TEACHING Consumer Law

Part Two

By Alvin C. Harrell[1]

I. Introduction

The Center for Consumer Law at the University of Houston Law Center, under the direction of Executive Director (and Dwight Olds Chair in Law) Richard Alderman, conducted its second program on "Teaching Consumer Law" on May 21-22, 2004 in Houston (2004 Program). This is believed to be the only series of programs devoted to teaching Consumer Law in law school, and, like the first program in 2002, the 2004 Program drew a world-wide audience.[2]

This article describes your author's perceptions of the 2004 Program and proceedings. It is believed to be accurate but is not a transcript or official report and should not be taken to represent the views of your author or any sponsor or other participant, absent direct confirmation from that person or organization. The comments in this article are based on your author's notes, taken during the 2004 Program. Law faculty are likely aware of the slippage that occurs between a teacher's lectures and the student's notes on those lectures. Probably that slippage is no less severe when it is a teacher taking the notes as here. Moreover, this article reflects an amalgamation of comments and responses from various sources. So it should not be taken as a literal description of any person's presentation. Your author appreciates the comments of those who have reviewed and assisted with this text but remains solely responsible for any errors.

II. Globalization of Consumer Issues

The emerging prominence of international issues was illustrated by the movement of this topic to the lead time slot of the 2004 Program. Cathy Lesser Mansfield of Drake University Law School was the Chair of this session, and she began by noting that the financial marketplace is becoming more international. For that and other reasons, consumer law issues are not limited to just one country. Although the U.S. is often viewed as the leader in developing consumer law, other countries are exploring additional and alternative methods of consumer protection, and there is much to be learned from these efforts. Moreover, it has long been noteworthy that things allowed in one country may be prohibited in another, and this observation is no less true in the consumer law field, often making comparative law analyses a matter of interest.

Iain Ramsay of York University in Toronto, Canada and President of the International Association of Consumer Law (IACL), spoke next, describing the potential for a greater Europeanization of American consumer law, e.g., increasing substantive scrutiny of unfair contract terms, the use of corporate ombudsmen, "soft law" (as opposed to hard and fast legal rules consistently applied), the spread of United Nations conventions, and increasing regulation as opposed to the common law. He raised the question: To what extent will these European ideas influence the U.S.?[3]

Professor Ramsay noted that the U.S. has long been its own laboratory in policy and legal matters, from the time of its founding often pursuing approaches very different from those traditional and widely accepted elsewhere. The large and relatively isolated nature of the U.S. economy has permitted a nearly unique legal ideology to develop and flourish. But, Professor Ramsay, reported, this has led to insularity in U.S. approaches to consumer law reform.[4]

American consumer law fits the overall pattern of insularity in American law, abetted by our federalist system and state common law traditions. Consumer law in the U.S. has long been considered a largely local issue, governed mostly by state law and built on the foundation of the common law (with its emphasis on local control, state judicial remedies, property law, and party autonomy).

But this may be changing, at least in some contexts, as illustrated by the 2004 assertion of broad preemptive regulatory authority by the U.S. Office of the Comptroller of the Currency.[5] This raises the question: what will be the future impact of globalization on the evolution of the U.S. legal community and the common law system? Is the U.S. out of step with the world (an "outlier"), or a role model (or both)? Will a unified global consumer credit market develop, with a corresponding need for unified rules? Will the nationalization of much U.S. consumer law over the past thirty years now be followed by a similar internationalization?

Interesting questions. And there are more, as discussed at the 2004 Program: What of the distributional effects, the impact on income disparities, and the role of cultural factors? Will global consumer credit sources dominate as in some other industries? Will high American consumer debt levels and the common use of consumer credit spread world-wide? How much of American law, and litigation practices, will follow? Will the U.S. lead or follow? Will the U.S. remake the world, or vice versa?[6]

Some of the answers may require a better understanding of why the differences exist. For example, why are levels of credit card use so much higher in the U.S. than elsewhere?[7] Is the reason cultural, or legal, or simply a matter of availability? Is it an inevitable result of party autonomy and the law of contracts? And is it good or bad? Perhaps the answer is a combination of the above. But in any event the future direction of world-wide consumer law trends may be influenced by the direction of national and international legal and policy initiatives, e.g.: the European Union Directive on Responsible Lending; European versus American approaches to contract law, privacy, and litigation; and the expanding role of regulation.

Professor Ramsay noted, however, that one cannot always assume that the U.S. model is contrary to developments elsewhere. For example, India and certain other emerging countries have legal structures that are similar to the U.S., and one result is that there are mutual lessons to be learned. For example, Professor Ramsay opined that a consideration of efforts to combat the very sophisticated illegal money lending system in India, which has existed for a long time, might provide insights that would be helpful in addressing abusive practices in the U.S. It could also be noted that "micro-lending" has expanded in such countries much like non-bank subprime credit has grown in the U.S.[8] Perhaps this is merely a reflection of the common law system, with its emphasis on party autonomy and open markets, allowing lower-income consumers to spend beyond their cash resources by using consumer credit. If so, this may be a near-universal phenomenon that transcends income levels and cultural factors, suggesting the likely emergence of world-wide credit markets and common issues based somewhat on the American model, except in countries where European-style substantive regulation actively constrains market entry and the consumer credit markets.

The next speaker was Allen Zysblat, previously at the University of British Columbia but now a member of the Hebrew University Law Faculty in Israel. Professor Zysblat previously served on the British Columbia Law Reform Commission and was invited to Israel because of a perception that newly arrived Israeli immigrants, e.g., from the former eastern bloc countries, need extra protection against the unfamiliar and sometimes sophisticated consumer abuses found in more open western societies. He noted that Israel has a common law foundation but has moved toward a civil law system as a result of the influence of European immigrants. Thus Israel is an interesting case study in terms of a comparative law analysis and cultural mixture.

In contrast, the U.S. is more insular due to its size and the sophistication of the U.S. legal system, and of course the uniqueness of the U.S. Constitution, legal system, traditions, and history. Professor Zysblat suggested that U.S. policy-makers and lawyers may have much to learn from comparative legal systems, even if that analysis is not legally required. And of course a globalization of legal issues is inevitable with respect to cross-border transactions, even at a rudimentary level (e.g., internet transactions). Thus some convergence of basic legal principles is desirable and likely.

Professor Zysblat noted that the U.S. has often been seen as an exporter of law and legal ideas, but that the process may now be reversing. The increasing globalization of commerce carries with it a corresponding potential for globalization in the law. Legal research is now global, and consumer problems are much the same everywhere, e.g., fraud and deception, access to justice, lost credit cards, disclosure, sales and finance issues.

Professor Zysblat noted that the consumer protection agenda often does not vary greatly from one country to another, despite fundamental differences in cultural and legal systems. Common law systems are foundational in the U.S., U.K., Canada, India, and Australia, while the civil law is the basic system in many European countries. But contract law is widely recognized everywhere, at least in theory, and both the common law and European Union countries recognize regulatory limitations and

have similar consumer protection objectives. Mixing and matching parts of these systems, mandates, and objectives is possible, is becoming more common, and with careful adaptation may be desirable.

How much of this belongs in a law school Consumer Law course? The answer of course, is up to the teacher. Clearly, international issues are relevant and important. Perhaps ideally there would be a separate Comparative Consumer Law course. But the issues also fit in a plain vanilla Consumer Law course, to the extent time allows. No doubt the students would find these issues more interesting than covering the details of Federal Reserve Board (FRB) Regulation Z.

Legal research is now global, and consumer problems are much the same everywhere; fraud and deception, access to justice, lost credit cards, disclosure, sales and finance issues.

University of Wisconsin Law Professor Gerald J. Thain spoke next. He was previously with the General Counsel's office at the Federal Trade Commission (FTC), and has written extensively on global consumer law issues. Professor Thain began by emphasizing that the average consumer is no idiot (a point perhaps too easily forgotten as we review cases involving egregious examples of foolish behavior). Instead, the consumer is your spouse, your friends and family, your colleagues. Not necessarily sophisticated as to specific transactions, but not stupid either. This is surely true everywhere.

The threshold issue is how to integrate international consumer law issues into a Consumer Law course. For example, is it better to introduce examples of internal consumer law from other countries, or to describe the laws applicable to cross-border transactions? Is it better to integrate these issues through-out the course, or to have a separate segment devoted to global issues? For example, comparative advertising is encouraged in the U.S. and largely prohibited in Europe. This creates a good policy comparison at the relevant point in the course (on advertising), but also could serve as a building block in a segregated comparative law segment of the course. Another example relates to remedies: Obviously, private remedies and litigation are more common in the U.S., while public remedies and regulation are more important in Europe, an important policy difference. But how should these comparative law issues be integrated into the course?

Finally, Professor Thain noted the Trans-Atlantic Consumer Dialogue (TACD), a group of consumer organizations created to help design uniform policies and legislative proposals for host governments. The scope of the TACD is not limited to consumer issues — labor, environmental, business, and commercial law issues are or have been covered. But the consumer law group is one of the most active, encompassing some forty-five European and twenty U.S.-based consumer groups. The goal is to develop uniform proposals as part of a single agenda, addressing similar problems everywhere.[9] But Professor Thain noted that cultural differences can create major hurdles to the development of uniform rules.

The next speaker was Bill Vukowich of Georgetown University. He began by reporting that U.S. consumers have already benefitted from the globalization of consumer law, e.g., in terms of stricter privacy rules derived from the European Union privacy directive. The E.U. directive also provides a single E.U.-wide system of rules, compared to the U.S. approach (which reflects partly a federalist system of state-based rules, and even sectorial nonuniformity with different rules for different industry segments). The E.U. rules are often regarded as more pro-consumer, but of course are imposed in the context of a more regulatory legal system with less emphasis on private remedies and litigation. Still, the need of U.S. multi-nationals to comply with E.U. directives has influenced the domestic U.S. policies of those companies. For example, the Microsoft Passport system has been adopted by that company world-wide.

The Internet has developed along with globalization, and together these developments have created new consumer issues and risks relating to electronic commerce, cross-border transactions, regulation, and enforcement systems. One result has been development of the International Consumer Practices and Enforcement Network (ICPEN), a consumer law sentinel group organized by the FTC in the U.S. and similar agencies in Canada, Australia, and fifteen other countries. In terms of the choice of law for cross-border transactions, the basic orientation of ICPEN is to choose the most protective of those laws that are potentially applicable. This is significantly different from traditional choice of law analysis.

Your author must admit that he does not cover much in the way of international issues in his Consumer Law course (the primary exception being a few internet issues — but there is a separate course for that). This omission is perhaps a false luxury that comes from teaching in the near-geographical center of the continental U.S., about as far away as one can get from non-U.S. legal issues and jurisdictions.[10] But the 2004 Program presentations of Professors Mansfield, Ramsay, Zysblat, Thain, and Vukowich would be sufficient to shake anyone's complacency on this point. It is becoming increasingly difficult to ignore these issues — even in central Oklahoma.[11] Soon enough we may all be teaching a much heavier dose of international law.

III. Teaching Consumer Law — What Works and What Doesn't

A. Introduction

This session was chaired by Michael M. Greenfield, the Walter D. Coles Professor of Law at Washington University School of Law in St. Louis. Professor Greenfield has taught Consumer Law since 1972 and is the author of the best-selling case book, Consumer Transactions (Foundation Press 4th ed. 2003). Professor Greenfield introduced the topic, focusing on the decisions a Consumer Law teacher must make in deciding how to structure and teach the course, including the choice of teaching materials, organization of the course, and the scope and content of the course. The speakers on this panel were: Jean Braucher, the Roger Henderson Professor of Law at the University of Arizona; your author; Southern Methodist University Dedman School of Law Professor Mary Spector; and James P. Nehf, Professor of Law and Cleon H. Foust Fellow at the Indiana University School of Law-Indianapolis, currently visiting at the University of Georgia School of Law.

