Teaching Consumer Law Part Five

By Alvin C. Harrell*

The 2010 Program featured both scheduled and impromptu comments on the causes, effects, and possible solutions to current problems in the mortgage and other credit markets.

I. Introduction

With impeccable timing, in the midst of perhaps the greatest-ever turmoil in American credit markets and consumer protection law, on May 21-22, 2010 the University of Houston and its Center for Consumer Law (in cooperation with the National Association of Consumer Advocates (NACA) and with the support of the Houston law firm of Moriarty Leyendicker, P.C.) presented its fifth biannual program on Teaching Consumer Law (the 2010 Program).[1]

While the massive changes underway in the consumer finance field were, in a sense, the 800 pound gorilla in the room (which could not be ignored), and the 2010 Program featured both scheduled and impromptu comments on the causes, effects, and possible solutions to current problems in the mortgage and other credit markets, as with the prior programs in this series the focus of the 2010 Program was teaching consumer law. In your author's experience, it is very difficult to maintain the focus, direction and quality of a program series like this one over a period that now approaches a full decade.[2] That the University of Houston Law Center and its Center for Consumer Law have been able to do so, under the leadership of its Director, Associate Dean and Conference Chair Richard Alderman, is a singular achievement that marks a unique contribution to the development and teaching of consumer law.[3]

This is not to suggest that the 2010 Program, any more than the previous ones, was a love-fest of consensus on any of these matters.[4] Quite the contrary, as usual and especially as to policy issues, as this article will attest, the disagreements were manifest; after all, the participants are in large measure trial lawyers, consumer advocates, and academics. Anyone who has practiced consumer law, or attended a law school faculty meeting, probably knows what this means -- this is not exactly a profession known for its reticence.

But it is clear to your author that Dean Alderman has labored mightily to maintain the academic focus, diversity, and quality of these programs, and his success in doing so was essential to the unique nature of the 2010 Program and its value to the teaching profession. He and the University of Houston Law Center are to be congratulated on these efforts and results.

As usual, this report largely reflects your author's perceptions regarding the 2010 Program presentations; your author is responsible for any errors, and these comments should not be attributed to any other person absent direct confirmation. Yet at the same time this article is in significant measure a joint effort of the 2010 Program participants. Your author appreciates the assistance of all of those who reviewed and contributed to this article (which includes most all of those named throughout this text).

II. The Consumer Debt/Credit Crisis

A. Welcome and Introductions

Dean Alderman commenced the 2010 Program with opening remarks and a welcome to the participants, including brief comments describing the history, focus and scope of the Program. He then turned over the Program to David Lander, of Saint Louis University School of Law in Missouri, to chair and speak in the first session, entitled "The Consumer Debt/Credit Crisis." After introductions of the panel members by David Lander, your author was allowed to begin this session with a brief description of his perspective on the causes and effects of the crisis, followed by presentations of the other two panelists (David Lander and Angela Littwin of the University of Texas School of Law in Austin) and, as noted below, comments from the audience.

B. Causes of the Crisis

Your author began by briefly noting the relevance of the credit crisis to a variety of law school courses and subjects. For example, the Uniform Commercial Code (UCC) Article 3 holder in due course rule plays a role in the securitization of mortgage loans; bankruptcy, mortgage law, and debtor-creditor remedies are obviously of increased importance as foreclosures soar. Truth in Lending and related consumer law issues become paramount as potential defenses in foreclosure cases.[5] Arbitration cases and litigation issues have multiplied and are apparently being transformed.[6] Even basic contract and tort law issues are implicated.[7] Not many teachers have a dedicated course on the credit crisis,[8] but almost every commercial or consumer law course is affected in some way. It is, therefore, important for those teaching in these areas of law to have a grasp of the issues and arguments relating to these developments.

The remainder of your author's comments were in large measure a synopsis of those included in a recent symposium of related law review articles published in the *Georgia State University Law Review*.[9] These remarks will not be repeated here, except to say that your author attributes the 1993-2006 housing and mortgage credit boom (or "bubble," if you like), and in turn its subsequent collapse, to six primary factors: (1) excessively accommodative Federal Reserve Board (FRB) monetary policies (which made it virtually irresistible to buy houses on credit); (2) federal policies intended to promote home ownership and subprime credit availability; (3) the growth and policies of Fannie Mae and Freddie Mac; (4) securitization; (5) mortgage fraud; and (6) the increasing public policy attack on subprime credit that followed, especially after 2006, which helped to puncture the bubble. The first five factors contributed to the "bubble," the sixth essentially helped puncture it by tipping the legal balance against the origination, refinance, and enforcement of subprime mortgage loan contracts and liens for consumers who were already dangerously overextended.[10] The result was a policy-induced credit bubble, followed by a policy-induced credit crunch that punctured the bubble (and continues to this day). Your author pointedly noted that there is likely to be disagreement on these issues, and disclaimed any effort to assign blame on a proportionate basis.[11]

While your author considers this analysis to be sound and perhaps even apparent, there is seldom full agreement on such matters, and of course there are other perspectives.[12] Your author expected such to be aired at the 2010 Program, and was not disappointed in this regard. Session Moderator David Lander immediately labeled the foregoing presentation "controversial," and there were others in the audience who also disagreed. The most vocal of these was Prentiss Cox, a clinician at the University of Minnesota Law School in Minneapolis. He responded from the floor, and then used some of the time in his session the next day to respond further.[13] His comments are capsulized here as they relate to this subject, rather than being presented in the usual chronological order.

The thrust of Professor Cox's remarks was that the nonprime mortgage bubble and its collapse, with the resulting broad economic consequences, was caused by a lack of adequate regulation of consumer credit and related secondary markets. In particular, he cited his own list of five factors: (1) the failure to regulate nonbank financial entities, especially the lack of safety and soundness review for these entitites; (2) the "almost complete identification" of federal banking regulators with industry interests, and a resulting hostility to consumer protection, as well as a failure of regulators to see the dangers of nonprime lending until too late, including the failure of the FRB to use its broad HOEPA authority until after the crash; (3) the combined efforts of federal regulators, federal courts and secondary market institutions to preempt or otherwise suppress state regulatory reforms aimed at controlling abusive mortgage lending; (4) the privatization of Fannie and Freddie and a failure to regulate the secondary mortgage markets; and (5) mortgage fraud.

Regarding your author's comments, Professor Cox responded that he "could not disagree more." Specifically, he stated that: the FRB's accommodative monetary stance was a "peripheral" issue that did not significantly affect the quantity or quality of nonprime mortgage loans because nonprime lending thrived in both high and low interest rate environments, and FRB policy affected the bubble only by contributing to sustained housing price growth that hid the problems with nonprime lending. He added that Fannie and Freddie were late to the nonprime market and thus were not significant factors in its growth, and that they entered that market to make additional profits because they had been privatized. He said that anti-predatory lending laws are part of the solution, not the problem. He concluded by stating that it is a "disservice" to the public to "rewrite history" consistent with the interests of those who drove the deregulatory agenda; the audience responded to this statement with vigorous applause.

C. A Seminar Approach

Angela Littwin then described her course on understanding the mortgage meltdown. This is a two credit hours course that includes each student writing a paper on the mortgage and credit crisis. This approach offers obvious benefits, in terms of prodding the students to conduct their own inquiries and reach their own conclusions (and perhaps minimizing the need for the teacher to choose among factors such as those noted above).

The objective of the course is to consider what went wrong. This requires the students to consider and understand the role of such things as: (1) the vocabulary of credit laws; (2) loan terms, such as adjustable mortgage loans (AMLs) and pre-payment penalties; (3) loan brokers, including the impact on minorities; (4) credit availability issues and the possibility that home-ownership is not necessarily good; (5) securitization (including misaligned incentives); (6) loan servicers; and (7) mortgage modification programs.

A challenging aspect noted by Professor Littwin is that this is as much a financial system crisis as a consumer crisis. Many students are more interested in finance than consumer protection, and the latter is politically charged. In addition, these issues relate to recent developments, and much of the literature is not current. Thus, students must rely to some extent on media reports and the like; moreover, the students choose their paper topics midway through the course, before they have a full understanding of the issues.

