



Teaching Consumer Law

By Alvin C. Harrell*

Part Four

I. Introduction

Once again this year, on May 23-24, 2008, under the direction of Associate Dean and Dwight Olds Chair in Law Richard M. Alderman, the University of Houston Law Center and its Center for Consumer Law held a bi-annual program on Teaching Consumer Law (the Houston program). The Houston program is a unique, one and a half day program for professors, adjunct faculty, clinical professors and others interested in the teaching of law school courses relating to consumer law (*e.g.*, the Consumer Law course).

As in past years,¹ the variety of approaches revealed in the presentations and open discussion was illuminating. For those of us wedded to a traditional law school approach, hearing so many alternatives described is something of a revelation. Virtually all of the approaches include components related to teaching students about the substantive law, and how it relates to real-world matters both personal and professional (a reassuring point, given that these are law school courses), but the extent of this emphasis

varies and beyond this there are many differences. The variety is fascinating and hopefully will be reflected in the observations reported here.

The variety is such that broad-based conclusions are difficult -- each reader will need to consider the alternatives directly, *e.g.*, upon a review of this article. As a generality, it seems to your author that full-time faculty are more likely to teach a more traditional Consumer Law course, *e.g.*, covering a broad range of traditional topics and laws (often updated with cutting-edge issues and new sources of materials), and focusing more on the law rather than advocacy or pure policy issues. But there are significant exceptions. Similarly, and appropriately, clinical and adjunct faculty seem more inclined to a practice-oriented approach, and of course some full-time and part-time faculty are more oriented than others toward policy-related and advocacy concerns. Again, the presentations at the 2008 Houston program, as described in this article, illustrate the diversity of these alternatives.

Probably at most schools the Consumer Law course is

heavily directed at the perspective of the aggrieved consumer. This is to be expected, and to a large extent is appropriate and inevitable, given the nature of the course, although in your author's view (as with any course) an entirely one-sided approach may have less value to the students than a more balanced presentation.² And it is a surprisingly difficult challenge to maintain this balance in the context of a course oriented toward remedying consumer grievances.³ This challenge is highlighted in a conference like the Houston program, reflecting the tension between the conflicting perspectives confronted in the Consumer Law course on almost a daily basis.

The challenge of these conflicting perspectives was evident at the 2008 Houston program, and as usual Dean Alderman is to be commended for his efforts to provide intellectual diversity, in the best traditions of academia. But individual panelists are under no such constraints, and the polarization of views in our society on these issues means that the Houston program is not a consensus-building exercise; rather, it is an opportunity for faculty and others to share their diverse views on what the educational process (and the law) is and should be. The Houston program is thus a forum for discussion of cutting-edge issues, both pedagogical and substantive.

A purpose of this article, as in the past,⁴ is to describe these presentations and the variety of approaches they represent, as delivered by the panelists at the Houston program. To state the obvious, however, the descriptions in this article cannot do justice to the presentations themselves. Law faculty are, by means of a rigorous selection process, at the top of their profession in terms of intellectual prowess and the ability to articulate their views. As a result one would expect a program featuring faculty presentations on matters within their unique expertise to be exceptional, and that is the case with the Houston program. Regardless of the perspective presented, the deliveries at the Houston program were first-rate and impressive. An article cannot fully capture that aspect of the Houston program, and in this respect is a regrettable disservice to the reader as well as the speakers and the sponsors of the program.

As with the reports on the previous Houston programs, it is also difficult to adequately separate the speakers' comments from the filter of your author's perceptions. With the exception of some brief comments on the roles of advocacy and party autonomy *infra* at Part XIII., and a few other author's observations sprinkled throughout (and hopefully labeled as such), this article seeks to report the program presentations, rather than commenting on them. Thus, as in the past, this article seeks to reflect what the speakers said, the points they were making, and the experiences they were relating, even when those points and experiences are very different from those of your author. For example, your author has little or no expertise as to some of the experiments and innovations being utilized in academia, as described here. A purpose of this article is to relate the speakers' presentations on these experiences to the reader, despite this lack of expertise. That is part of the value of the Houston program to an attendee such as your author, and hopefully is part of the value of this article. But it means that this article is a compromised endeavor, being drawn largely from notes taken by your author as the panelists spoke. Thus an obvious limitation of this report must be noted: While your author emphasizes that the views expressed below are not necessarily his own, and this article is intended as a report on the presentations at the Houston program, it may also be inadequate as a reflection of the views of the speakers being cited. Like the

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tendencies toward inaccuracy in popular media news reports (which we have likely all experienced), this article may not reflect the views of anyone (and certainly it does not do so fully). But within these limits it is presented for whatever its value as a broad reflection of trends in legal education, as delivered by a truly diverse and outstanding panel of specialists.

Two other introductory comments are appropriate. First, although the Houston program is directed at educational issues and methodology, the substantive context of these issues means that the program also provides an overview of current legal issues and recent developments. For example, the discussions of cutting-edge classroom issues necessarily relate to legislative, regulatory and litigation developments in consumer finance law. Thus the Houston program has an overall substantive content that is also reflected here, beyond the issue of teaching.

Finally, your author would like to thank the speakers for the Houston program, for their helpful comments and many contributions to this article (which greatly improved its content). Thanks also go to Dean Alderman and the University of Houston, for their sponsorship and support of the Houston program and this article.

II. Teaching Consumer Law I

Your author chaired the first panel at the 2008 Houston program, addressing what should be taught in a Consumer Law course. The four speakers described a variety of alternatives that seemed to cover the waterfront of creative approaches (your author wondered at the time what would be left for the other panels, though as it turned out there was plenty more to say).

Gene Marsh is Professor of Law at the University of Alabama, where he teaches contracts, commercial law, consumer protection, and business organizations law. His comments at the Houston program were geared in part toward taking advantage of the rich context that consumer protection courses offer, *e.g.*, in terms of incorporating discussions on legal ethics and professional responsibility. The timing for consideration of these issues is particularly right, given the problems that some renowned lawyers and law firms have faced in recent months -- in some cases lawyers and law firms and state officials that have done important work for consumers. Professor Marsh noted that these issues are an important part of the Consumer Law course.

Mark Bauer is Associate Dean and a Professor at Stetson University College of Law in Gulfport, Florida, where he teaches both a full semester consumer protection course and a special, intensive one-credit hour course taught over a long weekend, called "Financial Advocacy." The purpose of the Financial Advocacy course is to convey critical elements of financial literacy to law students, as encapsulated in the relevant statutes and common law, thus making the course appropriate for a law school. The course is team-taught by a group of professors and the content varies slightly from semester to semester, based on the interests of the professors volunteering to teach the class. But essential elements always covered include basic budgeting, health insurance, saving for retirement, payment systems (including various consumer issues related to credit, debit and stored value cards), warranties, the basic rubric of consumer protection law, and current issues in consumer fraud.

This is the second year that Stetson has offered Financial Advocacy and the course has typically had an enrollment of over one hundred students with a long waiting list. The school is considering making the course a requirement for graduation.

Mary Spector is Associate Professor of Law and Co-Director of the Southern Methodist University Dedman School of Law Civil Clinic. In addition to teaching a lecture-style Consumer Law course, she also supervises students representing consumers in the Clinic. She acknowledged the difficulty of not wearing her "consumer advocate hat" in her lecture, but suggested that wearing the hat actually may be appropriate in this particular course. To demonstrate, she used an exercise designed to highlight the effect of government policies in allocating wealth and economic protection and suggested that Consumer Law is one area of law that explicitly works to level what may otherwise be seen as an uneven playing field. As a result, she suggested that the adoption of a consumer protective approach is consistent with the subject matter of the course.

Professor of Law (now also Associate Vice President for Academic Personnel) Stephen Calkins of Wayne State University Law School provided a "real world" scenario illustrating some classic examples of consumer folly, of the type that helps make the Consumer Law course so important and interesting. He cited the example of an actual person (we all know them, perhaps sometimes we *are* them) who has a propensity to make almost every mistake in the Consumer Law casebook. For instance, this consumer: always buys the extended warranty; carries a large credit card balance by paying the monthly minimum payment; takes the income tax instant refund; frequently buys a new vehicle, from a dealer; and always negotiates to terms of the vehicle purchase by telling the sales person the amount of monthly payment the buyer can afford.

Calkins also argued, however, that the consumer law course should not be just for those who would represent consumers. In particular, he pointed to the many major companies that have been subject to recent FTC consumer protection decrees: LexisNexis, Budget Rent-a-Car, Ameriquest Mortgage, Kmart, Sony, Tropicana, CompUSA, Citicorp Mortgage, AT&T, and Sprint. Nor have the penalties been trivial. Recent award amounts have been quite substantial: \$10 million (ChoicePoint); \$7.7 million (Ameriquest Mortgage); \$5.3 million (DirecTV); \$2.9 million (ValueClick); \$2 million (EdebitPay).

When major companies are being sued and when major awards are being assessed, that means jobs for lawyers, including highly paid lawyers at major law firms. Perhaps as a consequence, the American Bar Association Antitrust Section is trying to position itself as a serious home for consumer law practitioners. It has committees on Federal Civil Enforcement (224 members), Consumer Protection (217 members), and Privacy and Data Security (116 members). The Section is also working hard to beef up its consumer law publications.

What all this means for us is that the Consumer Law course is an increasingly important course for law students who plan to practice with corporations and large law firms. We owe it to our students and to ourselves (if we are interested in robust enrollments) to teach a course that will serve these students as well as those fighting for consumer victims.

