

TEACHING CONSUMER LAW



By Alvin C. Harrell*

I. Introduction

On May 30 – 31, 2014 the Center for Consumer Law of the University of Houston Law Center presented “Teaching Consumer Law in a Virtual World” (the Conference), the seventh biannual presentation of a unique conference devoted to issues in teaching consumer protection law.¹ The Conference Co-Chairs were: Richard M. Alderman, Interim Dean, Dwight Olds Chair in Law and Director of the Center for Consumer Law at the University of Houston Law Center; and Nathalie Martin, the Frederick M. Hart Chair in Consumer and Clinical Law at the University of New Mexico School of Law. The 2014 Conference was held at the Hilton Santa Fe Historic Plaza Hotel in Santa Fe, New Mexico. During the Conference, Dean Alderman announced that the 2016 Conference will also be held in Santa Fe.

The Conference is designed primarily for doctrinal and clinical professors, adjunct faculty and others interested in teaching consumer protection law, though there is also a heavy dose of material for practitioners (largely from a plaintiff's perspective). The 2014 Conference was held in cooperation with the University of New Mexico and the National Association of Consumer Advocates (NACA), the latter being an organization devoted to protecting consumers from unfair and deceptive practices. It comes as no surprise that the focus of the Conference is on avenues (including litigation and regulation) for helping consumers obtain legal redress against merchants and creditors.

Richard Alderman introduced the 2014 Conference and Co-Chair Nathalie Martin. He announced his retirement as University of Houston Law Center Interim Dean but noted that he will continue as Director of the Center for Consumer Law and a Chair of the Conference. The Conference will continue to be held biannually with Santa Fe as the regular venue.

This article reports on the presentations at the 2014 Conference. As such, the focus is to describe the comments of other speakers (always a risky endeavor); an effort has made to separate instances where your author's views are expressed. Your author thanks the other speakers for their assistance in preparing this article but, as always, your author is responsible for any errors and interested parties should not attribute specific comments or views to a speaker without further, direct confirmation.

II. Increasing the Prominence of Consumer Law and Influencing Policy

A. Dee Pridgen

Dee Pridgen, the Carl M. Williams Professor of Law and Social Responsibility at the University of Wyoming College of Law, made the first presentation, as part of a panel entitled "Increasing the Prominence of Consumer Law and Influencing Policy," recounting her choice of a law career as a means to influence and improve society. She reported that she was attracted to academia as a means to promote social justice through teaching and scholarship. She stressed that the latter need not be dry and uninteresting (your author tried not to take offense at that remark). She cited as examples Elizabeth Warren's *Making Credit Safer*,² and articles by Kathleen Engel and Patricia McCoy,³ noting that these articles contributed to development of the Dodd-Frank Act.⁴ She also cited: *Seduction by Plastic*,⁵ which contributed to the Credit Card Act; and Chris Peterson's *Payday Lending in Military Towns*,⁶ which influenced amendments to the Military Loan Act.

Professor Pridgen's current project is to analyze studies by "conservative" law professors attacking state consumer protection laws (UDAP laws) and alleging that the resulting lawsuits are too costly and unpredictable. She said that these studies pro-

mote alternative model acts sponsored by the American Legislative Exchange Council (ALEC). She argued that these model laws seek to eliminate private rights of action.⁷

Professor Pridgen argued that the ALEC proposals would have the effect of eliminating private rights of action by: reimposing a justifiable reliance requirement for misrepresentation claims; eliminating statutory damages, thus limiting damages to out-of-pocket losses; eliminating consumer attorney fees unless the defendant had a willful intent to deceive; requiring a showing of ascertainable loss; constraining class actions; and imposing a one year statute of limitations, or a limit of four years after the "first instance." She posited that Consumer Law teachers and scholars can make a difference by writing and publishing on these issues.

B. Prentiss Cox

Prentiss Cox is an Associate Professor of Law at the University of Minnesota School of Law, and previously served as Assistant Attorney General and Manager of the Consumer Enforcement Division of the Minnesota Attorney General's Office. He posited that, to increase the influence of the academy, law schools should increase the racial diversity of the teachers of Consumer Law. In addition, he emphasized three points. First, he noted that there are multiple ways teachers and scholars can influence public policy, *e.g.*, by:

- using scholarship to shift public perceptions and discussion;
- identifying unfair and deceptive acts and practices (UDAP) (as in Dee Pridgen's article⁸);
- projecting issues through the media;
- supporting law reforms (drafting, testifying, etc.); and
- litigating cases or assisting litigators.

Second, he noted that consumer law offers opportunities to engage directly in policymaking, because:

- consumer law matters to consumers, policymakers and society;
- the Bureau of Consumer Financial Protection (CFPB) is a relatively new regulatory agency devoted to expanding consumer protection regulation, and this offers new policy-making opportunities;
- there is an imbalance of resources, and the CFPB can help counterbalance this;
- consumer advocacy centers offer other avenues to participate; and
- the polarization of views on consumer law issues creates opportunities for specialists to mediate between opposing views.

Third, to increase the prominence of the Consumer Law course, Professor Cox suggested increasing the importance of public service in academia as compared to teaching and publica-



tion. Such service could include: engaging in litigation; testifying; and drafting legislation or regulations. This improves scholarship and increases the importance of the academy, bringing together scholars and practitioners. He said that the Consumer Law course should not mimic other parts of the academy, but instead should seek to create its own unique role by combining service and scholarship.

C. Peter Holland

Peter Holland is a Clinical Instructor in the Consumer Protection Clinic at the University of Maryland Law School. He cited Dee Pridgen's *Wrecking Ball* article⁹ as a counterpoint to the ALEC proposal.¹⁰ He also opined that an imbalance of resources can be addressed by dealing with the media. For example, he described a call he received from the *American Banker* about debt collection, explaining how he established a rapport with the reporter by helping the reporter cover his assigned topic. Professor Holland suggested that academics make an effort to establish relationships through the media office of the university -- to funnel ideas to the media through this office. He pointed out that the media is a free, powerful resource, and suggested that academics cultivate relationships with reporters. In this regard, he offered the following practical "rules":

Rule 1: Ask the reporter: Who are you, what is your subject and deadline. Ask for submission of the reporter's questions in advance by e-mail. Respond by e-mail.

Rule 2: Do not respond spontaneously (your author has found this to be excellent advice).

Rule 3: Clarify and specify what is on or off the record. Agree on this before discussing any issue. Define what the terminology means. Ask for your quotes to be submitted in advance for your approval before publication. Otherwise, assume that everything is on the record. Specify that off-the-record material can be used for background but not quotation or attribution.

Richard Alderman added a suggestion from the floor: Be available to the media. He said they will continue to use you as a resource if you help and respond to their deadlines. Reporters need more stories and more help, and more quickly than in past. But, he said, think before you speak. He noted that the American Association of University Professors (AAUP) offers inexpensive malpractice insurance for academics, to protect against defamation suits.

D. Jeff Sovern

Jeff Sovern is a Professor of Law at St. John's University in New York City. He covered three basic topics: First, writing op-eds; second, how many schools teach Consumer Law?; and third, the role of "elite" law reviews.

First, as to op-eds (e.g., newspaper editorials), he suggested: Turn your law review article into an op-ed. More people read op-eds, and law review editors like the prior (or subsequent) media attention.

He then addressed how to write an op-ed, e.g., *To Catch a Creditor*.¹¹ Start with a human-interest story (e.g., from news reports or hearing testimony). The downside to this approach is that it may seem to be an isolated event; however, the author can use statistics or other news articles to make the case that it is a widespread problem. Then ask: Why did this happen? To answer this question, it may be helpful to identify problems in the marketplace or with existing law. Acknowledge the counter-arguments and explain why they are wrong. Then propose a solution (e.g., via the courts, CFPB, Federal Trade Commission (FTC), Congress). Then reach a conclusion: Refer back to the story at the beginning, to tie it all together. All in 750 words or less. Submit the op-ed to one place at a time.

Some op-eds hang on a "news-hook" while others are "evergreen" articles. A news-hook article responds to a recent news event. The risk is that it may get stale. Evergreen pieces do not depend on specific news, but relate to continuing problems. These have less risk of staleness; and if rejected, they can always be sent to a blog. But many editors prefer op-eds that connect to a recent event in the news.

Second, Professor Sovern addressed the role of the Consumer Law course in law schools. He reported that fifty-five law schools offer a course on Consumer Law, while 119 (roughly sixty percent) do not. Elite schools are no more likely to teach consumer law than non-elite schools, and (as regards his third point) elite law reviews reflect this, despite the prominence of consumer law in the news

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(e.g., the DoddFrank Act and CFPB, etc.). Professor Sovern compared the number of articles on consumer law published in recent years in the *Harvard Law Review* -- where consumer law is taught, and the *Stanford Law Review* -- where it is not taught, and reported that Harvard's law review published considerably more about consumer law than Stanford's. Professor Sovern noted that one lesson from this is that Consumer Law faculty may have difficulty securing placements in elite law reviews.