This must be one of the first law school courses in the country to focus entirely on the credit crisis, and Angela and the University of Texas Law School are to be commended for breaking this new ground. Her course requires the students to write a paper rather than taking an exam, and this allows the teacher to grade student papers relating to controversial subjects based on the form and quality of the analysis rather than the student reaching a "correct" answer. Even with all of the challenges, it seems a worthwhile approach.

D. Interdisciplinary Approach

David Lander then described his interdisciplinary course on consumer protection law, which approaches these issues by combining a focus on history, bankruptcy, and the impact of consumer protection on consumer credit, with bankruptcy issues taking up about one-third of the course, then coverage of the credit card explosion and mortgage debt (with a public policy focus).[14] There is coverage of the history of consumer credit prior to enactment of the federal Consumer Credit Protection Act in 1969, then coverage of Federal Trade Commission (FTC) materials, followed by discussion of credit law basics, including subprime and prime credit, refinancing issues, home equity withdrawals, auto finance, and credit reports.

Professor Lander then presents social science sessions covering sociology, economics, and behavioral economics. Basically, the course combines social sciences, consumer protection law, and bankruptcy, including how to enforce consumer remedies (*e.g.*, public versus private enforcement). Then the course ends with international comparisons.

Since the crash there is a new emphasis on teaser rates (for furniture, then credit cards, then mortgages and cars). Mortgage cases are said to be different because they can tip the entire economy (either up or down, unlike, say, furniture). But he queried: could credit cards do the same? What about autos and manufactured homes? All of these present important opportunities and risks for consumers, and the economy.

Of course, as Professor Lander noted, the tough part is finding appropriate solutions: What should the rules be to balance the risks and opportunities? It might be added that policy makers (and academics!) often seem better at identifying problems than effective solutions.

Professor Lander then invited comments and questions. Geraint Howells of the University of Manchester in the U.K. offered a British perspective: Teach as teams, each with expertise in different fields. This requires coordination, and one must remember that many students have no background in finance. He also noted that the new restrictions on consumer credit came at the wrong time, at the end of the boom.[15]

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Professor Lander then posited that bankruptcy law is where much consumer protection research is done (Elizabeth Warren's work is an obvious example). Perhaps the crash will lead to a reexamination of these interdisciplinary effects.

The discussion then turned to what students should get out of such a course. Consumer advocacy? Bankruptcy expertise? Law practice pointers? Policy prescriptions? Audience participants (including Prentiss Cox) favored a policy focus centering on the role of preemption and inadequate federal regulation. There was also mention of the role of rating agencies. Mark Budnitz suggested bringing in consumers to explain what happened to them -- citing a need to do more to show the human elements. Jeff Sovern suggested a need to connect the mortgage crisis to Truth in Lending, reflecting a need to help consumers understand credit terms.

III. Teaching Bankruptcy in a Consumer Law Course

Ohio State University Moritz College of Law Professor Creola Johnson presented next. She opined that expertise in bankruptcy law is increasingly necessary for today's consumer lawyer. Issues such as the automatic stay, discharge, cram downs, and Chapter 13 plans are often critical. Bankruptcy clearly is another layer of consumer protection.[16]

She also cited cases using consumer protection law to reduce creditor claims in bankruptcy, *e.g.*, involving car title loans, subprime mortgage loans (as governed by predatory lending laws), inadequate loan documentation, payday loans, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, and Truth in Lending.[17] She suggested maximizing the consumer's exempt assets and using the Chapter 13 cram down.[18] This is the magic of Chapter 13, but Professor Johnson noted the 910 day collateral rule in the "hanging paragraph" and limits on home mortgage cram downs.[19] She argued that a consumer should be able to assert the Truth in Lending right of rescission as a recoupment claim even though the statute of limitations has run.[20]

IV. Global Response to the Financial Crisis

A. U.K. Law

Mark D. Baeur of Stetson University College of Law in Gulfport, Florida served as the chair and moderator for this session, introducing the other speakers. Geraint Howells spoke first, noting that in the U.K. many schools teach consumer issues, but few teach consumer credit law to students.[21] The Consumer Law course came out of the Sales course. No consumer bankruptcy is taught. E.U. directives are only a recent influence. U.K. consumer credit law is difficult to master, being highly technical and based on arbitrary distinctions, with the result that it is very complex. Until recently, there was little case law. Examples at the end of a statute are often wrong, indicating that even the drafters could not get it right. Currently there is a consumer credit litigation explosion, often based on minor technical errors. This has spawned a new litigation industry, fueled by a natural desire of courts to use technical errors to correct substantive abuses. But it means that U.K. law is too complex to adequately cover in a law school course (welcome to the club!).

Onyeka Osuji of the University of Exeter School of Law in Cornwell, U.K., posited that there are three new issues to be covered in such a course, derived from the current crisis: (1) how did it start?; (2) how did credit marketing contribute?; and (3) how will businesses respond? He noted that the consumer remedies may include legal theories based on:

- business harassment of consumers;
- tort--no need to prove physical or psychiatric injury;
- emotional distress;
- negligence;
- privacy; and/or
- defamation (injury to reputation).[22]

B. Australia

Eileen Webb, of the University of Western Australia in Perth, noted that Australia has fared better than most countries, due to factors such as less subprime lending and securitization, a budget surplus, and the China boom. But she noted some recent legislative developments that parallel those in the U.S.

Professor Webb queried: How effectively will the new Australian uniform consumer credit law restrain predatory conduct? Australia has had something like the American Uniform Consumer Credit Code (U3C) since the early 1990s (*e.g.*, governing disclosure). This is state law. The new, national Consumer Credit Protection Package has two phases: (1) licensing mortgage lenders and brokers (now); and (2) responsible lending regulations, including a substantive obligation to assure that there is no substantial hardship and to assure suitability.[23] No one knows what substantial hardship means or what the impact will be on credit availability. A drying up of credit availability will be difficult for first time homebuyers and small businesses. The second phase will be effective in 2011. This will also impact reverse mortgages, point of sale lending, and small business lending. This suggests the possible emergence of issues similar to the credit law problems in the U.S., as the Australian U3C (like the American U3C) is based partly on the U.S. Truth in Lending Act. An unanswered question is: Are the Australian states with predatory lending statutes that go beyond the U3C faring better? In any event, and without answering that question, in Australia the states are giving up the issue to the federal government, much as in the U.S.

Another concern is the hardship for consumers going forward as AMLs adjust upward, especially if consumers are unable to refinance due to a lack of credit availability. Again, this suggests a parallel to the U.S. experience.

C. Vietnam

Nguyen Thi Van Anh of Hanoi Law University in Vietnam described new Vietnamese consumer protection legislation. There was essentially none before 1989. By the 1990s, a wide range of legal documentation requirements to protect consumers had been imposed, but deficiencies were evident, so Vietnam is in the process of drafting a new consumer protection law.

Until now, teaching consumer protection has not received sufficient attention in Vietnam. Today, however, eleven "training institutions" plan courses on this subject, including Hanoi Law University (the first one), officially beginning in October, 2011. The content of the new course includes: overview; pre-sale protections; sales; and dispute resolution mechanisms.

D. Other Comments

Frank Devlin, an Adjunct Professor at the University of Houston Law Center, noted a trend toward the convergence of world-wide legal environments, and queried: What is the goal of law schools in this? Professor Osuji responded: The E.U. illustrates the difficulty of, among other things, reconciling the free market versus regulation, and cultural differences. Professor Webb added that it is even difficult to achieve convergence between courses in the same school, much less internationally. Geraint Howells countered that many countries are facing the same kinds of problems, for example, e-commerce issues and balancing the need for consumer protection against the adverse impact on credit availability, and that some similar approaches are evident. The E.U. is seeking harmonization, and there are some common concepts.