III. Arbitration Update

Paul Bland, a Staff Attorney with Public Justice in Washington, D.C., next provided an update on arbitration developments from a consumer plaintiff's perspective. He noted that, in recent years, courts have decided a large number of cases involving challenges to arbitration clauses,⁵ and selected themes that can be derived from those cases. He queried: Are selected areas of litigation to disappear as a result? He argued that few consumer cases are actually taken to arbitration, so that the effect of arbitration clauses is not to move cases from one forum to another, but to eliminate cases. He said that out of 34,000 California arbitra-

tion cases decided by the National Arbitration Forum (NAF) over a period of years, only 118 were consumer cases against a business; 99 percent were cases processed by businesses against consumers.

The purpose of the clauses for many types of businesses, he said, is to bar class actions, and thus end certain types of consumer litigation that cannot be brought on an individual basis.

On the value of academia, Mr. Bland cited Chris Peterson's article⁶ that led to the Warner Act,⁷ designed to prevent payday lending at military bases, stating however that the law was watered down by the Defense Department regulations.

He concluded that courts are increasingly recognizing the manners in which arbitration clauses are abused, giving the example of class action bans embedded in arbitration clauses. He stated that two years ago most cases held that a ban on class actions was OK.⁸ In the last two years, he said, this has changed in state Supreme Courts and federal appellate courts. The California view has expanded to other states, including Washington, New Jersey, Oregon, Pennsylvania and Illinois. He said the trend is now to reject provisions (such as class action bans) that are embedded in arbitration clauses, where those terms effectively serve as an exculpation clause. But he noted that Utah law says such a ban is OK, and said that some corporations are attempting to circumvent the law in states with strong consumer protections by selecting the law of a state such as Utah in a choice-of-law clause in the contract.⁹ He said that many courts have rejected such choice-of-law ploys, however, and that these decisions are compatible with the Federal Arbitration Act.

In the meantime, Bland said that the use of arbitration clauses has spread, *e.g.*, to nursing home contracts. As a result, nursing home lawsuits are disappearing; likewise, litigation over new car credit contracts is declining. Debt collection, however, is an arbitration area where litigation is rapidly expanding. All of the major credit card companies are using the NAF instead of judicial collection mechanisms, but the debt collector must go to court to confirm the arbitrator award. Mr. Bland said that debt buyers are really account information buyers, meaning that there is often no formal loan documentation; if the consumer objects to the evidence before a competent forum that insists upon normal proof, the creditor should often lose.¹⁰ He said that, as a result, courts are increasingly refusing to confirm arbitration awards in debt collection cases.

But, he said, if arbitration advocates win the sweeping preemption arguments that they are making against limits on class action bans, class action litigation in consumer cases will end. He said that individual cases are also at risk. This means a loss of judicial precedent, *i.e.*, common law development. He expressed concern that the law as we know it will disappear if it is not publicly available in reported decisions.

Regarding the arbitration forums, Bland said that fewer corporations are including clauses that name the AAA or JAMS, and NAF is ascendant. Bland argued that NAF is biased, and challenged the propriety of certain NAF advertising, but recognized that there are unsettled ethical issues about such advertisements.

IV. Teaching Consumer Law II

Dee Pridgen, Associate Dean and Carl M. Williams Professor of Law and Social Responsibility at the University of Wyoming College of Law, discussed the issue of teaching cutting-edge topics versus basic foundational concepts. This is a tough call for many of us, in many courses (the curse, one supposes, of teaching in areas of law that are subject to rapid change -- one can only envy those who teach the course in English Legal History). Dean Pridgen suggested a compromise: Use newer versions of traditional topics, *e.g.*, internet pyramid schemes instead of chain

letters; or encourage students to “blog” or post items on current consumer issues, then discuss them in class. Instead of treating internet issues as a separate topic, this can be integrated into other topics, *e.g.*, telemarketing can be integrated into coverage of door-to-door sales. She noted that technology nearly always outpaces the law. Video rental laws, *e.g.*, the Video Rental Privacy Act,¹¹ are outmoded in view of YouTube and internet downloading. Door-to-door and even telemarketing schemes have been replaced by spam and texting (pharming and phishing), etc.¹² Paper checks and check fraud have not been replaced (witness the case law¹³) but are being heavily supplemented by electronic payments. The CAN-SPAM Act¹⁴ is becoming outmoded as filters have become more effective.

But some things never change, including the role of consumer lethargy in abetting fraud and deception. Dean Pridgen cited several examples of traditional, potential abuses that continue in more modern guises today: book clubs (old), now rebates and gift cards (new); bait & switch (old), now yo-yo financing for cars (new); boiler plate contract language (old), now shrink-wrap and click-wrap (new). Predatory lending issues are not new, being formerly known as usury, fraud and deception, etc. But predatory lending has a high profile now due to the bursting of the housing bubble and the resulting increase in foreclosures. The media crisis of the day can become a platform for policy discussions -- credit cards and debt collection are other examples; but one must be careful of chasing fads.

Creola Johnson is Professor of Law at the Ohio State University, Moritz College of Law. She discussed how to find hot topics (*e.g.*, using internet sources), and cases (*e.g.*, using Westlaw, PACER). She also suggested providing students a “hot topic assignment” (*e.g.*, a car title loan scenario), including the drafting of sample complaints covering the scenario. Then the teacher can lead a discussion of the potential remedies for any deceptive practices, *e.g.*, arguing that the car title loan violates the Truth in Lending Act (TILA). The students may find this more useful than studying the law in isolation. In effect, this is the case study approach updated to reflect current hot topics where there may not yet be case law. Of course, if a descriptive case is available, this provides an additional element of judicial authority (allowing the presentation to move beyond argument to the law). And caution should be exercised to avoid presenting untried arguments as settled law. But there is a role for cutting-edge arguments, even in the absence of direct judicial support, so long as the two are kept separate. In this way the class can be directed to also apply traditional concepts such as common law fraud, Unfair and Deceptive Acts and Practices (UDAP) statutes, and usury. It is a way to relate hot topics to traditional laws and remedies.

This can also be a platform for discussing social science and policy issues, *e.g.*, whether consumers are rational maximizers (more on this later) and whether disclosures are effective. Also, it allows discussion of: how practices may circumvent consumer protection laws, and needed reforms to

prevent this; the impact of federal preemption; and the prospects for mass media campaigns against predatory lending -- *e.g.*, encouraging students to do volunteer work, etc.

Jeff Sovern is a Professor of Law at St. John's University in New York City, where he has been teaching consumer protection law courses since 1987. Along with Professors John A. Spanogle, Ralph J. Rohner, and Dee Pridgen, he is co-author of the Third Edition of the Thomson/West casebook *Consumer Law: Cases and Materials*. He queried: Should we teach hot topics and if so what do we cut? The latter, of course, is the hard part. Professor Sovern noted that the traditional, core topics in a Consumer Law course include: fraud; disclosure; the Federal Trade Commission (FTC); UDAP statutes; bait & switch practices; pyramid schemes; door-to-door sales; the federal Consumer Credit Protection Act; warranties; assignee liability; pricing; remedies; and unconscionability.

While it is hard to imagine a Consumer Law course without some coverage of basic elements, Professor Sovern suggested other “hot” topics that can be integrated into these core subjects, *e.g.*: predatory lending (and the subprime mortgage meltdown); privacy; arbitration; and payday lending. The arguments for covering hot topics include increased relevance to society, the students, and the core subjects of traditional law. For example, predatory lending may connect to: the TILA; the Equal Credit Opportunity Act (ECOA); assignee liability; HOEPA; yield spread premiums; preemption; remedies; fraud; and UDAP statutes. Hot topics also illustrate core issues, statutory interpretation, public policy, and financial literacy. What, then, to cut? There is more discretion in a Consumer Law course than in courses on contracts, torts, commercial law, etc. This allows more in the way of variation and experimentation. Candidates for omission suggested by Professor Sovern include usury and material covered in other courses (*e.g.*: constitutional law; payments; holder in due course issues; the Electronic Funds Transfer Act (EFTA); e-commerce (if available in another course); debtor-creditor issues (including the Fair Debt Collection Practices Act (FDCPA); bankruptcy; warranties (covered in the course on sales); and fraud (torts) (but he also noted that these issues are worth repeating in the Consumer Law course as time permits, due to their importance)).

V. Bankruptcy Update

Jason Kilborn is Professor of Law at John Marshall Law School in Chicago, where he teaches business and commercial law (including bankruptcy). He began with some basic points about bankruptcy relief in 2008: (1) it is still available (though more

expensive); (2) there are more Chapter 13 payment plans, but fewer than expected; and (3) there are difficult issues for Chapter 13 plans, including: (a) the mandate for credit counseling and financial literacy education; (b) the increased burdens on lawyers and debtors to provide information and documentation; (c) potential lawyer sanctions for “abusive” filings; (d) application of the “means test”; (e)



Dean Richard Alderman greets the participants at the conference.

"910 claims" in vehicle purchase scenarios;¹⁵ and (f) limitations on home mortgage "lien stripping." Attorney fees have increased, from around \$1,000 to more like \$2,000-3,000 or even \$4,000 per case. Thus, some consumers have been priced out of the market, and others are discouraged from filing because: (1) of mandatory credit counseling; (2) lawyers must collect and process more information; and (3) lawyers fear sanctions for abusive cases -- but he queried: Are these fears an overreaction?

