Teaching Consumer Law

In Our Popular Culture and Social Media

By Alvin C. Harrell*

I. Introduction

This report describes the 2016 conference on "Teaching Consumer Law in our Popular Culture and Social Media," held in Santa Fe, New Mexico on May 20-21, 2016 [the Conference].[1] The Conference was sponsored by the Center for Consumer Law at the University of Houston Law Center, in cooperation with the National Association of Consumer Advocates and the University of New Mexico. Conference Co-Chair Richard M. Alderman[2] introduced the program and Co-Chair Nathalie Martin,[3] noting that this was the eighth edition of the bi-annual program; the first being held in 2002.[4]

As with the reports on previous conferences in this series, this report is intended to reflect the comments of the Conference participants and not, necessarily, the views of your author. However, there is an ever-present risk of error, and, as in past reports, your author is responsible for any such.

II. Consumer Law Topics

A. Are FDCPA Validation Notices Valid?

Jeff Sovern of St. John's University School of Law noted the alleged incidence of failures in the disclosure approach to consumer credit protection under the Truth in Lending act [TILA]. So, he queried, what about the viability of disclosure as required in the Fair Debt Collection Practices Act (FDCPA) for the section 1692g validation notice [the notice]? Are these FDCPA disclosures effective? What about the writing requirement? The thirty-day deadline? The prohibition on overshadowing?

Professor Sovern presented the results of an empirical study (the study), that focused on the notice as upheld in a Seventh Circuit case,[5] and also compared a simpler notice drafted by the National Consumer Law Center [NCLC], which tested as being more readable . [6] The study created four sample letters with different sample notices and displayed them to consumers. The consumers then answered questions that indicated their understanding of the notices. Professor Sovern received 700- plus survey responses [the responses, or respondents].

On most questions, the respondents who saw a debt collection letter with the notice approved by the Seventh Circuit did not show significantly better understanding of the validation notice than respondents who saw an otherwise identical letter without any validation notice at all. More than half the respondents were mystified by the disclosure about when the collector would assume the debt to be valid. Many did not take in that they had a right to verification of the debt, and many who did thought that an oral request would protect their rights when the notice indicated that a writing is required. On some questions, respondents shown the validation notice did worse than respondents who did not see a validation notice.

At least a third of the respondents said that if they missed the deadline in the thirty-day notice, either they would have to pay a debt they didn't owe or could not defend against a suit to collect the debt.

Professor Sovern noted all courts that have considered the issue hold that consumers are charged with a duty to read the FDCPA notice, but he opined that this survey indicates the shortcomings of this approach.

B. An Empirical Look at State UDAP Statutes

Prentiss Cox teaches consumer protection law and other subjects at the University of Minnesota School of Law. He presented an empirical study in progress [the study] examining the effectiveness of public enforcement of laws governing Unfair and Deceptive Acts and Practices [UDAP].[7] The study will examine UDAP cases that have reached a final resolution; it excluded *per se* violations. The study covers 2014 only. The majority of the cases were brought by state Attorneys General. The Bureau of Consumer Financial Protection [CFPB] was just ramping up -- there were only seventeen federal cases. There were nineteen multi-state cases, one-half with a federal partner, indicating that federal agencies are more likely to cooperate with states than with other federal agencies.

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The study will seek to provide a descriptive analysis as to what UDAP enforcers do, *e.g.,* who are the targets, and what is their location? Preliminary results show that many of the targets appear to be small entities. How were they resolved? Preliminary results show that no UDAP enforcer appears to have lost a case. It was also common to mix UDAP and non-UDAP claims, but Cox said that some states don't use their UDAP statute extensively.

C. When Peace Is Not the Goal of a Class Action Settlement

Teddy Rave teaches at the University of Houston Law Center, covering subjects that include civil procedure, complex litigation, constitutional law and election law. He began by noting that class action settlements are common and usually benefit both sides. This "peace" is good for both sides, and more efficient than protracted litigation. Plaintiffs can deliver peace by agreeing to satisfactory terms offered by the defendant. Usually this includes settlement of the class and related individual claims.

But it does not always work that way: The *Trans Union* privacy litigation settlement was not designed for peace, in that future individual claims were not barred.[8] The parties settled only the right to proceed on a class action basis; plaintiffs were free to march right back into court and sue individually. This begs the question: Why would a defendant agree and pay to settle a class action without achieving peace? In *Trans Union,* the claimed violations of the Fair Credit Reporting Act [FCRA] created a massive potential class liability. There was a 190 million-member class, with $190 billion in potential damages. The value of the resulting settlement was protection from this class liability, much like an *ex post* version of the class action waivers that have become ubiquitous in arbitration clauses. The modest individual claims remaining represent a small individual risk -- most cases won't be brought despite the prospect for individual statutory damages. Trans Union is essentially betting that most individuals won't litigate, so it doesn't need protection from this risk. Moreover, the exclusion (and therefore preservation) of these individual claims allowed a lower class settlement amount. Thus, Trans Union agreed to class certification and to settle the class action liability, in order to reduce the risk of massive class action liability.

The *Trans Union* settlement allowed the defendant and class counsel to receive a handsome settlement with low litigation risks and costs. Does this illustrate the risk of a sell-out? Class members are not precluded from bringing their individual cases, and they received some benefit as class members. Internet advertising produced 100,000 claims, despite the lack of any actual harm. Still, that was only a fraction of the 190 million potential claims, meaning that the deterrent effect was far less than if a class

action had gone forward. But, given that the statutory damages available were not tied to any measure of actual harm from the defendant's conduct, Professor Rave concluded that the defendant's payments to settle class members' rights to proceed as a class may have actually come closer to an optimal level of deterrence than making Trans Union pay $190 billion in statutory damages. But he noted that this sort of settlement structure is not suitable for negative-value claims (i.*e.,* claims that are too small to be viable on an individual basis).

D. Debt Collection Update

Dick Rubin is a well-known consumer protection lawyer with a national practice based in Santa Fe. He presented a Fair Debt Collection Practices Act [FDCPA] update. He noted that debt collection complaints comprise the largest number of complaints to the CFPB, with a focus on intrusive telephone collection practices. He also noted two recent and important United States Supreme Court decisions, in the *Gomez* and *Spokeo* cases.[9] In *Gomez*, the Court held that an offer of judgment does not moot the issues. In *Spokeo,* he opined, the Court punted – in a good way – reaffirming its Article III case or controversy standing and jurisdiction caselaw without disturbing extant jurisprudence.

Debt collection complaints comprise the largest number of complaints to the CFPB.

Rubin then noted *Sheriff v. Gillie,*[10] an unusual FDCPA class action. The State of Ohio [State] hired private lawyers to collect debts owed to the State. The State required the private lawyers to send a letter on the State Attorney General's [AG] letterhead - - it was argued that this was false and misleading under the FDCPA (although the letters identified the lawyer as a special counsel for the AG). The State argued that this was exempt from the FDCPA. The court did not reach this issue, because it found that the practice was not deceptive. The lawyer was designated as a special counsel acting as an agent for the State AG, and thus was not misleading. As the letters were truthful, the other issues were not addressed.

Rubin said that *Spokeo* was intended by the industry to stop class actions for statutory damages, and that this was *Edwards* redux.[11] The basic question was: Does a case or controversy require actual damages? Or can Congress create an injury in the form of statutory damages? Rubin observed that everyone expected a five-to-four loss for consumers, but Justice Scalia's death changed this. *Spokeo* concerned a FCRA violation due to errors in a credit report; the United States Court of Appeals for the Ninth Circuit said this injury was sufficient (as likely to occur, even without actual damages). The Supreme Court remanded (not reversed), directing the Ninth Circuit to reanalyze the distinction between the standards of "particularized" and "concrete." Justice Ginsberg said that statutory damages will meet the required test, even without actual damages, because there is a particularized and concrete injury. Thus, a mere disclosure failure would be sufficient. Rubin noted that the Court's failure to reverse was a victory for class actions, as it essentially continues prior law.

E. Payments Update

Julie Hill is a Professor of Law at the University of Alabama School of Law, where she teaches banking and commercial law subjects. She provided an update on payment law issues, including overdrafts and illegal payments.

Professor Hill noted that the Federal Reserve revised Regulation E, effective 2010, to prevent institutions holding consumer accounts from charging an overdraft fee for debit card transactions unless the consumer has consented to debt overdraft protection.[12] Professor Hill reported that a Federal Reserve Bank of Boston survey indicates that the number of debit card overdrafts has declined since the changes, though the revision has not eliminated the problem.[13] In 2012-2013 a Pew study asked if consumers remembered opting-in to overdraft protection programs -- it reported that most did not.[14] Professor Hill also noted there has been litigation regulatory enforcement actions involving financial institutions' efforts to implement the new opt-in requirements.[15]

Professor Hill also noted a new issue in overdraft fees: available balance disputes. These cases often target credit unions, which may charge for overdrafts based on the customer's available account balance rather than the current balance. In some cases, the available balance may be lower than the actual balance because debit card authorizations and holds on deposits of checks in collection[16] are not included in the available balance. Using the available balance may cause the consumer to incur unanticipated overdraft charges. It appears that if a financial institution uses the available balance, the institution should disclose the practice. Orange County's Credit Union has already settled a class action lawsuit involving available balance overdrafts[17] and other class actions suits are percolating.[18]

On the issue of consumer overdraft fees Professor Hill reported that the CFPB has mostly conducted studies only on these issues,[19] with only a few enforcement actions (such as *Regions Bank*).[20] However, the CFPB may become more active in overdraft enforcement in the future.[21]

Regarding illegal payments, Professor Hill noted that anti-money laundering requirements are receiving renewed emphasis, and there is a danger that this may discourage legitimate transactions in underserved areas.[22] For example, banks are closing branches on the Mexican border to avoid money laundering concerns.[23] This may mean that needed money transfers to poor consumers are being curtailed.