Arnold Rosenberg, Assistant Dean and Director of the Walter H. and Dorothy B. Diamond Graduate Program in International Taxation and Financial Services at Thomas Jefferson School of Law in San Diego, noted that some legal concepts are alien to other jurisdictions, *e.g.*, civil law versus common law. The biggest difference is enforcement (*e.g.*, litigation versus regulation and licensing). Professor Katheran Garcia, of the Erasmamus Universiteit Rotterdam School of Law in the Netherlands, noted the challenge of translation of laws, and related ill-defined concepts. Geraint Howells cited usury ceilings as examples: There is no consensus on the effects *re* the black market, etc.; and he cited the concept of an "unfair relationship," which is intentionally undefined in the U.K. Eileen Webb noted similar problems with "unconscionable" contracts in Australia. The Lisbon, Portugal - E.U. directive, choice of law rule addresses this by allowing application of the consumer's law. Geraint Howell noted that this is very protective of consumers, and requires harmonization in order to avoid unfairness to businesses in such transactions.

V. Settlement, Collection and Modification

A. Right of Rescission

Professor Michael Greenfield of Washington University Law School in St. Louis, author of a well-known Consumer Law casebook, served as Moderator of this session.

Professor Lea Krivinskas Shepard of Loyola University Chicago School of Law spoke first, describing the right of rescission under the Truth in Lending Act (TILA);[24] she summarized the TILA rules and the right of rescission (essentially limited to a non-purchase-money lien on the borrower's residence),[25] and raised certain issues, for example: How does the borrower finance the re-tender obligation? By sale or refinance? She noted that, with so many mortgage loans underwater, this may not be possible or even desirable. How then to fulfill the tender of payment obligation, with an underwater mortgage? TILA reverses the common law order: the creditor must release the mortgage before the borrower's tender. But this creates a serious risk for the creditor. For example, if the creditor releases the mortgage, then the debtor files bankruptcy. This is viewed as an end-run around the bankruptcy prohibition on modifying a home mortgage,[26] and courts thus revert to the common law model on equity grounds, killing the rescission right for underwater mortgages: If the borrower cannot tender, the rescission right is lost.[27]

She suggested a possible solution: The court should use equitable rescission to allow the borrower's tender in installments. Most rescission plaintiffs are responding to a foreclosure, not disclosure errors. TILA is designed to be liberally interpreted in favor of borrowers. Otherwise, TILA rescission will become obsolete in a soft housing market.

B. Debt Counseling

Professor Greenfield discussed credit counseling programs as a response to the credit bubble and collapse. He argued that risk-based pricing and other factors allowed an expansion of credit and the resulting problems when that bubble collapsed. Companies and agencies may offer help in the form of credit counseling and debt settlement arrangements. Credit counseling may result in a debt management plan (*i.e.*, a voluntary composition). He said that nonprofit Consumer Credit Counseling (CCC) agencies are now being supplemented by private entities masquerading as nonprofits. The policy responses have included the Credit Repair Organization Act (CROA)[28] and the Uniform Debt Management Services Act (UDMSA).[29]

Most states outlaw private for-profit debt settlement companies, but not all. The for-profit debt settlement companies focus in the remaining states. But similar, not-for-profit debt settlement services are often available in other states. Professor Greenfield described these debt adjusters as credit counseling "light" (because they negotiate for consumers but are light on counseling). Then there are foreclosure rescue firms.[30] He said that misrepresentations are rampant and unfair practices common (such as over-charging, and equity stripping), adding to consumers' problems instead of providing solutions.

Professor Greenfield noted that solutions are available: In 2002, NCCUSL began a uniform law effort, covering credit counseling and debt adjustment. The resulting UDMSA includes requirements for: registration and licensing; disclosure; substantive contract restrictions; private and public enforcement; and price controls. Consumer groups opposed a uniform act because they preferred an outright ban, but they now support federal legislation. The UDMSA has been adopted in six states; the FTC and state attorneys general have enforced other, existing laws. The FTC proposed two federal regulations, not applicable to banks and non-profits.[31] They apply to attorneys, prohibit misrepresentations, require disclosures, and impose time limits, and ban payment of compensation before debt is restructured. No fee can be charged unless the lender agrees to a mortgage modification for at least five years. In addition, Senate Bill 3264 proposes federal legislation (similar to the UDMSA).[32]

C. Debt Buyers

Professor Mary Spector of the Southern Methodist University Dedman School of Law spoke next, describing her recent study of litigation to collect consumer debts. With assistance from an American Bar Association grant, she gathered empirical data from Dallas County regarding credit card collection cases initiated by debt buyers. She explained that because the debt buyer often purchases the past due delinquent debt for pennies on the dollar, the buyer often receives only a list of files, not the files themselves. She reported growing concerns about the conduct of litigation based on these files, and the legitimacy of judgments

Scenes from the May conference.

awarded when the debt buyer sues on the basis of this list alone without offering the underlying evidence to support its legal claims.

Using cluster sampling, Professor Spector gathered information from 511 debt buyer cases, which represented about twenty-five percent of all cases filed in Dallas County courts in 2007 and about half of all debt cases filed in the jurisdiction. In her study, just five debt buyers were responsible for two-thirds of the cases, and large banks involved in issuing credit cards were the largest debt originators. Professor Spector reported that, although nearly 40 percent of the cases resulted in a default judgment, about half were dismissed without prejudice. While only one-in-four (twenty-five percent) of the defendants entered an appearance, their appearance appeared to increase the likelihood of a dismissal and where the consumer was represented by a lawyer, seventy-three percent of the cases were dismissed without prejudice. Although attorney representation did not mean the defendant prevailed, it often meant that the suit went away; moreover, this suggests that debtors unable or unwilling to secure legal representation may obtain a favorable result, *i.e.*, a dismissal, simply by making an appearance in the litigation.

Professor Greenfield asked if there was evidence of "sewer service" (*i.e.*, false service). Professor Spector indicated that there was no such evidence and suggested that the high rate of dismissals might suggest that sewer service was not a problem in the jurisdiction. Professor Mark Budnitz of Georgia State University College of Law noted that some debt buyers are attorneys, and claim not to be regulated by the state's attorney general, but by the bar association. Professor Spector noted that regulation by the bar may trigger additional professional responsibilities, and that there are proposals, for example, to enhance lawyers' obligations when dealing with unrepresented parties. She also noted that some states, such as Maryland, consider attorneys acting as debt buyers to be debt collectors and require registration as such; others, such as North Carolina, place additional requirements on parties and their attorneys when filing lawsuits to collect consumer debts, by requiring evidence of the debt to be filed with or before filing a lawsuit.

The discussion included other issues relating to the role of the courts in the collection of consumer debts. Among them was an apparent increase in some jurisdictions of the use of post-judgment discovery to serve as a basis for a bench warrant that, in turn, serves as the basis for the setting of a bond in the amount of the debt.

VI. Teaching Secured Financing in a Consumer Law Course

Professor William Vukowich of Georgetown University Law Center in Washington, D.C. described the impact of UCC Article 9, which governs personal property secured transactions. Article 9 recognizes self-help repossession upon default, and allows a claim for any deficiency.[33] Clearly a secured creditor's leverage is superior to that of an unsecured creditor, both in and outside of bankruptcy. In bankruptcy, the Article 9 secured party is entitled to a secured claim, with either a resulting 100 percent payment of that claim or a lien that "flows through bankruptcy" and can be enforced notwithstanding the debtor's discharge,[34] unless subject to lien avoidance or a cram down.[35]

The Article 9 security agreement typically defines default (but this always includes nonpayment; lack of insurance also is common as an event of default in consumer transactions).

Repleven is also allowed as a means of repossession but usually is less effective and more expensive than self-help. Professor Vukowich recommended the movie "Repo Man" (one of your author's favorites and undoubtedly among the worst movies ever made). He also described the Article 9 disposition process.