Professor Kilborn said that only about three percent of bankruptcy debtors have an alternative, so not many are being seriously deterred from bankruptcy by these factors. Fear of bankruptcy court sanctions against lawyers also is overblown. But the burden on debtors' lawyers is higher, *e.g.*: liaising with credit counselors; providing two months income advices (documentation); the means test; exemptions; and Debt Relief Agency disclosure requirements. Cases are now more complex, hence more expensive. There has been some decline in competition among bankruptcy lawyers, as casual practitioners have exited this area of law, and this has helped raise fees and hence the cost. But there has been no increase in actual lawyer sanctions.

Professor Kilborn noted that the proportion of Chapter 7 cases is gravitating towards two-thirds (compared to one-third for Chapter 13), basically the same as before the 2005 Bankruptcy Reform Act (BAPCPA), because: (1) the median income test allows ninety-one to ninety-four percent of the cases to be in Chapter 7 (less than ten percent of debtors are barred from Chapter 7 by the median income test); (2) the means test allows deduction of expenses (*e.g.*, medical expenses), which allows many of those remaining to qualify for Chapter 7; and (3) in the end, not many debtors are affected by the means test. Only about ten percent of those with above-median incomes have had so few deductible expenses that they "fail" the means test, and only about a third of this small group has faced a motion from the U.S. Trustee forcing them into Chapter 13, with an undetermined percentage voluntarily dismissing or converting to a payment plan. Thus, Professor Kilborn noted, the means test has proved so far to be substantially more bark than bite.

The next speaker, the Honorable Jeff Bohm, was sworn in as a Bankruptcy Judge for the Southern District of Texas, on December 30, 2004; Judge Bohm sits in Houston. He agreed with Professor Kilborn that the BAPCPA has not had the adverse impact that many predicted. He opined that the biggest problem is the requirement for increased documentation in Chapter 13. He said that the BAPCPA has primarily eliminated casual bankruptcy practitioners; they have concluded that the amended Bankruptcy Code is too complex to keep up with. While this has resulted in some reduction of competition among bankruptcy lawyers, there has been a large corresponding benefit in reducing the number of lesser-qualified lawyers in bankruptcy court, thereby improving the administration of bankruptcy cases and reducing unnecessary delays.

Judge Bohm said that, as intended, the BAPCPA has reduced serial bankruptcy filings; the amended Code has therefore reduced the cases filed in bad faith or that have little or no chance of success. Moreover, Judge Bohm noted that those individuals who have re-filed must now come to court and establish that the filings are in good faith; and in Judge Bohm's court he emphasizes to these particular debtors that he will be monitoring their cases closely and expects them to take the process seriously. The BAPCPA thus requires more serious attention by debtors, lawyers, and judges (a good consequence). It also requires a focus on the debtor's real need (or not) for bankruptcy. He agreed with Professor Kilborn that those with a need for bankruptcy are not being seriously deterred.

Judge Bohm noted that problems for consumer debtors

remain, of course: Higher legal costs are a fact of modern life (though warranted if the job is done right); as noted, the Chapter 13 payment history documentation of mortgages is difficult to analyze and monitor, which casts doubt on the integrity and accuracy of mortgagees' loan records, thereby requiring more court time to scrutinize the figures; and tightening credit conditions and higher fuel costs are pushing more consumers into bankruptcy.

VI. A Better Mousetrap?

Alternative approaches to teaching consumer law were the subject of a panel chaired by David Lander, an Adjunct Professor at Saint Louis University School of Law, where he teaches courses in bankruptcy and consumer finance law (the latter featuring a multi-disciplinary approach). David argued that the traditional mold for law school education is broken. He said that the question now is: how to fix it? He opined that interdisciplinary and clinical approaches offer the best prospects.

Kathleen Engel spoke as the first panelist, following David Lander's introductory comments. She is a Professor of Law at Cleveland-Marshall College of Law in Cleveland, Ohio, and has become well-known for her publications on mortgage finance and regulation, subprime and predatory lending, and housing discrimination.¹⁶ She teaches a seminar on predatory lending (the scope of the course is actually broader than this, also covering other aspects of subprime credit). There are usually twelve to fourteen students in the seminar, earning two credit hours, with a writing requirement. There are four course requirements: (1) class participation; (2) leading a class discussion; (3) presenting research in class; and (4) a twenty page paper. This is more like a graduate school seminar, rather than a traditional law school course. It has a student-driven curriculum, including exposure to consumer law, and a writing component. It reflects the wide varieties of student experiences and expertise, and has no final exam. The course covers a range of credit law issues; the first two weeks provide overview information, *e.g.*, a review of pertinent statutes and regulations. Professor Engel always gives the students a weekly task: *e.g.*, to review a law or type of credit product and report on it to the class.

Professor Engel's seminar is primarily a mortgage lending course. After the first few weeks, she asks the students to help identify the direction of the course. She then assigns each student to lead a class session on one of the chosen subjects. A problem she has encountered at this point is that there is too much law and the material is too complex, emphasizing the information and expertise disparities between students. But the dynamics change during the semester as the students become more engaged and focused on their areas of interest. Ultimately this allows coverage of more material in less time, as the students increasingly relate to the subject matter. Students choose their areas of interest, relate that interest to the class, and then share their experience and expertise as it develops. This student involvement generates an interdisciplinary and interactive approach that increases student satisfaction and interest. The structure of the course itself works as a teaching tool.

Patricia McCoy is the George J. and Helen M. England Professor of Law at the University of Connecticut School of Law, teaching courses on banking law, securities regulation, and corporate governance.¹⁷ Noting a convergence of some securities and consumer law issues, she described the impact of securitization on consumer retirement funds. These issues include the transfer of risk from employers to employees, and how to encourage better investment and savings decisions. The purposes include understanding law as a social construct, *e.g.*, the role of group politics and public policy, and relating the law to economic objectives. The Consumer Law course is well suited to the intersections

between law and economics and the behavioral sciences (and irrational decision-making is always a fun subject). Compared to most economic analyses, behavioral economics is less math and more a discussion of behavioral patterns. A goal is to expand the students' abilities to conduct economic and legal reasoning, and to analyze economic reports and studies, *e.g.*, helping the students to better understand basic statistical analyses and overcome math phobia by understanding basic analytical principles. This involves reading and discussing tables and graphs, criticizing the limits of studies, and learning basic principles of economics.

Initially, Professor McCoy's seminar skips the math and focuses on textual analyses. Then, midway, the subject matter shifts to a basic critique on statistical grounds. Demystifying economic analysis enables the students to read graphs and charts and question assumptions, for example considering the endowment effect: we over-value what we have (*e.g.*, the value of our cars and houses is often overstated). Multi-variate regressions are used -- controlling variables (*ceteris paribus* in economic terminology), and reading regression analyses. It is a way to relate law, math, and economics.

Steve Meili is Professor of Clinical Law at the University of Minnesota Law School. He noted that a clinic provides an effective teaching method, *e.g.*, providing a platform to relate academic subjects to real world problems. This includes substantive consumer law teaching, relating to clinical cases. Professor Meili also teaches a Consumer Law seminar. He discussed how to bring the benefits of a clinic to a traditional consumer law course, *e.g.*: (1) use a consumer clinic intake memo to create realistic scenarios based on actual cases; (2) have the students analyze the case under the substantive laws triggered by the facts; (3) consider the interrelation of law and non-legal issues, then create a clinical scenario in a classroom setting; and (4) introduce a service-learning component (working with legal services agencies or private practitioners (in a seminar setting)) to develop lawyering skills exercises based on cases in the text, *e.g.*, client interviews, drafting a complaint, etc.

This raises a new issue: student participation versus substantive content (one tends to push out the other, requiring consideration of how to balance these options). Professor Engel pointed out that class participation (*e.g.*, leading a class discussion) can increase the substantive coverage because the students have an incentive to engage in active learning. Thus participation and content can coexist (as in the Socratic method). But skills and classroom participation versus substance remains an issue. The trend is to cut substance in favor of skills, or reduce coverage to favor depth. The increasing complexity of the law encourages this. Professor Meili said that students retain skills better than substance; but one can also argue that basic substantive knowledge is needed in order to be conversant and use skills (this is hard to get on one's own). In your author's experience, this is a debate (or at least a quandary) that reaches across academia and affects nearly every subject area. Professor Cathy Mansfield of Drake Law School in Des Moines, Iowa pointed out that the students need the basics of substantive law in order to engage in a clinical experience and write a meaningful paper. Professor Engel suggested requiring short progress reports to the class on the writing project, while engaging the students to learn substance. Professor McCoy suggested requiring the students to write a critique of each presentation. Professor Meili argued that service-learning helps employment prospects, but warned that the professor must watch out for potential student mal-

practice and the unauthorized practice of law. This requires close faculty supervision and regular cautioning to the students. There was a discussion of how to constrain student interest within this proper scope. Again, several participants emphasized that close faculty supervision is essential and this must establish and maintain appropriate parameters.

VII. Payment Systems Update

Mark Budnitz is a Professor of Law at Georgia State University College of Law, teaching courses on consumer protection law, sales, payment systems, and electronic commerce. He has written four books and over thirty law review articles, and serves on the Board of Directors of the National Consumer Law Center. He began his presentation on teaching payment systems law by asking how many in the audience still write checks. Perhaps as a sign of the aging in academia, almost all program attendees responded to this question by indicating that they write checks. As noted above, this usage is also reflected in the continued high level of litigation over check-related issues.¹⁸ This suggests a need to continue teaching Uniform Commercial Code (UCC) Articles 3 and 4, along with emerging electronic payments systems, creating new challenges in the context of limited classroom time. Moreover, these are subjects that are not necessarily intuitive -- the students may have difficulty learning these subjects on their own, without thorough classroom instruction. And they are fundamental to many consumer transactions. Professor Budnitz considered these issues, and provided a suggested framework.