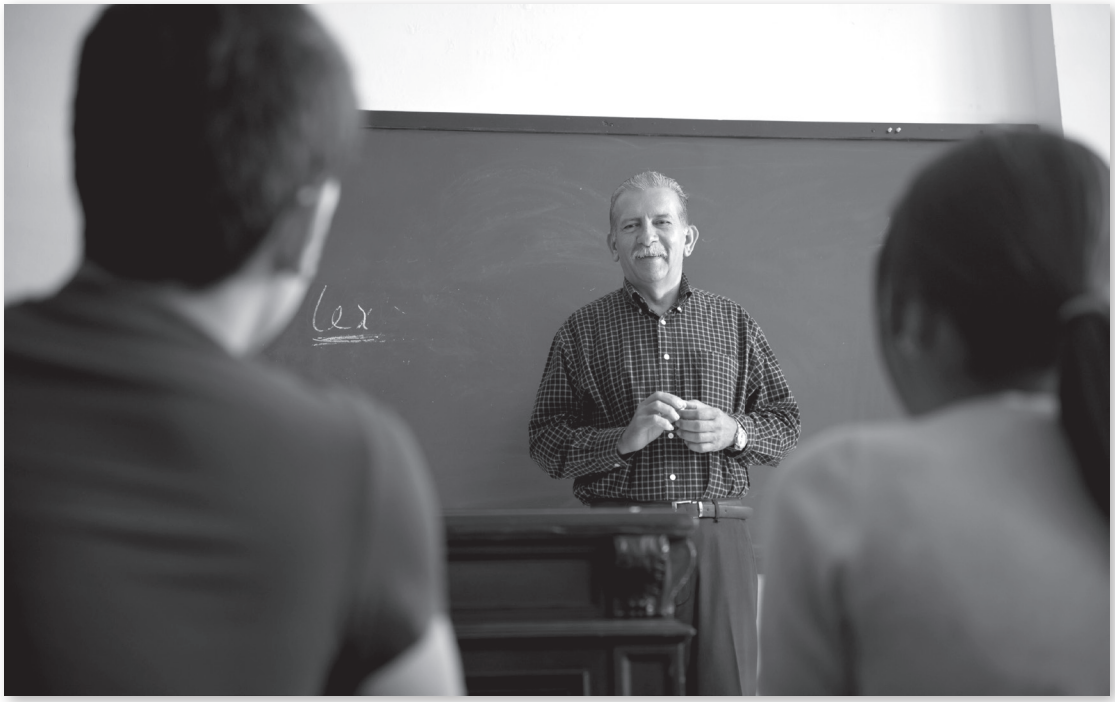
F. An Overview of Developments in Consumer Credit

Your author presented a sequel to his earlier paper for the 2014 conference,[24] this time entitled "Ten More Trends and Developments in Consumer Financial Services Law,"[25] noting that, although many of the obvious candidates for inclusion on this list were covered in the earlier paper, there are still many "hot topics" in this area of law, so that coming up with ten more was not difficult.

The ten topics identified and covered this year were:

- Plight of the Millennials;
- Impact of Technology;
- The Deleveraged Economy;
- Abusive Practices and the Role of the CFPB;
- Emerging Alternatives to Traditional Consumer Financial Services;
- The Scope of CFPB Jurisdiction;
- State Regulation of Out-of-State Internet Lenders;
- The *Madden* Case (federal preemption);
- The *Luis* Case (federal asset freezes); and
- The *MetLife* Case (designation of systemically-significant entities).[26]

With regard to The Deleveraged Economy,[27] your author opined that the crackdown on subprime mortgage lending since 2006 means that (with relatively few exceptions for subsidized target groups) only prime mortgage loans have been originated, and sometime soon this should mean the end of the recent high volume of home mortgage foreclosures.[28] During the



subsequent audience participation session, Suffolk University Professor Kathleen Engel disagreed, noting that a large number of mortgage loans were modified during the foreclosure crisis pursuant to various loan modification programs, and many of these are now going back into default again, suggesting that yet another wave of mortgage foreclosures may be on the way. Your author concedes that this is a significant possibility, and takes this opportunity to also observe that, no matter how cautious and prudent the underwriting, when an asset bubble has been created (*e.g.,* by very low interest rates and an accommodative monetary policy) and then bursts, there will be foreclosures. There is clearly some risk of that today,[29] not only in some housing markets but in commercial real estate as well.[30]

III. Teaching Consumer Law

A. Teaching Consumer Law Based on Performance-Based Learning

Marie Jull Sorensen of Aalborg University, Denmark, discussed a teaching exercise in which her students created a web site for consumer sales transactions that conformed to the applicable legal requirements. This has similarities to the concept of experiential learning in U.S. Professor Sorensen teaches Danish and E.U. consumer law. She found that lectures alone did not increase student interest. Her performance-based learning [PBL] approach follows the Aalborg PBL model, though it is not fully implemented in this context due to the need to also teach doctrinal law.

Professor Sorensen noted that teamwork affects the brain and the learning process. In the PBL model, courses are tailored to support the project. Cooperative efforts are a driving force, including knowledge sharing; cooperative decision-making; and mutual feedback. Features include:

- a problems orientation;
- integration of theory and practice;
- participant directions, with teacher supervision;
- a team-based approach;
- collaboration and feedback.

The goal is to raise the students' level of learning. The results include a high completion rate, thus helping students without a strong academic background. The sessions consist of seven workshops of five and one-half hours each. Each session includes a lecture, group work and class discussion. This is fundamentally different from a book-based approach; some students miss this overview, but most achieve their own overview.

One workshop focuses on the sharing economy. The professor teaches for thirty minutes, then becomes a supervisor. The students are encouraged to draw mindmaps. The students choose a chair to help organize the session, then return to the classroom afterward to discuss the results. The approach is problem- and research-based. The students create power-point presentations, and discuss potential directives, *e.g.,* regarding Uber and AirBNB. The process is helpful even if the results are not.

In another project, the students create a matrix to describe Danish contract law. There is a chapter on reflection to assess learning objectives. These are met but at some expense to broad superficial knowledge -- Professor Sorensen reported that in the PBL approach there is more in-depth learning at the expense of broader knowledge.

B. Bringing the Outside in — Creating Experiential and Hands-On Opportunities

Richard Frankel of the Drexel University Thomas R. Kline School of Law, where he directs the Appellate Litigation Clinic, continued the discussion of experiential learning techniques, which, he said, provide a more effective learning experience.[31] This includes: seeking skills development; a deeper internalization of knowledge; reaching those with different learning styles; and an increased understanding of real-world issues. His course is a first year (1L) course elective. It meets once each week, for two hours' credit.

For one course assignment, there is a debt collection simulation. The students form debtors and creditors teams; they have two weeks to resolve the issues. Typically they have no statutory background. In Part 1 of the exercise the students log their communications; and examine issues such as: How did you feel? In Part 2 they study the FDCPA and other statutory structures and analyze their prior behavior under the law. This generates sympathy for both sides, and creates a rubric for evaluation.

A second hands-on opportunity involved client-based interviews: Last semester a former client provided a prototype-issue interview by Skype. This produced many teachable moments. Students may ask inappropriate questions, such as: "What is your problem?" Students are often abrupt and lack communication skills. This is not graded. But the students became engaged.

The third stage of the course focuses on Payday/Pawn transactions: Actual transactions are investigated by students, then analyzed. However, payday lending is illegal in Pennsylvania. This made the students think, where else can you go? The resulting exposure to creditor marketing is instructive. In the future, more interaction with live clients is planned, with help from legal aid.

C. How to Create and Energize Consumer Law in the Curriculum and Academy

Katherine Porter is a Professor of Law at the University of California, Irvine, where she teaches commercial and consumer law subjects, including bankruptcy, mortgage foreclosure and credit cards. She is the author of a new consumer law casebook[32] and a leading bankruptcy casebook,[33] among other publications. She began her presentation by issuing a call to action to build an academic community dedicated to consumer law. She analogized to the success of the Olin Law and Economics Foundation, which encourages a market-based approach to law, and identified the importance of a powerful counter perspective. Professor Porter then queried: What is consumer law? She noted that one cannot energize an undefined concept. But should it be a definition of exclusion (*e.g.*, by excluding non-consumers)? And, who is a consumer? Consumer law is a core component of business law, but many law firms don't recognize this or list consumer law as an area of practice. Instead, consumer law typically is treated as a component of other areas of practice, including "commercial" litigation or banking law or general business counseling.