VII. Warnings, Disclosures, Behavioral Studies and Virtual Worlds

A. Impact of a Duty to Warn

Richard Alderman served as Moderator for this session. Joanna Luzak of the Universiteit van Amsterdam, the Netherlands, spoke first. She discussed the liability of a service provider (*e.g.*, a builder), after the consumer has been warned of a risk but decides to proceed anyway. *E.g.*, a builder is required to use certain building materials as demanded by the consumer, after warning the consumer that the materials were inappropriate. Clearly the builder has a duty to warn (and is liable for a failure to do so, *e.g.*, for a breach of the duty to warn). But what if there is a warning and the consumer doesn't change his or her instructions? Is the builder liable, if the builder follows the instructions and constructs a defective building? Is there liability in tort? Contract? In Germany, the contractor may be liable, and thus the builder should refuse; but then the contractor may be liable for breach of contract. Likewise, under U.K. law, there may be liability under contract and tort, though it is not quite as clear. But in either country the builder may be liable for proceeding or not. The consumer may either: (1) not understand risk; or (2) be willing to assume the risk. One key for a builder in this scenario is to make the warning clear, to avoid (1). Arguably, the builder should be liable in (1), but not (2). Professor Luzak's seminar materials provide guidelines for effective warnings.[36]

B. Standardized and Simplified Information Disclosure Mechanisms in Relation to Consumer Credit

Catherine Garcia,[37] Erasmus University, Rotterdam School of Law in the Netherlands, provided an overview of the "Truth in Lending" principle as laid down by the European Consumer Credit Directive[38] and compared the U.S. TILA, discussing the experimentation with three specific forms of mandatory information disclosure in relation to financial products – *i.e.*, wealth warnings, comparative tables, and summary boxes – as a means of addressing behavioral market failures.[39] She noted that the problems with disclosure include:

- Information overload is a risk, given the fact that an excessive amount of information may confuse consumers, as the amount a person can hold in short-term memory and effectively process is limited. The maximum human capacity to assimilate is about seven "chunks" of information (she cited behavioral economics studies -- there are times when your author would feel fortunate to hit seven);
- the lack of uniformity and simplicity with regard to key consumer credit information, which confuses the consumer and raises the thresholds for searching; and
- the TILA disclosures may come very shortly before the decision-making process, to which the consumer is already verbally and psychologically committed.

She noted that there are differences between the U.S. and E.U. disclosures but the problems noted above are common to both systems. She asserted that the challenge for policymakers in this area is to strike a balance between transparency (*i.e.*, content) and simplicity (*i.e.*, adequacy) of mandatory information disclosure, with standardization (*i.e.*, methodology) as the common guideline. Thus, she proposed that policy makers should make the disclosures: (1) simpler; and (2) easier to read; and (3) should provide better timing to achieve price transparency.

C. Virtual Worlds

Christine Riefa of Brunel University Law School in Uxbridge, Middlesex, England, described the emergence of computer games and virtual worlds as consumer issues. The games include serious role playing. Popular examples include Second Life, World of Warcraft and Entropia. Some of these games use separate (virtual) currencies, for example, Linden dollars for Second Life.

In Second Life, players may purchase virtual currency, make money in the game (measured by the virtual currency), and then reconvert it to real dollars. These virtual currencies are traded on the "Lindex" exchange. This constitutes a virtual economy, and raises the question: How to regulate these transactions in the real world? Do consumer laws apply? If so, how? It is, after all, a game. Do consumer laws apply to the game strategies of Monopoly players? If so, to what extent? But these games can relate to real money. (So can any other game, of course, but in this case the tie to reality is somewhat more formal.) Where is the dividing line? Would Monopoly transactions be subject to regulation if they used or could be converted to real money?

Sales of goods rules (*e.g.*, UCC Article 2) don't apply -- it is all computer code (governed by intellectual property law). Decision issues are different than in the real world because it is a game; thus, behavior is skewed. This may cut both ways: On the one hand, it is only a game, and is intended as an exercise in fantasy (so that normal rules don't apply); on the other hand, this may encourage extreme behavior that translates into real financial damages. Then there are the basic legal issues, *e.g.*: Does the Uniform Computer Information Act (UCITA) apply? How can one enforce such rules in a virtual world? What are the dispute resolution mechanisms? The substantive legal standards?

D. Behavioral Studies in Remittance Scams

Hesakazu Hirose of Aoyama Gakuin University in Tokyo spoke on remittance scams. As suggested by behavioral studies of those victimized by such scams, the factors that influence consumer susceptibility in these cases include: the impact of prompt versus considered decisions; and possible differences based on the consumer's age and gender.[40] Remittance scams often rely on a need for a prompt response to a telephone call--this suggests a need for a waiting period, *e.g.*, a delay in ATM or other funds transmission.

Other factors worth considering include limitations in the consumer's: power of memorization; ability to distinguish facts; length of attention span; and acclimation period. Consumers may be distinguished on this basis. Thus a "cooling off period" may work better for some consumers than for others. This illustrates the role of behavioral science in crafting consumer solutions -- but also that consumers are diverse, making difficult a broad public policy solution.

E. Questions and Comments

Professor Greenfield queried Professor Riefa: Is it important that the virtual world legal standards mirror the real world, to avoid unrealistic consumer expectations? Professor Riefa responded: Perhaps, but a purpose of a game is to allow unusual social norms. Professor Luzak added that players presumably know the difference.

VIII. Teaching Payment System Issues

Professor Mark Budnitz covered this topic, noting that payments law deserves to be part of a Consumer Law course, as it governs a vital consumer financial function. Payments are integral to consumer transactions; the dispute resolution mechanisms are specific and offer additional avenues of redress, but can be complex and the consumer may require the assistance of legal counsel. The payment processor may also have liability, in addition to the recipient of the funds.[41] The FRB has plenary power over most payment system issues, *e.g.*, the FRB has now declared that all checks are "local" under Regulation CC. But this is now to be supplemented by CFPB[42] jurisdiction over Regulations E and DD, under the Dodd-Frank Act.[43] This development may create some tension (and perhaps additional confusion) as between competing payment systems (and regulators). But all of this emphasizes the importance of payment system issues in consumer transactions.

As an apt example, Professor Budnitz cited shopping on the web: this activity implicates contract and consumer law, including e-commerce, but also payment law. Other examples include: Telemarketers' use of demand drafts; payday loans, which implicate an intersection between UCC negotiable instruments law and consumer law; mortgage loans and the role of the holder in due course doctrine in securitizations; government benefits and the EFTA; money services for the unbanked; on-line banking; and the use of debit cards, stored value cards, and credit cards. All involve payment system issues in the context of common consumer transactions. Professor Budnitz suggested a possible teaching approach which he has used for many years: Create a hypothetical sale of a cellular telephone (cell phone) in class, and consider payment by different means to illustrate the alternatives. This also provides a platform to illustrate topics such as: dispute resolution (if the cell phone doesn't work); privacy (which payment system provides the most privacy?); costs to the merchant (which payment systems and regulatory requirements are the most costly?); theft; and fraud (which laws provide the best liability limits for unauthorized use?). He suggested giving the students written materials in advance which include a description of various scenarios the consumer may encounter,[44] together with applicable statutory provisions such as liability for unauthorized transfers under Regulations Z and E. The materials also should raise policy issues such as the legal protections that consumers may need and the costs those protections may impose on merchants and financial institutions.

Payments law deserves to be part of a Consumer Law course, as it governs a vital consumer financial function.

IX. Teaching Arbitration

Richard Alderman covered this topic, which is one of his specialties. He noted that arbitration is in competition with many other important issues for attention in a Consumer Law course, including (as noted above): payment systems; secured transactions; and bankruptcy. But those are sometimes left out due to time constraints (and perhaps due to coverage in other courses), while arbitration is now commonly included as an essential subject in consumer law. But sometimes it is put at the end of the course, and consequently gets left out. Dean Alderman said it should not be -- because it is one of the "hottest" consumer law issues.