Professor Budnitz noted that students should understand the basic distinctions in payment system processing, *e.g.*, for: (1) paper checks, governed by UCC Articles 3 and 4, Regulation CC, and Check 21 (The Check Truncation Act) (including electronic processing and presentment); (2) transactions subject to the EFTA, including automated clearing house (ACH) transactions and various forms of electronic check conversion (ECK) transactions, and debit cards; and (3) other payment systems such as credit cards and stored value cards. He suggested there may be a gap in the law regarding electronic check image exchange. (This is not covered by Check 21 unless a "substitute check" is produced.) Some banks apparently avoid creating substitute checks when possible, instead exchanging electronic check images, in order to avoid the strictures of Check 21 (which are considered by some to be unnecessarily cumbersome and complex). If the consumer has agreed to check imaging, he or she has no Check 21 rights. Completely separate issues arise with respect to an electronic check conversion (ECK), which is collected by ACH, and is subject to the EFTA and Regulation E (variations include point-of-sale (POS) transactions, back office conversion, accounts receivable conversion, and lockbox arrangements); then there are the NACHA rules. Credit cards are yet another system (governed by the TILA, and Regulation Z). Stored value cards are yet another alternative (stored value payroll cards are governed by the EFTA and Regulation E; otherwise, stored value cards are governed largely by state law, *e.g.*, contract law).¹⁹

Professor Budnitz noted that "pre-paid debit cards" are not really debit cards, but gift cards (stored value cards). Other examples include payroll cards, and telephone cards. Payroll cards are covered by FDIC insurance as are debit cards drawn on an insured deposit account, but other stored value cards are not. These issues require consideration of the role of federal banking law and preemption. Issues such as disclosure, fees, the impact of issuer bankruptcy,

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and unclaimed property laws also should be noted.²⁰

Another potential issue for consumers is that error resolution procedures may vary depending on the applicable law, *e.g.*, the UCC or EFTA or Check 21, or TILA. For example, there is no investigation requirement in the UCC;²¹ and even federal laws differ: compare the EFTA, TILA, and Check 21. Much depends on how the check was deposited:

alternatives include remote deposit capture; ATM; POS; ECK; or Check 21. The applicable error resolution system may depend on the answer. The cases reflect this confusion and the impact of technology.²² The customer's review of the monthly bank statement remains important -- but if the customer discovers an error, the remedy may vary depending on whether the UCC, EFTA, TILA, or Check 21 applies. As noted, "cut down" clauses in deposit contracts, reducing the time periods for objecting to an improper payment, are another issue and potential problem.²³

"Telephone checks" are yet another matter. Regulation CC provides new warranties (generally following the 2002 UCC Article 3 amendments governing remotely-created items). In consumer litigation involving telephone checks, payment processors are being targeted for payment of improper items. State Attorneys General and private plaintiffs are active in suing on these issues, but Professor Budnitz argued that the FRB has been asleep.²⁴ In addition, state law is being preempted by federal regulatory guidances.

Professor Budnitz noted that overdraft protection programs blur the line between credit card and deposit accounts.²⁵ Proposed FRB regulations on credit cards include provisions on overdraft protection features.²⁶ If you use your debit card, getting an initial hold on your account (*e.g.*, to cover a prospective hotel or gasoline charge) may trigger the overdraft protection program.

Professor Budnitz argued that there is no rationale for these distinctions and the resulting confusion. Dean Alderman argued that the loss from fraudulent cashier's checks falls unfairly on the consumer when the bank charges back the dishonored cashier's check, because the loss falls on the consumer who took the check from the fraudster. This is designed to place the loss on the party best positioned to avoid it, and creates an incentive for the exercise of caution in such transactions; that is a reason for (and common theme in) the seemingly diverse rules tailored for various scenarios. But there is the potential for loss to the unwary consumer in such transactions.

VIII. New Ways of Looking at Old Problems

Chris Peterson has returned to the University of Utah as a Professor of Law after teaching commercial and consumer law for a number of years at the University of Florida. He is the author of an award-winning book on high-cost consumer credit, *Taming the Sharks*, and in 2007 was named by the National Association of Consumer Agency Administrators as Outstanding Consumer Advocate of the year. He discussed approaches to teaching about the upsurge in mortgage foreclosures, subprime lending, and MERS (the Mortgage Electronic Registration System). He



said that the Fitch rating firm estimates that forty-to-fifty percent of the subprime mortgage loans originated since 2006 will end in foreclosure. He did not further address the reasons -- time constraints at a conference like the Houston program obviously limit such explanations. In teaching these issues, one could consider whether to include a discussion of housing cycles and the impact of FRB monetary poli-

cies, plus the tendency of speculative fever to intensify at market peaks, as well as predatory lending issues.²⁷ In any event, six million foreclosures are expected, including fifty percent of the mortgages owned by MERS. Professor Peterson argued that MERS draws a "veil" across mortgage transactions, like a "masked executioner."²⁸ He said that no law review articles have yet explored this except those written by MERS executives. So far, however, the courts seem to be upholding MERS transactions.²⁹

Professor Peterson queried: Does MERS eliminate the public benefits of a recording system? He argued that the syndication of loans splits the ownership and MERS veils it. The advantage of MERS is that it avoids recording multiple assignments of mortgages; MERS is a private company created by the mortgage industry to maintain a registry of the ownership and servicing rights of mortgage loans, to avoid the necessity of multiple public recordings. MERS records an assignment of mortgage to MERS or records MERS as the original mortgagee (MOM). MERS then brings any foreclosure action in its own name. MERS is a nominee for the owner or owners; but this raises the question: is MERS the mortgagee? MERS is the mortgagee of record, holding the mortgage as trustee for the beneficial owners. But Professor Peterson argued that MERS is not the mortgagee, and therefore should not be treated as the mortgagee; therefore, it may not be perfected in a foreclosure and/or bankruptcy; it also may be a debt collector under the FDCPA (but Professor Peterson noted that there is fundamental disagreement on these issues).³⁰

Jim Hawkins then spoke on Rent to Own (RTO). He is a new professor at the University of Houston Law Center, having previously clerked for Judge Jerry E. Smith of the Fifth Circuit U.S. Court of Appeals and practiced commercial litigation at Fulbright & Jaworski. He had the highest grade point average in his class at the University of Texas and was Chief Articles Editor of the *Texas Law Review*. His article on RTO, *Renting the Good Life*,³¹ comprehensively covers the topic, including the debate over whether RTO is really a credit sale. The article (which appears in the Houston program book) also addresses the empirical data -- on this basis he concluded that it is difficult to justify barring RTO transactions. For example, there is no direct link to bankruptcy -- the consumer essentially has no obligation to pay and can walk away anytime. Rates are high, but not industry profits, and the industry appears competitive, suggesting that the risk is proportionate to the reward. There is a risk of consumers losing "equity," but a FTC study indicates that ninety percent of RTO consumers end up owning the goods after six months. Before then, there is not much equity due to the usual, rapid depreciation for consumer goods. This should not be a revelation:

New goods are worth a lot more than used goods. The risk of lost equity is apparently not a reason to bar RTO transactions.

Of course, this does not necessarily mean that RTO transactions should be free of restrictions. Possible regulatory approaches include APR-like disclosures. But Professor Hawkins noted that this is regarded as a bad idea because it is the equivalent of banning RTO transactions, due to usury limits. APR disclosures also raise costs and reduce competition -- if RTO operations are providing a valuable service, needed by the public, there is a need to permit this business. There is no need to create an artificial APR regime whose real purpose is to outlaw such transactions. He addressed the issue: Why doesn't the industry want to provide APR disclosures? In response, he noted that the APR is difficult to calculate in a meaningful way due to the mix of a sale and credit transaction (it is difficult to separate retail profit versus credit costs; the same problems are encountered under FRB Regulation M). Also, the APR (a yearly cost) is not very relevant to a weekly rental. Also, RTO transactions necessarily involve small dollar amounts; although the charges are high when expressed as a rate they are low in dollar terms (and profits to the industry). There is not much room in such a small transaction to impose a costly compliance regime, without rendering it uneconomical for the consumer.

Other potential regulations include a lifetime reinstatement requirement, to guarantee that consumers don't lose their equity. But this raises an important question: how can you effectively measure such equity, *e.g.*, the value of a used sofa, months or even years after the goods have been rented, repossessed and resold. Some RTO firms do this as a marketing tool. But of course, a voluntary program that represents essentially a gift to the consumer is very different from a legal mandate and valuation standard.

David Friedman was recently appointed Assistant Professor at Willamette University College of Law in Salem, Oregon, teaching Contracts and Business Associations. He previously taught Consumer Law in Willamette's clinical program, and was a Special Assistant Attorney General for the Oregon Department of Justice. He has recently written an article, *Reinventing Consumer Protection*,³² focusing on new, broader proposals for combating consumer fraud.³³ The article advocates use of an "invisible person" approach: Randomly selected consumers who are given enhanced consumer education and protections, but whose identity is kept secret. This would encourage creditors to treat all consumers as if they might be such a consumer; in effect, it creates "more dangerous" consumers as a deterrent to fraud (somewhat like the fear of a burglar that a household may have a gun).³⁴ This is somewhat like the use of "testers," which some agencies already favor. It is also an effect inherent to some degree in our litigation system, since some consumers are obviously more litigious than others. However, the idea that some consumers would receive a special education, or even special legal rights and remedies, not available to others, would likely raise public policy and even Constitutional concerns.