Internationally, consumer law is primarily centered on sales transactions.

Professor Porter then defined consumer law as the study of how individual people engage in marketplace transactions with businesses. Within well-established academic topics, she posited consumer law as the statutory framework that addresses weaknesses in the doctrines and theories of tort law and contract law. She then proposed a test for the audience, inviting each attendee to quickly list the elective courses a student should take to prepare for a consumer law practice. Your author made the following list:

- commercial paper and payments;
- secured transactions;
- electronic commerce;
- debtor-creditor law;
- bankruptcy;
- consumer law; and
- healthcare law.

Professor Porter then provided her list, which included most of the above plus:

- remedies;
- litigation skills classes;
- class actions or complex litigation;
- consumer finance;
- residential real property law;
- landlord-tenant law;
- immigration law;
- poverty law; and
- consumer protection clinic.

Professor Porter urged academics to: create a Consumer Law Society for law students; organize a Scholars of Consumer Law conference to compliment the Teaching Consumer Law Conference; advocate for the hiring of full-time consumer law faculty; and encourage junior faculty to engage in teaching and scholarship related to consumer law.

D. Starting Millennials Out Right: Consumer Law for 1Ls

Neil L. Sobol teaches at Texas A&M University School of Law, and is the school's Director of Legal Analysis, Research & Writing. He noted that about two-thirds of U.S. law schools do not offer a course on consumer law. Those that do offer a course typically do so as an upper-division elective with limited times during a student's tenure in law school, meaning (among other things) that many students do not take the course. To your author, this is an unfortunate reflection of the widespread failure of the academy (and, less surprisingly, the larger society) to recognize the importance of transactional law, including contract, commercial and consumer law (except, notably, in academia where the subjects are commonly tested on the bar exam).[34] As a result, Professor Sobol noted, consumer law not only takes a back seat, sometimes it is not even in the car. Millennials now outnumber all other generations, and (by-and-large) they are being educated without consumer law.

Millennials, he noted, have seven core traits:[35]

- They believe they are "special," having been told so from birth. Thus, they have high expectations.
- They have been sheltered; and they need encouragement.
- They are team oriented -- they like to join groups.
- They are confident.
- They are high achievers (perhaps due partly to grade inflation!).
- They feel pressured and become multi-taskers.
- But, in many ways, they are still conventional.

Why do they need consumer law? Their generation faces unprecedented "student loan debt, poverty and unemployment" levels.[36] They need and use consumer transactions, often complicated by new technologies, and in doing so face some unique challenges.[37]

To capitalize on student interest in consumer issues, Professor Sobol advocates introducing consumer law exercises and scenarios in required first-year classes. For example, in his writing and research classes, he has assigned research projects involving the FDCPA, in which students are asked to identify potential violations, determine if a debt is covered by the FDCPA, and assess whether a collector is one who "regularly collects debt" for purposes of the FDCPA. Students submit e-mail and traditional memorandum assignments in response to these questions. Additionally, students can be assigned letter writing assignments based on their findings – e.g., a demand letter to the collector or an advice letter to the client.[38] Professor Sobol also recommends addressing consumer law topics in first-year doctrinal classes – e.g., a shrink-wrap agreement in Contracts, a landlord-tenant dispute in Property, an identity-theft problem in Criminal Law. Providing students with consumer law topics in their first-year courses can generate interest and demand for upper-division consumer law courses and clinical offerings.

IV. Teaching Consumer Law Around the World

A. Introduction to Asian Consumer Law

Geraint Howells is Chair Professor of Commercial Law and Dean of the School of Law at City University of Hong Kong and former President of the International Association of Consumer Law, has held various academic positions in the U.K., and

is the author of numerous publications. He noted that, internationally, consumer law is primarily centered on sales transactions. In Hong Kong commercial law comprises three topics, one of which is consumer law. U.S. consumer law is not on the agenda with the EU model often being the reference point. Although consumer law teaching elsewhere tends to focus on commercial law, including sales, emerging consumer issues include telecommunications and utilities. One challenge is to transmit old consumer law concepts into new consumer issues. In the U.K., there is a general agreement that reasonable consumer law is a good thing. In contrast, Asian consumer law is roughly where UK consumer law was thirty years ago.

Professor Howells noted that the common law countries in Asia all have the basic English system, as modified. Hong Kong is the most traditional, with English common law from the 1980s. Not much has changed in this regard, so Hong Kong still has a relatively "pure" common law structure. Singapore and Malaysia have changed more, but retain the same basic structure. Enforcement is a challenge everywhere. Asians are hesitant to go to court, sometimes due to the limitations of the court system. In addition, not much law is geared to the internet age in Asia. There are only minimal disclosure requirements.

Sale of goods law is based on the English common law, although Malaysia has adopted a modern consumer protection law based on New Zealand law. As to unfair contract terms: Hong Kong has English law, including unconscionability; Singapore likewise has English inspired law; Malaysia is more progressive, based on the influence of Indian law, but there is little public enforcement. The countries are moving toward more civil enforcement. Malaysia has adopted a products liability statute, but the others have not. However, Singapore has listed forty-five products that require prior approval.

Small claims courts and alternative dispute resolution (ADR) are widely available. There also are special provisions for tourists, *e.g.,* in Hong Kong there is a six months return law to protect buyers. There is no class action procedure, and only minimal public enforcement, compared to UK. There is some movement toward the European model, but large gaps remain.

B. Teaching Consumer Law in the Countries of the Western Balkans

Mateja Durovic is an Assistant Professor at the School of Law, City University of Hong Kong. His research currently focuses on seven countries in the west Balkans. All have a common goal to join the European Union [E.U.]. He opined that E.U. consumer law is the most advanced in the world. E.U. membership requires an alignment with E.U. law. Thus, consumer law development in the West Balkans comes largely from the E.U., not from these countries themselves.

The main characteristics/problems in these countries include: Slow updates of law; minimal enforcement; and little or no litigation or education. He noted that having black letter law is not the same as having effective law. There is a tendency to adopt E.U. law but without effective implementation.

There is also little or no education regarding consumer law, and the courts may be unfair. There are many new laws, but they are not widely understood in practice. When this is criticized, the solution is that more new laws are enacted but usually with the same result.

Many foreign banks provide credit, with a result that some consumers are overburdened with debt. Utility services, telecommunications and sales of goods are problem areas. Public education is the biggest problem, but even the courts and lawyers often don't understand the laws. As a result, general law rather than consumer law is sometimes applied. He said that few students take a consumer law course; and more education clearly is needed.

C. Teaching Consumer Law in Ireland

Stephan Calkins is a Professor of Law (and former Interim Dean) at Wayne State University Law School (as well as Associate Provost of the University). He has also taught at the Universities of Michigan, Pennsylvania and Utrecht , Netherlands, and served as General Counsel of the U.S. Federal Trade Commission [FTC], from 1995 to 1997. He recently returned from four years of service in Ireland, as a Commissioner of the Competition and Consumer Protection Commission [the Commission] and a member of the Competition Authority, while also teaching at the University of Dublin Sutherland College of Law.

Professor Calkins noted that the recent Irish recession resulted in a consolidation of agencies and reduced funding, which was felt during the four years he worked on competition and consumer law enforcement. Irish consumer law is based on E.U. consumer law, but law school offerings are limited. There is little private litigation, and public enforcement is only beginning to become important. Consumer law topics in Ireland include especially unfair terms, and consumer rights. E.U. directives set out the legal standards, but enforcement is national and varies greatly.

In one sense, consumer law resides only on the periphery of Irish teaching. The leading written authority is a book by Mary Donnelly and Fidelma White of University College Cork, but even at Cork the only consumer law course is an LLM offering. The same is true at Trinity College -- indeed, at Trinity the course has only recently been reintroduced and addresses European (not Irish) consumer law. University College Dublin is the exception and offers an undergraduate course, but it is far from a mainstay of the curriculum. The problem, not surprisingly, is that consumer law is only sporadically enforced either by the government (although the Commission is changing this) or by private parties, who are handicapped by the "English Rule" for attorney fees and the difficulty of bringing collective (class) actions.

In a broader sense, however, consumer law is quite central to Irish education. The Commission and its predecessor consumer agency have devoted substantial resources to consumer education. Efforts include: a dedicated website (www.consumerhelp.ie); a consumer helpline, also available through email,

with 50,000 consumer contacts a year; social media postings; paid commercial advertisements; and the "Money Skills for Life" outreach program. Perhaps most remarkably, the Commission makes available without charge three different modules of consumer education appropriate for use in the Irish equivalent of middle schools and high schools. Ireland is only beginning to develop a cadre of consumer lawyers, but because of these educational efforts, may well exceed the U.S. in terms of the legal savvy of its consumers.

