitizations using securitization trusts with inputs from multiple lenders and outputs to multiple investors. This represents a massive dispersion of the legal and credit risks. Mortgage brokers, mortgage bankers, institutional creditors, mutual funds, institutional and private investors, providers of credit enhancements, credit rating agencies, and loan servicers, all share the risk. It is a world-wide phenomenon: The world is financing American consumers.

Among the resulting issues, does securitization: (1) create instability; (2) disadvantage unsecured creditors; (3) give capital to fly-by-night lenders; (4) and/or unbalance consumer protection?

B. Thomas Plank

Thomas Plank (University of Tennessee College of Law) emphasized that securitization helps consumers by making more and cheaper credit available; as a result the credit availability concerns that drove public policy for fifty years are gone. He argued that this does not facilitate predatory lending. However, it does add issues to the Consumer Law course.



Securitization issues in the Consumer Law course require consideration of bankruptcy, and its affect on secured credits. Bankruptcy potentially allows the trustee in bankruptcy to shift losses to creditors, imposing a bankruptcy tax on transactions. Securitization seeks to limit this risk, by limiting the risk to individual loans, dispersing this risk and excluding other operating risks. Lower risks mean lower consumer borrowing costs because the required yield is lower (1.30 percent in his example). General corporate debt for a financial intermediary requires a rate premium for operating risk; securitization eliminates this risk, by passing ownership of the underlying assets (*e.g.*, mortgage loans) directly to the investor via a bankruptcy-remote entity, insulating the investors from operating risks of the intermediaries (and dispersing the credit risks over a pool of loans). This puts pressure on the markets to lower retail rates due to the competition for mortgage loans (more capital chasing loans with lower risk equals lower prices). Also, it changes a non-liquid mortgage asset into a liquid asset, further awarding it a higher value. Securitization thus relies on good assets, and this cannot by itself encourage the creation of bad assets, *e.g.*, predatory lending, because investors and others in the chain demand good loans -- no one wants to buy bad loans. Cases involving fraud by rogue mortgage lenders and brokers are just that -- aberrational behavior that is inevitable given the volume of credit transactions. But they are caught and the examples (including criminal prosecution) should serve to discourage further fraud.

C. Diane Thompson

Diane Thompson (with the Land of Lincoln Legal Assistance Foundation, in East St. Louis, Illinois) said that seventy percent of subprime loans are securitized; she sees only securitization loans in her practice, and only "crap loans" at that (*e.g.*, fourteen percent interest charged to A- borrowers). The increased complexity of these transactions shifts costs to the consumer in resolving problems. She cited a sample problem: The consumer needs a workout; the servicer says it cannot modify the loan because the loan has been securitized; it is difficult to determine who is the holder of loan, as to allocate no TILA damages for a failure to respond. In order to identify the responsible party, one must consult and analyze a complex servicing agreement to determine servicer authority. Just getting a copy of the contract is a chore. Of course the consumer has no idea who the holder is, and while servicers are required by law to provide this information, Ms. Thompson said that they seldom comply in any kind of timely fashion perhaps because the TILA provides no statutory penalties or private right of action for a failure to do so. The result is often a foreclosure rather than a workout.

The servicer has an incentive to foreclose due to the fees, and the servicer's lack of credit risk. The results include: high foreclosure rates; and possible TILA, ECOA, FACT Act claims. But can you raise them against the securitization trust? The trust claims to be a "legal fiction" without responsibility. Where is the responsibility? With the servicer? The trust? Investors? The cost of resolving such issues and educating a judge often is too high. The motion practice is exhausting, and settlement is complicated, because it is not clear who has the authority and the responsibility. And who will clean up the credit report?

D. Kurt Eggert

Kurt Eggert of Chapman University School of Law in Orange, California spoke next. He noted that securitization has "atomized" the lending process--each function is done by a

Professor Rosenberg noted the race to create foreign special purpose entities (SPEs) as bankruptcy-insulated trusts to allow securitization -- is this a race to the bottom?

different, specialized entity. This results in dispersion of the risk and economies of scale but also narrows the responsibility of each link, making it difficult to assign liability for the required responses, and allowing unscrupulous entities to be inserted into the system, because the reputational risk is dispersed due to plausible deniability.