David Landers opined from the audience that one solution is for the school to develop adjuncts to teach Consumer Law, since full time faculty may not want to do so (or may view it as an inopportune career path). This allows an emphasis on the importance of consumer remedies, but at the cost of reduced scholarship.

III. Debt Collection Update

Dick Rubin is a nationally-known appellate law practitioner with a record of success in the United States courts of appeals. He discussed suing on time-barred debts,¹² and the "laundering" of bad debts.¹³ He reported that a common defense argument is that the statute of limitations is an affirmative defense that must be proved; however, he said this defense has been rejected by courts under Fair Debt Collection Practices Act (FDCPA) section 1692e(5) -- which makes it a violation to falsely threaten to sue.¹⁴ He also cited the recent decision in the *McMahon* case,¹⁵ holding that merely asking a consumer to pay a time-barred debt is a FDCPA violation, even if the debt collector does not threaten to sue, because an offer to settle could lead the consumer to think that litigation is threatened. The United States Court of Appeals for the Seventh Circuit said its decision conflicts with those in the Third and Eighth Circuits,¹⁶ but Rubin argued that there is no conflict. He noted that the same issue is pending in the Sixth Circuit.¹⁷ He noted that the split can be resolved by CFPB regulation, e.g., by requiring notice to the debtor that the debt is timebarred and cannot be sued on.

Rubin also noted that the United States Courts of Appeals for the Second, Third and Seventh Circuits have split on what is needed for a consumer to "prevail" in order to recover attorney fees under the FDCPA. He said the normal rule is, if the plaintiff establishes liability, he or she gets attorney fees. The amount may depend on the degree of success. In *Johnson v. Eaton*,¹⁸ however, the United States Court of Appeals for the Fifth Circuit disagreed, creating a circuit split. In *Marx v. General Revenue Corp.*,¹⁹ the United States Supreme Court held that the plain language of the FDCPA, as codified at 15 U.S.C. section 1692k,

requiring bad faith, is overcome by the general standard embodied in Rule 54; Rubin said the same result may attain to reject the *Johnson* rationale since the circuits that permit an award of fees and costs without any award of actual damages do so because of the general federal rule allowing an attorney fee award to the prevailing plaintiff once legal liability is established. He opined that the *Johnson v. Eaton* split may also go to the Supreme Court.

As regards the FDCPA disclosure requirement at 15 U.S.C. section 1692g (requiring at least thirty days notice), Rubin predicted that a CFPB rule will provide model language. For now, there is a split between the Third and other Circuits.²⁰ A question is whether following the plain language of the FDCPA is required. The Third Circuit said no; other Circuits have said yes.²¹ He also noted that there is a three-way split as to whether collector-to-debtor's attorney communications are covered by the FDCPA.²² Yet another question is whether a consumer can sue for FDCPA violations in bankruptcy.²³ Again, the courts are split.²⁴ Also unresolved is the issue of the least versus unsophisticated consumer.²⁵

IV. What's New with the FTC?

Lesley Fair is a Senior Attorney with the Federal Trade Commission (FTC) Bureau of Consumer Protection. She began her presentation by noting that 2014 is the 100th anniversary of the FTC. She addressed four illustrative areas of major interest to the FTC:

- financial services for low income consumers;
- deceptive health and safety claims;
- privacy rights; and
- new technology.

Fair cited several examples of evolving financial "scams," e.g., text messages sent to collect debts. Another example is the case where a debt collector faked a caller ID to impersonate Ed McMahan. In yet another case noted by Fair, a subprime auto creditor was sued by the FTC as both a creditor and debt collector. She also cited the issue of tribal payday loans, noting that a court rejected tribal protection for these loans in a recent CFPB case. She noted that these are challenging, resource-intensive cases. Fair also reported that the FTC is stepping up its auto credit scrutiny, citing a case where the advertised car price was after a down payment of \$5,000. She also described a new website: consumer.gov. It is designed to be easy to read and helpful to nonEnglish speakers. The FTC is also seeking coalitions and outreach with the legal services community.

Deceptive Health and Safety claims are another current focus. Companies are expected to have scientific bases for their claims. The FTC works with state attorneys general and private legislators in these cases. Visual representations must be accurate and substantiated. "Blurred lines" problems include advertisements that look like news items. Fair noted that this is not a new issue, it has been around since 1917. Consumers have a right to know if they are seeing an advertisement. Also, paid endorsements need to be disclosed as such, not presented as unbiased news reporting.

New technology is receiving increased attention. Some people may think this is only for the wealthy, but in fact the smartphone is a lifeline for the poor. This raises new consumer protection issues, e.g., phony virus alerts impersonating a telephone servicer. Clicking in response triggers charges. Kids' apps allow minors to buy things without their parents' knowledge (see, e.g., the Apple FTC settlement²⁶). Smartphones are increasingly being used as payment devices, and this also raises new concerns.²⁷ A basic FTC position across these issues is: If effective disclosures cannot be given, don't do it -- the ad should not be run.

At the time of the Conference, the FTC report on Data Brokers was just out,²⁸ covering the "Internet of Things," e.g., including cookies in computers of household appliances, which report data over the Internet to other computers. Ms. Fair also mentioned the *Aaron Rents* case:²⁹ This involved rent-to-own laptops that included software to identify the consumer's location and activate a web cam to film the consumers without their knowledge and without notice.

She suggested ways that academics and the FTC can work together, noting that the FTC welcomes scholarly publications. Academics also can: file public comments; attend FTC workshops; get free FTC consumer materials for consumers; subscribe to the FTC blog; and use FTC case studies.

V. Economic Justice and Consumer Law

A. David Lander

David Lander is a Partner in the St. Louis law firm of Greensfelder, Hemker, & Gale, and an Adjunct Professor at Saint Louis University School of Law. He noted the connections between consumer law and economic justice, and suggested the need for integration of the latter into the Consumer Law course. He teaches a course on the history of consumer credit and its influence on society, and a separate policy-oriented course on economic justice. He noted that there are four basic models for consumer protection: free markets; "soft" paternalism; "hard" paternalism; and prohibition. He said that issues of economic justice may influence which alternative is chosen.

Professor Lander emphasized the importance of looking at the supply as well as the demand for credit. He cited a casebook on economic justice,³⁰ which now includes materials on consumer law.

B. Kathleen Engel

Kathleen Engel has taught three courses at Suffolk University Law School in Boston: Credit and Catastrophe (focusing on the financial crisis); Comparative Financial Regulation (how the crisis played out in different countries); and Consumer Credit.³¹ The goal in each is to teach the financial crisis by emphasizing the links between consumer protection and the financial system, taking into account consumer behavior, incentives and systemic effects. She noted that consumer law is not a sideshow, but rather a central issue in the economy.



Professor Engel organizes her Consumer Credit course topically. Examples of topics include mortgages, auto loans and credit cards, all of which are important in our understanding of finance and the economy. After introducing the students to each topic—usually with materials she has assembled, she asks: what rules exist and what rules are needed? These open-ended questions engage the students with the material, and make them think not just about what the law says, but also what protection they believe the law should provide. As part of the discussions, Prof. Engel directs exploration of the economic and social impacts of consumer credit products, *e.g.*, student loans.

The courses are not conducted as lectures or like a seminar. Professor Engel uses powerpoint presentations to introduce concepts and then asks questions to generate class discussion. The students do group work in class and also have assignments outside of class that involve applying concepts and evaluating the law. One of the students' favorite assignments involves going into the community to inquire about credit transactions. Students visit payday lenders, tax refund companies, banks to learn about bank-linked credit cards, and other providers of credit.³² They have to write up their experiences and assess whether the credit providers violated any consumer laws.

Prof. Engel discussed the importance of students learning statutory analysis. In her experience, students come to the class with very little experience in taking deep dives into statutes. Because of this, she gives the students many opportunities to develop these skills.

Professor Engel cited challenges with her approach to teaching consumer credit, including the fact that payday and auto title lending are important in consumer law, but have nothing to do with the financial crisis. Another problem is that law students don't know how to study or prepare for the exam (it is more like a graduate school class).

For the exam, Professor Engel sometimes provides copies of real loan documents and a state law, and asks: Does this loan comply with the state law? She typically partners a question like this with a question that requires students to analyze the connections between certain credit products and the larger economy. The exam typically consists of ten true/false questions with explanations. The students receive points for: the correct answer; identifying the law; and analyzing it correctly (these are in addition to the two essay questions). The true/false questions primarily focus on statutory analysis.

C. FollowUp Discussion

Professor Lander described a class he teaches on Federal Reserve Board surveys. It is a one-hour class and includes consumer sentiment surveys. He said that schools should not ignore the importance of the revolution in consumer finance.

Professor Engel noted that she brings in guest lecturers who cover consumer issues, *e.g.*, Assistant Attorneys General, legal services attorneys, and private practitioners. The students become very excited about practicing in the field, but she queried: how do we provide jobs for all of these graduates?

Professor Lander also described his consumer bankruptcy course, noting that it has changed to increase the emphasis on bankruptcy as a consumer protection tool (with reduced emphasis on issues such as preferential transfers).