Onyeka Osuji teaches at the University of Exeter School of Law, Cornwall Campus, in the United Kingdom. His topic was: Relating the principles of corporate governance and social reporting to consumer protection so as to generate wider corporate responsibility and accountability, as an alternative to the exclusive reliance on profits. He said that recent Sarbanes-Oxley³⁵ and UK legislation are moves in that direction, but this movement is limited to large companies and is therefore incomplete; but, he said, this movement links practical social issues and

public expectations to corporate governance and reporting. Social performance is rated in the UK, which includes consumer protection and advertising. Some have also argued that social costs should be disclosed as part of the price of a product; but this has been criticized by others as mere window-dressing.

Professor Osuji said that freedom of contract should be balanced by "freedom from contract," *i.e.*, freedom to abstain from contracting with a particular party, *e.g.*, based on a disclosure of the social costs (by reason of corporate social reporting), as a prelude to the requirement for companies to trade "fairly" with consumers.

IX. Recovering Attorney Fees

Cary Flitter is a litigation partner with the Philadelphia firm of Lundy, Flitter, Beldecos & Berger, P.C., representing primarily consumer plaintiffs. He also serves on the adjunct faculty at Widener University School of Law in Wilmington, Delaware. He was joined on the next panel by Ronald Burdge, who practices consumer law in Dayton, Ohio. Mr. Burge also coaches and counsels attorneys through TheLawCoach.com. These speakers noted the prevalence of fee-shifting provisions in state and federal consumer law statutes. This significantly shifts the economics in consumer cases.

Flitter noted the TILA, 15 U.S.C. section 1640(a)(3), as an example, allowing a prevailing plaintiff to recover attorney fees and costs. Flitter noted that there are over 100 such federal laws, as well as many fee-shifting laws in Pennsylvania and other states. This changes the settlement negotiations because the defendant knows that two legal "meters" are running and many companies recognize that it will be more difficult to wear down the plaintiff.

Flitter raised the question: What is a "prevailing party" or "successful action?" The federal courts may require a judgment or consent decree, or the equivalent. Most settlement agreements should include "prevailing party" "or equivalent language in the judgment, if plaintiff counsel fees are not agreed as to amount. Fee-shifting rules govern the liability of the defendant to the plaintiff, not the liability of the plaintiff to his or her attorney, under Supreme Court precedent. Thus, the fee agreement does not set a ceiling or floor on the "reasonable fee." The plaintiff's attorney needs a specific fee agreement, setting the hourly rates for all lawyers. Bear in mind that this may be discoverable.

Flitter also noted that the lodestar is a presumptively reasonable fee; this may be adjusted up or down by the district court, but the fee applicant has the burden of proof. The federal rule does not allow an upward adjustment for the contingency of loss, but may for delay or an unusually good result. The lawyer must keep detailed, contemporaneous time records; time spent on the assertion of unsuccessful claims may or may not be compensable. The test under federal law is whether the unsuccessful (or non-fee-shifting) count is "distinct in all respects" from the successful (or fee-shifting) count.

Flitter noted that the amount of the recovery is relevant but is not a cap. The complexity of the case is also a relevant factor. The lawyer needs documentation, survey evidence, affidavits, and any other persuasive evidence to prove reasonable hourly rates and the time spent; an assertion is not enough. Expert witness fees are not always included in fee-shifting provisions for attorney fees, and therefore may not be recoverable in some cases. Although fee litigation is to be avoided if possible, most courts do allow counsel fees for litigating the counsel fee claim. Burdge suggested: Search for common elements in claims, to come within fee-shifting provisions. He said

These speakers noted the prevalence of fee-shifting provisions in state and federal consumer law statutes.

that consumer law is a specialized practice, like patent law, and this justifies a high hourly rate. Things to avoid include: vagueness and poor record-keeping; billing discretion; and billing for large blocks of time. Each entry should reflect a task, and specific claim. The lawyer should avoid repetitive entries.

Burdge said that fee-shifting corrects the marketplace, and ensures enforcement of the law (otherwise, he said, consumer law would be ignored). Thus, he said, it is a key to consumer law and remedies. Clearly these practical issues relating to the practice of consumer law deserve a place in the law school curriculum.

Upon a question from Chris Peterson, Flitter and Burdge addressed the impact of arbitration. Flitter said that the effectiveness depends on the arbitrator, the case, etc. It is possible to get fees in an arbitration. But the arbitrator is not bound to follow any of this jurisprudence on fee-shifting as developed by the courts, and Flitter said that consumer claims do not fare well in arbitration.

If you have a settlement in principle but not on fees, offer to let the court decide the fee. But document your case and your time.

X. What's New in the World of Consumer Law?

A. What's New in Nigeria

Felicia Monye is a Senior Law Lecturer at the University of Nigeria. She opined that consumer law in Africa had been dormant for many years, but now is expanding. New laws and regulations give regulatory authorities expanded jurisdiction to protect the interests of consumers. *E.g.*, section 419 of the Nigerian criminal code protects consumers against sales of goods and services by false pretenses. New laws are also being directed at cyber-crimes. It is too soon to assess the effectiveness, but she reported that the trend is favorable.

B. India

Dr. A. Rajendra Prasad is Professor of Law at Andhra University in Visakhapatnam, India. He pointed out that teaching consumer law is more than merely a study of the rules -- it is a study of consumer society. Consumers are everywhere, but worldwide the problems are dissimilar. Common issues are: what rights should be conferred? Enforced? How? Eighty percent of the world's population lives in developing countries. Their primary problems include: poverty; social inequality; and cultural hurdles and restraints. Half of the world's population lives in poverty. Many of these consumers are indifferent to their legal rights, even if such law exists.

In India, there is a backlog of thirty million cases in court. The Consumer Protection Act of 1986 is designed to provide simple, cheap, and speedy justice as an alternative (it has a ninety day limit for disposal of cases). But this creates special issues that are not common to other countries.

C. U.K.

Dr. Christine Riefa teaches consumer law at Brunel Law School, Brunel University West London in the U.K. She described recent European Commission (EC) Consumer Directives (as described in the Houston program written materials). In the European Union (EU), full harmonization directives are replacing minimums, requiring maximum and minimum standards (rather than merely the previous floors). The purpose is to eliminate European borders for economic transactions.

Regulation is difficult -- it provides uniformity but no flexibility. Di-

rectives are more flexible. With twenty-seven member states, the EU is politicized, making it difficult to achieve uniformity.³⁶

Consumer education is being emphasized in some subject areas, including industry compliance. Post-graduate courses (*i.e.*, continuing legal education, what we would call CLE) are being funded by the EC.

D. Romania

Dr. Rodica Diana Apan is a full time lecturer, teaching Business Law, Commercial Contracts and Procedures, Consumer Protection and Community Law at North University in Baia Mare, Faculty of Sciences, and Economic Sciences Department (CD). She spoke on the effects of ancient Greek mythology on Romanian consumer protection. She presented a paper entitled "Consumer Law in Romania, a contemporary creation" (included in the Houston program materials).

The purpose of her study was to find an answer for the questions laying at the basis of the edifice of the consumer law in Romania, *e.g.*, the limits of "protection domains," and the appropriate juridical means of protection, including the characteristics of this branch of law. She noted that, in Romania, the specific regulations for consumer protection are defined by a legislative *crescendo*. Starting in December 1992, up to today, a significant number of regulations have been adopted, which transformed the *communitarian acquis* in the national legislation, Romania being a Member State of the EU since January, 2007 (with some of the regulations becoming effective at that time).

In the study she sought to identify the juridical meaning of protections set up within the norms decreed in each protection domain. Norms having a sectorial character extend the means of protection from norms having general character, specifically to the following domains as subjected to analysis in the Houston program paper: advertising; pricing information; distant contracts and contracts away from business premises; unfair clauses; consumer credit; timeshares; tourist packages and services; warranties; safety; and unfair practices.

The study analyses each of these domains where the consumer's protection is specifically ensured, identifying the juridical means that the regulations set up for the consumer's protection. These are synthesized with a generic title as being: interdictions; obligations; consumers' special rights; formalism; responsibility; institutional frame; complementary measure; or procedural aspects. The juridical means are the imperative of consumer law in Romania.

These are the features of the consumer law in Romania that are outlined in the paper presented at the Houston program. This reveals a coherent system of juridical norms that is still being formed. Currently, she said, the jurisprudence is rudimentary, but hopefully it will continue to evolve.

Professor Apan also observed that a duality in the role of the consumer law in Romania and everywhere else in the world is obvious. While protecting the consumer, it also sets up rules for merchants and creditors, in this way ensuring the smooth functioning of the market, since markets cannot operate properly if the rules are unclear or any of the participants are at the other's unilateral discretion.

The Romanian juridical norms are being formed and transformed, to reflect reality (as in a common law system). At this moment in Romania, there is a coherent regulating framework in the domain of consumer protection. The decreed norms are being juridically adapted to the realities of Romanian life. Only by this application and evolution of the

The Nigerian criminal code protects consumers against sales of goods and services by false pretenses.

regulations, over time, will the mechanisms be improved and become efficient.

And finally, she queried: what is consumer law in Romania? In summary, she said it is the product of the present, born under the burden of the past, and definitely evolving under the pressure of the future.

E. Mexico

Marta V. Ruvalcaba of the Public Interest Law Clinic in Mexico City briefly described current issues confronted by consumers in Mexico.

XI. Inside the Mind of Consumers

Kurt Eggert is Professor of Law and Director of Clinical Legal Education at Chapman University School of Law in Orange, California, where he also directs Chapman's Alona Cortese Elder Law Center and teaches both clinical and substantive law courses. He opined that the study of behavioralism is important because it answers those who want to limit consumer protection, by rebutting the theory of voluntary and rational consumer decision-making as a basis for opposing mandatory consumer protection as a threat to consumer autonomy.