B. Teaching Methodology and Course Content

The most common components of teaching methodology seem to include: traditional case analysis; a problems approach;

reading assignments and lecture; and classroom review of outside materials. Other popular techniques include the use of guest speakers, field trips, empirical research, the Socratic method, role playing, internet programs, and video presentations. Obviously there is a great variety in the ways these approaches and techniques can be combined and utilized.

Professor Braucher noted that most any law school course can have a consumer law component. She suggested that some of the prime components of consumer law, e.g., the law governing adhesion contracts, should be treated as pervasive and widely included in other courses. As another example she cited the interplay between bankruptcy relief and the Truth in Lending Act (TILA) remedies, which together can create a synergy in terms of consumer remedies.[12] This provides, e.g., an opportunity to introduce bankruptcy issues into the Consumer Law course, and vice versa. Some schools (including your author's) now have a separate Consumer Bankruptcy course which is an ideal platform for these kinds of issues. But any Consumer Law, Debtor-Creditor Law, or Bankruptcy course can be used to illustrate the interplay between these laws.

Professor Braucher recommended use of the National Bankruptcy Review Commission Report to provide an overview of bankruptcy law and consumer issues for the students.[13] Other appropriate issues and sources suggested by Professor Braucher include usury and the time-price doctrine,[14] the history of consumer credit, the use of the TILA in litigation, and pay-day lending. In your author's view, appropriate multidisciplinary issues also could include the impact of complexity in the consumer credit laws, e.g., the TILA as a disclosure law that has substantive effects. For example, the complexity of the TILA requirements leads to creditor errors which can be used to remedy unrelated consumer grievances.[15] In effect, the complexity of the disclosure law has created a new range of substantive results and remedies. But this complexity also hampers the ability of judges and lawyers to handle the cases.[16] As part of this classroom analysis, the impact of these complexities on market entry and competition, and on the costs of and access to consumer credit, also could be considered.[17]

The relation between bankruptcy and other consumer protection laws is clearly an appropriate and important topic for both bankruptcy and consumer law courses. Professor Braucher noted some
cases that illustrate this relation,[18] and discussed some resulting legal strategies including: using bankruptcy to save the consumer's home from foreclosure; asserting TILA and HOEPA claims in bankruptcy (including rescission); class actions in bankruptcy; reaffirmation issues; and "ride-through."[19]

C. Organization and Format

Your author's presentation at the point described the roughly chronological organization of the case book he coauthors with Professors Fred Miller and Dan Morgan,[20] and the organization of the Consumer Law course as your author teaches it: the structure of the course follows the pattern of a transaction, beginning with advertising and other inducements and pre-transaction issues (including fraud, deception, misleading advertising, etc.), then moves to related transactional terms and conditions with a likelihood or potential for abuse (e.g., pyramid schemes, referral sales, balloon payments, door-to-door sales, rent-to-own). Then comes material on basic consumer credit issues, e.g., the time-price doctrine, add-on versus simple interest, sales finance and assignee issues, and unconscionability, followed by federal regulatory issues (disclosure, fair lending, FCRA, RESPA, and TILA rescission). Finally, regulation of charges and practices, remedies, debt collection, and bankruptcy are covered. The main problem, aside from the need to cover a mishmash of sometimes detailed laws and their confusing relation to each other, is time: It is difficult to get it all in.

Still, this approach allows the course to follow a logical progression that may help the students develop an overall view of transactions in this area of law. This approach also allows the course to begin with basic tort concepts (e.g., misrepresentation in advertising) that students often enjoy and can relate to, and then allows an early transition into federal regulation (via the FTC advertising rules). In turn this facilitates a basic comparison of tort and contract remedies, as well as private and public remedies, to set the stage for the basic legal choices to be presented through-out the course.

Of course there are many alternative organizational choices, including a procedure-oriented approach (e.g., how to frame and file a law suit), and other trial-practice approaches (as discussed later in the program by Professor Spector). The choice between a transactional approach (with an emphasis on substantive law) and a practice-oriented approach (with a greater emphasis on practice and procedure) also may influence other aspects of the course. In either approach, however, there is likely to be an emphasis on consumer remedies; after all, consumer protection is the subject of the course. However, a substantive law or transactional approach may lend itself additionally to consideration of legal compliance issues, and thereby encourage consideration of both consumer and creditor/merchant perspectives (or at least both buyer and seller perspectives), while a clinical approach may be more likely to reflect a trial practice or advocacy perspective that stresses how to win a case. Still (as noted again below at Part III. E.), your author continues to believe that the choice between consumer advocacy and creditor compliance is generally a false one in this context, at least to the extent that one is teaching law rather than political science, because it is difficult to adequately present one side of these legal issues without also explaining the opposing view.

D. Course Content — the Toughest Challenge?

As noted above, perhaps the most difficult challenge is to fit the subject matter into the allotted class time. For this reason, your author jealously guards his classroom time and does not often use field trips, guest lectures, or video programs as a substitute. Instead, and perhaps less interestingly from a student's perspective, your author spends much of the course slogging through a kind of survey of consumer laws, trying to expose the students to as much law as possible while pausing periodically for more in-depth coverage of important or developing issues.

One goal of this approach is to demonstrate the diverse sources and interpretations of consumer law, the multiplicity of legal theories that result, and the sometimes surprising ways they can fit together (or at least relate to each other). At the 2004 Program, Professor Braucher had already given several examples, e.g., relating to bankruptcy and the TILA.[21] Other sources of law and theories of recovery, evidencing various degrees of potential interplay with other laws, include: torts (e.g., fraud and deception); contracts (e.g., warranty and revocation); FTC regulation and enforcement; the U3C; state UDAP and consumer protection laws; and banking laws and regulations. As several speakers noted, one of the difficult aspects of identifying current "hot button" topics to cover in a law school course on Consumer Law is distinguishing those with broad implications or lasting importance from those likely to fizzle out under further scrutiny. For example, assignee liability issues under the TILA have been heavily litigated over the past ten years, perhaps encouraged by a generous jury award of punitive damages in a famous case involving Mercury Finance; but at this point it

appears that this case was aberrational and will have little lasting effect.[22] Other assignee liability theories have been asserted and some are still pending,[23] but mostly the law remains as it has been for decades or even centuries.[24]

Yet the lure of assignee liability remains, and cases continue to be pursued relating to issues such as yield spread premiums, APR splits, and ECOA claims. There has been so much litigation on these issues that logically they cannot be ignored in a Consumer Law course, even if the issues are largely settled and of only tangential interest to most practitioners. The issues can be complex and may threaten to absorb too much class time, but are sufficiently important to deserve attention despite this, and whether or not the law is changing. Predatory lending is another example that warrants extensive coverage, even though today that also requires coverage the of great disparities in state laws and federal preemption issues, a combination of issues that can absorb an inordinate chunk of classroom time and resources.

Inevitably some topics get pushed aside at the end of the course as time runs short. In your author's case that often means sacrificing coverage of debtor-creditor and bankruptcy issues (including, regrettably, the Fair Debt Collection Practices Act). While it is hard to sacrifice this coverage, it is some consolation if these topics are covered in other courses. But other, more core consumer law subjects also may get short shrift, e.g., the Fair Credit Billing Act, RESPA, even the FCRA and ECOA. The TILA coverage may get reduced inordinately (and the details can be so tedious as to encourage superficial coverage anyway). Except in a trial practice environment, procedure and remedies may be short-changed, along with sales and UCC issues (e.g., warranty and revocation). And where does one find time for the important privacy, electronic commerce, and international issues?

We as academics see to be suffering from the same legal overload as afflicts practitioners and our society as a whole. Clearly there are worse problems in the world than having to choose among consumer law topics, and the burden of having to make these choices is not likely to elicit much sympathy outside academia.[25] But for conscientious Consumer Law faculty these are serious decisions, and perhaps worrisome limitations.

E. Alternative Perspectives

Obviously there is no objectively correct answer to these classroom conundrums. Nor is there any "model" approach or preferred methodology or established course content. Procedural and substantive approaches are equally common and equally viable, merely in different ways. Based on comments of the participants at the 2004 Program, it seems that both pro-advocacy and more traditionally-balanced approaches are widely accepted. The Consumer Law course by nature deals with consumer protection and consumer protection laws, so some faculty orient the course toward a consumer advocacy focus, while others (including your author) try to include and balance both consumer protection and creditor/seller compliance issues. But the teaching process almost inevitably leads to coverage of both perspectives, as it is hard to adequately present the views of either side without noting arguments of the other. In the end, the teacher's agenda and intended focus seem likely to matter less than the academic standards in the classroom. Given the usual law school classroom environment, as long as the subject matter is covered the students are likely to learn a reasonable amount of consumer law no matter what we (as teachers) think.

F. A Clinical Approach

One of the basic alternatives in teaching Consumer Law is to integrate clinical methods into a traditional substantive law course. Obviously this makes sense in an area of law where consumer redress is the ultimate goal. SMU Professor Spector described this approach.

Professor Spector reported on using a series of practice assignments. These typically include a statement of facts, a sample demand letter and related communications from a creditor to the consumer client, a sample petition, consumer contract, etc. The students are directed to organize into small groups, as a series of legal teams representing different parties, and to research and conduct one or more aspects of the resulting law suit. This includes drafting motions and briefs on behalf of the designated client and making oral arguments.

This is a comprehensive approach, involving both substantive and procedural law, plus legal research, advocacy and trial practice techniques, as well as legal teamwork. Professor Spector also noted that law school clinics and their supervisors can serve as a resource for the Consumer Law teacher, and that she has developed her own teaching materials based on cases she previously supervised in her school's clinical program.

Cases are argued to the professor, acting as a judge (using clinical teaching techniques). This teaches students the law, as well as legal research, writing, and reasoning, legal teamwork, and advocacy. It creates a kind of legal diagnostic testing system, allowing the students to learn by doing as well as incorporating more traditional techniques such a research, writing, and lecture. Feedback from the professor is continual. This not only enhances and broadens the learning experience, it engages the students to a degree not common elsewhere in legal academia.

It also reveals fundamental misunderstandings, as students seek to apply laws to the facts of the case and to articulate potential theories of recovery. Professor Spector incorporates critiques through-out the course, in order to provide continual feedback on the students' performance. These interactive, collaborative, and critical analysis features may be nearly unique in the law school experience. Your author has no doubt that it is also fun for the students. This entire approach

Professor Richard Alderman chaired a session on consumer redress.

seems novel and exciting in comparison to more traditional substantive law courses. Your author came away with a new-found respect for clinical legal education.

G. Online Education

No, we are not talking here about replacing traditional law schools and teaching with Internet correspondence courses.[26] James Nehf is Professor of Law and Cleon H. Foust Fellow at the Indiana University School of Law in Indianapolis, currently visiting at the University of Georgia School of Law. He discussed the use of modern technologies and innovative teaching techniques, including online consumer law sources and materials. He illustrated the Westlaw TWEN system (The Westlaw Education Network), which provides online course outlines and supplementary materials. This system facilitates custom design and constant updating of these materials.

TWEN has become an alternative to the traditional case book and packet of supplementary handouts, in effect allowing every teacher to design his or her own case book (perhaps to the chagrin of traditional case book authors and publishers, but then again maybe not — see below). Professor Nehf discussed the pros and the cons of the new system. Among the "pros:" TWEN is easy to assemble, use, and update, for both faculty and students. It can include and also integrate problems, cases, text, assignments, and exams. It can be used interactively, e.g., to provide feedback to both faculty and students, and to integrate real-world features: e.g., credit reports, do-not-call lists, and links to other sources including the FTC site and those of consumer organizations. Today's students are often computer buffs who like online access. It also allows increased portability, bringing far greater access to the classroom.

Among the "cons" noted by Professor Nehf were: the inevitable technical problems that can come with student (or faculty) use of technology; variations in the levels of technology and technological expertise available to students; the danger of volume overload (which suggests a need for careful prioritizing, editing, guidance, and supervision — the inherent discipline of the page limits in a case book do not exist online); the increased burden on students and faculty to organize and integrate masses of relevant material (again, illustrating the function of a case book); and the unavailability of some materials online (including, e.g., explanatory comments by the case book author). So, case books may not go out of style just yet.