VI. Virtual Currency Update

Julie Hill is an Associate Professor of Law at the University of Alabama. She described the increasing use of Bitcoins and other virtual currencies as a payment mechanism, noting that current laws are not drafted to deal with these issues.³³

Professor Hill raised the initial question: What are virtu-

al currencies? She noted that virtual currencies are electronic mediums of exchange, but are not legal tender. They

arose from on-line computer games, used for keeping score with curren-

cies initially not interchangeable into dollars. Some games then allowed the currencies to be bought and sold, for dollars. Cryptocurrencies were the next stage, *e.g.*, Bitcoin, allowing an exchange between bitcoins and dollars, unrelated to a computer game. This allows the bitcoins to be used for payment in private transactions. Bitcoins were developed from a published paper using computer programs, with numerous variations.³⁴ Bitcoins in "circulation" now total over \$5 billion.

Professor Hill described how Bitcoins work. Bitcoin users see an app that allows their use as a payment mechanism. The program substitutes for a bank, in essence assuring that the same money is not spent twice. A central ledger assures security and anonymity. The program is the financial intermediary. Bitcoin "miners" create the entries that assure security, in return for receiving new bitcoins. There are development teams and Bitcoin exchanges that convert bitcoins into real currencies and vice versa.

Criminal law issues identified by Professor Hill include counterfeiting³⁵ and money laundering.³⁶ Concerns that virtual currencies will be treated as illegal counterfeits have receded, but the use of virtual currencies to facilitate other crimes is a concern. In this respect, Bank Secrecy Act (BSA) issues predominate. Money services businesses are subject to special rules. Is dealing in virtual currency a money services business (MSB)? The Department of Justice (DOJ) says the user is not a MSB, but that a Bitcoin exchange is a MSB, subject to the BSA.³⁷ The DOJ made this point clearly when it arrested and convicted Charlie Shrem (then vice president of the Bitcoin Foundation) for facilitating money laundering through a Bitcoin exchange.³⁸

Tax law is also a major issue. Under tax law, bitcoins are now treated as property rather than currency.³⁹ Therefore, any appreciation in value is a capital gain when spent. Multiple and meticulous recordkeeping is required for numerous small transactions.

Professor Hill noted that Bitcoin issues do not fall easily within the existing bank regulatory systems. Federal Reserve Chairman Janet Yellen has noted that Bitcoin is "a payment innovation that is taking place entirely outside the banking industry."⁴⁰ Moreover, due to regulatory efforts aimed at third-party payment processors, banks may be hesitant to offer bank accounts to Bitcoin exchanges.⁴¹

Finally, securities and consumer protection laws do not squarely cover Bitcoin, or Bitcoin transactions.

At this point, using bitcoins is legally and economically risky; bitcoins can have a volatile value. One other thing is clear, however: The creator of Bitcoin is smart, publicity shy, and unknown.

VII. Consumer Credit Update - Ten Things We Need to Teach Our Students (About)

Your author presented a paper titled as above,⁴² intended to highlight current issues that arguably deserve attention in a Consumer Law course. This, of course, suggests again a root problem for academics teaching Consumer Law, discussed through-out the Conference: What to include in the Consumer Law course, given a modern legal environment overflowing with legal issues and controversies? Your author's program materials

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and presentation offered one view selected from an avalanche of potential topics.

It can be noted that this also illustrates the crux of a modern controversy, or at least a dilemma: Is there too much law? Some lawyers (and academics) of course would like to have more law, and the more complex the better. Advocates of a regulatory approach always can find problems that need attention, creating a dynamic that favors increased regulation. This is not limited to the plaintiffs' side (although more and increasingly complex laws and regulations obviously offer greater potential for violations and litigation); some defense lawyers also associate legal complexity and increased regulation with their own interests and livelihood. We are all entitled to advocate policies that we favor, for whatever reason.

But this modern trend reinforces an age-old conundrum for Consumer Law academics, as probably all of us recognize the inability to cover everything in an adequate manner in a law school course (even if we could know and understand it all). Indeed, this has been a continuing theme since the beginning of the Teaching Consumer Law Conferences. Hence, the inevitable quandary: What to put in and what to leave out? This can be particularly difficult with regard to emerging and cutting edge issues, which may turn out to be "the next big thing" or, alternatively, much ado about nothing. To some extent all of the speakers at the Conference addressed this; your author's presentation merely added one more voice to the chorus.

Your author highlighted ten current issues that arguably deserve at least some attention in a Consumer Law course, while recognizing that others will disagree and/or have their own lists. And of course, some academic courses are directed at more narrow segments of the law that may exclude the broad reach of this list. Your author's list of issues and developments is essentially as follows:

- The demise of private subprime lending;⁴³
- the impact of expanded regulation on the availability of consumer financial services;⁴⁴
- developments affecting private student lending and for-profit schools;⁴⁵
- federal regulation of debt collection;⁴⁶
- regulation of the Internet;⁴⁷
- the TILA/RESPA integrated disclosure rule;⁴⁸
- increased consolidation in the financial services industry;⁴⁹
- cybersecurity, privacy, identity theft, and electronic money;⁵⁰
- CFPB initiatives regarding vehicle sales finance and fair lending;⁵¹ and
- the limited but continuing vitality of contract law and party autonomy.⁵²

While one would not expect much in the way of agreement on any of these issues, some of them were covered elsewhere in the Conference presentations and materials (suggesting some consensus, at least as to the relevance of those issues). Your author's perspective on these issues probably differs from that of many others, *e.g.*, with regard to the extent that laws and regulations are having dramatic effects on the structure of the consumer finance industry, consequently affecting the cost and availability of financial services. While your author believes that the full range of such matters deserves consideration in any public policy debate (and in the Consumer Law course), the focus of the presentation was merely an effort to identify broad areas of current or important legal developments.

VIII. View from the Trenches

A. Richard Feferman

Richard Feferman is a partner in the New Mexico law firm of Feferman & Warren, and the 2013 recipient of the National Consumer Law Center's Vern Countryman Consumer Law Award. He addressed the issue of access to the courts, opining that arbitration and class action waivers currently constitute the greatest threat to private consumer rights.

He also addressed the problems associated with sales of damaged used vehicles. He argued that it is common for damaged vehicles to be sold to consumers without disclosure of the damage, observing that private actions are needed as a remedy. He offered the following scenario: The salesman verbally denies that there is damage, or the vehicle sales contract discloses a "possible salvage title." A salvage title is not provided because the certificate of title has been "laundered," and the dealer denies any knowledge of this. But the consumer cannot trade-in the vehicle because it is later discovered that the car has been wrecked or suffered other damage.⁵³

Feferman suggested that the consumer should sue the selling dealer for fraud and misrepresentation. Often there is physical evidence of the damage, but the dealer has withheld the documentation. The consumer's attorney should talk to the prior owner, who may report that the dealer gave him or her a reduced trade-in allowance due to the damage. Also, Feferman suggested that the consumer's attorney subpoena documents from CAR-FAX. If there is an arbitration clause, he suggested the use of arbitration to get the needed documentation. He said that seventy percent of these cases also involve the TILA. Nonetheless, it seems to your author that improved disclosure of "title brands," as provided in UCOTA, also would also help.

B. Cary Flitter

Cary Flitter practices consumer law in Pennsylvania and New Jersey, and serves as Adjunct Professor at Temple University Beasley School of Law in Philadelphia and Widener University School of Law in Delaware. His Consumer Law course covers only private remedies. Three primary examples: the FDCPA;⁵⁴ the Telephone Consumer Protection Act (TCPA);⁵⁵ and the Fair Credit Reporting Act (FCRA).⁵⁶ He noted that there are only a small number of consumer lawyers in each state, despite the high demand. Fees-hifting provisions, *e.g.*, in the FDCPA, TCPA and FCRA, help to solve the funding problem for consumer plaintiffs. He cited as a problem the scenario of a collection agency masquerading as a law firm. He noted that the consumer may need a remedy outside the FDCPA, and suggested the possibility of restitution based on an unjust enrichment argument. He said a case is pending on this issue.

He also mentioned another case of interest: a FDCPA/privacy case where his firm challenged the standard practice of displaying the consumer's account number above the consumer's name and address on routine debt collection correspondence. Flitter noted that most prior litigation under 15 U.S.C. section 1692f(8) had been dismissed due to bad facts, and initially his case suffered the same fate. However, subsequent to the Conference the United States Court of Appeals for the Third Circuit reversed, holding that the account number practice implicates consumer privacy, a core issue under the FDCPA.⁵⁷

C. Ira Rheingold

Ira Rheingold is Executive Director of the National Association of Consumer Advocates (NACA), a cosponsor of the Conference. He began by saying it was a pleasure to be in a room with academics who use reason, as compared to the political rhet-

oric in Washington D.C. He noted that there were those who tried to warn of the 2007 – 2008 financial crisis, and said that for a while after 2008 the banks were quiet. Now, however, he said it is like the financial crisis never happened; the same lobbyists are still there, urging resumption of the old ways. Rheingold stated that the House Financial Services Committee wants to repeal the Dodd-Frank Act but has lost that fight. He said the Dodd-Frank Act was the first productive consumer protection law passed in twenty-something years. He predicted that the CFPB Arbitration Study will provide empirical information to support CFPB restrictions on arbitration, but noted that a brutal fight will result.