This theme was explored further by Lauren Willis, Associate Professor of Law at Loyola Law School Los Angeles. She has focused considerable scholarly attention on these issues and echoed Professor Eggert's emphasis on a behavioralist approach. She indicated that this is a matter of teaching students about themselves, as well as other consumers. She suggested asking students to tell stories they know about consumer scams. This illustrates how we all make poor decisions.

Professor Willis noted that decisions involve evaluating alternative future scenarios. We must choose the most valuable option, according to our personal preferences. But inevitably this evaluation is influenced by the presentation of the seller (this, after all, is the purpose of marketing, or salesmanship), and as a result our analysis is often incomplete. Thus, we weigh uncertainties poorly.

Professor Willis opined that poor decision-making by consumers³⁷ is also due to so-called "personal preferences" which may not be known until after the decision is made, and thus may be unduly influenced by advertising and marketing. In effect, we often make mistakes when forecasting the future, particularly our own. Consumers also tend to minimize intangible transaction costs (*e.g.*, time, and effort), instead using apparent information (advertising content, and marketing). This allows the exercise of inordinate influence by the seller, further encouraging poor decisions. Perceived consumer preferences thus are often inaccurate. Other factors contributing to poor decision-making include the use of a short time reference, and our tendency to discount uncertainty over time (construal level theory).

If this is to say that human decisions are often flawed and based on imperfect data, then history (and many of our personal experiences) readily confirms that. But your author cannot help wondering how we can determine that the personal choices of others are not valid for them, just because we think they are unwise. It would seem that in the end only the consumer can know if his or her preferences are valid, and this is a strong argument for party autonomy. Professor Willis cited other problems that contribute to poor consumer choices: choice overload -- taking the first acceptable option; a tendency to use a compromise effect (splitting the difference; a preference for the smallest payment, etc.); dominating alternatives (*e.g.*, making stock fund choices based on past performance); a tendency to reduce the choices to a few factors we understand; a tendency to ignore discomforting facts; over-optimism; a tendency to avoid making a decision, by

deferring to others (*e.g.*, sellers); a tendency to reciprocate to the perceived friendship of the seller; and a tendency to allow the seller to frame the alternatives. Much of this has always been a part of human relationships. But how can the law and legal education best address these issues?

Alan White has been teaching consumer law, commercial law, and contracts at Valparaiso University School of Law in Indiana since 2007. He argued that the answer is to stop teaching things we know are wrong. He said that behavioral economics tells us that:

- rational choice theory is wrong;
- consumers do not maximize their own utility;
- sellers understand and exploit this behavior; and
- deregulation does not serve consumers.

Professor White argued that U.S. policy has been captured by a law and economics theory based on these false suppositions. This theory claims normative agnosticism and efficiency, based on voluntary transactions that maximize the utility for both parties. This, he said, is false. Deregulation and disclosure are the goals of this theory, justified by an expanding gross national product (providing the greatest good for the greatest number, a measure based on economic efficiency). But, he said, consumers are not necessarily better off by reason of increases in aggregate wealth.

Moreover, he said, even if we accept the premise of economic efficiency, voluntary transactions don't work, because consumers don't make rational decisions. Thus, an embedded norm that freedom is good prevents us from imposing needed restrictions. Selected paternalism accepts the basic model but seeks to improve consumer decisions, *e.g.*, by disclosures. But this too is based on an erroneous basic model. Other basic models need to be considered, maximizing other values not wealth. Autonomy defenders say it is a valuable norm even if consumers make poor decisions, but this is flawed and does not create social efficiency. Thus, public policy requires a choice between autonomy and social efficiency.

There is a third alternative model (the first two being party autonomy and selected paternalism): Justice and fairness as an independent norm designed to prevent exploitation, irrespective of autonomy or efficiency. Professor White argued that the law should focus on protecting vulnerable consumers as the overriding norm; he said that autonomy and deregulation have led to harm to both justice and efficiency (*e.g.*, in the subprime crisis). Thus, protection of the weakest and most vulnerable should be the primary goal, not their autonomy or overall efficiency.

There followed a question from the audience: Is it any better for the government to exploit these same weaknesses in an effort to "help" or change people? Answer: We should change the decision-making environment to limit consumer options so they can better exercise their autonomy within a restricted environment. This will help autonomy by reducing the number of erroneous options. People may think that more choices are better, but consumers can make better decisions if the choices are few. Professor White opined that people don't like choices -- and therefore giving them unlimited choices is not their choice at all.

In pursuit of this agenda, Professor White suggested that one can frame the policy choices in the same way as industry frames consumer choices; he said that exploitation exists in our current policy choices as well as in consumer choices. Consumers will not want to give up their freedom of choice. Therefore the challenge is: How to organize a social movement to effect this change. The foreclosure crisis illustrates how an entire financial system can be predatory. This provides an opportunity to fundamentally restructure that system, to reduce the opportunities for erroneous future choices. Professor White offered no precise policy prescriptions, but argued that these issues should be heavily considered in policy deliberations.

XII. View From the Trenches

Ira Rheingold, Executive Director and General Counsel of the National Association of Consumer Advocates (NACA, a cosponsor of the Houston program), spoke next, offering another policy perspective. He opined that movement in Washington, D.C. is a delayed reaction. He said there is a broad public perception around the country that the system has failed and must be changed. This is not yet fully reflected in Washington, he said, but wait for January, 2009. He noted that this is not merely an electoral phenomenon. For example, the FRB is moving towards more substantive regulation.³⁸

He observed that the subprime mortgage crisis is one of the reasons. He said that everyone in public office says they want to do something, but so far the only result is a voluntary approach that leaves a system in place that is destroying the economy. He opined that a primary problem is the lack of legal risk in securitizations. He also advocated changes in bankruptcy law to allow consumers to better protect their homes. He said it is an irrational response to argue that the cost of credit would go up as a result, or that credit availability for the poor will go down. He also argued that such a bankruptcy change can be limited to past transactions and will not affect the future, unless mortgage lenders screw up in the future and then Congress should intervene again. Your author must note, however, that this is tantamount to announcing that future transactions will be impaired every time the economy hits a major speed bump.

Ira then commented on current hot topics in the practice of law: TILA; rescission; and the FCRA (*e.g.*, reporting errors and permissible purpose cases). He argued that the FCRA system is broken; Cary Flitter added that there are billions of entries, and if even a small percentage of errors occurs, this is still thousands of errors, plus there is identity theft. He said that FCRA cases are here to stay, and it is a growth area for legal practice.

Sales of debt receivables illustrate another trend. The debt collector/assignee often has little documentation to support its claim, and the debts may be time-barred. Ira said these are "not really debt buyers, but assignees of inaccurate information."³⁹ The assignor often disclaims any other responsibility. He said this combination of identity theft, erroneous computer-generated information, a sale of phony debt, and contract law enforcement through private arbitration results in consumer liability not founded in law and never reviewed by any court.

Peter Holland, of the Holland Law Firm in Annapolis, Maryland, posited an abusive "spot delivery" scenario: The consumer buys a car, using dealer financing; two weeks later the dealer says the financing was not approved and the consumer must sign a new contract. The consumer refuses, then the vehicle is repossessed, with dramatically adverse financial consequences for the consumer. He characterized this as a yo-yo or spot delivery transaction.⁴⁰ He said that consumers in the real world read at a seventh grade level, whereas modern contracts cannot be understood by a Ph.D. He cited another type of scam: The title company prepares a false affidavit stating that the consumer has never been through a foreclosure or filed bankruptcy for the consumer to sign, then uses that against the consumer by seeking an exception to discharge when he or she files bankruptcy.⁴¹

Currently, Holland said, the two biggest enemies are arbitration and federal preemption, as both are threats to our tradition of local, state law judicial remedies. Also, he said there is some judicial hostility to individual cases involving small amounts. Default judgments and "voluntary" consent decrees are other common problems he cited.

Holland argued that spot delivery or yo-yo sales are illegal, yet are a standard practice. Car dealers don't sell cars, he said, they sell financing. They use the vehicle to trigger a yo-yo financ-

ing scheme that allows the dealer to make a subsequent unilateral modification of the credit terms as the consumer's only alternative to repossession. He said, however, that the original contract means that the consumer is not guilty of conversion; instead, the subsequent repossession may be conversion. Clearly the consumer has some legal rights in this scenario. If auto dealers are intentionally embarking on this strategy, *i.e.*, turning subprime buyers loose with vehicles intending that the contracts will go into default so the vehicles can be repossessed, it strikes your author as a highly risky strategy, both legally and economically.⁴²

XIII. Author's Perspective

A. Balance in the Classroom

At the Houston program, and in the Consumer Law classroom, an advocacy perspective is to be expected, and to some extent is inherent in the subject matter; consumer protection obviously is a focus of the course, and has a fundamental role to play. But of course almost any issue has two sides, and there is always a risk of shortchanging our students (itself arguably a form of consumer abuse!) if our teaching is too much focused on a single perspective. So your author favors a balanced approach. This is not to criticize those who seek to teach the Consumer Law course from a consumer protection or consumer litigation perspective (a common approach in academia, and inevitable to some extent by reason of the nature of the course), but only to suggest that a proper presentation of this perspective requires some recognition of countervailing arguments and considerations.