Perhaps all of this can be summed up in terms of coherence. The use of online materials allows students and faculty to customize their teaching materials, but this means loss of the organizational benefits, insights, and coherence of a carefully constructed case book. The opportunity to customize carries with it an increased duty to organize. Probably many of us remember the immense value of a good case book (and treatise) the first few times we taught a new course. Those benefits may diminish as our own expertise increases, but the need remains for the organizational coherence contributed by a case book author. Indeed, that need may increase in proportion to the volume of our resource materials. Without this coherence our course materials may tend to become an undisciplined hodge-podge of materials that are individually valuable but lack the needed context, cross-references, theme, etc. for optimal educational purposes.

Other issues also were mentioned by Professor Nehf as appropriate for consideration. Security levels and features may be important. Which parts of the online system should be open, closed, require a password, or have other security features? Professor Greenfield asked whether Professor Nehf edits the cases for online use. The answer was: not yet, but that is possible and probably desirable. Related notes and cross-references also can be added. Of course, this is how case books begin, and the online programs may begat a new range of online or even published case books.

Exams are another issue. Should students be online during exams? Exams could be entirely closed-book, or open-book but offline, or open-book and online. Exams also can be open-book and online for only limited source materials (e.g., statutes and regulations), but this requires secure software so students cannot access other online source materials during the exam. These options again raise issues about the impact of variations in student technology, resources, and sophistication.

None of these issues will retard the march of technology into the classroom, but they illustrate some concerns for faculty to consider. The trend is toward the use of online course materials but not online course instruction. The Internet holds great promise as a means to distribute course materials and to provide greater classroom access to world-wide source materials. But this opportunity carries with it some new teaching responsibilities, and new risks with regard to volume overload, the coherence of materials, access to the teacher's notes (and a "teacher's manual" of answers), and exams.

Professor Alderman chimed in at this point to announce efforts at creating a Consumer Law Listserv at the University of Houston Center for Consumer Law. He also noted that some students don't like TWEN because they view it as shifting various administrative and organizational burdens from faculty to the students. This is similar to the volume overload and editing issues noted by Professor Nehf as outlined above. Also, Professor Alderman reported that some students resent the time needed to log-on and access the TWEN system. It is easier and faster to flip open a case book. He also raised again the possible impact of varying degrees of computer sophistication among the students.

IV. Consumer Redress

This session was chaired by Professor Alderman, and looked at ways to approach the teaching of consumer remedies in the Consumer Law course. Among other things, this discussion addressed the role and teaching of punitive damages, class actions, statutory damages and penalties, bankruptcy, and related practical issues regarding remedies for aggrieved consumers. It was noted that the inherent orientation of a Consumer Law course toward consumer protection issues requires coverage of remedial techniques as well as substantive laws.

Professor Alderman began by explaining his use of Monopoly game play money to illustrate a Ponzi scheme in class. (If this gets around it will be hard for the rest of us to compete!) He also discussed the specialized nature of consumer remedies, drawing an analogy to Sports Law (where traditional legal principles are adapted to a specialized context). He also noted the role of commercial law statutes like the UCC, e.g., Article 2 revocation of acceptance, Article 3 payment-in-full checks, and Article 9 statutory remedies. He then introduced the other speakers.

Joseph Sanders, the A.A. White Professor of Law at the University of Houston, has written extensively on the attribution of responsibility, mass torts, and the use of scientific evidence in court. He spoke on the relations between tort law, products liability, and punitive damages, noting that these are hot-button, politically sensitive issues that garner lots of media attention. Billion dollar punitive damages awards make for a nice headline, and are sure to generate public discussion. It is common in consumer tort law cases to have detailed jury instructions that include the net worth of the defendant. The

net worth of a major corporate defendant is likely to greatly exceed that of the individual jurors. The impact of this disparity on jury deliberations cannot be ignored. Cutting the other way, in many jurisdictions, an intentional act and not negligence is required to support a punitive damages claim.

Juries are famous for their volatility in awarding punitive damages, sometimes with a great dispersion of results that has been likened to creating a casino-like legal atmosphere.[27] Professor Sanders reported that punitive damages are awarded in about six percent of jury cases, including: four percent of personal injury cases, twelve percent of contract law cases, twenty percent of intentional tort cases, and thirty percent of employment law cases. The median award is around $50,000; the mean is $500,000-$2 million. Obviously a relatively small number of large awards are driving up the mean. But many of these are significantly reduced by the judge or on appeal.

Professor Sanders next discussed the effects of punitive damages caps. A majority of the states now have caps, though the precise impact is not yet clear. A Rand Corporation study reportedly indicated that some sixty percent of punitive damages claims are being affected, but Professor Sanders reported that in tort cases it is unusual for awards to hit the caps. Broader tort reform has also been a factor: Five states don't allow punitive damages; most states allow punitives but with caps and the caps vary greatly. Most states require intentional conduct as a prerequisite, and many require clear and convincing evidence (a relatively high burden of proof).

The U.S. Supreme Court has weighed in on all of this, e.g., in the Gore and Campbell cases,[28] indicating three criteria to be considered when determining an appropriate level of punitive damages: The degree of reprehensible conduct; disparities between the levels of compensation and punishment; and the relation between punitive and civil penalties. In Campbell, for example, the disparity between $1 million in direct damages and $145 million in punitive damages was too much, and not sufficiently related to the plaintiff's injury and complaint. The Supreme Court rejected the use of an overall pattern of conduct as the basis for a punitive award, because that would allow multiple plaintiffs to recover duplicate damages for the same acts.

Next Stephen Meili, Clinical Associate Professor and Director of the Consumer Law Litigation Clinic at the University of Wisconsin Law School, spoke on the role of class actions. He noted that there has been a dramatic increase in consumer class action litigation in recent decades, as more trial lawyers have moved into the consumer law field. He noted the impact of recent changes to the Federal Rules of Civil Procedure: Rule 23(c)(2)(B), mandating more information in the class notices; Rule 23(e), governing settlements (and particularly coupon settlements and opt-out rights); Rule 23(g), a new rule governing the appointment of class counsel; and Rule 23(h) on attorney fees.

Still, there has been a significant increase in class action litigation, and a counter-movement to use arbitration clauses as an alternative. There have also been judicial efforts to restrain class action litigation. In Texas there has been controversy over using Rule 23(b)(2) to shoehorn damages claims into class action cases without meeting the Rule 23(b)(3) criteria.

Professor Meili also discussed the use of class action law as a teaching tool. With the deregulation of interest rates in many states, there is essentially no usury so many cases allege unconscionability as an upward limit on rates and charges. These cases often illustrate the perils and benefits of using unconscionability in class action litigation. Unconscionability is a common law concept that is analytically challenging to establish, but often has popular appeal. The widespread use of standard form contracts has been a boon to class action litigation for obvious reasons.

Most class action cases are settled if a class is certified. The risk of a ruinous adverse judgment is just too great for many defendants. So most class action litigation is a battle over certification. Some states have statutory caps on class action liability in consumer cases, and some cases have increased the difficulties of getting class certification. But sometimes the publicity generated by such cases has a political impact of its own or can raise public awareness of an issue, even if the case is unsuccessful in court.

The next speaker was William Whitford, Professor of Law at the University of Wisconsin. Professor Whitford opined that the biggest problem in the U.S. justice system is obtaining redress for grievances in small transactions.[29] Class actions and punitive damages represent a partial solution.[30] Consumer bankruptcy is another. Often bankruptcy is the most practical solution, e.g., providing more direct benefits to the client than a class action. The mass-production bankruptcy bar has achieved economies of scale and can handle large volumes of these cases at relatively little cost to each consumer, by spreading the administrative costs and the cost of developing new legal theories over a large case load.

As a result, Professor Whitford reported, consumer bankruptcy now overshadows other consumer remedies in some respects. Every town of any size now is now likely to have at least one consumer bankruptcy specialist. However, the obstacles to consumer bankruptcy relief remain significant. Professor Whitford cited as examples the Bankruptcy Code section 523 exceptions to discharge, and the differing treatment of secured and unsecured claims.[31]

Professor Whitford then considered a question that is central to the ongoing bankruptcy reform debate: Is current bankruptcy law a case of overkill? He noted that a consumer can still repay any discharged debt as desired. What of the adverse impact (or "stigma") of bankruptcy on the consumer's credit record? Professor Whitford said this is over-rated, and that consumers frequently improve their credit status following bankruptcy.

Professor Whitford noted a basic divide in the law of consumer remedies: Bankruptcy, on the one hand, is essentially a consumer entitlement based on need, subject only to vague limits relating to, e.g., fraud and abuse.[32] There are frequently no issues of fault to be litigated. In contrast, most of the alternatives focus on fault, negligence, noncompliance, etc., and therefore require proof of creditor errors or wrongdoing in order for the consumer to prevail. This requires an adversarial process that often leads to litigation. This can be expensive and the results are often uncertain. Bankruptcy also provides a forum for asserting creditor errors, but does not require this. It permits a shift away from reliance on creditor wrongdoing as a prerequisite to consumer remedies.

This is not to say that consumer bankruptcy is free of problems from the consumer perspective. Among the problems noted by Professor Whitford, some lawyers are less client-oriented than they should be. Some seem inclined to operate an assembly-line that cranks out bankruptcy filings with little regard to the client's needs.[33] These problems are not limited to bankruptcy, but the awesome power of the bankruptcy process to affect people's lives means that the risks of abuse should not be ignored.

John Roddy, a partner in the Boston law firm of Grant Klein & Roddy, spoke next. The first non-academic on the 2004 Program, he is Co-Chair of the Practising Law Institute's annual

program on Consumer Financial Services Litigation, and has spoken and written widely on consumer law and litigation. Mr. Roddy specializes in representing consumers in class action litigation, and he addressed the issue of consumer remedies from this perspective.

Mr. Roddy noted that some consumer remedies are articulated in statutes and some are not. New causes of action and remedies can be created by mixing and matching various statutory and non-statutory claims. He urged plaintiffs' lawyers to consider the full range of alphabet soup statutes and regulations, in combination with common law claims, to maximize the prospects for consumer recovery. One example is using TILA errors as the basis for a tort law misrepresentation claim, to be remedied under the state UDAP statute.

Mr. Roddy reported that it is difficult for a plaintiffs' lawyer to earn a good living handling small or individual consumer cases, because of the time required and the small recoveries. Class actions are thus necessary to subsidize the small cases. He again noted that most class actions are settled once the class is certified, as the economic risk of a liability finding is a significant incentive for the defendant to settle.

Bankruptcy also provides a forum for asserting creditor errors, but does not require this. It permits a shift away from reliance on creditor wrongdoing as a prerequisite to consumer remedies.

Mr. Roddy also noted the use of traditional and statutory remedies. The new consumer notices required under revised UCC Article 9 (e.g., section 9-625) offer favorable prospects for plaintiffs' lawyers. Credit contracts written at the limit of usury statutes are easily bumped over that limit by minor calculation or disclosure errors. The use of form contracts and computer programs make these prospective class actions. Even small statutory damages, spread over the class, can mean large recoveries. Once the class is certified, the application of statutory damages (e.g., under UCC section 9-625) may limit the court's discretion to reduce the plaintiff's recovery.

Mr. Roddy also noted the 2002 TransUnion privacy litigation, under the FCRA.[34] This class action involved 190 million consumers, and claims for statutory, actual, and punitive damages. At a recovery of even $100 per consumer the damages could have been debilitating to the defendants (e.g., liability to 190 million consumers at $100 each). The judge ultimately concluded that these damages were disproportionate to the harm and the class was not certified.