As to residential mortgages, he opined that “all rational thought is gone.” He queried: “What will mortgage origination look like over the next ten years?” He said that what is needed is expanded affordable housing programs from Fannie and Freddie. Rheingold noted that European housing markets are different from those in the U.S.; they don’t worry about home ownership, instead providing other safety nets so that consumers don’t need to own homes as a wealth-building device. Housing is used to solve other problems in the U.S., as a substitute for a safety net (e.g., providing financial security). He said that mortgage origination, servicing and foreclosure rules need to be used to protect consumers but this is not being considered in Washington.

IX. Consumer Law from an International Perspective

A. Joasia Luzak

Joasia Luzak is an Associate Professor at the Institute of Private Law at the University of Amsterdam and a member of the University’s research institute, the Centre for the Study of European Contract Law (CSECL). Her discussion focused on the European approach to consumer privacy. An issue is: how to provide clear and comprehensive information on the issue of “cookies,” as required in Europe.⁵⁸ Online service providers need guidance. She said that some cookies can be helpful, in storing information to facilitate consumer choice, but others are not. Disclosure and consent are required, along with an option to renege. The European Union (E.U.) Article 5(3) ePrivacy Directive requires informed consent in advance. But not every E.U. member state

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accepts the opt-in principle; some still require consumers to optout.

To be effective, Professor Luzak said that a privacy notice needs to: (1) attract the attention of the reader; (2) truthfully reveal the privacy policy; and (3) be understandable, i.e., “Privacy for Dummies.” The purpose should be to inform, not provide substantive legal protection. Current policies are directed at the age sixteen reader level, but half of the consumers in the U.K. read at the age eleven level.

She reported that Dutch guidelines are not specific. The U.K. guidelines require the notice to: have an adjustment to the level of the reader; explain the purpose of the cookies used; disclose any third-party sharing; have a layering of information; and be designed so that the disclosure is prominent.⁵⁹ But the U.K. guidelines are not yet being enforced, and even then they will be enforced only in response to complaints, and authorities will give violators a second chance.⁶⁰ Other problems cited by Professor

Luzak include a lack of standardization and enforcement, and unclear rules.

She cited a British study that set up a website to see if consumers read terms and conditions -- the consumers who read the terms would see that opting out would earn them a gift certificate. Very few consumers checked the box as needed to receive the gift certificate. This may suggest that few consumers cared enough to read the disclosures. Professor Luzak also reported that one of the terms agreed to stated that the consumer was selling his or her soul and would submit to torture by fire upon default. Apparently this was not enough to capture the attention of most readers.

B. Jacolien Barnard

Jacolien Barnard is a Senior Lecturer at the Department of Mercantile Law at the University of Pretoria in South Africa. She addressed the search for the “ordinary consumer” in a multicultural society. She noted that it is important to talk to consumers in a language they understand. The new South Africa Consumer Protection Act (the Act) is an umbrella law, providing comprehensive coverage with a focus on vulnerable consumers. It is the first South African law protecting fundamental consumer rights.

Under the Act, the consumer has a right to notices and information in plain language, with average intelligence level and literacy content, significance and importance. South Africa has eleven languages. There is not yet any case law guidance, thus legal writers are important. Simple language in notices is important, so that it can be understood by consumers without a dictionary or lawyer. The format should make the notice prominent. Jacolien said the common law assumes equal bargaining power, but this is often not the case with South African consumers.

The average literacy level in South Africa is grade seven. Moreover, the ordinary consumer concept may differ for different types of transactions. She said that South Africa generally looks to the E.U. standards regarding such things as: vulnerable consumers; mental or physical infirmity; age; and credulity.

C. Trish O’Sullivan

Patricia (Trish) O’Sullivan is a Business Law Lecturer in the School of Accountancy at Massey University, Albany Campus, Auckland, New Zealand. Her topic was online shopping in New Zealand and Australia -- specifically the incorporation of terms into online shopping contracts. She conducted the following empirical research to determine how terms are being incorporated into online shopping contracts in practice: She posed as a consumer and shopped, up to the point of payment, after creating an online account. She then recorded whether the method used to incorporate terms was a “click-wrap” or “browse-wrap” and noted the number of words in each set of terms. Typically “on site” shoppers do not agree to the terms before the sale; but it is easier to do this in online transactions.

Common law rules on incorporation of terms in a signed contract provide that the parties are bound even if they don’t read the terms and if terms are not signed they may be incorporated by sufficient notice.⁶¹ The common law also recognizes the effect of a change-in-terms notice.⁶² “Click-wrap” and “browse-wrap” terms are commonly used in electronic contracts (giving rise to issues regarding the adequacy of notice).⁶³ This requires prominent disclosure before agreement.

“Click-wrap” essentially means the consumer is required to indicate consent to the contract terms by checking a box or clicking “I agree” prior to entering payment information; “browse-wrap” essentially means the link to view the terms and conditions is disclosed at the bottom of each webpage, typically

in small print.⁶⁴ A Robert Hillman survey of ninety-two law students indicated that only about four percent read the full terms and conditions in the contract.⁶⁵ Unusual or onerous terms may require enhanced disclosure.⁶⁶

Results of the survey indicate that websites using browsewrap disclosures typically put the link to the terms at the bottom of the page without further reference to the terms, and this is not sufficient notice. In New Zealand, fifty-two percent of the retail websites in the survey used browse-wrap; in Australia sixty-eight percent used browse-wrap. The combined results for New Zealand and Australia showed that sixty percent of the fifty websites reviewed used browse-wrap. O'Sullivan opined that this method does not provide sufficient notice to consumers.

In addition, different terminology is sometimes used to describe the same crucial terms. In *Spreadex Ltd v. Cochrane*⁶⁷ a child created a \$60,000 deficit in trading securities on a website. Click-wrap was used to incorporate the terms but the court said that the notice given was insufficient due to the excessive number of words in the terms and the fact that there were four separate documents containing terms. O'Sullivan said this suggests that even click-wrap may not provide sufficient notice.

X. Making the Most of Consumer Clinics

A. Mary Spector

Mary Spector is an Associate Professor of Law and Co-Director of the SMU Dedman School of Law Civil Clinic (the SMU clinic). Her subject was: integrating research into the clinic curriculum.

The traditional clinic model is to provide service to the community by having students work with clients under faculty supervision, while training the students in practical skills.⁶⁸ The SMU clinic conducts a general civil practice, including home and auto repairs, identity theft, debt collection, etc. Professor Spector said the consumer's credit report often plays a central role. The client may ask: How will settlement affect my credit report? An answer is that the clinic can help, *e.g.*, students can help the consumer rent an apartment despite a flawed credit report. But on reflection, clients may need more going forward. Professor Spector queried: What else can be done?

The SMU clinic Credit Reporting Project is designed to address this. It includes: (1) community outreach; (2) direct assistance (*e.g.*, helping to pull credit reports for consumers); (3) talking to consumers about the accuracy of their credit report (a seventy percent error rate was found); (4) research; and (5) policy advocacy -- using data from the project and sharing it with other advocates.

An inherent challenge for clinics is to get the right cases for students to handle. The Credit Report Project generated such cases, based on data from the survey, *e.g.*, helping consumers who could not get their credit reports. The Credit Report Project indicated a fifty-five percent to sixty-six percent to eighty-three percent success rate in consumers seeking a credit report. The survey questions allowed consumers to achieve a better success rate, and improved the project.

B. Max Weinstein

Max Weinstein is a Senior Clinical Instructor on Law in the Predatory Lending/Consumer Protection Clinic at the Legal Services Center of Harvard Law School (the Harvard clinic). He began by noting that clinical teaching by representing consumers can expand the nonclinical curriculum. Bankruptcy, foreclosure, and debt collection issues are common parts of the practice in a clinic; observers

have noted that the student loan debt burden is a factor in some of these cases. Many students are mired in debt for useless academic programs. Student loan debt now exceeds \$1 trillion, and is the largest category of consumer debt. Federal student loans are not considered in "default" for 270 days; but federal student loans are subject to nonjudicial garnishment. These loans are difficult to discharge in bankruptcy.⁶⁹

The Harvard clinic has a program designed to address predatory student loans: It targets for-profit schools, and the securitization of student loans. This provides practical practice opportunities for students. Policy advocacy also benefits from this experience. There is also a law school course at Harvard devoted to student loans, with doctrinal teaching derived from the clinical experience.

C. Karen Meyers

Karen Meyers is an Assistant Attorney General and Director of the Consumer Protection Division for the Office of the New Mexico Attorney General. She addressed the intersection between practice, policy and learning, including efforts to educate the public. This helps to develop regulations to respond to changing needs in the marketplace. New Mexico programs include: externships; clinics; and a government lawyering clinic. A goal is to increase collaborations for consumer rights. She said that law schools are a good resource for these efforts, and vice versa.