D. Teaching Consumer Law in Canada

Freya Kodar is an Associate Professor at the Faculty of Law, University of Victoria in British Columbia. She teaches courses on Debtor-Creditor Relations, Pension Law and Policy, Torts, and Statutory Interpretation. Previously the Debtor-Creditor Relations course was a traditional enforcement of money judgments course, but she has expanded it into a broader-based consumer law course that also includes discussion of the benefits and problems of access to unsecured credit; the regulation of credit reporting and debt collection practices; rising debt levels; the expansion of the alternative financial services sector, payday loan litigation and regulation; and bankruptcy. Students seem to be more engaged with the course than they were when it only focused on judgment enforcement.

There are no consumer law clinics in Canada.

She has structured the course in this manner in part, because the size of the law school makes it difficult to regularly offer separate courses in consumer law, money judgment enforcement and bankruptcy. She noted two developments that prompted her to become interested in the extent of consumer law teaching in Canadian law schools: (1) consumer law problems rank fairly high on surveys of unmet legal need;[39] and (2) the federal Office of Consumer Affairs has noted a downward trend in consumer interest research programs within universities, along with very few undergraduate courses focused on consumer protection or consumer legal issues.[40]

Consumer law courses in Canadian law schools, *e.g.,* courses that include some discussion of the legal frameworks for consumer transactions, include courses on consumer law; bankruptcy; debtor-creditor law; sale of goods; secured transactions; and poverty law. Twenty-three law schools in Canada offer a common or civil law degree, or both. A survey of the course information available on their websites found that five offer a consumer law course. Secured transactions courses are offered at all schools (most likely by full-time faculty); most schools also offer bankruptcy courses. Sales of goods courses are offered at approximately half of the schools (often focused on commercial transactions); as are judgment enforcement courses (*e.g.,* debtor-creditor law). A few schools offer class action courses, and their course descriptions highlight the use of class actions to address consumer law issues.

There are no consumer law clinics. Seven schools offer a course on poverty law, though only one course description mentions consumer protection as a possible topic of discussion. Consumer law is not mandatory anywhere. However, in contrast to the common law schools, all civil law schools in the province of Quebec offer a consumer law course. In summary, in Canada: (1) secured transactions and bankruptcy are the most common consumer law courses (heavily oriented to commercial law); (2) most consumer law is covered as an adjunct to other courses; and (3) there appears to be little teaching about the regulation of consumer lending, or of Internet transactions, including online lending.

V. Consumer Law Topics Around the Globe

A. Comparative Standards for Assessing Misleading Advertising

Joasia Luzak teaches at the University of Exeter in the U.K., and previously taught at the University of Amsterdam. She described her empirical research in consumer law cases involving "up to" advertising claims (*e.g.,* "save up to 50%").[41] She focused on price claims because, as between price and performance savings claims, price claims are easier to verify for factual accuracy. She noted the risk that advertisements may indicate potential and not the actual price savings. She said that, to be effective on this issue, the E.U. anti-commercial practices directive must be implemented uniformly. If claims are not true or are deceptive for the purpose of inducing the average consumer to make the transaction, then the claim is misleading.

She also noted that an advertising claim can be true but still misleading, *e.g.,* if the benefits are overstated. For example, "50% off" is different from "up to 50% off." She reported that the standard Netherlands test is: If buyers in at least ten percent of sales realize the savings, the advertisement is not misleading. If at least one item is available at the sale price, this is ok.

Compared to the FTC standard, she reported that the ten percent test for price claims is similar. The FTC test is whether ten percent of consumers are able to experience the "maximum" benefits advertised. In contrast, performance claims should be: available to most all consumers; and not contradicted by small print. With regard to price claims, Professor Luzak said that consumers in the survey did not distinguish regarding the "up to" language. The FTC has concluded there is a need for a higher standard of proof to support price claims, but the ten percent test is still applied. Clearly, if a majority of the customers realize the advertised savings, this is ok.

The E.U. directive disclaims any statistical test, but courts can still consider it. However, cases on this issue rarely go to court in the E.U., as cases are usually resolved in administrative proceedings. Thus, the enforcement standard is not clear and merchants are essentially given a free bite at the apple. And she said, as a result, many consumers are being misled.

B. Writing Seminar

Nathalie Martin, Co-Chair of the Conference and Frederick M. Hart Chair in Consumer and Clinical Law at the University of New Mexico School of Law, described a consumer-oriented writing seminar designed to encourage the development of student-written publishable manuscripts. It is a two-credit class that satisfies the law school writing requirement. Essentially, the students choose from a list of possible topics. Professor Martin provides sources and alternatives and lets the students choose their topics. The class meets once each week, for a two-hour class. The students present their works in progress, and there is a peer review.

Topics last year included: medical marijuana; car dealership issues; stolen antiquities; and sophisticated/unsophisticated consumer tests. Five of the resulting ten papers were publishable.

C. What's New in Washington?

Ira Rheingold is Executive Director and General Counsel of the National Association of Consumer Advocates [NACA], an organization directed at protecting consumers from unfair and deceptive practices; and a cosponsor, with the University of Houston Law Center's Center for Consumer Law and the University of New Mexico, of the Conference. He observed that Washington,

D.C. is the same dysfunctional place as usual. He said that no significant consumer legislation is expected this year. The budget process is being used to make law, *e.g., by* providing an exception to the Telephone Consumer Protection Act [TCPA] for collectors of government debts, based on the need to save the government $9 million to balance the budget projections.

He noted that pending bills of interest include: Dodd-Frank revisions; the structure of the CFPB (appointing a Board or Commission versus a Director); funding of the CFPB; UDAAP authority; auto dealers/fair lending; and payday lenders. A possible future consumer agenda includes: the use of international law and treaties, *e.g.,* using international treaties' dispute resolution processes to sue governments to provide consumer regulation; debt overhang issues versus access to consumer credit; credit report errors; and economic inclusion.

He noted important new CFPB regulations that are coming soon: the CFPB arbitration rule (essentially prohibiting class action waivers); arbitration as regards the contract provision requiring arbitration; and a proposed rule for payday lending (issued later in the summer).[42] A usury cap for payday loans is not permitted by the Dodd-Frank Act, but an ability-to-repay requirement was expected (and was forthcoming). Rheingold opined that overdraft protection rules are coming later this year, then new FDCPA and FCRA rules. In all, he predicted a busy twelve months ahead for the CFPB.

VI. Consumer Law Topics

A. What's New with the *Restatement of Consumer Contracts*

Dee Pridgen is a well-known consumer law specialist, and the Carl M. Williams Professor of Law and Social Responsibility at the University of Wyoming College of Law. She is the co-author of a well-known consumer law casebook,[43] and three legal treatises (including two practitioners' texts co-authored with Richard Alderman and the new fourth edition of *Consumer Law in a Nutshell*). Professor Pridgen described the American Law Institute (ALI) consumer contracts project.[44] She reported that the Consumer Contracts Project has been four years in the making so far, but largely settles for the status quo, thereby losing an opportunity for major change. She described the history and work of the ALI (2,000-plus members, with a maximum 3,000 allowed). The most influential solo work of the ALI is the *Restatements of the Law*, but of course the ALI is also a co-sponsor (with the Uniform Law Commission, and in cooperation with the American Bar Association) of the Uniform Commercial Code (UCC).

The official goal of the *Restatements* - which are addressed to courts although widely used in academia (and Professor Pridgen noted that this is a legally conservative goal) - is restating current law, though in this process there is the potential for pushing to improve the law. The Consumer Contracts Project started in 2012; the second preliminary draft has not been publicly circulated. The Reporters, Oren Bar-Gill, Omri Ben-Shahar, and Florencia Marotta-Wurgler, are the primary drafters. The Reporters are well-respected academics, but the result must be approved by the ALI Counsel and ALI membership.

Professor Pridgen noted that some might argue that contract law is largely irrelevant to consumer law today because so much consumer law is statutory and regulatory.[45] But she said this is not true because consumer contracts, including online contracts, are the basis for most consumer transactions and obligations and thus remain important. Online contracts present some unique issues because they permit an unlimited number of clauses and the consumer often clicks "I agree" without reading them at all. In this context, the doctrine of assent is relaxed, allowing assent based on an opportunity to read. But no one reads the full contract terms. Professor Pridgen cited a study indicating that only one or two out of every 1,000 consumers reads the terms for even one second. But the assumption is that the terms are standard. Problems may include matters such as unexpected monthly service charges, privacy and arbitration. The Reporters conceded that consumers know they are ignorant of the terms, but nonetheless concluded that a manifestation of assent is sufficient if the consumer signifies this assent after having an opportunity to read the provisions as referenced in a conspicuous hyperlink.[46] Professor Pridgen agreed that standard terms are needed in order to allow online commerce. Consumers at least know the basic terms of the transaction. But the approach taken in the ALI Consumer Contracts Project contemplates something of a grand bargain: A relaxed standard of assent applicable to consumer contracts is balanced by the doctrines of unconscionability and deception. Neither the UCC nor the *Restatement Second of Contracts* defines unconscionability but the ALI Consumer Contracts Project defines unconscionability to include both substantive and procedural aspects. Substantive unconscionability includes provisions that are fundamentally unfair or unreasonably one-sided. Terms are procedurally unconscionable if they amount to unfair surprise or deprive the consumer of meaningful choice. Deception is defined as a deceptive act or practice. However, this does not include deception by omission or half-truth.[47]

Arbitration issues are at the essence of consumer law, because the goal is to deny consumers a chance to assert their rights, not to provide a more convenient forum.