Mr. Roddy also reported on a FCRA case brought in the Northern District of Illinois.[35] A car dealer was pulling credit reports on "tire-kickers" without their permission. The class action claimed 65,000 class members. Again, a recovery of $100 per class member would have annihilated the defendant; the judge concluded this was disproportionate and declined to certify the class. Thus cases where the plaintiff's economic leverage is the greatest may pose special challenges in terms of class certification. But Mr. Roddy noted that other judges might have viewed such cases differently, especially where the defendant's conduct is unsavory, e.g., in usury cases.

The hospitability or hostility of the forum is a key factor in class certification, and therefore may determine the value of the plaintiff's case. Mr. Roddy noted that a failure to consider, e.g., the forum's jurisprudence on arbitration clauses would be ineffective lawyering. The personal relationships between the plaintiffs' and defendants' counsel also may be as important as the law in reaching settlements. Experience litigating previous class actions with the defense counsel provides a level of understanding that is valuable. And the plaintiff's lawyer should not underestimate the defendant's "headline" risk — the potential public relations damage from an adverse ruling on a politically-sensitive issue. A usury class action may become a human interest story to the media, with serious adverse consequences in terms of sales, the company's reputation, even the company's stock price. These things can easily generate calls for changes in the defendant's management (this might be called the scapegoat risk), and can lead to secondary consequences such as state Attorney General investigations, federal regulatory scrutiny, etc.

V. Luncheon

At the informal luncheon provided at the end of the first morning of the 2004 Program, Professor Alderman summarized the morning sessions and commented on the events of the day. He noted that the morning presentations reflected a variety of perspectives, backgrounds, geographic regions, ages, experience levels, educational backgrounds, philosophies, and academic approaches, and that the active audience participation indicated a similar variety among other attendees.

Professor Alderman noted again that a surprising number of schools do not teach Consumer Law, and some of those that do may de-emphasize the course in significant ways. Others in the audience noted that Consumer Law is seldom a "hire" position — one is unlikely to be hired at any university due to consumer law expertise. Thus it is almost accidental when the full-time faculty includes Consumer Law expertise. And adjunct faculty teaching in this area of law may not receive the support or recognition they deserve. Even some academic organizations do not provide adequate recognition to Consumer Law as a legal specialty.

As in 2002, the 2004 Program provided a needed boost to this discipline, e.g., in terms of exposing attendees to the techniques, issues, and developments used or emphasized by others in the teaching field. The sessions were also a helpful look at various alternatives for newcomers and those seeking fresh ideas or approaches. The number and variety of the alternatives discussed was again an eye-opener, at least to your author. The 2004 Program was off to an excellent start, and Professor Alderman thanked all of the morning speakers. The audience spontaneously expressed its appreciation to Professor Alderman and the University of Houston Law Center for again hosting the event.

VI. The Role of the Federal Trade Commission in a Consumer Law Course

The afternoon featured "break-out" sessions for attendees to choose among. Your author began with the FTC break-out session chaired by former FTC General Counsel Stephen Calkins, now Professor of Law and Director of Graduate Studies at Wayne State University Law School.

Professor Calkins began by describing the new OCC preemption rules,[36] and discussing their effects. Among these is a potential diminution of FTC jurisdiction, e.g., as to unfair and deceptive practices issues regarding national bank subsidiaries.[37] This may be less obvious than the similar effects on state courts and agencies. He also mentioned other recent FTC developments, e.g., the new FTC rule-making authority under the FCRA, created by the FACT Act.[38] He also noted

the impact of securitization on consumer credit, and the issue of due diligence obligations for assignees — currently an unregulated area but one of prospective interest to the FTC.

Next Professor Calkins led a discussion regarding the role of the FTC and related issues in a Consumer Law course. At the previous (2002) Houston program, Professor Calkins advocated a significant role for FTC issues in a Consumer Law course.[39] This year (at the 2004 program) he took a different approach, discussing the problems that come with including a significant FTC component. Attendees contributed their own pros and cons. Among these: Unless the coverage is so expansive as to swallow the course, it may be inadequate and serve merely to over-simplify the issues. And FTC law inherently includes a heavy dose of federal administrative law, which deserves a course in itself. But the FTC seems too important to leave out, unless one has a course focused entirely on state law.

Attendees differed as to the optimal extent of coverage. Some said it should be minimal, others advocated a heavy dose. Your author devotes roughly four class sessions of seventy-five minutes each to FTC issues, sometimes more, but is not clear as to whether that would be considered a heavy or a light dose. Of course, classroom coverage can be supplemented by the use of written materials. It was also noted that the relation between the FTC and private law has evolved over the past thirty years. Previously, public enforcement often preceded private law developments. Today, it may be more likely that private litigation will lead the way and FTC enforcement will follow suit. But clearly the symbiotic relation continues.

Professor Calkins complained (uh-oh) that case books too often do a poor job of presenting FTC issues, e.g., including obsolete or inappropriate cases, misleading materials, etc. Clearly this is a difficult area for the non-specialist. He said FTC coverage should emphasize the FTC staff benchmark of consumer injury. Without an injury, the FTC is unlikely to be interested in technical errors — FTC resources are limited, and there are more than enough injurious cases to go around.

In the advertising arena, the deception and unfairness statements remain the touchstones.[40] The FTC distinguishes between credence goods and experience goods. The former are goods where reliance on manufacturers' and retailers' representations is essential, e.g., pharmaceutical drugs. Experience goods are those where the consumer's stakes are lower and his or her experience level is of greater importance, e.g., a candy bar. An exaggerated claim on a candy wrapper ("great taste") is probably not actionable, because the injury is minimal and the market can easily self-correct based on consumer experience. But representations about the effects of a drug to combat prostrate cancer may deserve greater credence because the consumer cannot self-correct based on experience until it is too late. In the latter case, advertising credence is essential because experience alone is not adequate to allow self-correction.

Other FTC issues of relevance to a Consumer Law course include new developments like the do-not-call rule, and the CAN-SPAM Act.[41] Aside from obvious compliance and liability issues, these kinds of FTC rules can generate classroom policy discussions, e.g., how far should the FTC go in regulating free speech, what is the difference between subprime and predatory lending, how much can and should privacy be protected, what should be the relation between state and federal regulation, or between public and private remedies? There are also lessons to be learned from discarded FTC rules and unsuccessful enforcement actions (the stop me before I over-regulate again syndrome).

Continuing with the discussion of risks in the coverage of FTC issues, Professor Calkins noted the distinction between students as consumers and students as prospective lawyers. This is an uneasy distinction that is confronted throughout the Consumer Law course, as students are both. But the appropriate treatment of issues may be very different for each of these purposes. Practices that are costly or imprudent from a consumer perspective (e.g., excessive or high-cost debt) may not be unlawful or suitable for redress by litigation. The Consumer Law class can serve both the roles of legal education and credit counseling, but the separation of these roles should be noted and maintained. FTC issues may be relevant to both, but in different ways, and again these distinctions are important and deserve emphasis.

For example, the Consumer Law course can be approached as a public policy course for potential administrative lawyers, or a training ground for trial lawyers and corporate compliance officers, or as a high-level credit counseling service. Perhaps ideally it should incorporate all of the above elements. In any of these approaches it is appropriate to consider the limits of public enforcement and regulatory sanctions, the role of private remedies and enforcement, and the lines between imprudence and illegality. The FTC is relevant to all of these issues, but the needed level of detail and the nature of the coverage may vary depending on the purpose of the discussion.

Professor Calkins reported that the FTC currently prefers to file cases in federal court, rather than pursuing administrative enforcement actions (though there is some of both and the use of Consent Orders is still common). Federal court actions provide more wide-ranging and serious remedies against outright fraud artists (where the evidence is clear and legal nuances are less important). The equitable powers of the federal courts allow the FTC to harness that authority in a variety of contexts where wrongdoing is clear (e.g., against fraud artists). The result has been effectively an increase in the FTC's enforcement powers and remedies in federal court.[42] But as noted Consent Orders remain important, e.g., as a means to develop new substantive law standards and rules outside the judicial system. If the legal issues are less clear, a Consent Order provides a more limited thought potentially effective remedy. This has recently been seen in the development of privacy standards under the GLB Act and related substantive rules.

What are the FTC challenges ahead? The food industry is apparently on the agenda, e.g., claims of health food status by fast food chains. Telephone scams remain a high priority. Professor Calkins reported on a case relating to the American Idol TV series: Viewers were invited to call in to "vote" their preferences; callers then were solicited for charges to be imposed on their telephone bill (99 cents per minute, minimum three minutes) in order to "vote." It was misrepresented to be part of the TV show. Apparently over 25,000 callers fell for it and were charged. The use of slightly misspelled variations of popular websites is another ongoing scam. Many of these problems have been resolved by Consent Orders, and similar efforts are continuing.

Of course the basic dilemma for the FTC (as for many federal agencies) remains: When to make a federal case of it? The resources of any agency are finite, and the historical record includes cases where enforcement authority was misdirected. Suppose that an Internet service provider discovers it has imposed unauthorized charges, and then is slow in making refunds. Should this be the basis for a federal cause of action? It is not an answer to simply favor tougher enforcement or bigger budgets; every organization has limited capabilities and must prioritize its efforts. This can be the toughest challenge. It requires the agency to distinguish between normal errors

and reasonable behavior on the one hand, and unfair acts and practices on the other. This is a distinction that not all human beings are suited to make. Consent orders, though common, do not always make that line clear, and may reflect little more than an agency's bargaining authority. It is an excellent teaching area, mixing unfairness standards with federal administrative law, but remains a challenge for students and faculty, as well as the federal agencies themselves (and not just the FTC).[43]

VII. Innovative Teaching Methods

The next break-out session your author attended was Professor Dee Pridgen's session on Innovative Teaching Methods. Mary "Dee" Pridgen is Associate Dean and Professor of Law at the University of Wyoming College of Law, where she has been teaching since 1982. She is one of the best known Consumer Law academicians, and has authored two treatises on the subject[44] as well as a case book,[45] all published by West Publishing Co.

This break-out session focused on both technology and non-technological solutions to modern teaching challenges, e.g., creative uses of the Internet, including links, supplementary materials, e-mail, chat rooms, interactive sites, etc.[46] But new approaches create new challenges, e.g., how much new responsibility should be put on students?

Professor Pridgen suggested the use of problems to illustrate the effects of otherwise boring laws and regulations. The TILA is an obvious example. It is probably too much to expect students to memorize all of the tedious details of the TILA and FRB Regulation Z, absent examples using problems that the students can relate to. Allowing student group discussions and analyses, and possibly a group report to the class, also may help.[47] But this requires careful instructions, structure, and supervision, to be sure the students focus on a specific task and the process doesn't devolve into general chat sessions. One way to do this is to give the student break-out groups a client or specific case to argue.[48] Even if they reach wrong answers or utilize defective analyses, this can provide a useful learning experience, given appropriate faculty supervision and review. For example, providing a client or framing an issue is essential at the beginning of the process, while a review of the analysis is essential at the end, with additional supervision needed in between. There are, of course, many other ways to combine problems and student break-out sessions as a means to analyze statutes and regulations, and various alternative approaches were also discussed.

Among these is the use of field trips, e.g., to visit car dealers, financial institutions, etc. Your author is too jealous of his class time to do this, but it must be admitted that the students would love it and likely find it instructive. Others suggested a "mystery shopper" or "testing" approach, e.g., sending pairs of students with varying ethnic characteristics to a car dealer or bank, then comparing the results to look for ECOA violations. Yet another approach is to conduct classroom analyses of competing mail solicitations, or to have the students obtain and analyze their credit reports. The latter could include a guest presentation by FCRA experts or a representative of a credit bureau, or an identity theft specialist, to further explain how credit reporting works, discuss the treatment of errors, etc. Willing students also can be asked to share their own credit experiences. And numerous examples of advertising, web sites, and form contracts are always available for classroom discussion and analysis.