She raised a question relating to clinics as a teaching tool: Do clinic cases allow students to achieve a lawyer perspective *re* systemic problems, or do they limit the lessons to individual issues and cases? She opined that the expanded sharing of information helps to achieve a larger perspective. A goal is to identify where practice, learning and policy overlap. She cited as an example a case where the refinancing of installment loans became a series of interest-only loans because the consumers could not afford the payments. Attorney General data on this type of problem can inform the clinic's representation of consumers. A student-focused symposium could further share this information.



Assimilating the information with a focus on systemic effects would benefit both the Attorney General and law school clinics. It also would provide benefits regarding: enforcement actions (state and federal); shared research; critical legal analysis; expert testimony; and training Attorney General attorneys.

D. Ted Mermin

Ted Mermin teaches Consumer Law at the University of California Berkeley (UCB) School of Law and is Senior Advisor to the Consumer Justice Clinic at East Bay Community Law Center. He also directs the Public Good Law Center. He left a previous position as Deputy Attorney General (DAG) at the United States Department of Justice to teach consumer law to the Prime Minister of Thailand at UCB. He said the biggest issue for the clinic is credit card debt collection by debt buyers, and as DAG he needed to answer these questions. He now teaches a Consumer Protection Law course at UCB, "keeping it real" by conducting field trips to check cashiers, the meat department at a supermarket, and a car dealer. Students conduct research and writing projects; there is no exam. Research papers result, and some are published in law reviews. He also files amicus briefs in consumer cases, drafted by students.

One issue is how to expand the effects of these programs on campus. His suggestions include: Form a student group; offer more courses on consumer law; have students petition for a course with a particular adjunct teacher; encourage alumni involvement (e.g., by meeting with alumni groups); have a speakers program; make connections with local practitioners; create a skills-oriented course (e.g., How to Run a Consumer Law Practice); sponsor and support legislation.

XI. Report by Richard Alderman – People's Law School and the Center for Consumer Law and Consumer Complaint Center

Richard Alderman introduced the second day of the Conference, noting again the positive response to the Santa Fe venue and describing current activities of the Center for Consumer Law (Center), including a new Consumer Complaint Center.

He discussed the "law for the lay-person" programs the Center conducts and reported that more than 55,000 people have attended the sessions of the "People's Law School." Richard explained that these programs are very good for developing relationships between the community, the law school, and the bar, and offered to assist anyone who is interesting in starting a "People's Law School" at his or her institution.

He also discussed the new Consumer Complaint Center (CCC), and the "Consumer Dispute Resolution" course at the University of Houston Law Center. The course places students with the CCC to assist consumers with their disputes. The Center receives approximately 300 - 400 complaints a month and works with consumers and the other party to resolve the dispute. The CCC does everything short of filing suit. Richard explained that the program has had great success in resolving disputes, and offers students an opportunity to learn consumer law, while engaging in client counseling and informal mediation.

XII. Class Action Update

Lonny Hoffman is the Associate Dean and Law Foundation Professor at the University of Houston Law Center. He reported that the last two years have been "pretty rough" for class action plaintiffs, with the United States Supreme Court decisions in *Italian Colors* and *Concepcion*.⁷⁰ But there are other important recent developments.

Dean Hoffman began by citing some history: Since 1997, the Supreme Court has tightened the requirements for class actions.⁷¹ In *Walmart*,⁷² the Supreme Court rejected class

certification. Then in 2013, two cases addressed the materiality and predominance requirements.⁷³

When a plaintiff alleges that a class of consumers relied on a false advertisement or injury,

the defendant may argue that there is no commonality because of different suffering levels, e.g., factual dissimilarities. *Amgen* raised a fundamental issue: Does materiality have to be proved at the class certification stage? The Supreme Court held that, i.e., all will fail or prevail in unison. But this did not increase the class certification requirements. Then in *Comcast v. Behrend*,⁷⁴ Justice Scalia seemed to move toward a stricter interpretation. This continued in *Walmart*, taking back some of what *Amgen* suggested. *Comcast* said a class needs two things: (1) a common injury; and (2) the damages must all derive from the same injury. Thus, the plaintiff must prove commonality as to both the liability and the remedy (i.e., the remedy must match the liability). This raises the possibility of single-issue classes, a trend that is likely to increase.

There is also a trend toward a Rule 23 requirement of ascertainability, i.e., all class members must be ascertainable at class certification. *Carrera v. Bayer*⁷⁵ articulates this, to protect absent class members. This may require a dilution of claims.

Dean Hoffman argued that the role of class actions is endangered by this focus on the injury, because class actions also serve a role in discouraging wrongful behavior, and avoiding windfalls to wrongdoers. He said that deterrence, not only the remedy, should be a key factor.

One major change not seen in 2013 concerns the Fair Labor Standards Act (FLSA), which creates a private right of action (including a class action) to enforce claims to pay for employee overtime (but requires an opt-in by class members). This opt-in requirement limits FLSA class actions. In 2011, when *Walmart* reduced other class actions, some plaintiffs switched to arguing that Rule 23 applies to the FLSA, overriding the FLSA limitation to opt-in members. However, the Fifth Circuit rejected this argument.⁷⁶

Nonetheless, Dean Hoffman noted, a singular truth remains with regard to collective actions -- class certification is the crucial stage, and is essential to class actions as a private remedy.

XIII. Innovative Teaching

A. Mark Steiner

Mark Steiner is the Godwin Lewis PC Research Professor and Professor of Law at South Texas College of Law. He began by noting that Consumer Law is on the Texas Bar Examination each year: the bar exam subject includes the Texas Deceptive Trade Practices Act, the Texas Debt Collection Act (TDCA),⁷⁷ FDCPA and Texas Insurance Law. He said that Consumer Law is taught three-to-four times each academic year at South Texas, with a full enrollment each time. His course materials include a chapter on debt collection, with excerpts from twenty-one cases, articles, and media reports.

Professor Steiner said the second greatest outrage among students in the class is the poor evidence commonly offered by debt buyers. He also raised two questions for law teachers: Who is acting like a lawyer in class; who is doing most of the talking? The professor or the students? Professor Steiner emphasizes the latter, using problems (his materials have seventy-five problems, allowing coverage of fifteen problems and student

Dean Hoffman began by citing some history: Since 1997, the Supreme Court has tightened the requirements for class actions.

recitations per class). He bans laptops.

Professor Steiner noted that the FDCPA and TDCPA definitions and scope provisions are different (*e.g.*, this affects when lawyers and creditors are debt collectors). His approach is to raise the problem, and ask the students for their best arguments, including the crucial: why?

B. Ashok Patil

Ashok Patil is a Chair Professor of Consumer Law and Practice for the Ministry of Consumer Affairs, Government of India. His discussion addressed teaching a Consumer Law course in India, with a focus on misleading advertisements, including an explanation of professional and consumer legal education in India. India has a federal system of government, with national law that is implemented by the states. There are exclusive court systems at the state and federal levels for consumer law; he said that sometimes implementation is weak at the state level.

Class actions are viewed as public interest litigation. The Consumer Law course includes a class field trip for students to buy and use advertised cosmetics for two months, typically with no result, suggesting that the advertised claims were false; the students then notify the companies and ask for a response. Then the students file lawsuits in consumer courts. These courts provide simple procedures, and the students can represent themselves. Company lawyers sometimes threaten the students or offer gifts to settle, and sometimes even threaten the school. This research was submitted to the consumer protection agency, which held conferences and has urged law reform. Professor Patil is drafting a proposed amendment.

The goals of the exercise include: consumer law reform; education of the students; and to provide the students with practical experience.

C. Monika Jagielska

Monika Jagielska is the Dean's Deputy on International Co-operation, Faculty of Law and Administration, and Associate Professor of Private and International Law, at the University of Silesia in Katowice, Poland. Her presentation focused on teaching consumer law in formerly socialist countries -- using Poland as the example. She reported that some problems are common throughout much of the world. Common issues relate to, *e.g.*, Bitcoins and other virtual currencies, and privacy. She then described how consumer law developed in the formerly socialist countries of Eastern Europe.

The collapse of the Iron Curtain led to the development of consumer markets. In the 1970s, there was a single civil code in Poland, with no consumer protections; these were viewed as being unneeded in a nationalized economy. There was a basic structure of protective legal concepts, somewhat similar to the West, including standard contract terms and a right to withdraw, but reality did not reflect these basic consumer rights or the schoolbook mythology. By the 1980s, the results had become clear: There were no goods on the shelves, and there were lines for food. Consumer goods were largely unavailable, so there was no use for consumer protections. Citizens did not trust government authorities for consumer protection or anything else.

In the 1990s there was a transition from socialism to a free market. The old rules were rejected. Consumer protection was introduced into the civil code, but many consumers were unprepared and suspicious of the law. There remained a lack of trust in government. Consumer Law was introduced in schools. Many consumer scams were evident, including misrepresentation and bad contracts, because citizens had no background or experience with such transactions. The courts also lacked the needed experience.