He said that most students do not have a basic understanding of consumer arbitration, despite the expansion of Alternative Dispute Resolution (ADR) courses in law schools. Therefore, there is a need to cover at least the basics in a Consumer Law course, and distinguish it from commercial arbitration. One basic issue is: Did the consumer really agree to arbitration? If the arbitration clause is hidden in the fine print, there is probably no consent. Another basic question is: When and how is arbitration imposed? Dean Alderman said the U.S. may be unique on this issue, as other countries have rejected mandatory arbitration, *e.g.* Vietnam.

The possibility of a lawsuit to challenge arbitration is not the consumer's best remedy; Dean Alderman argued that consumers should not have to sue. States vary on this: The California cases are favorable to consumers, but are not representative of other states, regarding how and when arbitration can be challenged. However, a right of appeal is an essential part of the right to litigate.

Why does arbitration matter in a Consumer Law course? Dean Alderman posited four primary reasons:

- Arbitration affects the substance of the dispute, not merely the forum (*e.g.*, due to the "repeat player" advantage, the absence of substantive law rules, and the lack of a judicial record and opinion; moreover, arbitration costs deter claims);
- there are no class actions (waivers are enforced). This is a reason for many arbitration clauses -- it allows creditors to ignore mass violations;
- there is no common law development of substantive law in arbitration; and
- it is rapidly developing, with many state variations.[45]

The proposed federal Arbitration Fairness Act[46] would prohibit mandatory predispute consumer arbitration clauses and also deal with other issues; it would continue to allow arbitration in employment and securities cases (where larger amounts are at issue and arbitration works better). However, the final scope is currently unclear. In addition, the Dodd-Frank Act casts doubt on the future of consumer arbitration, *e.g.*, directing the CFPB to study and regulate (or even prohibit) arbitration clauses as needed.[47]

X. View from Clinicians

A. The Houston Clinic

The Moderator for this session was Laura Boeckman of Florida Coastal School of Law in Jacksonville. She introduced Richard McElvaney, Program Director at the Center for Consumer Law at the University of Houston Law Center, who spoke first. He noted that the University of Houston has multiple consumer clinics, and a survey practice course (along with a number of community and consumer services programs sponsored by the Center for Consumer Law). Where does a clinic get its clients? This is no problem, he said, as there is no or a nominal fee and multiple sources for cases, *e.g.*: the Texas Consumer Complaint Center and Legal Aid provide referrals; the volunteer lawyer program; students and professors; former clients and word-of-mouth; and consumer educational events.

A typical clinical scope and structure is illustrated by the Houston clinic: The clinic is open to the public during regular business hours (with two staff meetings each week; one to review cases and one for substantive teaching). The areas covered include: landlord-tenant relations; various scams; bankruptcy; family law; debtor-creditor relations; wills and death issues. Student activities cover the process from the initial intake to jury trials. The clinic has responsibilities with regard to both clients and students. Current active cases include: debt collection and mortgage fraud; legislative advocacy work; teams of students working on large projects; and related classroom sessions. The benefits include: integration of policy and training; training that crosses substantive areas of law; training that develops thinking like a lawyer; and pre-trial and trial work.

B. Florida Clinical Consumer Law Course

Professor Boeckman described her first and second semester substantive Consumer Law course (like a doctrinal course but covering less policy), combining clinical and substantive elements.[48] This course includes an overview of consumer rights and remedies, foreclosure defenses, and debt collection issues as the largest parts of the course. Legal Aid is the source of the cases and issues covered (they do intake, which is time-consuming). The students then do legal research in support of the Legal Aid case load. A concern is the typical length of a case: Foreclosure defense cases can take two years, and often include deposition and discovery; the downside is that students graduate and the turnover hurts. Students thus may lose the sense of how long the process takes. Also: Lawyers on the other side often lack competence, so the students may not see good examples. The cases seldom go to trial, instead usually settle.

Professor Boeckman's class meets twice each week, for two hours in each session; this teaches group work and team efforts. The process of obtaining state approval (clearance certification) for each student is time-consuming and is sometimes a deterrent to out-of-state students. However, this does not prevent out-of-state students from applying; all of the students in the program receive their clearance certificate from the Florida Bar Association before becoming a certified legal intern and practicing in court. It is a CROA violation[49] if the clinic takes a fee, as a goal of the clinic is to correct the consumer's credit report (so the school does not charge a fee). The class is limited to eight students due to the level of supervision needed. Students say the experience is the best thing in law school.

C. Minnesota Clinic

Prentiss Cox of the University of Minnesota Law School stated that his law school's consumer clinic has many similarities with the programs at the University of Houston and Florida Coastal. The Minnesota clinic also takes debt collection abuse and other individual consumer matters. Each student represents one or more individual clients with a consumer protection concern. Each student also participates in one team that works on either a policy project or a larger piece of litigation, and Professor Cox focused his remarks on this part of the clinic's work. He gave as an example of policy work a debt management bill that was researched and drafted by clinic students, and subsequently enacted by the Minnesota legislature. He also mentioned his clinic's involvement as co-counsel in a class action suit involving a real estate broker. Professor Cox noted that the clinic was able to work especially well in helping to formulate the legal theories of the case and drafting the complaint, although it was more difficult to manage effective clinic participation as the case progressed through motions and discovery.

D. Questions and Comments

A question from the audience raised concerns about drawing the attention of adverse legislation if a clinic succeeds in cases against important constituents. This was regarded as a particular risk with regard to class actions and other high profile cases. But Professor Boeckman reported that her Dean and faculty fully support the clinic; she said this is an essential part of the success of the program. She said that attorney fees are claimed if the client supports it. But attorney fees can be waived if needed in order to settle, at the client's choice. What about contingent fees? This was advocated as a means to help create a realistic scenario, but it was noted by Cox and others that this raises other issues and complexity. But someone noted that it might help budgets.

Mary Spector noted that conflicts are possible with regard to clinic students who intern at law firms with client conflicts. The firm could challenge such a conflict, but she opined that often the firms are so disorganized they don't recognize the conflict. She suggested creating a Chinese wall to isolate students from cases with conflicts.

Prentiss Cox responded to a question about the stature of clinics in legal education by noting that one of the only two non-plenary sessions in the 2010 Program pitted the Clinicians Panel against an alternative break-out session for those interested in applying to teach consumer law (your author did not attend the latter and it is not described here). He opined that this seemed odd because it required an attendee interested in teaching consumer law in a clinical setting to choose between the two most important sessions of the 2010 Program. He said this seemed to reflect an inappropriate hierarchical bias about the relative value of clinical teachers in the academy. Professor Cox opined that the law school hierarchy is the reverse of what would be optimal: the priorities should be: (1) research and writing; (2) the clinic; (3) doctrinal law teaching. Instead, he noted, the hierarchy traditionally is the opposite at many schools.

Other common challenges for a clinic were also discussed, *e.g.*: beyond simple cases, the clinical professor must guide the students and there is a risk they may become mere "go-fers." It is a labor-intensive process to lead students without being overbearing. Some suggested a focus on small cases, which students can lead; obviously, larger cases require more direction; but a trade-off is that students learn more in complex cases, though some believe this is outside the traditional clinic model. Others opined that a focus on small cases is the opposite of what their clinic does.

XI. Regulating Consumer Credit

A. The Dodd-Frank Act

University of Houston Law Professor Jim Hawkins served as Moderator (and a speaker) for this session.

Jeff Sovern of St. John's University School of law in Jamaica, New York led off the panel of speakers, with a point-by-point explanation of the bills that subsequently became the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).[50] He described the status of the bills, which previously would have created a federal Consumer Financial Protection Agency (CFPA) but were reconstituted to create the Bureau of Consumer Financial Protection (CFPB) as an autonomous unit within the Federal Reserve System (FRS), independent of any influence by the Federal Reserve Board (FRB). The Director of the CFPB is to appoint a Consumer Advisory Board, to advise the Director . The Dodd-Frank Act also provides for a separate Financial Stability Oversight council (FSOC), with authority over the safety and soundness of the financial system (S&S) (and authority to overturn a CFPB rule if that rule threatens that S&S). Professor Sovern noted the potential tension between consumer protection and S&S.