The common law of contracts is reaffirmed in the Consumer Contracts Project even though, according to Professor Pridgen, consumer assent is a "legal fiction." Of course, although the courts generally will not interfere with contractual bargains, unconscionability and deception are different. Professor Pridgen argued for enforcement of the parties' agreement only to the extent it includes conscionable and non-deceptive terms, and the merchant would have the burden on this issue. Thus, she urged more of a consumer protection approach. During the subsequent question-and-answer session, Nathalie Martin opined that either substantive or procedural unconscionability is enough if strong, though otherwise both are needed.[48]

B. Arbitration

Richard Alderman provided an update on arbitration.[49] He argued that arbitration issues are at the essence of consumer law, because the goal is to deny consumers a chance to assert their rights, not to provide a more convenient forum. He said that almost all consumer contracts now contain an arbitration clause. Such clauses can sometimes be challenged successfully in court but most challenges are unsuccessful. Most consumer arbitration clauses also include a class action waiver precluding the consumer from asserting or joining a class action. As a result, consumers are effectively precluded from seeking redress through the civil justice system.

He then reported the following history: At the turn of the century, the Federal Arbitration Act (FAA)[50] was passed to overcome courts refusing to enforce arbitration per se. The FAA says that arbitration contracts are like any other contract. But courts now interpret the FAA to say there is a strong pol-

icy in favor of arbitration.

Alderman discussed several representative cases. For example, *Buckeye Check Cashing,*[51] concluding that there is no difference between consumer and commercial arbitration, the Court upheld an arbitration clause in an illegal contract on grounds that the issue of legality had to be arbitrated; and, *AT&T Mobility,*[52] which challenged class action waivers, but they were upheld. In *Italian Colors,*[53] the court upheld a class action waiver notwithstanding the fact that the cost of bringing suit exceeded the amount in controversy. He also mentioned the decision in *Sprint Spectrum,*[54] a Posner decision, which questions the "strong federal policy" favoring arbitration.

Professor Alderman cited the following as problems with arbitration: costs and fairness; repeat player advantages; and the elimination of one of our three branches of government---the judiciary. He noted that arbitration precludes the courts from playing their essential role in our common law system. He cited, as an example, that when Alabama courts were ruling against homebuilders and car dealers, the businesses "exempted" themselves from the civil justice system via arbitration. He also recognized that the businesses could easily revert back to the judicial system by simply revising their contracts when the judicial climate changed. Alderman also emphasized that "manifest disregard of the law" may no longer be a basis to challenge the decision of an arbitrator.

As to the future: States may pass the National Consumer Law Center (NCLC) model law; the Supreme Court may change; and, the CFPB has propose a rule to ban class action waivers, based on the initial CFPB report. Alderman believes, however, that the CFPB needs to look at consumer arbitration more broadly, and not just the problem with class action waivers. Finally, he also noted the *General Mills* case -- where public pressure forced the removal of an arbitration clause on cereal boxes.[55]

C. FinTech's Potential to Help and Harm Consumers

Kathleen C. Engel is a Research Professor of Law at Suffolk University Law School in Boston. She has written extensively on mortgage finance, foreclosure and regulation, subprime and predatory lending, consumer credit and housing discrimination. Last year, she was appointed to the Consumer Advisory Board of the CFPB.

Professor Engel defined "FinTech" as including start-up companies that provide electronic financial services using new technologies. One example is where a FinTech firm functions like a broker, *i.e.*, a financial institution provides the loan and ensures TILA compliance, but the FinTech company facilitates, underwrites and ultimately buys the loan. Most FinTech companies employ "big data" for underwriting. They obtain the data from data aggregators that collect as many as 75,000 data points per person, hence the term "big data." The information may include the state of the consumer's marriage, his or her health, the consumer's Facebook friends, shopping habits, music preferences, taste in autos, travel, subscriptions, web surfing, and other transactions.[56]

What do FinTech companies do with this data? They use a technique called machine learning, which sorts through the data to predict how consumers will behave. The computers can then determine things like the propensity for credit applicants to default. Unlike regression analysis, where human beings specify the variables, with machine learning, computers sort through vast amounts of data to detect patterns from which the computers generate a set of rules that are used to predict outcomes. The result is a complex set of variables and rules that interact with each other to generate propensities. Through machine learning, companies can predict the propensity of various human behaviors, *e.g.*, whether someone is an impulsive shopper or likely to experience job loss.

The machine-generated algorithms can be valuable to consumers because they can be an alternative method for credit scoring, offer products the rules predict will be desirable to a consumer, or match consumers with appropriate credit and other products. Machine learning can also facilitate exploitation of consumers by predicting, for example, the relative likelihood that someone can be lured into a high-cost product.

With most machine learning, human beings are not involved in developing the actual algorithms and, more importantly, the rules themselves are inscrutable. Without humans selecting the variables or otherwise being involved with the creation of the actual rules, there is no risk of intentional discrimination. That does not mean that there is no discrimination.

The machines themselves can engage in discrimination by making discriminatory inferences. For example, if a person is African-American, computers might consider her at risk of committing a crime because the computer "learned" that African-Americans are more likely to be arrested. There is no way of seeing or disentangling the rules that machine learning uses to generate propensity scores. As a result, it is impossible under extant law to bring discrimination claims based on machine learning.

In addition to the discrimination risk, there can be errors in the data, which can effect the propensity calculations. Likewise, computers may confuse people's identities, especially if people have identical names and relatively few data points. The data from one person can be used to fill gaps in another person's record. Lastly, machines can make false inferences, *e.g.*, predict that because a person is Hispanic, her propensity to understand complex mortgage products is low. Currently there is little or no regulatory oversight of FinTech companies, data aggregators or machine learning. Federal agencies that have studied these domains are not sure what to do, and they are far behind the technology curve. Professor Engel contends that legislators and regulators need to update consumer protection and discrimination laws that were designed in the manual underwriting age to take into account the new age of FinTech.

VII. Consumer Law Topics Around the Globe, Part Two

A. Will the Real "Consumer" Please Stand Up?

Trish O'Sullivan is a Senior Lecturer in Business Law in the School of Accountancy at Massey University, Auckland, New Zealand, and a Ph.D. candidate at the University of Auckland. She outlined the differing definitions of the term 'consumer' contained in the New Zealand Consumer Guarantees 1993 Act and related Australian and New Zealand law.[57]

She opined that there could be four considerations in the definition:

- the purpose of the transaction;
- the type of goods being acquired;
- the identity of the parties; and
- the value of the transaction.

The definition of "consumer" in the New Zealand Consumer Guarantees Act 1993 focuses on the type or 'ordinary use' of the goods being acquired. The definition covers both individuals and businesses who acquire goods that are ordinarily acquired for personal, domestic or household use. Some goods may commonly be acquired for either personal or commercial use, for example, a pen. In *Nesbit v. Porter*,[58] the purchaser of a small pick-up truck was held to be a 'consumer.'[59] The trial court said there could be only one use, and it was predominantly commercial, but on appeal the court disagreed, saying the farmer could be a consumer because this type of truck was commonly used for private

use (the evidence showed that twenty percent of buyers purchased for private use).

Trish O'Sullivan noted that, the Australian statute[60] uses the amount of the price as a distinction, *e.g.,* a presumption that transactions valued at $40,000 or less are consumer transactions. Tests based on the "ordinary use" of goods are uncertain and may require a statistical analysis, but a dollar limit is arbitrary and covers all business purchases below the limit. The E.U. definition focuses on the identity of the buyer and the purpose of the transaction (a consumer transaction must be outside the person's trade or course of business). She said that American law is not consistent on the issue; it focuses on a purpose test but the test varies across states.[61] Texas has a wide definition, including an entity with less than $25 million in assets and excluding transactions over $100,000 conducted with legal advice. This raises a big issue: Should the definition exclude businesses from consumer protection? Should it define "consumer" to include individuals and small businesses and then define a small business (*e.g.,* by net assets, turnover or number of employees), or should it go very broad, to include all sales of goods or services. Trish O'Sullivan noted that it is important to consider the policy issues, including equality of bargaining power, when developing a new definition of "consumer."

B. Standard Contract Legislation in Japan

Hisakazu Hirose is a Professor Emeritus of the University of Tokyo, where he taught contract law, consumer law and other subjects for twenty-nine years. Professor Hirose described proposed Japanese legislation (the bill) which aims to reform the Japanese contract law that is part of the Civil Code of 1898. He reported that the bill had been presented to the Diet (legislature) on March 31, 2015. The bill includes "standard terms" provisions which entail both potential benefits and dangers for consumers as well as others. His written Conference program materials provide several examples on this point, and include excerpts from the bill showing the proposed statutory language and changes, and examples as to how it might work.[62]

VIII. The CFPB and the FTC

A. What's New at the FTC

Lesley Fair is a Senior Attorney in the FTC Bureau of Consumer Protection. She noted that there has been a rise in deceptive advertisements directed at aging baby boomers concerned with, *e.g.,* impending dementia (among other health issues), based on unsubstantiated claims -- she noted that these claims need to be backed-up by sound science.[63] She also noted safety concerns, and VW's device that masked emissions in government testing.