The twenty-first century brought accession to the E.U. and E.U. consumer directives, requiring changes in the civil code including separate consumer laws. This represented a major change in Polish law; the only debate was the timetable, not the merits of the change. It was a massive challenge to integrate the E.U. directives into existing Polish law -- and it was not always an improvement. Professor Jagielska said that, even today, many Polish citizens do not understand consumer law and still don't trust the government.

XIV. Consumer Arbitration

Theodore (Teddy) Rave is an Assistant Professor of Law at the University of Houston Law Center. He began by summarizing the Federal Arbitration Act (FAA).⁷⁸ He noted that arbitration is a creation of contract; if there is no contract, there is no arbitration. Professor Rave noted that small consumer claims have a negative litigation value, thus there is a need for class actions. He said that the purpose of arbitration is to prevent class actions, citing an example created by General Mills: If you "liked" Cheerios on Facebook, you agreed to arbitrate claims (this has now changed due to public pressure and a *New York Times* article).

In the 1990s, arbitration clauses typically had extreme terms and often were rejected by courts. Companies then moved to adopt more consumer-friendly arbitration clauses to address the courts' concerns. California courts adopted a blanket rule saying arbitration was largely unconscionable *per se*. However, the United States Supreme Court rejected this in *Concepcion*.⁷⁹

Professor Rae noted that there is a tendency to compare the cost of litigation and arbitration, with the latter being much lower, but argued that the settlement of cases means that much litigation is like arbitration (so that the larger expense of litigation is often a myth). But he noted that arbitration encourages early settlement of small claims, and may be better for the individual consumer than a class action. The Supreme Court recognized this in *Concepcion*.

Nonetheless, Professor Rave said that there are policy risks in this approach -- arbitration reduces the deterrent effect of class actions, by allowing companies to pay only a few small claims. He said that courts are prioritizing the need for compensation of individual consumers over the broader effect of deterrence.

In a class action settlement, there is equal bargaining power, unlike arbitration (where the parameters are determined in an adhesion contract). But review by the courts on contract grounds limits this. In *Concepcion*, the arbitration clause really was effective and favorable to consumers. Thus, as noted, favoring compensation over deterrence may help individual consumers. However, in *American Express Co., et al v. Italian Colors*,⁸⁰ the Supreme Court adopted a formalistic approach that suggests the courts do not want to individually measure the validity of each arbitration clause; this may open the door to more onerous contract terms. Professor Rave said the Ninth Circuit has rejected this but the Sixth Circuit and Tenth Circuit lean the other way, limiting the unconscionability theory as a means to attack arbitration.

He said that this undercuts the incentives for lawyers to

In *American Express Co., et al v. Italian Colors*, the Supreme Court adopted a formalistic approach that suggests the courts do not want to individually measure the validity of each arbitration clause.

seek out wrongdoing via class actions, and may reduce the pressure on companies and arbitrators to provide consumer-friendly protocols. He concluded that the ongoing CFPB initiatives offer the best prospects for reform on behalf of those who oppose arbitration.⁸¹

XV. Computerized Delivery of Consumer Law

Katie Porter is a law professor at the University of California Irvine, where she specializes in consumer and commercial law. In February 2012, she was appointed by California Attorney General Kamala Harris as an independent monitor of the banks in the nationwide \$25 billion National Mortgage Settlement. She described the California Monitor Program's work in taking complaints from over 5,000 California homeowners and engaging mortgage companies in oversight.

Her first point was that technology can be deployed much more effectively to give consumers information and assistance with legal problems. She stressed that this is not legal advice or assistance, in the sense of providing representation. She noted that consumers with legal problems often can be substantially helped by receiving more tailored, usable information than is delivered on most websites or handouts. For example, the California Monitor Program built an interactive, question-and-answer tool that helped consumers determine if they were eligible, as a *prima facie* matter, for National Mortgage Settlement relief. This site delivered legal information using technology and freed up lawyers on staff for investigation and negotiation after consumers had established their eligibility for relief. She described how computerized intake systems can help consumers organize the relevant information and more effectively tell their stories—which is really describing their legal problems.

Her second point related to the use of technology to gather data to further enforcement efforts. She opined that the first line of defense for financial institutions often is: this is a one-off problem. Porter said that data can disprove this factually. Tracking violations using a database also allows the aggregation of data, *e.g.*, comparing market share to the volume of complaints for individual companies. This may defeat a “one-off” defense and facilitate efforts to address violations that harmed thousands of consumers, rather than seeking an individual remedy as traditional attorney representation would do.

XVI. Nonjudicial Foreclosure and Unlawful Detainers

John Campbell teaches at the University of Denver Sturm College of Law. He addressed issues relating to the eviction of homeowners following a nonjudicial foreclosure. He noted that nonjudicial foreclosure is expedited; it happens quickly and (by definition) without judicial review. It has its origins in

English law, developed in the landlord-tenant context. It allows eviction in a summary proceeding, treating the foreclosed homeowners essentially as tenants. The plaintiff must prove: (1) title; (2) unlawful possession; and (3) damages.

Despite its nonjudicial character, Campbell said that the expedited proceeding may have some *res judicata*-like effects, meaning that the former homeowner may have a limited ability to defend by attacking the foreclosure after-the-fact. Statutes in some states prohibit a subsequent inquiry as to title (in other states the result may be the same under the doctrine of collateral estoppel or *res judicata*). However, some states allow judicial review of the foreclosure after-the-fact in the eviction proceeding. Some states allow a collateral attack on the foreclosure after-the-fact only after the eviction, in a separate suit. However, wrongful foreclosure can have adverse effects on the consumer's credit report and in other ways, with a result that the consumer cannot afford to file suit. If so, the eviction becomes a claim suppressant. The foreclosure may even prevent the consumer from renting a new home, and the incentive to litigate is diminished once the house is lost. Courts have generally upheld expedited evictions.

Professor Campbell cited potential solutions that include: elimination of nonjudicial foreclosure as inappropriate in a modern securitization scenario; allowing full foreclosure defenses in evictions following a nonjudicial foreclosure (but he noted that this would allow a *res judicata* defense against a subsequent separate suit for wrongful foreclosure); and a mandatory stay of eviction upon assertion of a defense to prevent irreparable harm.

XVII. Consumer Law from an International Perspective

A. Richard Alderman

Richard introduced this segment by noting that it is difficult to explain to a foreign audience how arbitration works in the U.S., *e.g.*, to preclude judicial review. He explained the benefits of exploring international consumer law issues in this context.

B. Strict Product Liability in South Africa

Corlia Van Heerden is the ABSA Chair in Banking Law at the University of Pretoria, South Africa. She described her goal of expanding the students' minds in the area of South African consumer law, using products liability as an example. Until recently, South Africa lacked a statutory framework for products liability. Judge-made law made the development of products liability law difficult, but a 2003 Supreme Court case was a breakthrough, acknowledging the need for legislative intervention in order to introduce a regime of strict products liability. This led to the 2008 Consumer Protection Act (the Act),⁸² recognizing a no-fault basis for products liability.

The South Africa Consumer Protection Act preserves the consumer's common law rights and also permits reference to foreign law (but expressly prohibits the use of black magic!). There is a heavy reliance on E.U. directives. The Act broadly defines “consumer” to include users and “goods” to include intangible property. The range of defenses received attention, along with the level of proof, and who is liable. The South African legislature considered the cost of litigation to be anti-consumer, and the Act mandates a preliminary mediation procedure.

The Act provides six provisions to facilitate redress, seeking preventative as well as remedial functions and including a recall function. The Act is modeled on the E.U. product liability directive. Anyone in the supply chain is liable, regardless of negligence. This includes service providers, and creates joint and several liability. Damages can include personal injury and property loss.



The Act provides strict products liability but the liability is not absolute. Defenses include: (1) compliance with applicable regulations; (2) the defect did not exist at that stage; (3) the defendant engaged in marketing only; and (4) the defendant merely followed instructions. Also, contributory negligence is a defense. There is a three-year statute of limitations.

There is some ambiguity in the Act, *e.g.*, the definition of “defect,” which incorporates a consumer expectations test, is problematic. Definitions within definitions create further uncertainties. Also, although the draft bill initially made provision for the development risk defense, this defense was not retained in the Act. But there is concern as to the adverse impacts on consumer prices and innovation if no defenses are allowed.

Professor Van Heerden observed that the Act is evidence that South Africa is moving toward a proper mix of strict and fault-based products liability.

XVIII. What’s New at the CFPB?

Kelly Cochran is the Assistant Director for Regulations at the Bureau of Consumer Financial Protection (CFPB). She began by recognizing the role of law professors in creating and supporting the CFPB.

Three years later, the CFPB has 1,300 employees and four main divisions: supervisory; enforcement (including expanded authority beyond that provided by prior law); consumer response; and research. The main areas of non-bank supervision include: mortgages; payday lending; student loans and student loan servicing; credit reports; and debt collection. She said the CFPB conducted 100 supervisory actions in 2013; and 150 were expected in 2014. Compliance management systems are a focus.