VIII. Payments Systems and Check Truncation

Mark E. Budnitz is Professor of Law at Georgia State University College of Law and a well known author and specialist in both consumer and payments systems law.[49] At his session Professor Budnitz described new developments in electronic payments law, including Check 21, electronic checks, ACH payments, and the latest UCC Article 3 and 4 revisions. He noted variations in the legal treatment of various forms of electronic payments and electronic checks: Point of Purchase ACH entries (POP); Accounts Receivable ACH entries (ARC) (sometime called lockbox ECC); and Electronic Check Conversion (ECC).

Professor Budnitz distinguished between electronic checks that are originated in paper form and similar payment systems that are originated electronically. He also distinguished between the new Check Truncation Act (Check 21), and ACH transactions that can be originated by check and then converted into electronic processing and transmission. In a common form of transaction, a check is the source document used to create an ACH transaction, governed not by UCC Articles 3 and 4 (or Check 21) but by FRB Regulation E and clearing house (e.g., NACHA) rules. The latter are unusual because the NACHA provisions are a form of private law-making. The states have not enacted the NACHA rules, which are imposed by agreement on the participating parties. Of course, the Electronic Funds Transfer Act (EFTA)[50] and FRB Regulation E[51] govern ACH transactions, and the NACHA rules cannot override federal law, but the convergence of federal law and the NACHA rules (in lieu of UCC Articles 3 and 4, Check 21, etc.) can be confusing to lawyers, not to mention consumers. For example, there is no notice to the consumer in a check-originated ACH transaction of the EFTA and Regulation E error resolution requirements. It was noted that the Attorney General of West Virginia brought an action against Telecheck for collecting bad checks via the ACH system in order to take advantage of the NACHA rules.[52] Professor Budnitz also recommended Professor Ronald Mann's case book on payment systems,[53] in part for its coverage of the NACHA rules.

All of this raises a "scope of the course" issue, as noted by Professor Budnitz: How much of UCC Articles 3, 4, and 4A should be taught in the Consumer Law course?[54] For that matter, how much payments system law? The Consumer Law course traditionally has focused on consumer credit and sales of goods issues, but payment system issues are becoming increasingly important to consumers and may be viewed as a potential third tier.[55] Yet, payment systems expertise is as scarce as FTC or

Professor Jean Braucher led a lively discussion of consumer bankruptcy.

other consumer law expertise. Moreover, payments system issues need and deserve (and often have) their own course, and this cannot realistically be replicated in the Consumer Law course. So it often becomes a matter of focusing on a few of the special consumer law payment remedies available, e.g., under Articles 3 and 4 and Regulation E, and now Check 21. But each of these is a complex area, especially the comprehensive rules of the UCC and even more so now with Check 21. So the selection of issues and determining the proper mix of topics (and the allocation of time) is a difficult challenge.

Those like your author who teach both Consumer Law and Commercial Paper/Bank Deposit and Collection courses can afford the luxury of allocating most payment system issues to the latter course. But in some ways it is a false solution, as many students do not take both courses. And in the end, in both courses, there is the basic dilemma: Should one abbreviate coverage of the foundational and comprehensive UCC system in order to spend more time on cutting-edge consumer remedies involving NACHA, Regulation E, Check 21, debit and credit cards, stored value cards, etc.? Some erosion of the former seems inevitable as the latter increase in importance. But how much?

Again there is no single answer, and even in some Payment Systems courses the UCC Article 3 and 4 issues already have been relegated to little more than footnote status. Your author does not agree with this approach but admits that it is one solution to the overload problem. And as the UCC coverage is reduced, it risks becoming so inadequate as to be misleading, perhaps suggesting further reduction. It is a problem that can only become more acute as more and more electronic payment systems emerge into prominence to compete for the business of consumers.[56] For example, "pure" electronic checks (as opposed to Check 21 and ECC) and other internet-based payment systems potentially represent an entirely new and separate payment system. These pure e-checks are not checks or an ACH transaction, and are not governed by the UCC or NACHA rules or FRB Regulation CC or Check 21. But they are covered by Regulation E, and the electronic source document may resemble a check.[57] This can add to the confusion of to consumers (and even their lawyers), who may have difficulty distinguishing between these various payment systems.

Professor Budnitz noted that Check 21 evidences the federal policy favoring the elimination of paper. The FRB drafted the implementing rules (as amendments to Regulation CC), and included input from both consumer and industry representatives.[58] The goals were to: reduce the costs associated with processing paper; reduce the "float" in the collection system; reduce the physical risks in transporting paper; and generally increase speed and efficiency. Laudable goals, each and every one, and there is broad agreement on these points.

But of course there is the inevitable question that confronts all progress: At what cost, and to whom? Considering that most of our modern payment systems (and related laws) are based at a fundamental level on the concept of negotiability, and a paper instrument, there is some leap of faith involved in simply eliminating that paper. Check 21 does not require or even expressly permit truncation (i.e., destruction of paper checks), but effectively does so by essentially requiring anyone whose check is destroyed without his or her authorization to accept instead a "substitute check."[59] The major collecting banks which most want to process checks electronically are effectively authorized to do so, without permission of the owner of the check. So it seems likely that paper checks will almost immediately disappear from the bank collection system. Check 21 then provides for the use of "substitute checks" as a crutch when a paper replacement is needed.

The major collecting banks which most want to process checks electronically are effectively authorized to do so, without permission of the owner of the check.

The FRB has worked hard to assure that this does not undermine the rights of parties to these checks, and has been far more solicitous of state law than is sometimes the case at the federal agency level. But foreseen and unforeseen problems will inevitably result. Among those mentioned by Professor Budnitz: As float is reduced, the consumer's "window" for stopping payment will also be reduced. The check image on a "substitute check" will be reduced in size, and perhaps clarity, making forgery and alteration scenarios more difficult to resolve (and perhaps more likely to occur). Some might argue that the current, serious problems with check fraud will become even worse. The Check 21 indemnities, warranties, and consumer recredit procedures, though important and drafted with the best of intentions, are somewhat complex and may add another layer of difficulty to an already challenging area of law. And though a consumer who has not agreed to imaging has a right to obtain a substitute check, including new warranties and indemnities, as an alternative to an original check that has been destroyed, exercising those rights may be easier said than done.[60] And then there are the questions regarding the enforcement of substitute checks, and the duplicates or multiple copies that seem likely to appear.

It all seems likely to generate increased identity theft and check fraud problems — exactly the kinds of problems that the law of negotiable instruments (before Check 21) was designed to resolve. Check fraud prosecutions may increase, and become more difficult. The essential security features of a paper check (safety paper, texture, color, an ink signature) will be lost, making unauthorized duplication easier to do and harder to detect. The warranty, indemnity, and recredit procedures are designed to compensate, but a remedy is never quite the same as prevention, and the new remedies are complex and have a difficult intersection with the underlying UCC law to which they must relate. It is legitimate to wonder if these concerns have been given the fullest attention in the rush to achieve the efficiencies of electronification.

Other emerging payment system issues involve payroll cards - - the use of stored value cards instead of paychecks. Again, what law applies? The UCC, Regulation E, FDIC insurance rules? The FRB considered rules to clarify this but as of this writing had not taken a stand, and practices are changing rapidly as the technology evolves.[61] Should the law encourage this, or discourage it, or take sides at all? What about disclosures, and error resolution? And what if payroll cards evolve into a device for making high-cost payday loans?

IX. Arbitration

Professor Stephen K. Huber spoke next, on consumer arbitration. Professor Huber teaches at the University of Houston Law Center and is a long-time specialist in banking law, alternative dispute resolution, and administrative law, among other things.[62] Your author has known Professor Huber since the days of the SMU Banking Law Institute in the early 1980s, and

has always admired Professor Huber's intellectual independence and willingness to question the conventional wisdom. His presentation at the 2004 Program did not disappoint.

Professor Huber's topic was arbitration. If anyone present was expecting a narrow, legalistic approach they may have been surprised. Professor Huber was a Peace Corps volunteer in Africa and has written scholarly articles critical of some aspects of arbitration.[63] But he is also a student of Law and Economics, and at the 2004 Program presented a wide-ranging analysis that included both pros and cons as well as an economics perspective.

Professor Huber began by noting the role of arbitration in improving consumer welfare, e.g., as a means to a quick and cost-effective resolution of small yet complex consumer disputes. Of course it largely shuts lawyers (or at least large lawyers' fees) out of the process, which is likely a reason why many trial lawyers (on both the plaintiffs' and defense sides) become incensed at a kind mention of the "A" word. Professor Huber confronted this head-on, noting that in contrast many outside the legal profession think that lawyers and legal fees are part of the problem, not the solution.

He noted that use of the term "ADR" (Alternative Dispute Resolution) can be a misnomer because this broad concept lumps together a variety of dissimilar processes that includes but is not limited to arbitration.[64] Still, many outside the legal community view any kind of ADR as a win-win situation in terms of resolving disputes. Broad-scale attacks on arbitration may have unintended consequences in this debate. (From a Law and Economics perspective, the law of unintended consequences remains famous despite the self-assurance of many policy advocates.) As an example, Professor Huber noted that housing activists seeking stricter enforcement of housing codes may simply end up reducing the stock of affordable housing and pushing the poor into even worse conditions. As an alternative approach, Professor Huber suggested consideration of providing incentives for new housing, though this may be viewed as the antithesis of "slow-growth" constituencies in some areas. As with many problems, there is not easy solution, or at least not an easy one that works (maybe that's why they are called "problems").

The TILA is another example noted by Professor Huber. Plaintiffs' lawyers like it because the legal complexities are beyond many creditors and this leads to technical compliance errors and enhanced litigation potential. Large, sophisticated creditors like it because it provides competitive advantages against small competitors and discourages market entry, as well as providing defensive protections and justifying higher consumer credit interest rates. But it has left ordinary consumers, merchants, and creditors at the mercy of highly specialized legal counsel, which is inevitably more costly, because a general practitioner cannot be expected to master TILA law. Consumers have thus become dependent on a relatively small cadre of specialist lawyers, who can utilize legal technicalities to enhance recoveries for their clients (and themselves), but at some cost to other lawyers and to consumers and perhaps society overall. There is of course beneficial fallout as well, including a deterrence effect and improved consumer disclosure. No one is suggesting that TILA be abolished (least of all creditors and defense counsel), but it is fair to note that such progress seldom comes without costs.

Consolidation in the banking industry, encouraged by an increased regulatory burden designed in part to prevent a recurrence of the deposit insurance crises of the 1980s, may be yet another example. One result has been an increase in the number of "unbanked" consumers, particularly among the poor. It is quite possible that the new Check Truncation Act[65] may reinforce this trend, as the new expedited recredit provisions[66] increase the risks of providing checking account services to marginal customers and may result in tougher eligibility requirements for bank checking accounts. The consolidation in the banking industry over the past fifteen years and the "unbundling" of banking services probably has led to increased costs for many ordinary customers, and increased reliance on non-bank alternatives for many others — a quite unintended result of banking law and regulation.

This has contributed to the conventional wisdom that "the poor pay more," and in terms of financial services obviously the less creditworthy will pay more than the most creditworthy. Indeed, consumer protections may widen this gap by raising the cost of serving the poor, e.g., increasing the risks and burdens of compliance, which affect the poor more than the affluent (who default and therefore pose fewer such risks). But Professor Huber noted that in other ways (unrelated to consumer protection) the poor do not pay more, and indeed may pay much less or be on a more equal footing than ever before. He mentioned a few examples: Wal-Mart prices as compared to upscale shopping malls; inexpensive new cars or late model used cars (after the prior owner has suffered serious depreciation) that are often good for 100,000 or even 200,000 miles with minimal maintenance (compare that to the price of a new BMW); computers, the internet, DVD players, etc. In the legal profession we may tend to equate litigation with consumer protection, but there are other ways that consumers benefit. In many ways consumer progress has come from business enterprise, competition, global markets, and technology. Consumer protection law cannot claim credit for all of the advances.[67]

This is not an argument against consumer law or consumer protections, but merely to note the obvious: that consumer well-being is a multi-faceted phenomenon. A focus on consumer protection and legal remedies (necessarily the point of a law school course) does not have to mean a narrow perspective. As Professor Huber noted, the globalization of markets has reduced consumer costs and increased living standards world-wide. Secondary mortgage markets have improved housing affordability. He suggested comparing current living standards with those of a century ago, when a common consumer aspiration was to live in a painted house.[68] Not everyone has benefitted equally, and this progress may not console the consumer who has been ripped-off, but overall the gains have been impressive.