Ms. Fair observed that the FTC works with the CFPB on joint cases in the financial services arena. The *Green Tree* settlement is an example.[64] Areas of agency cooperation include debt collection cases, such as: collection of phantom debts; use of inappropriate (threatening) language; and false threats of criminal prosecution. The enforcement tools now being utilized include: lifetime bans on defendants; contempt orders; and civil penalties. Current focuses also include: for-profit education; the lead generation industry; FinTech lending; mobile phone deception; illegal charges; and do-not-call violations. Social media endorsements are another area of interest -- these require disclosure of any connections between the tweeters, etc. and merchants. Data security and privacy issues are also a priority. She noted the *Wyndham* case,[65] as illustrating that the FTC covers data security and privacy issues (under the unfairness standards). She urged participation in FTC projects by academics, and suggested ways to do this.

B. What's New at the CFPB

Karen Meyers is Assistant Deputy Enforcement Director for Policy and Strategy at the CFPB. She was previously a plaintiff's attorney handling consumer protection and personal injury matters, and served as Assistant Attorney General and Director of the Consumer Protection Division of the New Mexico Attorney General's office from 2007 - 2014.

There has been a rise in deceptive advertisements directed at aging baby boomers.

Ms. Meyers described the history and background of the CFPB, including its Unfair, Deceptive and Abusive Acts and Practices (UDAAP) authority and the twenty federal consumer protection statutes implemented by the CFPB. The CFPB has a diverse framework of tools (in its "toolbox"), including responses to consumer complaints, and examination and supervision of non-bank financial entities. The CFPB has recently defined "larger participants" subject to its jurisdiction.[66]

The first five years of CFPB history resulted in $11 billion in consumer recoveries, for more than twenty-five million consumers. Research and markets data also have been developed (the CFPB is data driven), including numerous studies and reports. Also, a regulatory agenda is regularly issued, currently, *e.g.,* focusing on: arbitration; payday lending; prepaid accounts; overdraft protection plans; and debt collection. Supervisory Highlights are also issued to explain violation views. The CFPB is also active in consumer engagement, *e.g.,* by soliciting consumer complaints. The CFPB covers all consumer financial markets.

CFPB enforcement is intended to deter adverse behavior and provide remediation for consumers. The CFPB looks to the FTC history with regard to UDAP standards and violations, while developing the new "abusive" prong. The definitions of "persons" and "service providers" are crucial to the scope of CFPB jurisdiction.

As noted above at Part VI.C., FinTech lead generators

buy and market consumer information, *e.g.,* if you apply for a payday loan this data is sold to other lenders. The CFPB alleges that there is a failure to vet this data as between buyers and sellers. This may result in unfair and abusive creditor claims. Consumers then lose control of their information, which is sold to the highest bidder.

Other important concerns include: student debt relief schemes; data security cases, including *Dwolla*;[67] false promises of data security; auto finance and FCRA issues, including abuses of "buy here – pay here" in vehicle credit sales where the auto dealer fails to accurately disclose the credit terms;[68] and debt collection, including: debt buyers; false legal process (resulting in pursuit of law firms under the FDCPA); false allegations in law suits; and sales of paid accounts.

C. The CFPB and Consumer Law Teachers

Judith Fox is a Clinical Professor of Law at Notre Dame Law School, where she practices and teaches consumer law. She described ways that consumer law faculty can interact with the CFPB.[69] She noted that the CFPB 2014 toolkit is no longer posted, as the new "Your Money Your Goals Toolkit" replaced it. The new Toolkit: provides an overview of the CFPB and federal consumer laws; defines terms and basic concepts; explains credit reports; and provides sample letters, *e.g.,* for sending disputes to the CFPB (this is a means to interact). Familiarity with this shows students how to file complaints with the CFPB (and the CFPB will respond).

The CFPB also holds conference calls with law school clinics once each semester. During these calls the CFPB solicits input and information. Free brochures are also available from the CFPB, and can be ordered in bulk for the students.

Classroom "podium issues" include the fact that many students dislike books, and prefer online information. Some will not read books, but will read online posts. This invites the use of CFPB online resources, *e.g.*, students can read and file comments with regard to proposed rules, and follow the CFPB regulatory agenda.

D. The CFPB in Action

Angela Littwin is a Professor at the University of Texas School of Law, where she focuses on bankruptcy, consumer law and commercial law. She teaches a course on credit cards. As part of this course she has students go to the CFPB website to read credit card agreements. She reported that the students say it is their hardest day in law school.

The credit industry has a new focus on compliance management functions -- including an emphasis on self-enforcement.

Professor Littwin mentioned two articles she wrote or co-authored, addressing fundamental issues including how to assure enforcement of consumer protection.[70] She discussed CFPB examinations as a means of consumer protection – saying that they can address the problem of there being much law on the books but little enforcement. She argued that the statutory framework needs to, and does in fact, facilitate enforcement. In this regard, she said that rules are better than broad standards (*e.g.,* unconscionability), but the best approach of all is to have rules backed by standards. This provides for more compliance, even with less effective rules. She opined that private enforcement is insufficient, and public enforcement best.

She noted the CFPB Supervisory Highlights, and stated that the CFPB has been providing long-overdue enforcement. In addition, she said that company compliance without direct enforcement is improving. The credit industry has a new focus on compliance management functions -- including an emphasis on self-enforcement. This requires an independent compliance function within the company, with auditing, extensive review of documents, interviews with consumers, and the full spectrum of enforcement tools, and affects the basic risk-benefit analysis of the company.

In addition, she noted that CFPB enforcement tools include:

- non-public enforcement tools, such as:
  - non-binding recommendations;
  - matters requiring attention; and
  - non-public enforcement actions; and
- public enforcement actions, such as:
  - consent decrees; and
  - lawsuits.

Public enforcement efforts are effective partly because they affect the public relations of the defendant. However, the pitfalls of a reliance on public enforcement tools include:

- the risk of industry capture;
- the risk of a hostile presidential administration; and
- the risk of revealing confidential information (this may discourage full disclosure) (the CFPB Supervisory Highlights reveal the disposition without disclosing the identity of the parties).

Consumer complaints play a major role. The purposes include:

- dispute resolution (for smaller claims);
- regulation development; and
- creating goodwill for the CFPB.

Professor Littwin noted that the CFPB responds to complaints by extending an inquiry to the company, and also asks the consumer what he or she thinks would be a fair resolution. The company views this information and has fifteen days to respond; nonresponse is a cardinal sin and may result in an enforcement action. Roughly seventy-five percent of the company responses are explanations. She noted that it is difficult to measure the effectiveness of the process. The consumer can dispute the company's response, but the CFPB follow-up is uncertain. Consumers respond to the company's explanation in about twenty-one percent of the cases.

Professor Littwin reported that over sixty percent of the resulting relief is provided in response to complaints about products that are likely to provide lower levels of relief. Forty percent of the complaints are mortgage complaints, but only twenty percent of these result in relief. Only credit cards grant fifty percent relief, mostly in a waiver of late charges. This relief is likely to be far less valuable than mortgage relief would have been.

IX. Conclusion

Once again, as in previous years, the 2016 Conference featured a lively and informative presentation of views on consumer law issues, held for the second time in the lovely setting of Santa Fe, New Mexico. The usual academic divisions also were evident, *e.g.,* between conflicting perspectives on consumer protection, teaching styles and other fundamental issues. As in the recent years, this reflected notable differences in the approaches of doctrinal and clinical faculty, and significant across-the-board differences in the content, focus and basic approaches to teaching consumer law, along with an increased emphasis on experiential learning. Once again, a variety of perspectives from around the world added to this diversity, bringing an international tenor to this unique Conference.

A significant trend that was apparent again this year, and understandably so, was an increased emphasis on regulation and public enforcement by the CFPB and FTC. This may raise a question, at least for doctrinal faculty, as to how much of a consumer law course to devote to these issues (as opposed to private litigation and remedies). Ideally, of course, there would be a separate course on the CFPB and FTC, given their importance. But in a world of limits, where this is not possible, expanded coverage of federal supervision, regulation and enforcement must come at the expense of other issues.

Something like this has long been a challenge for consumer law faculty, but it may become increasingly so. This may mean that traditional, private consumer law and remedies will recede somewhat in importance, both in doctrinal consumer law courses and the "outside" world, as perhaps already indicated in the surprisingly small (and possibly declining) number of schools that offer a traditional Consumer Law course taught by full-time faculty. If this trend continues and the number of consumer law courses and research faculty dwindle further, this will represent a significant change in the academic landscape. Consumer law clinics and other forms of experiential learning may then become the primary focus of consumer law teaching (possibly with a mandate to focus more broadly on additional issues beyond the scope of traditional consumer law[71]). We shall see, but as academics in this field we may at least find it interesting to reflect on these and the other issues highlighted at the 2016 Conference. So again, thank you, Richard and Nathalie, and thanks to all of the speakers who contributed to this article and the 2016 Conference.