This is where education departs from advocacy. Advocacy is at the heart of our profession, and inherently seeks to present, in the most favorable light, a particular perspective, with little or no need to consider alternative views (that is up to the opposing advocate). This is obviously critical to a successful litigation (or negotiation) strategy; in that context, the opposing view is separately represented and that (along with an impartial tribunal) assures the opportunity for fairness and balance. But even in this context advocacy cannot be fully effective without an understanding of the opposing arguments. And in the classroom the teacher must fill all three roles, if there is to be fairness and balance. If advocacy unbridled by balance dominates the classroom, the educational process is likely to suffer. Thus, education is important to the development of effective advocacy, and vice versa, and that education needs to reflect the diverse substantive arguments on all sides of an issue in order to be effective. It is relatively easy to present one side of any argument in isolation, but quite another thing to win that argument after a balanced debate.

There was naturally some emphasis on advocacy in many of the presentations at the Houston program (though Dean Alderman also insured that there was a degree of balance); and more than one speaker noted that advocacy is the focus of his or her law school course. Of course, in the very short time frame of a conference presentation, it cannot be expected that a speaker (especially one seeking to emphasize his or her advocacy credentials) will dwell on opposing views. But there was also some recognition that the future credibility of the Consumer Law course probably depends in some measure on our ability as teachers to subordinate our personal perspectives to the overall, traditional constraints of legal education.

It was interesting to observe how each speaker at the Houston program confronted these issues, *e.g.*, in seeking to balance his or her advocacy views with a need to recognize and teach the law as it is. Some obviously addressed this balance more strenuously than others, and if I may be allowed to paint with a broad brush I will add that overall the full-time faculty seemed more cognizant of this issue than the practitioners and other professional advocates. This is probably not surprising, and perhaps

even is reassuring, and ideally to be expected, but it also may be that the difference was slight and I don't want to overstate the point. There is obviously a temptation in a conference setting (and perhaps in the classroom) to suggest that there is no legitimate view in opposition to your own. This is quite understandable -- it is asking a lot to expect someone who has strongly-held views and perceives himself or herself as an advocate engaged in an important debate to essentially present the opposing arguments. But in the classroom it is part of our job to disabuse the students of this very notion; and in the classroom there cannot be two equal debaters and a judge -- the professor must fill all three roles to some extent (hopefully, with some help from the students), if the educational process is to be complete. Again, this requires that education depart from a pure advocacy approach. It is very difficult, especially when one remembers that we are teaching the students to be advocates, and are ourselves advocates by training.

The difficulty of making this transition from advocacy to education was evident at the Houston program, as some participants seemed disinclined to present (or recognize) opposing views. As noted, this is essential in the world of advocacy, and is customary at legal conferences, but is (or should be) something of a red flag in the classroom. In the latter context, there is little benefit to denying the existence of a rational opposing view, or attributing it entirely to "politics." Almost any view needs to be answered, and it is not sufficient in academia to simply declare the opposition to be irrational.

B. Party Autonomy

Speakers on the second day of the Houston program raised fundamental issues relating to consumer choice and party autonomy, *e.g.*, questioning whether party autonomy is effective or even should be a policy goal, based on behavioral economic studies noting the cognitive dissonance in consumer decision-making.⁴³ Discussing these studies in class is fun, perhaps in part because we all enjoy hearing about the mistakes of others (after all, that is the basis of much humor, and other public entertainment). Clearly it can also be an important and informative part of a Consumer Law course. It is not, however, an entirely new idea; your author is slightly puzzled when hearing these behavioral studies cited as the basis for unprecedented revelations about the foolishness of human behavior.⁴⁴ No doubt the social sciences have advanced, but it all sounds very similar to things your author studied in college over forty years ago, and has pretty much taken for granted ever since.

Basically, we all act stupid at times and we all make dumb mistakes. I made a fair number on the way to and from the Houston program, and even during it (including the consumption of too many candy bars, potato chips, and cups of coffee), which I later regretted. Even worse, we do things we *don't* regret, but which others do not agree with. Objectively, many of these decisions cannot be justified, as numerous studies prove. Admittedly, eating too many candy bars is a different order of magnitude than having your home mortgage foreclosed, but surely the principle is the same.

Moreover, your author joins those who find much advertising obnoxious. It is sad to think of the state of a mentality that is positively influenced by such things. On the other hand, if these modern sales techniques are so effective, why do so many sophisticated enterprises fail for lack of satisfactory customers? Could it be that consumer advocates, the industry, and behavioral scientists are all overestimating the effects of marketing research

But there remains much common ground in the legal profession, even as between consumer advocacy and the industry.

and development? Does anyone else remember the Edsel?

In any event, consumers seem disinclined to give up their party autonomy in return for protection from error. Your author is not aware of any successful political initiative that has been framed in that way. Consumer protection initiatives are most successful when they are framed as being cost-free, *e.g.*, nondiscrimination, disclosure, even Social Security. But cost-benefit analyses often

represent a fatal threat to the success of more ambitious plans. Every day is a new day, and perhaps next time will be different. Perhaps the current credit crisis will create such severe dislocations that consumers will eagerly give up their ready access to private mortgage finance in return for protections against predatory lending. But it hasn't happened yet, and it seems more likely that if this is going to happen it will be imposed by stealth.⁴⁵

Ironically, to date it has not been the poor and ignorant consumer who has voluntarily yielded his or her autonomy, but sophisticated captains of industry and finance, some of whom, at the first onset of a serious crisis, seem eager to cede swaths of their autonomy to any agency of government that will promise in return some kind of bailout and/or protection from competition.⁴⁶

It is not entirely an irrational choice; almost any professional manager is better off to continue earning his or her salary for a few more years, and perhaps salvage the stock options, rather than resigning in disgrace. The costs are almost always borne by others, including future managers, shareholders, employees, and even (if the management is clever and sufficiently influential) taxpayers and competitors. In contrast, the unsophisticated consumer has proved remarkably resistant to the same offer. Perhaps this is because a consumer is more than a temporary manager of his or her own affairs; in a sense, the consumer is his own long-term shareholder. Perhaps the consumer is better able to measure his or her long-term future that we realize.

For whatever reasons, consumers seem reluctant to embrace limits on their autonomy as a form of consumer protection. Most consumers do not seem inclined to accept social justice as an alternative to the exercise of their personal preferences, flawed as those preferences may be. Perhaps this will change; perhaps the issue can be framed in such a way as to give limits on personal freedom a broader appeal. The future may offer enhanced prospects for such a change, incrementally if not wholesale, or perhaps by regulations that the public will not understand.

Hopefully the academic community, and the Consumer Law course, will be there to shed light on these developments, pro and con. Given the complexity of the legal issues, there is no one else likely to do that job, and in the end education may be our most important form of consumer protection.

XIV. Conclusion

The Center for Consumer Law exists to serve consumers, just as NACA (a supporter of the Houston program) exists to serve consumer plaintiffs' attorneys. The Houston program serves these purposes, as well as broader purposes relating to education, teaching, and scholarship. But this combination of purposes highlights the fine line between advocacy and education, a line illustrated during the Houston program.

No sponsor can predict entirely what its panelists will say, despite some obvious clues. Perhaps this is doubly true of academics (as anyone who has attended a faculty meeting can attest). A pro-advocacy approach is likely at any such gathering. But there remains much common ground in the legal profession, even as between consumer advocacy and the industry (and, more

clearly, between lawyers, and hopefully even more so between academics). While neither side has the incentive to emphasize this common ground, discussing it (as well as the polar positions) is a part of the educational process. As in the past, the 2008 Houston program achieved this goal.

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1. For descriptions of the prior Houston programs, 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); Alvin C. Harrell, *Teaching Consumer Law, Part Three*, 10 J. Consumer & Comm. L. 46 (2006).

2. See, e.g., *infra* Part XIII.

3. Obviously, as noted, this is not unique to the Consumer Law course. But the Consumer Law course is a prime example. See, e.g., Gene A. Marsh, *Ethical Responsibilities in Teaching Consumer Protection Law*, 60 Consumer Fin. L. Q. Rep. 11 (2006).

4. See *supra* note 1.

5. See, e.g., Mark H. Tyson, *Review of Selected Arbitration Issues and Cases*, 61 Consumer Fin. L. Q. Rep. 230 (2007); Thomas Ishmael, *Buckeye Check Cashing v. Cardegna: Enforcing Arbitration Clauses Within Void Contracts*, *id.*, 235; Yvette Ostodaza, *Enforcement of Arbitration Agreements in Consumer Financial Services Contracts*, 60 Consumer Fin. L. Q. Rep. 265 (2006).

6. Steven Graves & Christopher Peterson, *Predatory Lending and the Military: The Law and Geography of "Payday" Loans in Military Towns*, 66 Oh. St. L. J. 653 (2005).

7. Pub. L. No. 109-364, § 670, 120 Stat. 2083 (Oct. 17, 2006) (codified at 10 U.S.C. § 987 (2007)); see generally Stephen F.J. Ornstein, Matthew S. Yoon and Richard B. Horn, *Final Regulations Under Section 670 of the John Warner National Defense Authorization Act for Fiscal Year 2007*, 61 Consumer Fin. L. Q. Rep. 342 (2007).

8. See *supra* note 5.

9. See, e.g., Alan S. Kaplinsky, *Utah Enacts Unprecedented Statute Validating Class Action Waivers*, 60 Consumer Fin. L. Q. Rep. 700 (2006).

10. It is not a problem limited to unsecured accounts receivable; in part due to securitization, the loan documentation needed for a mortgage foreclosure may be difficult to find. See, e.g., Bernard Condon, *Paper Chase*, *Forbes*, June 18, 2007 at 40 (noting the success of consumer lawyers in stopping foreclosures by objecting to inadequate loan documentation).