Returning to arbitration, Professor Huber utilized an approach that he described as contrarian in the context of a litigation-oriented audience: He described how arbitration works well. He noted that consumer arbitration is now fifteen years old — the genesis was U.S. Supreme Court decisions regarding securities law and employment cases. The purpose was not avoidance of class actions, but to provide a cost-effective forum for resolving relatively small and specialized, fact-intensive disputes. This was built on the foundation of a long history of commercial arbitration. Organized labor supported the trend by demanding arbitration clauses in union contracts, in order to avoid the courts and judicial doctrines such as employment at will. Today arbitration in securities, insurance, and employment cases is common and widely accepted. Consumers win over fifty percent of the cases, arbitration protocols have been standardized, and consumer costs are minimal. Online arbitration is coming, and will be even cheaper and more convenient.

Arbitration is also being widely used to resolve auto sales disputes. Warranty claims and lemon laws are examples. Sometimes an arbitration panel of two consumers and one dealer is used; sometimes the dealer or insurance company pays all costs, e.g., if the consumer agrees to be bound by the result, or

the parties may split the costs and agree that the consumer is not bound. The AAA consumer arbitration protocol allows the option of small claims court as an alternative; NAF is an even less expensive choice. Any of these options creates a meaningful remedy for consumers at minimal cost, and consumers win some relief in most arbitrations. In some auto sales arbitrations, the limit on the remedy is a new car, and the process calls for review of the vehicle in dispute by an independent mechanic. The consumer is entitled to legal representation throughout.

In the vast majority of these transactions, arbitration works fine and is superior to any reasonable alternative.[69] Bazzel[70] says it is OK as a legal matter, based on contract law and subject to the usual restraints. Class-wide arbitration is possible in appropriate cases, though the lack of judicial or appellate review is a procedural weakness. Arbitration in the U.S. more resembles the administrative law systems used in some other countries, as compared to the more open-ended U.S. litigation system; if global legal systems coalesce in the years ahead,[71] this may encourage a continuing expansion of administrative and arbitration remedies in the U.S., at the expense of common law judicial processes.

X. Current Issues and Developments

Your author spoke next, describing a variety of recent legislative, regulatory, and judicial developments. As with any current issue being presented to a diverse audience, some controversy was expected, and your author was curious to see which issues would generate debate and criticism.

Not surprisingly, one issue that generated audience participation was assignee liability. Your author's suggestion that the FTC "holder" notice largely reflects the common law of assignment and does not create new substantive causes of action met with disagreement from some in the audience.[72] An attendee pointed out that the FTC notice eliminates the need to prove a "close connection" as required in some of the cases,[73] but in response it can be noted that those cases involved the UCC Article 3 holder in due course (HDC) doctrine, not the law of ordinary assignments. It is one thing (and relatively easy) to demonstrate a sufficient connection to bar HDC status under the UCC (or, more precisely, to rebut the holder's burden of proving good faith and a lack of notice[74]), but quite another to establish a sufficient link between an assignor and assignee to go beyond the common law limits on assignee liability. Long before the FTC rule, the common law made assignees subject to claims in recoupment,[75] but generally not more absent a very heavy "connection," e.g., under agency law, and the FTC holder rule does not change that. So a rule imputing a connection sufficient to bar HDC status in consumer credit sales via the FTC notice is significant, but does not much affect ordinary assignments where HDC status is not claimed. The UCC, the common law, the FTC holder rule, and other consumer laws (such as the U3C, TILA, and the ECOA) continue to recognize traditional limits on the liability of assignees quite aside from the HDC doctrine and related "close connection" cases. The limitations on recovery in the FTC holder notice are one example of this and also serve to illustrate the consistency in the law of assignment. So your author stands by his view that the traditional law of assignment is alive and well and may even have been reinforced by modern consumer law.

Perhaps the most controversy was provoked by your author's coverage of bank account "bounce protection" programs. Your author has no dog in this fight, but the law seems clear that such programs are permitted if properly disclosed and agreed to. Your author's comment to this effect provoked some vigorous dissent from the audience, including recitations of personal experiences where there was allegedly a lack of disclosure or assent, along with excessive charges. But it seems that complaints about disclosure or assent are fully consistent with your author's description of the law as stated above. There were also arguments that banks should not advertise this service. So your author posed the question to the group: If a bounce protection program is lawful, is fully disclosed, and is voluntary, why shouldn't it be advertised? The answers from attendees were instructive.

There were two immediate responses to the question recited above: Bounce protection programs (and/or their promotion) should be barred because (1) they cost too much and (2) they constitute payday lending by banks. This immediately brought into focus a fundamental point that, perhaps, had not been fully articulated to that point in the presentation: Quite aside from the question of whether to teach Consumer Law from a balanced perspective or from an advocacy view, there is a question whether to teach the course as a legal subject or from a credit counseling perspective.[76]

Your author readily concedes that some of both is appropriate, even advisable. Your author includes both, and finds it both useful and enjoyable, but as noted believes it is essential to distinguish between financial and legal advice.[77] From a credit counseling standpoint your author would be the first to advise students about the high cost of various types of credit, including overdraft protection programs (though it is also appropriate to note that some consumers face even worse alternatives). So in this sense (and with appropriate caveats) your author might, for example, advise students that bounce protection can be quite expensive and can become a form of "payday" credit.

Audience participation was encouraged, and lively.

But it is also (or should be) important to distinguish between this credit counseling advice and the related legal advice (or law teaching). Saying that bounce protection can be too expensive or amounts to payday lending is not the same as saying it is illegal. This is obviously a crucial distinction for lawyers, law students, and law teachers. As we move back and forth between credit counseling and teaching the law, it is important that our students understand the difference. This is not always easy to do; even at this conference of law teachers it did not always seem that the dividing line was always clear.

And of course the line is in a state of flux, being moved around as new cases, regulations, and legislation refine or even redefine the line between lawful and unlawful behavior.[78] But the line is there, and this discussion at the 2004 Program emphasized the importance of helping the students see it. As always, a significant divide exists between prudence or advisability on the one hand and illegality on the other, and also between advocacy and the law. All are appropriate for coverage in a Consumer Law course, but highlighting the distinctions is an essential goal of legal education.

XI. Fair Debt Collection

The next speaker was Manuel Newburger of Barron & Newburger, P.C. in Austin. Manny is also an Adjunct Professor at the University of Texas School of Law and a frequent speaker at Conference on Consumer Finance Law and other programs. He is a noted authority on the Fair Debt Collection Practices Act (FDCPA or the Act) and coauthor of Fair Debt Collection Practices: Federal and State Law and Regulation (Sheshunoff & Pratt 2002).

Manny noted that the FDCPA is largely a law of definitions.[79] Terms such as "consumer," "debt collector," "communication," "least sophisticated consumer," "meaningful involvement," etc., permeate the Act and case law.[80] But he noted that other fundamental practice pointers and concepts also deserve emphasis in this context, e.g.: always tell the truth; never use threats or profanity; assume all conversations are being recorded; disclose frequently and prominently; beware of aggressive tactics on both sides of the transaction, e.g., a consumer who calls the debt collector to inquire about the debt (a "communication") and then sues for a disclosure violation. Again, a mixture of prudence and law (and ethics) is in order.

Manny noted that the widespread use of answering machines today means that debt collectors must leave recorded messages. This requires careful formulation in order to avoid leaving recorded evidence of a FDCPA violation, e.g., properly identifying the caller and meeting the Title 15 U.S.C. section 1692e(11) requirements. Manny reported that the current industry standard is to leave the debt collector's name and a toll free telephone number, and to use the debt collection agency's name only if it does not indicate an effort to collect a debt. But this raises the question: Is the message a FDCPA "communication?" If so it requires the section 1692e(11) disclosure. But if it does not include information about a debt it is not a FDCPA communication, and in that case including the section 1692e(11) disclosure may violate the Act. Moreover, a recorded telephone message that includes the section 1692e(11) disclosure may be heard by third parties not the debtor, violating both the FDCPA and privacy laws.

"Meaningful involvement" is another troublesome issue for lawyers. Manny stated that the Clomon case[81] was correct on its facts but created a difficult legal standard. Avila[82] misstated the Clomon rational - - Clomon does not require meaningful involvement, it merely prohibits misrepresentations as to meaningful involvement by a lawyer. But some courts have not recognized the distinction. It is a distinction supported by the Act: The FDCPA prohibits misrepresentation but does not require meaningful involvement.

The failure to recognize this has led some courts down a garden path. Lawyers have successfully argued that a debt collector cannot give meaningful review to 200,000 collection letters per year, but that is not the salient issue. The Seventh Circuit has created a standard that requires fifteen minutes per letter as a prerequisite to meaningful involvement, but this is both unnecessary and unrealistic, e.g., as regards dishonored checks, and has no basis in the Act. To the extent that meaningful involvement is required, Manny suggested that distinctions should be drawn between, e.g., bounced checks and home mortgage foreclosures.

It can also be argued that a lawyer acting as a debt collector under the FDCPA should be treated as a debt collector for FDCPA issues, not as a lawyer. The FDCPA does not impose any special duties on lawyers or on a debt collector who happens to be a lawyer. Thus a lawyer has no special obligation under the FDCPA to prejudge the creditor's claim via a meaningful involvement standard, absent a representation by the lawyer to that effect. The only real basis for distinguishing a lawyer's legal obligation is the applicable standard for professional responsibility,[83] not the FDCPA. The standards for professional responsibility allow the use of legal assistants with proper supervision, and do not require a fifteen minute review of every collection letter or dishonored check, or a manual signature by the attorney. The FDCPA does not, or should not, override these standards.

Manny reiterated that the FDCPA does not require meaningful involvement, but noted the contrary argument that a communication from a lawyer carries the implication that the lawyer has made a legal judgment that the debt is due, not merely that the client says so. This argument has proved convincing to some courts, meaning that lawyers have been held to a separate set of FDCPA standards and giving rise to the "meaningful involvement" line of cases. The strict liability and attorney fee provisions of the FDCPA mean that few debt collection lawyers can afford to risk fighting the issue.

XII. ECOA Claims

Winnie F. Taylor is Professor of Law at Cornell University Law School, having previously served as Professor of Law at the University of Florida. She is a specialist in fair lending and the ECOA, and she discussed the role of empirical research in teaching and litigation, e.g., with regard to disparate impact analyses.

Professor Taylor discussed the relation between fair lending and credit scoring issues, and various means to determine discriminatory effects. It was suggested by attendees that the current ECOA litigation against assignees is a natural result of the ECOA Regulation B effects test.[84]

Professor Taylor posed a hypothetical scenario: Suppose a credit rejection letter describes as a reason the applicant's inadequate points from a credit scoring system. The consumer then asks for more information about the reasons and the credit scoring system. The creditor then offers the consumer credit at a higher rate, based on the credit score. If the consumer is a member of a protected ECOA class, how does one analyze the relevant factors to ascertain whether there is a violation?

For example, how does one determine whether a credit scoring system has a discriminatory effect? These systems and related statistical analyses are complex and difficult to decipher. How can a consumers' lawyer demonstrate the required elements of a cause of action? For that matter, how can defense counsel effectively respond to the conclusions of a statistical expert based on arcane quantitative methodology? Will these important issues be decided by statisticians using quantitative techniques that few others understand? It is possible that this is where the effects test is leading.

Perhaps even more importantly, if the credit scoring system is determined to be statistically sound as predictive indicator, is it legally protected despite having a disparate impact? Some concern was expressed that valid predictive factors will have such an effect, setting up a conflict between

business necessities and disparate effects. Resolving this dichotomy could be difficult and could have a dramatic impact on equal credit opportunity law. Perhaps that is why, after all of these years, some of these fundamental issues still have not been confronted head-on by the courts, Congress, or the regulatory agencies.