Portfolio lenders retain all credit and reputation risk and thus have an incentive for good loan underwriting. That is gone with securitization. Originators are focused on volume, and this encourages mortgage broker fraud because there is no reputational or credit risk at the point of origin.⁹ Brokers are thinly capitalized, and often disappear when problems arise. But this is also a problem for lenders and others in the securitization chain. Securitization also allows rapid growth by thinly-capitalized lenders; the need for volume may prevail over prudent underwriting. This also reduces lender discretion to address problems (creating trench warfare -- the servicer has a conflict of interests as between trenches). The servicer also has a captive audience; there is no incentive to accommodate borrowers, and loyalty is to the investors and sellers; the servicer's incentive is to maximize the fees imposed on consumers. This encourages abuses at both the front and back end. These costs may offset the lower cost of credit to consumers from securitization.

E. Open Discussion

In the open discussion that followed Professor Rosenberg noted the race to create foreign special purpose entities (SPEs) as bankruptcy-insulated trusts to allow securitization -- is this a race to the bottom? Countries are seeking to create filing systems to facilitate this. Quite possibly this is a natural consequence of U.S. consumers being funded by overseas money. To the extent this is essentially U.S. consumers borrowing money elsewhere, some use of overseas intermediaries may be inevitable. If this is considered problematic, it may test our principles; the alternative is to cut off international capital flows and deprive consumers of an important source of low-cost credit.

Professor Plank noted that many of these problems are not unique to securitization; and many are a result of changes in the economy and are inevitable in any expansion of the credit economy world-wide. Portfolio lending is largely over, it disappeared with the traditional savings and loan (S&L) mortgage lending system in the 1980s (a disappearance caused by the faulty S&L business plan imposed by federal regulation, that required uneconomical portfolios of long-term fixed rate mortgage loans). Without securitization to fill the gap resulting from this collapse of portfolio lending, there would have been a huge credit crunch and an economic crisis. Moreover, portfolio lending requires higher rates; securitizations saved the economy from a lack of credit availability that would have caused disproportionate injury to the poor, creating a huge social crisis.

It is a fair question, to ask whether the increased credit availability and the lower cost of credit associated with securitization is worth the servicing headaches and other problems noted at the 2006 Conference. But in a sense consumers are voting with their feet, by embracing the low-cost credit opportunities offered via securitization. Portfolio lending is still available, sometimes at higher cost but accompanied by the personal service benefits cited at the 2006 conference. Some consumers still value this, but many others are opting for the alternative benefits of securitization. It appears that academics and practitioners, in the Consumer Law course and elsewhere, will need to add securitization issues to their fields of expertise.

VIII. View From the Trenches

A. Ira Rheingold

Ira Rheingold, the Executive Director of the National Association of Consumer Advocates (NACA), a cosponsor of the 2006 Conference, served as Moderator and a speaker for the "Trenches" segment of the program. He began by noting a fundamental shift in consumer credit law, from usury regulation to debt market regulation. Thus market regulation is replacing direct consumer protection (at least at the federal level).

This approach is based on the foundation of mandated disclosure to consumers, to permit and encourage rational consumer decisions. But he noted that these laws were created in the context of federalism, which permits additional state law protections but today no longer exists due to federal banking law preemption by "industry-friendly" federal regulatory agencies.

B. Bernard Brown

Bernard Brown of the Brown Law Firm in Kansas City, Missouri provided a perspective on the case law of the last ten-to-fifteen years, including changes in the types of cases. He reported that consumer car fraud continues to be a major problem for consumers, especially in the areas of flood damage, odometer fraud, wrecks, and condition. He commented that home equity lending fraud and abuses of many kinds is absolutely rampant, and for some years has been, and indicated he believes it to be the single worst kind of consumer fraud and abuse that does not actually cause death or major injury. Auto finance problems include: junk fees; packing; up- charges; insurance; interest rate premiums; service contracts; yo-yo sales (and general overreaching).

C. Stephen Gardner

Steve Gardner, a Dallas class action lawyer and Director of the Center for Science in the Public Interest (CSPI), Washington, D.C., addressed class action litigation issues. How has the class action practice changed? Cases have grown in number, due to: (1) migration of securities lawyers into the consumer class action filed after congress cracked down on securities law; and (2) a vacuum of public enforcement, so private litigation has filled the void.