11. *Wrongful Disclosure of Video Tape Rental or Sale Records*, 18 U.S.C. § 2710.

12. See, e.g., Scot M. Graydon, *Phishing and Pharming: The New Evolution of Identity Theft*, 60 Consumer Fin. L. Q. Rep. 335 (2006).

13. See, e.g., Fred H. Miller & Alvin C. Harrell, *THE LAW OF MODERN PAYMENT SYSTEMS AND NOTES* Chs. 8 and 9 (2007 Suppl.); Vol. 13 WEST'S LEGAL FORMS 3rd Ed. Chs. 7 - 9 (2007-2008 Pocket Part).

14. *The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003*, Pub. L. 108-187 (Dec. 16, 2003). See generally Carolyn S. Melvin & Vanessa A. Nelson, *The CAN-SPAM Act and the FTC's Request for Comments*, 58 Consumer Fin. L. Q. Rep. 201 (2004).

15. See, e.g., Maya P. Hill & Thomas A. Hill, *Bankruptcy Code Section 1325: 910 Creditor Claims in the Post-BAPCPA Environment*, 61 Consumer Fin. L. Q. Rep. 587 (2007).

16. See, e.g., Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80

Tex. L. Rev. 1255 (2002); Kathleen C. Engel & Patricia A. McCoy, *Predatory Lending: What does Wall Street Have To Do with It?* 15 Hous. Pol'y. Debate 715 (2004).

17. In addition to books such as the BANKING LAW MANUAL: FEDERAL REGULATIONS OF FINANCIAL HOLDING COMPANIES, BANKS AND THRIFTS (2nd ed. 2000 & cum. Supp.), and other publications, Professor McCoy has coauthored with Kathleen Engel several well-known articles on predatory lending and housing discrimination. See *supra* note 16.

18. See *supra* note 13.

19. See generally Roberta G. Torian, Russell W. Schrader, Oliver I. Ireland & Ryan S. Stinneford, *Current Developments in Electronic Banking and Payment Systems*, 63 Bus. Law. 689 (2008).

20. See, e.g., Christopher B. Woods, *Update on Prepaid Card Law and Regulation*, 61 Consumer Fin. L. Q. Rep. 815 (2007).

21. However, it should be noted that UCC Article 4 gives the customer a right, within time limits, to object to payment of any item on grounds that it was not properly payable, essentially requiring the bank to investigate in order to protect itself. See UCC Article 4 Part 4. As noted *infra* this text, however, Professor Budnitz also noted that courts have upheld the right of banks to impose shorter deadlines in the deposit contract (much shorter than under the EFTA and Check 21), for customer reports of errors. These deadlines are triggered by the bank sending the statement, regardless of when the customer receives the statement (presumably this is because receipt is difficult to prove). A goal is to alert the bank to possible check fraud, given the bank's liability for payment of improper items, but it does impose a duty of prompt action on the part of the customer (who is uniquely situated to discover the fraud), thus creating risks for bank customers.

22. See, e.g., *Chevy Chase Bank v. Wachovia Bank*, 208 Fed. Appx. 232 (4th Cir. 2006) (unpublished opinions are not binding precedent under Fourth Circuit rules); *Wachovia Bank v. Foster Bancshares*, 457 F.3d. 619 (7th Cir. 2006, *reh. denied*, Aug. 16, 2006). Both cases are discussed in Professor Budnitz's written materials in the Houston program book.

23. See, e.g., cases collected in West's Legal Forms, *supra* note 13, at § 7.2 Form 17 and § 7.9 (2007-2008 Pocket Part); *supra* note 21.

24. See, e.g., *Faloney & Whitt v. Wachovia Bank*, Civ Action No. 07 CV 1455 JP (E.D. Pa.) (consumer class action claiming that Wachovia conspired with payment processors to process telephone checks deposited by telemarketers engaged in fraudulent activities, in violation of the federal RICO statute, 18 U.S.C. §1029). Professor Budnitz reported that the Attorneys General of Ohio, Florida, Illinois, North Carolina and Vermont brought an action against a check processor (Amerinet), which then agreed to stop processing telephone checks from telemarketers. He also cited two FTC enforcement actions: *FTC v. Cordeiro d/b/a Quick Checks* (N.D. Cal. 2001); and *FTC v. Rubin, Global Marketing Group, et al* (M.D. Fla. 2006).

25. Professor Budnitz cited and discussed a recent case in his written program materials: *In re Washington Mutual Overdraft Protection Litigation*, 2008 WL 763122 (C.D. Cal. 2008) (decided on grounds that federal law and regulations preempted the state law claims).

26. See FRB, Department of the Treasury, and NCUA, Proposed Rule, *Unfair or Deceptive Acts or Practices*, 73 Fed. Reg. 28904 (May 19, 2008) (proposing to amend 12 CFR pts. 227, 535, and 706).

27. See, e.g., Donald C. Lampe, Fred H. Miller & Alvin C. Harrell, *Introduction to the 2008 Annual Survey of Consumer Financial Services Law*, 63 Bus. Law. 561 (2008).

28. These issues have not gone unnoticed by the press. See, e.g., Bernard Condon, *Paper Chase*, *Forbes*, June 18, 2008, at 40.

Ironically, however, it seems that MERS may actually help address this problem, by simplifying and assisting determinations as to the ownership of mortgage loans.

29. See, e.g., *In the Matter of MERSCORP, Inc. v. Romaine*, 861 N. E. 2d 81 (N.Y. 2006); Stephen F.J. Ornstein & Matthew S. Yoon, *In the Matter of MERSCORP, Inc. v. Romaine*, 61 Consumer Fin. L. Q. Rep. 914 (2007).

30. *Id.*

31. Jim Hawkins, *Renting the Good Life*, 49 William & Mary L. Rev. 2041 (2008).

32. 57 DePaul L. Rev. 45 (2007).

33. *Id.* at 48.

34. *Id.* at 75 - 77.

35. Sarbanes-Oxley Act of 2002 (the Public Accounting Reform and Investors Act), Pub. L. No. 107-204, 116 Stat. 745 (2002); see generally, Symposium, *Corporate Governance in the Twenty-First Century*, 60 Consumer Fin. L. Q. Rep. 18 (2006).

36. Compare 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 (2006); see also Fred H. Miller, *The Uniform Law Process and its Global Impact*, 56 Consumer Fin. L. Q. Rep. 136 (2002).

37. This is something we all witness every day, every time we drive a vehicle or visit a retail store. Your author used to cite, as an egregious classroom example, that some people spend money to purchase recordings of Barry Manilow singing. Then one year, the students in my class claimed to be diehard Barry Manilow fans. I still have the Barry Manilow LP album the students presented to show that there were (allegedly) no hard feelings. But it was a reminder of the risks of criticizing the personal choices of others. Of course, others have cited such behavior using more scientific methodology, and no doubt the behavioral sciences have advanced in recent years. See, e.g., ORI BRAFMAN & ROM BRAFMAN, *SWAY* (Doubleday 2008), and MARC GERSTEIN with MICHAEL ELLSBERG, *FLIRTING WITH DISASTER* (Union Square 2008) (both reviewed in David A. Shaywitz, Bookshelf, *Free to Choose, But Often Wrong*, Wall Str. J., June 24, 2008, at A17.); Laurie A. Burlingame, *Getting to the Truth of the Matter: Revising the TILA Credit Card Disclosure Scheme to Better Protect Consumers*, 61

Consumer Fin. L. Q. Rep. 308, 314-15, and 321-32 (2007). But the risks remain much the same.

38. See, e.g., Stephen F.J. Ornstein & Matthew S. Yoon, *Proposed FRB Mortgage Lending Regulations*, 61 Consumer Fin. L. Q. Rep. 616 (2007); Stephen F.J. Ornstein & Matthew S. Yoon, *Update on Federal Anti-Predatory Lending Legislative Efforts*, *id.*, at 620.

39. See, *supra* this text and notes 10 and 28.

40. See generally, Eric L. Johnson, *Can You "Spot Deliver" a Vehicle and Stay Out of Court?*, 61 Consumer Fin. L. Q. Rep. 789 (2007).

41. See 11 U.S.C. § 523 (exceptions to discharge in bankruptcy).

42. While this is not the place for a full exploration of these issues, it seems to your author that a dealer might be more inclined to use the first credit contract as a kind of "trial balloon," knowing that if it cannot be sold to a contract purchaser in a secondary transaction the consumer likely will want to renegotiate the terms rather than lose the vehicle. This does create pressure on the consumer to renegotiate the terms if the first contract cannot be sold, though this should be acceptable if these facts are disclosed to the consumer in advance and he or she wants to take the risk in order to obtain earlier delivery of the vehicle. Absent such a disclosure and agreement, the dealer may have a serious problem as the holder of a contract it cannot sell. And either way, repossession is an unattractive option for the dealer, as it is either illegal and a breach of contract or represents a likely loss on the vehicle (with at best an uncertain claim to a deficiency).

43. See *supra* note 37.

44. *Id.*

45. On the other hand, see Candice Choi (AP Business Writer), *Group advocates an end to consumerism*, Oklahoman, July 22, 2008, at 3B (describing the success of groups dedicated to abandoning the "consumer culture" for a year in the name of conservation: "Give up worldly goods and help save the earth." The group is said to have more than 9,000 members with spinoffs "sprouting up across the country.")

46. See, e.g., Review & Outlook, *The Next Bailout: Detroit*, Wall Str. J., Aug. 22, 2008, at A14 (summarizing the federal bailout of corporate enterprises to date in 2008, and the prospects for more).