Interested parties can look to employment law for an analogy, as suggested in the Regulation B footnote,[85] because the effects test is more developed in that context. But the context is sufficiently different that the crucial credit law issues do not arise in the employment context.[86] So the analogy to employment law is of limited use, and one is left with the stark reality that the effects test may collide with the statistically sound factors that predict credit-worthiness.

A consumer plaintiff must overcome this on the basis of reasonably available data, in any disparate impact case. Unlike a disparate treatment case, the information necessary to carry this burden may be complex and difficult to demonstrate, e.g., involving statistical analyses of the applicant pool, credit-worthiness criteria, credit terms, various racial profiles, etc. Sufficient information may or may not be publicly available, e.g., drivers license records and HMDA data may be available but not dispositive, and either way the necessary statistical reports are expensive and remain largely unproven in court. Allegations of unlawful disparate impact are common in some circles, but many of the theories remain untested in litigation. Some data (including that from HMDA) is considered unreliable by many and likewise remains unproven as a statistical or legal foundation. More litigation on these issues is expected, and perhaps eventually will answer these questions.

If a disparate impact is demonstrated, of course, the battleground then shifts to business necessity, another issue that remains somewhat unresolved. Credit scoring techniques are believed by many to answer this question as well, by establishing the systems as valid predictive criteria and therefore a business necessity. Thus some may consider this a non-issue, but there may be more battles ahead if the accepted proxies for credit-worthiness are also proxies for race, as others believe. No one can predict with certainty the ultimate results of this potential confrontation between credit-worthiness and disparate impact.

Professor Mark Budnitz discussed 21st Century payment systems.

Some consumer advocates apparently have concluded that law suits are not their best forum for resolving these issues. While trial courts differ greatly, appellate courts seem more likely to defer to long-standing principles when those principles clash with creative advocacy.[87] Thus some advocates argue that administrative and regulatory initiatives are the best means to change the law in this area. But at this point it is more political speculation than established law. In the meantime, the litigation skirmishes continue.

XIII. In the Trenches

The next session featured a panel of well-known consumer representatives: Dallas attorney Stephen Gardner, a class action specialist who speaks and writes widely (for the National Consumer Law Center, Consumers Union, the National Association of Consumer Advocates, and the Conference on Consumer Finance Law, among others); John Roddy of Grant Klein & Roddy in Boston; and Willard P. Ogburn, Executive Director of the National Consumer Law Center. They were joined later by Janet Varnell, of Varnell & Warwick in The Villages, Florida, who also spoke at a Saturday luncheon concluding the program. As befits a panel of plaintiffs' lawyers and consumer advocates, this panel was somewhat more partisan in its approach, as compared to the prior academic presentations. But the insight and perspectives were no less interesting.

This presentation was subdivided into two parts, the good news and the bad news. Steve Gardner began with the bad news, discussing threats to consumer advocacy and litigation, including federal preemption of state consumer protection laws. He noted the irony of consumer advocates as the new Dixiecrats, arguing for states' rights. He characterized federal preemption as an honest doctrine that can be put to dishonest uses, arguing that some policy advocates only assert states' rights until the states do something that person doesn't like. And no doubt this is true, as a principled and consistent position is all too rare, though the problem is not limited to creditors or even credit law issues.

Federal regulatory authority of course has expanded greatly over the years, often with broad bipartisan support. So we should not be surprised when that authority is exercised to preempt traditional state law remedies. Steve Gardner mentioned a litany of examples where federal preemption can be viewed as limiting traditional consumer remedies, e.g.: the OCC preemption of state predatory lending laws; the pending federal class action bill; arbitration under the Federal Arbitration Act; the FACT Act and FCRA; and federal agency regulation of internet fraud, privacy, and identity theft. It may be an inevitable consequence of continually expanding federal authority.

John Roddy then provided corresponding good news for consumer advocates. He noted that consumer advocates and attorneys often don't have clients they represent on a regular basis: Thus plaintiffs' lawyers to some extent must rely on angry consumers, who get riled up enough to seek a lawyer and sue. Technical violations, combined with a consumer who has been treated very badly and gets really mad, provide a legal basis for righting a wrong. And the good news for plaintiffs' lawyers is that there seem to be a lot of angry consumers out there.

Mr. Roddy suggested that generally technical violations should only be pursued if they are part of a compelling human interest narrative. But he reported that sometimes it almost seems there is a conspiracy of ineptitude among businesses — poor business and public relations judgments are common, and pressures in the marketplace, e.g., from shareholders or even a corporate culture, can reinforce these human frailties. Regulators can also contribute to this: The pressure on banks

to perform well in comparison to their peers creates continual incentives to take risks, legal as well as financial, in order to maximize financial performance. Cost-cutting in customer service or legal compliance areas can be another contributing factor. Everyone is trapped somewhat by lifestyle needs and the desire to be financially successful and to earn more money, and this may create pressures to "push the envelope" in terms of legal (and other) risks, in an effort to generate more income. This, of course, is not limited to merchants, doctors, and creditors (though Mr. Roddy did not say so, perhaps even lawyers are not immune), and in some transactions it can lead to inappropriate practices, even deception, and serious damages. That is what the courts and, increasingly, the regulatory agencies, are designed to address.

For a business that systemically violates the law and gets caught in the cross-hairs of plaintiffs' counsel and associated regulatory investigations, the results can be a nightmare. Defendants in major cases face the prospects of simultaneous multi-faceted litigation, detailed regulatory scrutiny, and sometimes a media blitz (not to mention competitors and customers eager to take advantage). The resulting correlation of adverse consequences can have domino effects including, e.g.: adverse headlines, a collapsing stock price, multiple lawsuits, customer dissatisfaction and declining sales, detailed regulatory investigations, and state attorney general prosecutions.

As Janet Varnell put it, these pressures work because, "with corporations, it is all about money." Your author will concede that corporations are, primarily, economic enterprises, though one might say the same about litigants, lawyers, and litigation generally. That is why so many settlements occur. It is often about economics as much as law.

The panel of speakers then confronted another important issue: Does all of this benefit consumers? There are of course divergent views on this in our society today. High turnover among corporate executives may seem a moral victory to some, and some observers might conclude that not many consumers benefit directly and significantly. Though not discussed by the panel, there are also overall costs to society, in terms of increased business costs and reduced economic competitiveness, and perhaps in terms of employment and inflation. But as noted by the panel, there is a deterrent effect as regards bad practices, and this includes a lessening of pressures on companies with good practices to change in order to compete with those inclined to skirt the law. It was noted that this creates a more level playing field for all business competitors, including those less inclined to test or exceed the legal limits, that otherwise would be pressured to meet the financial performance of competitors who do. In all, the cost-benefit analysis is complex and difficult to quantify. But the panel noted that social reform by litigation is one of the few avenues for change available at a time of legislative gridlock.

The panel then considered the future of consumer advocacy. The panel members discounted the value of disclosure as a consumer benefit, though considering it useful as a litigation tool. Regulatory oversight was also discounted as a means to anticipate and remedy credit scams. Privacy was deemed a promising subject for future litigation, in part because it is a middle and upper class issue, not limited to the subprime markets. In fact, it was noted that privacy is an issue more oriented to the upper income credit markets: the stolen identity or personal financial information of a credit-worthy person is more valuable to a thief than that of a subprime borrower. And sophisticated marketing algorithms allow more accurate statistical predictions of consumer behavior, making consumers' personal information even more valuable to legitimate businesses as well as scam artists.

Your author believes that consumer education can be helpful, and was pleased to see the panel discuss this issue next. The discussion was largely favorable to the benefits of consumer education, though limitations were noted. For example, consumer education in high school would be helpful, as that is a formative age, but may be forgotten and need reinforcement in later years. There will always be a barrage of marketing solicitations and tempting transactions available (at least we should hope so, or something is wrong), and continuing education can help consumers sort it out. But that is easier said than done, and effective consumer education remains a challenge. And, in academia and elsewhere, your author is continually reminded that education does not necessarily yield wisdom.

One speaker advocated European-style pricing disclosure requirements, e.g., as in France. But others disagreed, either because of lacking confidence in the disclosures or because retail prices are already widely known to consumers in the U.S. It seems to your author unlikely that any disclosure regime, no matter how effectively or costly, can ever prevent poor judgement, unwise decisions, over-indulgence by consumers, or even "buyer's remorse." But the panel's strongest reaction against the efficacy of disclosure was that it does not prevent the excesses of fraud, misleading sales techniques, and expensive abuses hidden in the details of a transaction or by unwarranted marketing practices. The panel concluded that these kinds of consumer scams can never be entirely stopped "without a paradigm shift" in our legal and political system.

XIV. Conclusion

This being a program for teachers, attendees reading this article may have experienced the often-stated frustration of academics disappointed that their crystal-clear classroom lectures have become so badly garbled in the students' notes and exam papers. That frustration may be rekindled by this article, as readers may find that their recollections of the 2004 Program differ significantly from this report.

So it is appropriate to emphasize again that this article represents your author's perceptions and observations about the program, a mixture of what I think was said and what I thought it meant, sprinkled with some supplementary comments of my own. Consequently his article is at best a mongrel, representing neither the speakers' views nor your author's in their entirety, but hopefully throwing in something from nearly everyone. Obviously, then, this article should not be used to attribute any specific view to anyone. But hopefully it captures the spirit and scope of a fascinating and diverse conference that confronted many provocative issues in legal education and consumer law.

Your author would like to again extend his thanks to Professor Richard Alderman, and to the University of Houston Center for Consumer Law (in conjunction with the National Association of Consumer Advocates and the National Consumer Law Center) for sponsoring the program, and to the program faculty (and especially those who reviewed and commented on this article before publication) for their participation in the program and assistance with this project.

Editor's Comment: As Professor Harrell notes, his article is based on his observations of the Conference. Unfortunately, Professor Harrell could not be at two places at once and missed some very interesting breakout sessions.

The breakout session on Teaching Comparative Consumer Law was led by Professors Hisan , of the University of Tokyo Law School, and Bill Vukowich, of Georgetown University Law Center. Prof. Vukowich began by describing the

topics that he finds useful for a comparative course or seminar: advertising, deceptive sales practices, credit, privacy, product quality and safety, unfair contract terms, and enforcement of consumers' rights. The final few classes are a retrospective of the course and focus on the differences and similarities in the different legal systems' approaches to consumer law.

Prof. Vukowich also recommended the use of "reaction papers," for each class, a few assigned students submit a short paper that describes their reactions to some part or all of the assigned readings and their papers are made available to all prior to classes via the internet. In class, the students' papers are integrated into the class discussion. The use of these papers heightens the students' focus on and appreciation of the many policy issues that underlie consumer law.

Professor Hirose discussed different legal systems' policies underlying contract law and its effects on the development of consumer law. For example, judicial control over unfair contract terms by way of such general concepts as "unconscionability" (in the US) and "good faith" (in EU) are well known even in Japan. Professor Hirose noted we tend to think that contract laws in the world are, and should be, now converging, at least in this field. But there still exist differences. For example, different legal systems deal differently with questions such as, (1) how far into the core of the contract (such as price) the judge can intervene, and (2) whether the judge can take into account the situation of the parties after the conclusion of the contract. Roughly speaking, central European countries such as France, Germany, and England, as well as EC Directive in 1993, have a tendency to respond negatively to both (1) and (2). In Scandinavian countries, however, the tendency is positive in both (1) and (2). Japan seems in between, that is, negative on (1) but positive on (2), while Australia is negative on (1) but positive on (2). The situation in the US is hard to summarize but, according to professor Hirose, similar to central Europe or a little bit more positive on (1) considering the development of case law on UCC §2-302.