Due to some "black sheep" in the class action bar, resulting abuses, and a reaction by the federal judiciary, there is a perception that the class action remedy has fallen into disfavor. Class action reform in the Class Action Fairness Act (CAFA): federalized class actions; reformed coupon settlements; and was intended to help business by moving cases to federal court. But the reformers shot themselves in the foot (or north of there) because a federal court is friendlier than the judiciary in some states (e.g., Texas), and CAFA has increased litigation costs due to removal expenses. It also has made settlements more difficult to obtain.

D. Rheingold - Brown- Gardner Panel Discussion

Bernard Brown began the panel discussion by raising the issue: What is the state of public consumer enforcement? At the state and federal level, he said it is a thimble full in an ocean of fraud. The public thinks the government is there to protect them, but this is a myth. For example, as to dealers selling unsafe, wrecked cars, there is zero enforcement.

Steve Gardner responded that he is not quite so negative. There are some "good" state attorney generals. The tobacco settlement was bad because it hooked attorney generals on large, lucrative settlements. As a result they are less interested in vehicle fraud, predatory lending, etc. But the Ameritrust settlement is an exception (though notably a by-product of private litigation).

Bernard cited the example of insurance companies selling salvage vehicles to rebuilders, who put them back on the road without disclosure. This affects many of the three-to-four million salvage vehicles sold each year. Insurance companies cooperate in not labeling salvage cars because the cars are worth more if sold without a label. One insurance company settled with the State

of Indiana and agreed to cease the practice, then did it again (30,000 cars since 1997). As a result, there are many dangerous cars still on the road.

Steve Gardner raised another example involving credit report errors. He said credit bureaus fail to correct errors as required by law because compliance costs more than the liability for violations. Mr. Brown asked the question: Do cases result in behavior modification? He concluded that there is some *in terrorem* effect, but not enough. Steve Gardner stated that credit reporting is better after the FACT Act though still terrible. Creditors want accurate reports, but credit bureaus would rather have a false negative than a false positive. Steve Calkin noted, however, that most errors are very small. Ira Rheingold reported that the Consumer Federation of America says fifty percent of credit scores are adversely affected.

Steve Gardner opined that some litigation has been effective in changing behavior (e.g., the CSPI litigation taking soft drinks out of schools). Bernard Brown then warned that the impact of federal preemption and arbitration is weakening traditional consumer litigation remedies, stating that arbitration clauses impose new risks on consumers that deter litigation. There are two-thirds fewer civil jury trials since 1985 (though not necessarily less litigation). Steve Gardner added that activist federal judges are making fact determinations on motions for summary judgments because they don't trust juries.

As to federal preemption, the panelists agreed that Ronald Reagan believed in federalism; in contrast the current view favors preemption of state law, even if there is no conflict because there is no federal action. The result is a diminution of private remedies by reason of federal regulation.

IX. Is Consumer Law Still Needed?

A. Richard Alderman and Thierry Bourgoignie

Saturday morning began with a panel discussion featuring Professor (now Dean) Alderman and University du Quebec at Montreal Professor Thierry Bourgoignie, addressing the issue: Is consumer protection law still needed in 2006? It may seem a silly question, but it served to raise several important issues.

Professor Bourgoignie opined that the policy objectives of consumer law must be redefined in the new context of globalization, and new production and consumption patterns designed in order to promote a sustainable consumption model. He argued that the regulatory approach toward consumer protection is even more essential today than in the previous wave of consumerism. He also argued for a clear international dimension to consumer law teaching, to go beyond mere comparative law and legal transplants.

Richard Alderman responded that we (in the U.S.) start with laws, while international scholars begin with policy goals and tailor laws to achieve those goals. He used an example from his recent travels, of home-made Serbian cheese—rancid, but prices reflect this and disclosure is easy. Such policy needs are a proper part of Consumer Law course.

Alderman and Bourgoignie then noted the traditional belief that consumers need special protection because they lack bargaining power, and perhaps political power as well, with a consequential potential for abuse. They noted two enforcement models, private versus public, and discussed the impact of various reforms to civil justice systems.

They addressed a perceived new political and judicial reality: Has society disrupted the fundamental balance of power between the legislature and the courts? Courts have long protected consumers, since consumers have little voice in legislation. Now, however, this balance is disrupted by arbitration, and preemption; as a result the usual presumption of legal remedies in court is

now obsolete. Professor/Dean Alderman cited a Texas example - the TRCCA (Texas Residential Construction Contract Act) and RCLA limit damages in the sale of a house or repair (essentially the consumer cannot sue without first exhausting administrative remedies; there are also limits on damages).