He explained that the autonomy of the CFPB is supported by an independent budget within the FRS, keyed to FRS revenues (and currently estimated at about $500 million per year). Presumably the Consumer Advisory Board members will come from consumer representatives. This is wholly different from the current FRB consumer advisory board, which will cease to exist. The CFPB has jurisdiction over the full range of consumer protection statutes, including TILA, ECOA, etc.[51] The CFPB also has the authority to issue substantive rules to prevent "unfair, deceptive or abusive practices." In the House bill, "abusive" was defined as: (1) the act or practice is reasonably likely to result in a consumer's inability to understand the terms and conditions of a financial product or service or to protect their own interests in selecting or using a financial product or service; and (2) the widespread use of the act or practice is reasonably likely to contribute to instability and greater risk in the financial system. The Senate bill had a different standard, *e.g.*, with no systemic risk factor. Both versions included authority to restrict consumer credit arbitration, and the Dodd-Frank Act incorporates this and prohibits it outright in some circumstances.[52] Both versions (and the final bill) restrict prepayment penalties and amend the TILA to restrict, but not entirely eliminate, yield-spread premiums.

Like prior law, the Dodd-Frank Act requires mortgage lenders to verify a consumer's ability to repay the loan, with a presumption of repayment ability if the creditor uses a fully-indexed rate, subject to exceptions for loans with certain features. The CFPB has extensive power to issue further regulations, orders, and guidance on these and related issues.

Professor Sovern then described the exclusions from the Dodd-Frank Act. The entities excluded from direct CFPB supervisory jurisdiction include:

- retailers who don't sell their debt;
- debt collection by creditors that don't sell their debt (as under the FDCPA);
- small FDIC-insured banks;
- real estate agents;
- lawyers; and
- certain categories of auto dealers.

However, some of these entities (*e.g.*, small banks) are subject to the substantive regulations issued by the CFPB (*e.g.*, TILA) even though enforcement and supervision are largely limited to state and federal bank regulatory agencies.

The CFPB cannot impose new usury limits or require "plain vanilla" products. The Dodd-Frank Act also reduces the preemption authority of the OCC and OTS.[53]

B. Rationale for the Dodd-Frank Act

Jim Hawkins discussed the background and rationale for the Dodd-Frank Act. This included arguments that there were too many financial regulatory agencies, creating a "race to the bottom" in terms of supervision. However, he also noted that supervision remains somewhat dispersed (*e.g.*, for banks and auto dealers), and substantive rule-making authority was already centralized (*e.g.*, TILA at the FRB). Moreover, it may be easier to have major industry players "capture" a single agency. To your author, it is somewhat surprising how eager the states (and their elected representatives) have been to turn over such comprehensive authority to a federal agency with new preemption authority (though I recognize the apparent limits on that preemption and the expected consumer-friendly results, it can surely be conceded that these limits and results are not absolute or inevitable).

Of course, as noted by Professor Hawkins, the stated and most important rationale for the Dodd-Frank Act was to prevent another economic meltdown like that of 2007-2010, and protect consumers from poor credit decisions. If private credit transactions cause external harm, this is a policy reason to regulate and prevent them. This applies to mortgages and credit cards, but why were payday lenders included? The answer of course is that the Dodd-Frank Act became something of a Christmas tree of provisions favored by those who want to restrict access to certain forms of consumer credit. There is some irony in this, as the "meltdown" itself is characterized by such a reduction (*e.g.*, as many homeowners have been unable to refinance or sell their homes, and are consequently in foreclosure).

Professor Hawkins noted that credit cards are yet another matter, as they somewhat divorce the credit transaction from the specific purchase, and also allow credit terms to be finely tuned to reflect the risk, based on a credit score, thereby allowing an expansion of credit availability. The amount of potential debt is very high, and there is no guarantee of ability or willingness to repay. Thus, there is some potential macro-economic impact. Payday loans, pawns and title loans, however are very different -- these cover very specific items and limited debt amounts (asset or income-based), and are structured for payment from collateral or regular income (therefore, *e.g.*, it is impossible to take on excessive pawn debt). The stated rationale for the Dodd-Frank Act and CFPB fails in this context.

In passing the Dodd-Frank Act, the role of behavioral economics was not emphasized politically. It is an obvious factor, but it was not deemed politically useful (perhaps because it emphasizes the need to constrain consumers' access to credit, at a time when reduced credit availability is at the center of the current credit crisis).[54]

C. Payday Lending

Nathalie Martin of the University of New Mexico School of Law in Albuquerque continued the discussion of payday loans, asking: Do consumers understand payday loans? Her article in the 2010 Program book answers the question: No.[55] The biggest problem she identified is rollover; she said the business plan is to keep people in debt, not repayment. She reported that a recently-enacted New Mexico law purported to limit the charges on payday loans to 417 percent and to prevent rollover but in reality had little effect on interest rates because the loans covered by the new law were defined as those that were 14-35 days in duration, or those involving post-dated checks or automatic debit transactions. She said the industry simply began offering new loan products outside this definition the next day. Professor Martin cited the following as problems with payday loans:

- rollovers;
- multiple loans;
- high fees;
- unclear terms; and
- the socio-economic status of customers (Professor Martin noted that the industry claims a middle class clientele, but she disagreed).

She said that most of middle America does not know about this industry and seems to have no idea that people borrow money at 500 or 600 percent interest, or that such loans are legal. Many people seem to think there are still usury and fee caps in most states, which is untrue for many small loans. The typical loan is $400-500 until payday, with a $100 fee. The customer can then pay interest only (*e.g.*, $100) every two weeks. Another trick is to offer the consumer more money upon renewal. The customer soon loses the ability to repay. Some consumers have multiple loans.

Payments received by the creditor over a two or two-and-a-half month period often repay the loan principle; thereafter, to this extent, there is no risk to the lender. Default rates are low due to aggressive collection efforts. Professor Martin said these loans should be curtailed by the CFPB.

Professor Martin also noted that the industry does not believe they should even be governed by the CFPB, because, (as noted by Professor Hawkins) they argue: Payday lending did not cause the financial crisis; the CFPB will put them out of business; and the industry provides short term emergency loans that consumers need (and people will be hurt by a lack of access). She opined that, while she also is worried about where people might go for cash if all these sources dry up, none of these are valid reasons to avoid regulation and protection of consumers.

D. Questions and Comments

In response to a question from the audience, Professor Sovern further discussed preemption by the CFPB, as provided in the Dodd-Frank Act.[56] He noted that this codifies *Marquette* (credit cards) and *Cuomo*.[57] Preemption *re* state banks is somewhat less clear, but clearly there is a potential for continuing, or even increased preemption.

Arnold Rosenberg commented on payday lending, noting that a University of Chicago Business School study showed that "de-biasing" disclosures, by juxtaposing the cost of payday borrowing and the cost of borrowing the same amount on a credit card, reduced payday borrowing by more than ten percent.[58] But Professor Martin responded that, if so, this defeats the argument that payday loans are necessary for emergencies. Jim Hawkins added that most studies indicate that disclosure is not enough to preclude payday lending, because the emergencies are real. Professor Martin argued that the only effective answer, in light of the industry's end-run around whatever statutes are passed, might be an absolute usury cap. But Professor Hawkins responded that this is tantamount to a full ban, *e.g.*, in New York there is a thirty-six percent cap and no payday lending.[59]

Another participant asked: How can political influence be limited at the CFPB, *e.g.*, on issues like arbitration? Professor Sovern noted that the five-year term of the CFPB Director is designed to limit this. Of course, one can never be sure about such things -- and the history of such matters is not entirely encouraging, from any perspective. So, it will be interesting to see how this works out. At best, increased uncertainty, unforeseen consequences, and policy volatility seem likely, with the potential for major changes every five years or so. It is not clear how thirty-year transactions (*e.g.*, mortgage loans) can be prudently conducted in such an environment, but maybe that does not matter as virtually all such loans are now being funded by the government anyway.[60] Professor Martin said that, with regard to payday lending, there is no more rent-a-charter, but national banks now do this directly (*e.g.*, through overdraft programs), and generate consumer demand by marketing. This may change under the CFPB. But at least these are short-term transactions that can be quickly curtailed based on changes in the law, without widespread macro-economic effect. The same cannot be said with respect to mortgage lending.