With regard to enforcement, there were thirty-one enforcement actions in the one-year period ending in March 2014. These resulted in significant monetary and other relief, including mortgage balance reductions. Fair lending enforcement is also very active. With regard to the consumer response function, payday lending and debt collection are the biggest areas of complaints. The CFPB operates a confidential portal for consumer input, relays the information to the respective institutions, and gives the consumer a right to respond, with possible referral to enforcement staff.

With respect to consumer engagement and empowerment, “Ask the CFPB” has resulted in 300,000 hits per month, helping consumers make major decisions. The research, markets, and regulations division provides a rule-writing function. The CFPB has been busy with the Dodd-Frank Act requirements but is now looking more deeply beyond the Dodd-Frank Act. There is an increased focus on discretionary rule-writing measures, *e.g.*, overdraft protection programs, debt collection, and stored value products.

Research models are being developed -- with a core focus to create new models. More research is scheduled, *e.g.*, the arbitration study, debt collection, and small dollar credit products. Data compilations are crucial, and are being made more accessible. Markets research teams include staff with deep operational experience, *e.g.*, electronic mortgage closings including state law. A goal is to develop and require best practices regarding operational issues and procedures.

What is next? Many consumer issues and areas need attention, beyond the Dodd-Frank Act. Potential solutions include: First, work deeper on existing regulations, supervision and enforcement of new rules, including follow-ups and lookbacks (to review and amend rules). Second, go broader, beyond the Dodd-Frank Act (*e.g.* with regard to mortgages). There is a focus on the four Ds: Deceptive Acts; Debt Traps; Dead-Ends; and

Discrimination. There will be an increased emphasis on discretionary rules; this requires a data-driven process and administrative record. One goal is to generate greater public input through the Internet.

Third, increase the supervision of nonbanks and issue related new rules. The next target is auto lending and finance. Fourth, work smarter, so as to ingrain the DNA for the long-term and work with partners, creating alternatives to rulemaking.

Cochran suggested ways for academics and practitioners to engage with CFPB, *e.g.*: provide input; respond to CFPB outreach; participate in advisory boards; and encourage consumer in-



Speakers' dinner in Santa Fe.

put. Use the “Tell your story” feature on the CFPB website. She also suggested creating university partnerships with the CFPB.

IXX. Observations and Conclusion

Along with presenting the usual diverse views on a wide variety of issues, the 2014 Conference again highlighted a basic conundrum in consumer protection law, which arguably should also be a focus of legal education and policymaking. There is no shortage of sharp (and in some cases outright deceptive, unfair or abusive) practices, naïve consumers and poor decisionmaking, and the ever-increasing complexity of our laws and society seem to exacerbate these problems.⁸³ It is not a challenge to identify examples. It is, however, a challenge to devise laws, regulations and processes to minimize the damage and provide appropriate redress for these problems, without impairing desirable and legitimate transactions.

This challenge goes to the basic function of a legal system, as a means to order society and provide a dispute resolution system. And it goes to the heart of a legal education and the legal profession. If we get it wrong, in any direction, consumers will suffer (even if we as lawyers and educators do not).

If legal education is to survive in its traditional role, academics must seek to overcome our sometimes myopic (and quite natural) instincts to view these issues entirely as advocates of narrow interests, and instead recognize broad and diverse perspectives, costs and benefits. This is not to deny the importance of narrow advocacy, but only to suggest that effective advocacy as to doctrinal issues in an academic setting also suggests the need for recognition that there are multiple views, costs and benefits in every policy choice.

Richard Alderman’s Conference is to be applauded for providing another opportunity for illustration and emphasis of all these points.

** Professor, Oklahoma City School of Law. He also serves as editor of The Consumer Finance Law Quarterly Report and was editor of The Annual Survey of Consumer Financial Services Law in The Business Lawyer, 1989-2013.*

<http://11ssrn.com/abstract=2426381>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Described in Pridgen, *supra* note 7 and noted *supra* this text at Part II.A.

¹¹ Jeff Sovern & Ira Rheingold, *To Catch a Creditor*, N.Y. TIMES (July 10, 2013), available at <http://www.nytimes.com/2013/07/11/opinion/to-catch-a-creditor.html?r=0>

¹² See also Timothy E. Goldsmith & Nathalie Martin, *Testing Materiality Under Unfair Practices Acts: What Information Matters When Collecting Time-Barred Debts?*, 64 CONSUMER FIN. L. Q. REP. 372 (2010).

¹³ See generally Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed By Debt Buyers*, 26 LOYOLA CONSUMER L. REV. 179 (2014) (provided as part of the Conference materials). Rubin noted that this is an issue likely to be addressed by the CFPB. See also, e.g., Lauren Compisi, et al, *Federal and Municipal Developments Affecting Debt Collection, Foreclosure, Servicemember and FCRA Requirements*, 67 CONSUMER FIN. L. Q. REP. 256, 263 (2013).

¹⁴ See 15 U.S.C. § 1692e(5).

¹⁵ McMahon v. LVNV Funding, LLC, F.3d 1010 (7th Cir. 2014).

¹⁶ See *id.*

¹⁷ Buchanan v. Northland Group, No. 13-2523. All of these issues and cases are discussed in the program materials provided for the Conference. See Richard J. Rubin, *Circuit Splits Under the FDCPA – May 2014*, program materials for Teaching Consumer Law 2014 (Center for Consumer Law 2014).

¹⁸ 80 F.3d 148 (5th Cir. 1996).

¹⁹ 133 S. Ct. 1166 (2013).

²⁰ Compare, e.g., Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991) with Clark v. Absolute Collection Service, Inc., 741 F.3d 487 (4th Cir. 2014). Other relevant case citations are provided in the Conference program materials. See Rubin, *supra* note 17.

²¹ See *supra* note 20.

²² See Rubin program materials, *supra* note 17, at 4.

²³ *Id.* at 8.

²⁴ *Id.*

²⁵ *Id.* at 7.

²⁶ *In the Matter of Apple, Inc.*, Federal Trade Commission, Docket No. C-444 (Mar. 25, 2014), available at <http://www.ftc.gov/sites/default/files/documents/cases/140115appleagree.pdf>.

²⁷ FTC Staff Report, Paper, Plastic . . . or Mobile?, an FTC Workshop on Mobile Payments (Mar. 2013), available at www.ftc.gov/os/2013/03/130306mobilereport.pdf.

²⁸ <http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf>.

²⁹ *In re Aaron's, Inc.*, Federal Trade Commission, Consent Order, File, No. 1223264, available at <http://www.ftc.gov/sites/default/files/documents/cases/131022aaronsagree.pdf>.

³⁰ EMMA COLEMAN JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE, RACE, GENDER, IDENTITY AND ECONOMICS: CASES AND MATERIALS* (2d ed. Foundation Press 2011).

³¹ Professor Engel’s program materials for the Conference, entitled “Teaching the Financial Crisis Through Consumer Law,” explain her approach and will be published at: 18 J. OF CONSUMER & COMM. L. [in press] (2015).

³² It is a federal crime to file a false financial statement, so the students do not actually complete applications.

³³ Professor Hill’s remarks were drawn from an article forthcoming in this issue of the Journal of Consumer and Commercial Law. See Julie Andersen Hill, *Virtual Currencies and Federal Law*, 18 J. CONSUMER & COMM. L. [in press] (2015).

³⁴ See, e.g., Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, <https://bitcoin.org/bitcoin.pdf> (2008).

³⁵ See 18 U.S.C. § 336 (2014).

¹ Reports on previous Conferences are available as follows: 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); Alvin C. Harrell, *Teaching Consumer Law, Part Four*, 12 J. CONSUMER & COMM. L. 8 (2008); and Alvin C. Harrell, *Teaching Consumer Law, Part Five*, 14 CONSUMER & COMM. L. 87 (2011). Your author was unable to provide a report on the sixth (2012) conference due to a scheduling conflict.

² Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 UNIV. PA. L. REV. 1 (2008).

³ Kathleen C. Engel & Patricia McCoy, *A Tale of Three Markets*, 82 TEX. L. REV. 439 (2003); Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255 (2002).

⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

⁵ Oren Bar-Gill, *Seduction by Plastic*, 98 NW. UNIV. L. REV. 1373 (2004).

⁶ Steven M. Graves & Christopher L. Peterson, *Predatory Lending and the Military: The Law and Geography of “Payday” Loan in Military Towns*, 66 OHIO ST. L. J. 653 (2005).

⁷ See Dee Pridgen, *Wrecking Ball Disguised as Reform: ALEC’s Model Act on Private Enforcement of Consumer Protection Statutes*, 39 N.Y. UNIV. REV. OF LAW AND SOCIAL CHANGE [in press] (2015), available at

³⁶ See: 31 U.S.C. § 5330 (2014); 31 C.F.R. § 1022.380 (2014).

³⁷ FIN. CRIMES ENFORCEMENT NETWORK, DEP'T OF TREASURY, FIN-2013-G001, GUIDANCE: APPLICATION OF FINCEN'S REGULATIONS TO PERSONS ADMINISTERING, EXCHANGING, OR USING VIRTUAL CURRENCIES I (Mar. 18, 2013), available at http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2013-G001.pdf.