Iain Ramsay opined that consumer law inherently means regulation of consumer markets. More empirical data is needed, but even that is not enough without a theoretical basis for law as a means to modify behavior. One must know: What is the result of a case? Legal pluralism means that government is not the only regulator (consider the role of markets). How do corporations make decisions? The answers are needed if the law is to modify behavior. International dimensions add yet another layer -- with a special impact on developing countries.

X. Legal Updates and Conclusion

The final segment of the 2006 conference on Saturday morning featured: Paul Bland of the Trial Lawyers for Public Justice in Washington, D.C., covering Arbitration; Richard Rubin of Santa Fe, New Mexico, on Debt Collection; Professor Mark Budnitz of Georgia State University College of Law in Atlanta, Georgia, updating developments in payments systems law; and your author providing an overview of consumer credit developments. These presentations were too comprehensive to repeat in detail here;¹⁰ suffice it to say that the presentations by Messrs. Bland and Rubin and Professor Budnitz were polished and informative, as one would expect. Your author, in turn, noted his appreciation at being invited, both as part of such a distinguished faculty and because the alternative was to be in Oklahoma City grading student exam papers. Your author could not help agreeing with some of the previous speakers that the expansion of federal preemption effectively means the end of private state law consumer remedies (and the common law system) as we have known it in this country for some 300 years. The implications, not only for consumers but for businesses and the practice of law, are significant and likely to include important, unforeseen consequences.

In all, the 2006 Conference included much food for thought regarding the future of consumer protection law as a legal and academic discipline, both in the U.S. and elsewhere. Many perspectives were represented, to the benefit of all attendees. The result was a unique exposition of the challenges and alternatives facing consumer law practitioners and academics world-wide. As one would expect among academics there was much disagreement, and your author wouldn't want to stake his career on winning a vote among such a diverse group, but probably many others present would not, either. That is a measure of why, by any traditional academic standard, the 2006 Conference was again such a success.

*Alvin C. Harrell is a Professor of Law at Oklahoma City University School of Law and Executive Director of the Conference on Consumer Finance Law.

1. See Alvin C. Harrell, *Teaching Consumer Law*, 6 J. TEX. CONSUMER L. 50 (2003); Alvin C. Harrell, *Teaching Consumer Law, Part Two*, 8 J. TEX. CONSUMER L. 2 (2004).

2. Compare STEVEN L. HARRIS & CHARLES W. MOONEY, JR., *SECURITY INTERESTS IN PERSONAL PROPERTY* (4th ed. 2006) (similar approach in a case book covering UCC Article 9).

3. His article on the latter was published earlier this year. See Gene A. Marsh, *Ethical Responsibilities in Teaching Consumer Protection Law*, 60 CONSUMER FIN., L.Q. REP. 11 (2006).

4. Ronald J. Mann, *Making Sense of Payments Policy in the Information Age*, 93 Geo. L.J. 633 (2005); see also Arnold S. Rosenberg, *Better Than Cash? Global Proliferation of Payment cards and Consumer Protection Policy*, 60 CONSUMER FIN. L.Q. REP. 426 (2006).

5. See also Fred H. Miller, *International Legal Developments and Uniform State Laws: A Radical Proposal?*, 60 CONSUMER FIN. L.Q. REP. 402 (2006); Fred H. Miller, *The Uniform Law Process for the Development of Private State Law in the United States: A Model for Other Systems?*, 60 CONSUMER FIN. L.Q. REP. 4, 9 (2006).

6. In the U.S., e.g., compare the approach of the FFIEC, FinCen, OCC, OTS, etc.

7. Professor Sanders cited, e.g., *Green v. Bittner*, 412 A.2d 210 (NJ 1980) (wrongful death of a teenager); *Philip Morris v. French*, 2004 WL 2955179 (Fla. 2004) (sinusitis caused by tobacco smoke) (\$5.5 million damages versus \$500,000).

8. Author of: CHRISTOPHER L. PETERSON, *TAMING OF THE SHARKS—TOWARDS A CURE FOR THE HIGH-COST CREDIT MARKET* (2004).

9. Your author would like to note that, while this is undoubtedly true, mortgage fraud is against the law and recent criminal prosecutions remind us that the criminal section is alive and well as a disincentive to fraudulent behavior.

10. Professor Budnitz's paper has been published in this journal. See *Payment Systems Law 2005—2006*, 10 J. CONSUMER AND COMM. L. 2 (2006).