Jeff Sovern noted that there is no private right of action in the Dodd-Frank Act or CFPB regulations, but as under prior law state UDAP statutes may provide such an action, and individual laws provide remedies, *e.g.*, TILA; also there is the possibility of state Attorney General enforcement actions (enhanced under the Dodd-Frank Act).

XII. View from the Trenches

A. Supreme Court Litigation

Deepak Gupta, with the Public Citizen Litigation Group (Public Citizen) in Washington, D.C., noted that the litigation branch of Public Citizen was founded by Ralph Nader some forty years ago. Public Citizen helps consumer lawyers around the country, to offset the specialized Supreme Court bar in Washington, D.C. He said that consumer advocacy interest groups typically don't focus on the *certiorari* stage of Supreme Court litigation; this is a specialized area where consumer litigants need help. This expertise is important, *e.g.*, to keep cases out of the Supreme Court where the Court is known to be hostile (*e.g.*, arbitration). Public Citizen also conducts moot court proceedings to help prepare litigant counsel for oral arguments.

Recent Supreme Court cases include *Jerman*,[61] holding that there is no defense for a mistake of law in the Fair Debt Collection Practices Act,[62] but also that there are no damages for technical violations.[63] Public Citizen thought that this was the wrong case, with bad facts for the consumer, and declined to help with the petition for *certiorari*, but helped on the substance. The consumer then won, despite the adverse facts. But there was a strong dissent raising issues that remain problematic for consumer plaintiffs.

Other recent cases of interest include *Stolt-Nielsen*[64] (involving the right to class action arbitration; holding that class action arbitrations cannot be imposed absent both parties' agreement); and *Rent-a-Center*[65] (involving the right of an arbitrator to decide the validity of arbitration; not yet decided). Another unresolved issue is whether a state can strike down a class action ban on unconscionability grounds (at the time of the 2010 Program, this was on appeal from the Ninth Circuit).

In the *Milavetz* case,[66] attorneys were deemed to be Bankruptcy Code "debt relief agencies" under the 2005 BAPCPA amendments, and therefore cannot advise debtors to incur debt.

XIII. Conclusion

The broad scope of the 2010 Program and the diverse viewpoints presented are apparent from this report. Academics, legal services attorneys, clinicians, and practitioners from all over the United States and numerous other countries, representing sometimes dramatically diverse cultures and views, gathered to discuss common and unique issues, practices, prospects and problems. This itself is unusual (and certainly commendable), given that so many law-related programs are devoted to a single perspective and lack this intellectual diversity. The participants' contributions to this article further evidence this diversity, and are commendable given the strong disagreements on many of these issues. Moreover, the comments of participants during the 2010 Program were generally civil and restrained; this is a testament to the participants and the academic environment fostered by Dean Alderman and the University of Houston Law Center.

As one would expect from any such gathering, however, some discord was evident. In this environment, disagreements over matters relating to teaching and legal education in general are added to differing perspectives on public policy, current events, and the role of law.[67] For example, there appears to be some potential for tension between clinical and doctrinal teaching, and it is always a challenge to maintain civility in faculty relations,[68] perhaps even more so when the faculty consists of lawyers trained in advocacy.[69] The increasing role of clinics in legal education, with their focus on advocacy as well as education, brings these issues into focus and ultimately may result in a re-examination of the traditional hierarchies in legal education, as suggested during the 2010 Program.

As indicated in this report, the presentations and related discussions at the 2010 Program were wide-ranging. Despite this breadth of coverage, however, the gorilla in the room remained the continuing credit and economic crisis, and the U.S. solution as illustrated by the Dodd-Frank Act and CFPB. There is no doubt that fundamental change has now arrived. Now the question is: What happens next and how do we, as teachers, help the students explore and understand it? While perhaps not providing definitive answers to every aspect of this question, the 2010 Program certainly illuminated the issues in contention and their roles in the classroom environment. As always, the rest is up to us, as law teachers.

Your author would again like to thank Richard Alderman, the University of Houston Law Center, and the other sponsors of the 2010 Program, for providing a platform allowing us as law faculty and other interested persons to "vent" as noted in this article, and would also like to again thank the 2010 Program participants for assisting with this article despite the obvious points of disagreement with respect to many of the issues being discussed.

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1 The Conference Chair for this and the prior programs was University of Houston Law Center Associate Dean and Dwight Olds Chair in Law, and Director of the Center for Consumer Law, Richard M. Alderman. *See* http://www.law.uh.edu/ccl/.The 2010 Program materials are available on compact disc from this source. *Id.*

2 The first program in the series was held in May, 2002. *See*, *e.g.*, Alvin C. Harrell, *Teaching Consumer Law*, 6 J. Tex. Consumer L. 50 (2003).

3 *See supra* note 1. For descriptions of the other programs in this series, *see*: Harrell, *supra* note 2; 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); and Alvin C. Harrell, *Teaching Consumer Law, Part Four*, 12 J. Consumer & Comm. L. 8 (2008).

4 *See* discussion below and descriptions of prior programs, in the sources cited *supra* at notes 2 and 3.

5 *See*, *e.g.*, *infra* Part V.; and, as others have noted, there are international implications. *See*, *e.g.*, *infra* Part VII.B.

6 *See*, *e.g.*, Dean Alderman's comments at the 2010 Program, described *infra* at Part IX.

7 *See*, *e.g.*, *infra* Part VII. Again there are also international implications. *See*, *e.g.*, *infra* Parts IV. and VII.

8 But some do; *see* remarks of Professor Littwin, noted below at Part II.C.

9 Alvin C. Harrell, *The Great Credit Contraction: Who, What, When, Where and Why*, 26 Ga. St. Univ. L. Rev. 1209 (2010). Your author appreciates the invitation from Professor Mark Budnitz to participate in this law review symposium, and hopes that Mark's credibility among his advocacy colleagues does not suffer as a result. Your author also recommends to the reader a review of the other articles in the *Georgia State University Law Review* symposium.

10 *See id*.

11 While permitting myself an observation that, in my experience and focusing on a broad scope, FRB monetary policy probably was the single most important factor and mortgage fraud probably was the least.

12 *See*, *e.g.*, Kathleen E. Keest, *Consumer Financial Services Law and Policy: 1968-20?? In the Thick of the Battlefield for America's Economic Soul*, 26 Ga. St. Univ. L. Rev. 1087, 1091-92 (2010) (Foreword to the Symposium noted *supra* at note 9) (listing factors under consideration by the federal Financial Crisis Inquiry Commission as possibly contributing to the "financial and economic crisis.").

13 *See infra* Part X.C.

14 A more extensive description of the course is included in the 2010 Program materials.

15 *See also* discussion *supra* at Part II.B.

16 Professor Johnson's portion of the 2010 Program materials includes discussion and citations for the relevant statutes and cases.

17 *See*, *e.g.*, *infra* notes 24-27 (referencing relevant legal authority and the 2010 Program materials).

18 *See* 17 U.S.C. § 1322(b)(2); Irena Damnjanoska, *Update on Avoidance of Subordinate Home Mortgage Liens in Chapter 13 Bankruptcy Cases*, 64 Consumer Fin. L.Q. Rep. 57 (2010).

19 *See*, *e.g.*, Maya P. Hill & Thomas A. Hill, *Bankruptcy Code Section 1325: 910 Day Creditor Claims in the Post-BAPCPA Environment*, 61 Consumer Fin. L.Q. Rep. 587 (2007); Alvin C. Harrell, *Did the Seventh Circuit Make the* "Wright" *Decision in Resolving the BAPCPA "Hanging Paragraph"?*, *id.*, at 598; Damnjanoska, *supra* note 18.

20 *But see* Beach v. Ocwen Federal Bank, 118 S.Ct. 1408 (1998).