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1 Reports on previous bi-annual Conferences in this series are available as follows: Alvin C. Harrell, *Teaching Consumer Law in a Virtual World,* 18 J. Consumer & Comm. L. 34 (2014); Alvin C. Harrell, *Teaching Consumer Law, Part Five,* 14 J. Consumer & Comm. L. 87 (2011); Alvin C. Harrell, *Teaching Consumer Law, Part Four,* 12 J. Consumer & Comm. L. 8 (2008); Alvin C. Harrell, *Teaching Consumer Law, Part Three,* 10 J. Consumer & Comm. L. 46 (2006); Alvin C. Harrell, *Teaching Consumer Law, Part Two,* 8 J. Consumer & Comm. L. 2 (2004); Alvin C. Harrell, *Teaching Consumer Law,* 6 J. Consumer & Comm. L. 50 (2003).

2 Professor Emeritus and Director, Center for Consumer Law, University of Houston Law Center.

3 Frederick M. Hart Chair in Consumer and Clinical Law University of New Mexico School of Law.

4 *See supra* note 1. Your author has participated in all except one, and has written reports accordingly. *Id.*

5 Zemeckis v. Global Credit & Collection Corp., 679 F.3d 632 (7th Cir.), *cert. denied,* 133 S.Ct. 584 (2012). The sample notices and other information about the study are available in Professor Sovern's written Conference materials. *See* Jeff Sovern & Kate Walton, "Are FDCPA Validation Notices Valid," program materials for Teaching Consumer Law (Center for Consumer Law 2016). Note: Although referenced through-out this article as "written" Conference materials (in the sense that the materials were written and provided by the Conference speakers), the materials are in fact available in electronic format.

6 The study will be published in, *Are Validation Notices Valid? An Empirical Evaluation of Consumer Understanding of Debt Collection Validation Notices*, 75 Md. L. Rev. 1 (2017 forthcoming), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2808531.

7 The study is also described in the written program materials for the Conference. *See* Prentiss Cox, "An Empirical Look at Public UDAP Enforcement," program materials for Teaching Consumer Law (Center for Consumer Law 2016).

8 *In re* Trans Union Corporation Privacy Litigation, 741 F.3d 811 (7th Cir. 2014). The case is discussed more fully in Professor Rave's published article on the subject, also included in the written materials for the Conference. *See* D. Theodore Rave, *When Peace is not the Goal of a Class Action Settlement*, 50 Ga. L. Rev. 475 (2016).

9 Campbell-Ewald Co. v. Gomez, 136 S.Ct. 663, 193 L.Ed.2d 571, 84 USLW 4051 (2016); Spokeo, Inc. v. Robins, 136 S.Ct. 1540, 194 L.Ed.2d 635 (2016).

10 136 S.Ct. 1594, 194 L.Ed.2d 625, 84 USLW 4259 (2016).

11 *See* Edwards v. First American Corp. 610 F.3d 514 (9th Cir. 2010).

12 Electronic Fund Transfers, 74 Fed. Reg. 59,033 (Nov. 17, 2009) (codified at 12 CFR pt. 205). Regulation E implements the Electronic Fund Transfers Act, 15 U.S.C. §§ 1693 *et seq.*

13 *See* Claire Greene & Mi Luo, Consumers' Use of Overdraft Protection, The 2013 Survey of Consumer Payment Choice: Summary Results, Federal Reserve Bank of Boston Research Data Report 15-8 (2015), *available at* https://www.bostonfed.org/publications/research-data-report/2015/consumers-use-of-overdraft-protection.aspx. .

14 Pew Charitable Trusts, Overdrawn: Persistent Confusion and Concern About Bank Overdraft Practices (2014), *available at* http://www.pewtrusts.org/~/media/assets/2014/06/26/safe_checking_overdraft_survey_report.pdf.

15 *See, e.g.,* Gray v. Los Angeles Fed. Credit Union, Case No. 2:15-CV-7266 (C.D. Cal.) (Sept 16, 2015) (Complaint) (case has been dismissed) (alleging that member opt-in did not contain the amount of the overdraft fee); Regions Bank, Consent Order, No. 2015-CFPB-0009 (Apr. 29, 2015), *available at* http://files.consumerfinance.gov/f/201504_cfpb_consent-order_regions-bank.pdf (resolving problem that resulted when Regions did not provide opt-in procedures for consumers with linked checking and savings accounts, but charged overdrafts on debit transactions that exceeded the balance in both linked accounts).

16 The Expedited Funds Availability Act allows financial institutions to place holds on some account deposits. 12 U.S.C. § 4001-10 (2012) (This means that those funds need not be available for withdrawal, even though they may still be visible to the consumer on the bans web-based account portal.

17 Casey v. Orange County's Credit Union, Settlement Agreement and Release, Case No. 30-2013-00658493-CU-BT-CXC (Cal. Orange Co. Super. Ct. Dec. 16, 2014) *available at* http://www.orangecounty-creditunionoverdraftsettlement.com/Documents/OCU0001/Fully%20Executed%20Settlement%20Agreement%20and%20Release.pdf

18 *Class-Action Lawsuits Target CU Overdraft Programs*, CUtoday.info, http://www.cutoday.info/THE-feature/Class-Action-Lawsuits-Target-CU-Overdraft-Programs (May 25, 2015).

19 CFPB Study of Overdraft Programs: A White Paper of Initial Data Findings (2013), *available at* http://files.consumerfinance.gov/f/201306_cfpb_whitepaper_overdraft-practices.pdf; CFPB, Data Point: Checking Account Overdraft (2014), *available at* http://files.consumerfinance.gov/f/201407_cfpb_report_data-point_overdrafts.pdf.

20 Regions Bank, Consent Order, No. 2015-CFPB-0009 (Apr. 29, 2015), *available at* http://files.consumerfinance.gov/f/201504_cfpb_consent-order_regions-bank.pdf

21 *See infra* Parts V.C. and VIII., noting the likelihood of future CFPB action as to overdraft protection issues.

22 The Department of Justice announced an initiative dubbed "Operation Choke Point" in 2013. The initiative scrutinized financial institutions that do business with "high-risk" industries like payment, processors and payday lenders. *See* Alan Zibel & Brent Kendall, *Probe Turns Up Heat on Banks*, Wall St. J., Aug. 7, 2013; Staff of Comm. On Oversight and Government Reform, 113th Cong., Report on The Department of Justice's "Operation Choke Point": Illegally Choking Off Legitimate Business (May 29, 2014), *available at* https://oversight.house.gov/wp-content/uploads/2014/05/Staff-Report-Operation-Choke-Point1.pdf.

23 Emily Glazer, *Big Banks Shut Border Branches in Effort to Avoid Dirty Money*, Wall St. J., May 25, 2015.

24 *Available at:* Alvin C. Harrell, *Ten Current Issues Affecting Consumer Financial Services Law*, 68 Consumer Fin. L. Q. Rep. 286 (2014).

25 Subsequently published as: Alvin C. Harrell, *Ten More Trends and Developments in Consumer Financial Services Law,* 69 Consumer Fin. L. Q. Rep. 250 (2015).

26 For further discussion, *see id.* The paper also appears in the written Conference program materials.

27 Which has come despite near-zero or even negative interest rates, an amazing and (at least in the U.S.) unprecedented phenomenon. *See, e.g.,* Robert J. Barro, Opinion, *The Reasons Behind the Obama Non-Recovery,* Wall Str. J., Sept. 21, 2016, at A13 (". . . weak opportunities for private investment [have] motivated banks and other institutions to hold the Fed's added obligations despite the negative real interest rates paid"). Barro is a professor of economics at Harvard University.

28 The obvious theory being that prime loans are less likely to go into foreclosure. Of course, some other factors are also involved. *See, e.g.,* Alvin C. Harrell, Commentary: *The Surprising Decline (and Fall?) of Consumer Mortgage Law and Litigation,* 69 Consumer Fin. L. Q. Rep. ___ (2015). *See also infra* note 22.

29 *See, e.g.*: Barro, *supra* note 20 ("The 2007-08 financial crisis [has been] followed by [a] vast monetary expansion . . . ."); Michael S. Derby, *Fed "Dove' Warns of Low-Rate Risk,* Wall Str. J., Sept. 19, 2016, at c1 ("Boston Federal Reserve Bank President Eric Rosengren has a reputation as one of the Fed's leading doves — advocates of easy money policies . . . . But more recently, he has developed strong concerns that easy money could be letting markets get out of hand the way they did before the financial crisis."); Martin Feldstein, Opinion, *Why the Fed Should Raise Rates Now,* Wall Str. J., Oct. 7, 2016, at A13 ("The Fed's policy of exceptionally low interest rates causes investors to reach for yield, continuing to raise the overvalued prices of equities, longer-term bonds, commercial real estate and other riskier assets."). Feldstein is a professor at Harvard and was Chair of President Reagan's Counsel of Economic Advisors. His article goes on to cite specific examples of current asset bubbles, including commercial real estate.

30 *See, e.g.*: Derby, *supra* note 29 (reporting that Boston Federal Reserve Bank President Rosengren's "main source of concern is commercial real estate — the soaring market for office buildings, warehouses and apartment buildings."); Feldstein, *supra* note 29.