³⁸ See: Indictment, U.S. v. Faiella, 14-CRIM-243 (S.D.N.Y. Apr. 10, 2014); Press Release, U.S. Attorney's Office, Southern District of New York, Bitcoin Exchanges Plead Guilty in Manhattan Federal Court In Connection with the Sale of Approximately \$1 Million in Bitcoins for Use on the Silk Road Website (Sept. 4, 2014), <http://www.justice.gov/usao/nys/pressreleases/September14/FaiellaShremPleasPR.php>. See generally Marcus A. Asner, Andrew Joseph Shipe & Alexandra L. Mitter, *Taming the "Wild West": Regulators Take Aim at Unregulated Virtual Currencies*, 67 CONSUMER FIN. L.Q. REP. 397 (2013).

³⁹ I.R.S. Notice 2014-21, 2014-16 I.R.B. 938, available at <http://www.irs.gov/pub/irs-drop/n-14-21.pdf>.

⁴⁰ Steven Russolillo, *Yellen on Bitcoin: Fed Doesn't Have Authority to Regulate It in Any Way*, Wall St. J. Blog (Feb. 27, 2014, 12:43 PM), <http://blogs.wsj.com/moneybeat/2014/02/27/yellen-on-bitcoin-fed-doesnt-have-authority-to-regulate-it-in-any-way/>.

⁴¹ See, e.g., Marjorie J. Pierce & Jeremy T. Rosenblum, *DOJ Hits Bank Target in "Operation Choke Point"*, 67 CONSUMER FIN. L.Q. REP. 243 (2013) (discussing DOJ efforts to regulate third-party payment processing through "Operation Choke Point").

⁴² A revised version is being published in the Consumer Finance Law Quarterly Report. See Alvin C. Harrell, *Ten Current Issues Affecting Consumer Financial Services Law*, 68 CONSUMER FIN. L.Q. REP. [in press] (2014).

⁴³ See, e.g., Nick Timiraos & Deborah Soloman, *U.S. Backs Off Tight Mortgage Rules*, Wall St. J., May 14, 2014, at A1 (noting this problem).

⁴⁴ *Id.* See also, e.g., KPMG: Compliance Is Drag on Bank Growth, 74 DIRECTORS & TRUSTEES DIGEST No. 10 at 1 - 2 (Oct. 2014) (40% of bankers surveyed cited regulatory limitations on products and services as the factor having the greatest negative impact).

⁴⁵ See, e.g., John L. Culhane, Jr., *CFPB Impact on Student Lending and Loan Servicers*, 68 CONSUMER FIN. L.Q. REP. 40 (2014).

⁴⁶ See *supra* this text Part III.

⁴⁷ See, e.g., L. Gordon Crovitz, *The U.N. Trumps Silicon Valley*, WALL STR. J., Oct. 20, 2014, at A17.

⁴⁸ See, e.g., Stephen F.J. Ornstein, Scott D. Samlin, R. Colgate Selden & Rinaldo Martinez, *At Long Last . . . New Mortgage Loan Disclosures Issued: TILA and RESPA Engaged! Wedding Set for August 2015*, 67 CONSUMER FIN. L.Q. REP. 323 (2013).

⁴⁹ See, e.g., Ryan T. O'Shields, *Historic Literature Presages Dodd-Frank Act as a Death Knell for Community Banks*, 67 CONSUMER FIN. L.Q. REP. 326 (2013).

⁵⁰ See, e.g., *supra* this text Part VI.

⁵¹ See, e.g., *infra* this text Part XVIII.

⁵² See, e.g., Alvin C. Harrell, *Commentary, Reflections on the Mortgage, Housing and Financial Crisis*, 68 CONSUMER FIN. L.Q. REP. 123 (2014).

⁵³ It can be noted that the creditor who finances the consumer's purchase of the damaged vehicle also is at risk in this scenario. It also can be noted that enactment by the states of a modern, uniform certificate of title statute such as the Uniform Certificate of Title Act (UCOTA) would go a long way toward alleviating these problems, by preventing this "laundering" of titles; however, the efforts to enact UCOTA have not received significant support from either the industry or consumer advocates.

⁵⁴ See *supra* Part III.

⁵⁵ Codified at 47 U.S.C. § 227.

⁵⁶ Codified at 15 U.S.C. §§ 1681 - 1681x. See also Regulation V, 12 C.F.R. pt. 1022.

⁵⁷ Douglas v. Convergent Outsourcing, 765 F.3d 299 (3d Cir. 2014).

⁵⁸ See, e.g., Joasia Al Luzak, *Privacy Notice for Dummies? Towards*

European Guidelines on How to Give 'Clear and Comprehensive Information' on the Cookies' Use in Order to Protect the Internet User's Right to Online Privacy, Amsterdam Law School Legal Studies Research Paper No. 2013-65, Centre for the Study of European Contract Law Working Paper No. 2013-12, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2350209.

⁵⁹ See *id.*

⁶⁰ *Id.*

⁶¹ See, e.g.: Parker v. South Eastern Railway, 2 CPD 416 (1877); Harvey v. Ascot Dry Cleaning Co Ltd., NZLR 549 (1953); Spurling Ltd v. Bradshaw, 2 All ER 121 (1956), 1 WLR 461 (1956); Thornton v. Shoe Lane Parking, 2 QB 163 (1971), 1 All ER 686; MacRobertson Miller Airline Services v. Commissioner of State Taxation (WA), 133 CLR 125 (1975), 8 ALR 131, 50 ALJR 348; Oceanic Sun Line Special Company Inc. v. Fay, 165 CLR 197 (1988), 79 ALR 9, HCA 32 (1988); L'Estrange v. Graucob, 2 KB 394 (1943); Toll (FGCT) Pty Ltd v. Alphapharm Pty Ltd, 219 CLR 165 (2004), 211 ALR 342; HCA 52 (2004), BC200407463.

⁶² See *supra* note 61. The idea being that either party to an ongoing relation constituting essentially a series of separate contracts can propose a change in terms going forward, and alternatively either party can then terminate the relation if they don't agree.

⁶³ There is usually a good discussion and update on these issues under U.S. law, going back several years, in the American Bar Association Annual Survey of Cyberspace Law. See, e.g.: Juliet M. Moringiello & William L. Reynolds, *Electronic Contracting Cases 2009 - 2010*, 66 BUS. LAW. 175 (2010); Juliet M. Moringiello & William L. Reynolds, *Electronic Contracting Cases 2008 - 2009*, 65 BUS. LAW. 317 (2009).

⁶⁴ *Id.*

⁶⁵ See: R. A. Hillman & J. J. Rachlinski, *Standard Form Contracting in the Electronic Age*, 77 N.Y. UNIV. L. REV. 429 (2002); R. A. Hillman, *Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications*, in JANE WINN (ED.), CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY' 283 (Ashgate Publishing Ltd, Aldershot, England 2006). See also *supra* Part IX.A.

⁶⁶ Lord Denning in Spurling Ltd v. Bradshaw, 2 All ER 121 (1956), 1 WLR 461 (1956).

⁶⁷ Spreadex Ltd v. Cochrane, EWHC 1290 (Comm) (Eng. & Wales 2012).

⁶⁸ See, e.g., descriptions of various clinics in the report on the 2010 Conference, at Alvin C. Harrell, *Teaching Consumer Law, Part Five*, 14 J. CONSUMER & COMM. L. 87, 94 - 95 (2011).

⁶⁹ See, e.g., U.S. Bankruptcy Code, as codified at 11 U.S.C. § 523 (non-dischargeable debts).

⁷⁰ American Express Co., *et al v.* Italian Colors, 133 S.Ct. 2304 (2013); AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011). See also *infra* Part XIV.

⁷¹ See, e.g.: Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds, 133 S.Ct. 1184 (2013); *Italian Colors*, 133 S.Ct. 2304.

⁷² Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011).

⁷³ See discussion immediately below and cases cited *infra* at notes 74 - 75.

⁷⁴ Comcast Corp. v. Behrend, 133 S.Ct. 1426 (2013).

⁷⁵ Carrera v. Bayer Corp, 727 F.3d 300 (3d Cir. 2013).

⁷⁶ Roussell v. Brinker Intern., Inc., 441 Fed. Appx. 222 (5th Cir. 2011).

⁷⁷ Tex. Fin. Code tit. 5 ch. 392, available at <http://www.statutes.legis.state.tx.us/Docs/FI/htm/FI.392.htm>.

⁷⁸ Codified at 9 U.S.C. §§ 1 - 16. See also *supra* Part XII.

⁷⁹ AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740 (2011).

⁸⁰ 133 S.Ct. 2304 (2013).

⁸¹ See, e.g., Christine A. Scheuneman, Joseph T. Lynlak, III & Amy L. Pierce, *The CFPB's Arbitration Study - A Warning to Consumer Financial Service Companies*, 68 CONSUMER FIN. L.Q. REP. 32 (2014).

⁸² See also *supra* Part IX.B.

⁸³ Which are not unknown in other contexts, even within the legal profession.