21 The 2010 Program materials include a related memorandum by Professor Howells.

22 Copies of Dr. Osuji's power-point presentation are included

in the 2010 Program materials.
23 Copies of Professor Webb's power-point presentation are included in the 2010 Program materials.
24 15 U.S.C. §§ 1601-1666j (2010); Ralph J. Rohner & Fred H. Miller, Truth in Lending Ch. 8 (2000 & 2009 Suppl.).
25 *See* 15 U.S.C. § 1635(a); FRB Regulation Z, 12 CFR pt. 226, at § 226.15(a), (f) (2010).
26 *See*, *e.g.*, Lea Krivinskas Shepard, *It's All About the Principal: Preserving Consumers' Right of Rescission Under the Truth in Lending Act*, 89 N. Car. L. Rev. [forthcoming] (2010), as included in the 2010 Program materials.
27 Yamamoto v. Bank of New York, 329 F.3d 1167 (9th Cir. 2003).
28 15 U.S.C. § 1679. *See*, *e.g.*, Eugene J. Kelley, Jr., John L. Ropiequet & Andrea J. Durkin, *The Credit Repair Organization Act (CROA): The "Next Big Thing?"*, 57 Consumer Fin. L.Q. Rep. 49 (2003).
29 Professor Greenfield's 2010 Program materials include a copy of the UDMSA, with Reporter's comments, as well as a copy of proposed federal legislation (S. 3264).
30 *See generally* Ashley Harrell, *Mortgage Rescue Fraud and the Subsequent Purchaser*, 64 Consumer Fin. L.Q. Rep. [forthcoming] (2010).
31 FTC, Telemarketing Sales Rule, Proposed Rule, 74 Fed. Reg. 41988 and 42017 (Aug. 19, 2009); FTC, Mortgage Assistance Relief Services, Proposed Rule, 75 Fed. Reg. 10707 (Mar. 9, 2010) (both rules are included in Professor Greenfield's 2010 Program materials). *See also* FTC, Telemarketing Sales Rule, Final Rule, 75 Fed. Reg. 48458 (Aug. 10, 2010); John L. Ropiequet & Jason B. Hirsh, *The 2010 Amendments to the Telemarketing Sales Rule: Expanding FTC Regulatory Oversight to Debt Relief Services*, 64 Consumer Fin. L.Q. Rep. [forthcoming] (2010).
32 *See supra* note 29.
33 Professor Vukowich cited Imperical Discount Corp., 38 Misc. 2d 187, 238 N.Y.S.2d 269 (1963). *See also* UCC Article 9 Part 6. Copies of both are included in the 2010 Program materials.
34 *See*, *e.g.*, 11 U.S.C. § 506; Damnjanoska, *supra* note 18.
35 *See*, *e.g.*, 11 U.S.C. §§ 522(f), 544-548, and 1322(b(2); *supra* note 18.
36 *See* J. Luzak, *You Have Been Warned! . . . Really?*, in the 2010 Program materials.
37 Doctoral researcher at the Erasmus University Rotterdam School of Law in the Netherlands. Within the framework of the "Behavioural Approach to Contract and Tort Law" research programme, her thesis concerns "Transparency, accessibility and simplicity of consumer credit information in order to empower consumers: turning theory into reality."
38 Directive 2008/48/EC on Credit Agreements for Consumers, repealing Council Directive 87/102/EEC (European Consumer Credit Directive) enacted in 2008, was expected to be implemented on June 11, 2010.
39 Copies of the power-point slides presented by Garcia are included in the 2010 Program materials.
40 The 2010 Program materials include reports on the behavioral studies noted here.
41 Professor Budnitz cited as an example: Federal Trade Commission v. FTN Promotions, Inc., Civ. No. 8:07-cv-1279-T-30TGW (M.D. Fla. Dec. 30, 2008) (Stipulated Order for Permanent Injunction).
42 The Bureau of Consumer Financial Protection (CFPB) was created by Title X of the Dodd-Frank Act. *See infra* Part XI. and notes 50-53.
43 *Id.*
44 An example of such a handout is included in the 2010 Program materials.
45 *See*, *e.g.*, Ranzy v. Extra Cash of Tex., Inc., 2010 U.S. Dist. LEXIS 22551 (S. D. Tex. Mar. 11, 2010) (clauses naming NAF invalid).
46 S. 931; HR 1020.
47 *See*, *e.g.*, Dodd-Frank Act, *infra* note 50, § 1028.
48 The 2010 Program materials include materials describing the course, such as a course syllabus, "Policy and Procedures Memorandum for Litigation Students," and a "Required Case File Organization" memo.
49 *See*, *e.g.*, Kelley, Ropiequet & Durkin, *supra* note 28.
50 HR 4173, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010). The slides for his talk can be viewed at http://pubcit.typepad.com/clpblog/2010/05/comparing-the-senate-and-house-cfpab-bills.html, and are included in the 2010 Program materials.
51 *See supra* note 50. *See also* Robert A. Cook & Meghan Musselman, *Summary of the Mortgage Lending Provisions in the Dodd-Frank Wall Stteet Reform and Consumer Protection Act*, 64 Consumer Fin. L.Q. Rep. 231 (2010).
52 *See* sources cited *supra* at notes 47 and 50-51.
53 *See also* Matthew Dyckman, Matthew S. Yoon & John P. Holahan, *Financial Regulatory Reform - The Dodd-Frank Act Rolls Back Federal Preemption*, 64 Consumer Fin. L.Q. Rep. 129 (2010).
54 There is also, of course, the impact on the issue of party autonomy, an issue not widely addressed at the 2010 Program but discussed at the preceding (2008) program. *See*, *e.g.*, Alvin C. Harrell, *Teaching Consumer Law, Part Four*, 12 J. Consumer & Comm. L. 8, 19 (2008).
55 *See* Nathalie Martin, *1,000% Interest-Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, in the 2010 Program materials.
56 *See also supra* this text and note 53.
57 *See*, *e.g.*, Dyckman, *et al*, *id*.
58 Marianne Bertrand & Adair Morse, Information Disclosure, Cognitive Biases and Payday Borrowing, *available at* http://www.fdic.gov/bank/analytical/CFR/bank_research_conference/annual_9th/Morse_A.pdf. Of course, not every payday borrower has access to a credit card.
59 *See also* Fred H. Miller, *Prime Interest Rates for Subprime Borrowers?*, 26 Ga. St. Univ. L. Rev. 1259 (2010).
60 *See*, *e.g.*, Harrell, *supra* note 9, at 1210 n. 3 and 1238-48.
61 Jerman v. Castle, 130 S.Ct. 1605 (2010).
62 *See* 15 U.S.C. § 1692k(c) (bona fide error defense).
63 *Jerman*, 130 S.Ct. at 1620-21.
64 Stolt-Nielsen S.A. v. AnimalFeeds International Corp., 130 S.Ct. 1758 (2010).
65 Rent-A-Center, West, Inc. v. Jackson, 130 S.Ct. 2772, 177 L.Ed.2d 403 (2010).
66 Milavetz, Gallop & Milavetz, P.A. v. U.S., 130 S.Ct. 1324 (2010).
67 For a nice recent dissertation on the history of and differing approaches to legal education and the role of law in the United States, *see* Stephen R. Alton, *Roll Over Langdell, Tell Llewellyn the News: A Brief History of American Legal Education*, 35 Okla. City Univ. L. Rev. 339 (2010).
68 One is reminded again of President Woodrow Wilson's comment to the effect that academic politics are vicious. *See* Michael A. Olivas, *The Inception of Modern Professional Education: C. C. Langdell, 1826–1906 (review)*, 81 J. Higher Educ. 547 (2010).
69 *See*, *e.g.*, Gene A. Marsh, *Ethical Responsibilities in Teaching Consumer Protection Law*, 60 Consumer Fin. L.Q. Rep. 11 (2006) (noting the risk that a Consumer Law course will become an exercise in one-sided advocacy); *see also* Harrell, *supra* note 54, at 9-10, and 18-19 (describing discussions of similar issues at the 2008 Houston program).