31 More information on this presentation is available in the written Conference program materials. *See* Richard Frankel, "Bringing The Outside In: Creating Experiential and Hands-On Opportunities," program materials for Teaching Consumer Law (Center for Consumer Law 2016).

32 Katherine Porter, Modern Consumer Law (2016).

33 Elizabeth Warren, Jay Westbrook, John Pottow, and Katherine Porter, The Law of Debtors and Creditors: Text, Cases and Problems (7th ed. 2014).

34 Although it must be conceded that, as these subjects become more regulatory in nature, the issues may increasingly fall to a small cadre of regulatory specialists and be of less interest to the broader range of legal practitioners. *See, e.g.,* Harrell, *supra* note 28; *see generally* Opinion, Notable & Quotable: *Presidential Economics,* Wall Str. J., Sept. 21, 2016, at A13 (quoting David Henderson: "We live in a regulatory state."). *See also infra* Part IX.

35 Neil Howe & William Strauss, Millennials Go to College 59-80 (2d ed. 2007).

36 Pew Research Center, Millennials in Adulthood, (Mar. 7, 2014), *available at* http://www.pewsocialtrends.org/2014/03/07/millennials-in-adulthood/

37 *See, e.g., supra* Part II.F. (your author's presentation at this Conference), noting the "Plight of the Millennials" as the first of ten topics; this issue is discussed further in Harrell, *supra* note 18.

38 Additional materials relating to these exercises, including an In-Class Rule Exercise, a Sample E-Mail and Traditional Memorandum Assignment, and a Letter-Writing Assignment, are included in the written Conference program materials. *See* Neil L. Sobol, "Starting Millennials Out Right: Consumer Law for 1Ls," program materials for Teaching Consumer Law (Center for Consumer Law 2016).

39 Ab Currie, *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians* (Ottawa: Department of Justice Canada, 2007): www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf.

40 Office of Consumer Affairs, Industry Canada, *Consumer Trends Update: An Overview of Academic Consumer Interest Research in Canada* (Industry Canada, 2013) at 11-12, online: https://www.ic.gc.ca/eic/site/oca-bc.nsf/vwapj/ConsumerTrendsUpdate_Spring2013-eng.pdf/$file/ConsumerTrendsUpdate_Spring2013-eng.pdf.

41 Also described in her written Conference program materials. *See* Dr. Joasia Luzak, "Empirical Evidence in Consumer Law Cases: 'Up to' Claims," program materials for Teaching Consumer Law (Center for Consumer Law 2016).

42 *See* Bureau of Consumer Financial Protection, Payday, Vehicle Title, and Certain High-Cost Installment Loans, proposed rule with request for public comment, 81 Fed. Reg. 47863 (July 22, 2016).

43 Consumer Law: Cases and Materials (West 4th ed. 2013).

44 The proposed Restatement of Consumer Contracts [the Consumer Contracts Project]. *See also* Professor Pridgen's written Conference materials: Dee Pridgen, *"What's New with the Restatement of Consumer Contracts*," program materials for Teaching Consumer Law (Center for Consumer Law 2016).

45 *See, e.g., supra* notes 28 & 29.

46 Your author will take this opportunity to note his brief article on essentially this issue. *See* Alvin C. Harrell, *Electronic Commerce and Incorporation by Reference in Contract Law,* 86 Okla. Bar J. 2351 (2015).

47 An interesting case on this issue, suggesting that an arbitration clause may be invalid on the basis of a duty to "say nothing or to tell the whole truth," is Key Finance, Inc. v. Koon, 2016 OK CIV APP 27, 2015 WL 10734036 (Okla. Ct. App. Oct. 6, 2015). This case has generated some differences of opinion between your author and at least one academic colleague. The court's analysis may partly reflect a judicial antipathy toward arbitration, rather than contract law as such, in which case it belongs instead with the discussion below at Part VI.B.

48 While the point is true on a technical basis, consider also Professor Murray's observation that "a holding that a contract or term is unconscionable on the basis of procedural unconscionability, alone, would be more than rare." John Edward Murray, Jr., Contracts: Cases and Materials 478 (7th ed. 2015) [the Murray casebook]. In addition, while there are cases (*e.g.,* as cited in the Murray casebook, *id.* at 472) rendering contracts unenforceable on the basis of substantive unconscionability alone, one may wonder how often this will be enough as an invalidating cause, in the face of a complete absence of procedural unconscionability and other issues. The approach advocated by Professor Pridgen (as noted in the text immediately above) could change this, but query whether we are there yet. *See, e.g.,* Ingle v. Circuit City Stores, Inc., 328 F.3d 1165 (9th Cir. 2003) (presented in the Murray casebook, *supra* this note, at 479, as illustrating the current state of the law). While *Ingle* does a reasonable job of explaining the basic law of unconscionability (both procedural and substantive), including recognition of Professor Martin's basic point that both types need not be present in the same degree, parts of the *Ingle* court's analysis (*e.g.,* suggesting that the unilateral right to propose a future modification of an executory contract renders it substantively unconscionable) may have been unduly influenced by the same kind of antipathy noted *supra* at note 36.

49 Professor Alderman provided extensive written Conference program materials on this topic. *See* Richard M. Alderman," Arbitration Update," (Center for Consumer Law 2016).

50 Pub. L. No. 80-282, ch. 392, 61 Stat. 609 (1947) (codified as amended at 9 U.S.C. §§ 1 - 16). *See* 9 U.S.C. § 2.

51 Buckeye Check Cashing Inc. v. Cardegna, 126 S. Ct. 1204 (2006). *See generally* Thomas Ishmael, Buckeye Check Cashing v. Cardegna: *Enforcing Arbitration Clauses Within Void Contracts,* 61 Consumer Fin. L. Q. Rep. 235 (2007).

52 AT& T Mobility, LLC v. Concepcion, 131 S.Ct. 1740 (2011).
53 American Express Co. v. Italian Colors Restaurants, 133 S.Ct. 2304 (2013).
54 Andermann v. Sprint Spectrum L.P., 785 F.3d 1157 (7th Cir. 2015).
55 *See* press release, General Mills, "We've listened - and we're changing our legal terms back," http://www.blog.generalmills.com/2014/04/weve-listened-and-were-changing-our-legal-terms-back-to-what-they-were/.
56 Professor Engel noted that efforts to correct errors in such data may be dangerous, *e.g.*: about the data.com reveals your information to you, but also installs cookies on your computer.
57 *See also* her written Conference program materials: Trish O'Sullivan, "Who is the Consumer? Will the Real 'Consumer' Please Stand Up," program materials for Teaching Consumer Law (Center for Consumer Law 2016).
58 [2000] 2 NZLR 465.
59 [2000] 2 NZLR 465. *See generally* The Law of Truth in Lending ¶¶ 2.01[1] & 2.04[1] (Alvin C. Harrell ed. 2014 & 2015 Supp.). [Truth in Lending].
60 Section 3 of the Australian Consumer Law set out in Schedule 2 of the Competition and Consumer Act 2010.
61 *See, e.g.,* Truth in Lending, *supra* note 59.
62 *See* Hisakazu Hirose, "Standard Contract Legislation in Japan," program materials for Teaching Consumer Law (Center for Consumer Law 2016).
63 Ms. Fair provided extensive written Conference program materials covering these and related issues. *See* Lesley Fair, "Federal Trade Commission Advertising Enforcement," program materials for Teaching Consumer Law (Center for Consumer Law 2016).
64 *See* Federal Trade Commission and Consumer Financial Protection Bureau v. Green Tree Servicing, LLC, 15-cv-02064 (SRN-JSM) (U.S. D. Ct. D. Minn. April 23, 2015).
65 Federal Trade Commission v. Wyndham Worldwide Corporation, *et al,* 799 F.3d 236 (3rd Cir. 2015).
66 For example, the fifth and latest "larger participant" rule covers vehicle finance by non-banks. *See, e.g.,* Consumer Financial Protection Bureau, Defining Larger Participants of the Automobile Financing Market and Defining Certain Automobile Leasing Activity as a Financial Product or Service, Final Rule, 80 Fed. Reg. 37496 (June 30, 2015).
67 *In the Matter of* Dwolla, Inc., Consumer Financial Protection Bureau, File No. 2016-CFPB-0007 (Mar. 2, 2016).
68 *See* consent decree in *Herbies* case, Administrative Proceeding File No. 2016-CFPB-0001 (Jan. 21, 2016), *available at* http://files.consumerfinance.gov/f/201601_cfpb_consent-order_y-kings-corp-also-doing-business-as-herbies-auto-sales.pdf.
69 *See also* her written Conference program materials: Judith Fox, "The CFPB and Consumer Law Teachers," program materials for Teaching Consumer Law (Center for Consumer Law 2016).
70 *Examination as a Method of Consumer Protection*, 87 Temple L. Rev. 807–873 (2015) (with Jean Braucher); *Why Process Complaints? Then and Now*, 87 Temple L. Rev. 895–946 (2015).
71 As possibly reflecting the broad needs of clinical clientele.