There also was an very informative session on law and economics for the consumer law professor, presented by professors Gregory Travalio and Hisakazu Hirose. Professor Travalio, of the Ohio State University, Moritz College of Law, presented a discussion of how economics could be integrated into the consumer law course. He noted some concrete cases and materials that could be sued by the consumer law professor and many helpful outside sources. Professor Hisakazu Hirose discussed a defective wine bottle case as an example of how to integrate issues of liability and law and economics.

1. Your author appreciates the efforts of Stephen Calkins, Stephen Gardner, Stephen K. Huber, Mary D. Pridgen, James Nehf, Will Ogburn, Iain Ramsay, John Roddy, and Mary Spector for their reviews and comments on this article, and their assistance in correcting errors in an earlier draft. Your author also thanks Richard Alderman for his encouragement and his efforts on behalf of "Teaching Consumer Law."

2. The first program was conducted April 26-27, 2002, and is described in Alvin C. Harrell, Teaching Consumer Law, 6 J. Tex. Consumer L. 50 (2003).

3. Professor Ramsay noted that until the 1980s the U.S. was a significant influence on consumer law ideas throughout the world, citing, e.g., Wolfgang Wiegand, The Reception of Law in Europe, 39 Am.J. of Compar. L. 229 (1991). Since then, he reported, the focus has probably shifted to Europe as a source of ideas with greater innovations in the development of consumer law, citing, e.g., David Vogel, The Hare and the Tortoise Revisited: The New Politics of Consumer and Environmental Regulation in Europe, 33 British J. of Pol. Science 557 (2003).

Professor Ramsay's may be contacted at IACL-L@YORK U.CA. The IACL is active in a wide range of international consumer law issues and projects, and also may be contacted at http://www.iacl.ca..

4. Citing, e.g.: Brooke Overby, An Institutional Analysis of Consumer Law, 34 Vanderbilt J. of Transnat'l. L. 1219, at 1223:

> U.S. law reform efforts all too frequently proceed without serious reflection on the manner in which other jurisdictions have addressed and resolved similar issues[;]

and James Maxeiner, Standard Form Contracting in the Global Electronic Age: European Alternatives, 28 Yale J. of Internat'l. L. 109, at 176:

> For the last dozen years two of the most influential organizations in American law and legions of American lawyers have looked at the controversial issue of unfair terms in standard form contracts with no one systematically studying — indeed, with hardly anyone ever noting — that a trading bloc comparable in size to the United States and a major trading partner is itself addressing the very same issues and is applying its law to Americans.

Your author would add many Americans, and legal historians, and probably citizens of other countries, consider the American experiment in individual liberty a resounding success and even a stellar achievement in the history of human relations. But from the beginning it has been viewed with skepticism by governing elites in some countries, particularly in Europe. See, e.g., Bernard Bailyn, To Begin the World Anew — The Genius and Ambiguities of the American Founders (2003). Professor Bailyn is regarded by many as the world's greatest living historian, and his book notes the extent to which the Founding Fathers and their ideas were considered provincial and even heretical by the established political and legal elites of Eighteenth Century Europe. So it is interesting that American law has a history of independence from European ideas, and in that sense has some pride in its insularity. While your author interprets Professor Ramsay's point to be as much about process as substance, that is, to urge consultation rather than substantive deference, and therefore to be compatible with Professor Bailyn's observations, it is noteworthy that something like the historical debates continue to this day.

5. 69 Fed. Reg. 1895 (visitorial powers); 69 Fed. Reg., 1904 (preemption) (Jan. 13, 2004). See generally Symposium: Banking Law 2004, 58 Consumer Fin. L. Q. Rep. 4 (2004).

6. See supra note 3.

7. See, e.g., Paper Losses — As Cash Fades, America Becomes a Plastic Nation, Wall Str. J., July 23, 2004, at A1 (describing the new dominance of credit and debit cards as payment mechanisms in the U.S.).

8. See, e.g., Muhammad Yunus and Fazle Abed, Helping the Very Poor, Daily Oklah., June 23, 2004, 2004 WL 84116308 (describing the positive effects of "micro-lending" in Nicaragua, Bangladesh, and other under-developed countries).

9. Cf. Fred H. Miller, The Uniform Law Process and its Global Impact, 56 Consumer Fin. L. Q. Rep. 136 (2002).

10. Lest the reader conclude that all Oklahoma academics are similarly provincial, it should be noted that your author's law school offers a number of other courses featuring major international law components, and the core business curriculum of the Oklahoma City University School of Business is grounded in international disciplines, including international finance, marketing, economics, and strategic planning. The university also operates a number of overseas programs, in Asia, Europe, and South America.

11. Id.
12. See generally Ernest B. Williams IV and Alvin C. Harrell, Selected Chapter 13 Case Developments, 59 Consumer Fin. L. Q. Rep. ___ (2004).
13. See generally, The National Bankruptcy Review Commission Recommendations to Congress (Consumer Bankruptcy Issues), 52 Consumer Fin. L.Q. Rep. 136 (1998). While certainly a relevant and interesting source, for various reasons (e.g., the proposals were never enacted) the Commission Report would not be your author's first choice. As an alternative approach, your author's Consumer Law case book includes an introduction to bankruptcy law, and other sources such as FRED H. MILLER AND ALVIN C. HARRELL, THE ABCS OF THE UCC-RELATED INSOLVENCY LAW (Am. Bar Assoc. 2002) can provide the students an overview of bankruptcy law as it exists. Sources such as the National Bankruptcy Review Commission Report, and related academic commentary, can then be used as supplementary materials to illustrate continuing debates over the appropriate direction of potential reforms. But any of these approaches should be useful as a means to illustrate interdisciplinary issues and challenges.
14. See, e.g., FREDERICK H. MILLER, ALVIN C. HARRELL, AND DANIEL J. MORGAN, CONSUMER LAW CASES, PROBLEMS AND MATERIALS 76, 149-154, and Ch. 7 (1998).
15. See also infra Pts. IV. and XII.
16. Id.
17. In your author's experience, the increasing complexity of consumer credit laws has tended to reduce competition by discouraging smaller, locally-owned competitors from engaging in the business, thereby restricting the sources of consumer credit and somewhat increasing its cost. In addition, this complexity may leave the consumer increasingly dependent on a relatively small number of legal specialists competent to handle consumer finance cases. The relation between competitive factors, the cost of credit, the availability of affordable consumer remedies, and the level and complexity of consumer protections seems an appropriate topic for consideration in this context.
18. See also Williams and Harrell, supra note 11.
19. Id.; Jon Ann Giblin, Current Issues and Recent Developments in Consumer Bankruptcies, 58 Consumer Fin. L.Q. Rep. ___ (2004); Ernest B. Williams, IV and Alvin C. Harrell, Consumer Bankruptcy Developments, 59 Bus. Law. 1321 (2004); Symposium: Liens and Reaffirmations in Bankruptcy, 53 Consumer Fin. L.Q. Rep. 118 (1999).
20. See supra note 13.
21. See supra this text Pt.III.B.
22. See, e.g., Mark E. Dapier, Eugene J. Kelley, Jr., John L. Ropiequet, and Christopher S. Naveja, Assignee Liability Under the TILA: Is the Conduit Theory Really Dead?, 54 Consumer Fin. L. Q. Rep. 242 (2000).
23. See, e.g., Anne P. Fortney and James Chareq, Auto Finance Litigation Under the Equal Credit Opportunity Act, 57 Consumer Fin. L.Q. Rep. 227 (2003); Eugene J. Kelley, Jr. and John L. Ropiequet, Assignee Liability Under State Law After Jackson v. South Holland Dodge, 56 Consumer Fin. L.Q. Rep. 16 (2002).
24. See infra Pt. X. Some disagreement erupted at the 2004 Program when your author asserted this point, so it is not free of controversy. For example, there was disagreement between your author and some of the other attendees as to the significance and effect of the FTC "holder in due course" rule at 16 CFR Pt. 433. This issue will be the subject of further consideration infra at Pt. X. and in a future Quarterly Report article, and your author invites interested parties to comment. In the meantime, although some assignee liability issues remain open to dispute (see, e.g., Fortney, supra note 22), your author is sticking with his story: Many of the assignee issues litigated over the past ten years remain well-settled in accordance with long-standing common law principles. See, e.g., Kelley and Ropiequet, supra note 22; Eugene J. Kelley, Jr., John L. Ropiequet, and Anna-Katrina S. Christakis, APR Splits: Still Legal After All These Years, 56 Consumer Fin. L.Q. Rep. 296 (2002); infra Pt.X.
25. Your author is reminded of a billboard at the Universal Studio's "City Walk" in Universal City near Los Angeles: In an unusual self-parody of the southern California celebrity lifestyle, entitled "L.A. Angst," the billboard reads something like this: "The hot tub overflowed and ruined my cell phone. Then the cappuccino maker exploded and the top of the convertible is stuck shut again." This text is accompanied by a picture of a weeping L.A. resident crying profusely on her partner's shoulder. Outside academia our classroom problems may generate about the same levels of popular sympathy as "L.A. Angst."
26. Though some are. See, e.g., Jessica Minta, Enterprise - Law School Profits From Classroom-Web Mix, Wall Str. J., Aug. 17. 2004, at B3 (describing a four-year law degree program that can be conducted entirely over the Internet, through Abraham Lincoln University in California).
27. See, e.g., Alvin C. Harrell and Kurt Eggert, Chapman University Presents Consumer Law Symposium on Responsibility and Reform, 58 Consumer Fin. L.Q. Rep. 214 (2004).
28. BMW of North America v. Gore, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996); State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408, 123 S.CT. 1513, 155 L.Ed.2d 585 (2003); see generally Harrell and Eggert, supra note 26, at 215-217.
29. See, e.g., William C. Whitford, The Ideal of Individualized Justice: Consumer Bankruptcy as Consumer Protection, and Consumer Protection in Consumer Bankruptcy, 68 Amer. Bankr. L.J. 397 (1994).
30. Miller, Harrell, and Morgan, supra note 13, at 28-36.
31. See also Miller and Harrell, supra note 12, on the treatment of secured claims in bankruptcy.
32. See, e.g., Bankruptcy Code, 11 U.S.C. §§ 523(a), 707(b), 1322(b).
33. One egregious example, cited by 2004 Program speaker Stephen Gardner at another seminar, is where a bankruptcy lawyer ignorant of the FCRA issues puts the client in bankruptcy in order to discharge debts the consumer does not owe due to an identity theft. This imposes costs on the consumer, mars his or her credit record, and is unnecessary because the debts are false and there are ample remedies under the FCRA.
34. Fair Credit Reporting Act, 15 U.S.C. §§ 1681 st seq.
35. Tucker v. New Rogers Pontiac, Inc., 2003 WL 22078297 (N.D. Ill. 2003).
36. See supra note 4.
37. See generally Julie L. Williams and Michael S. Bylsma, Federal Preemption and Federal Banking Agency Responses to Predatory Lending, 59 Bus. Law. 1193 (2004); Julie L. Williams and Michael S. Bylsma, On the Same Page: Federal Banking Agency Enforcement of the FTC Act to Address Unfair and Deceptive Practices by Banks, 58 Bus. Law. 1243 (2003).
38. See generally Symposium: Privacy, Identity Theft, and the FACT Act, 58 Consumer Fin. L.Q. Rep. 4 (2004).
39. A position favored in your author's case book. See Miller, Harrell, and Morgan, supra note 13, at 52-75.
40. See, e.g., Stephen Calkins, FTC Unfairness: An Essay, 46 Wayne L. Rev. 1935 (2001).
41. See generally Carolyn S. Melvin and Vanessa A. Nelson, The CAN-SPAM Act and the FTC's Request for Comments, 58 Consumer Fin. L.Q. Rep. 201 (2004); Robert H.

Jackson, Congress Throws Telemarketers a Curve Ball: 2004 Appropriations Bill Requires Monthly Updates of the National Do-Not-Call List, id., at 204.
42. See, e.g., Stephen Calkins, Corporate Compliance and the Antitrust Agencies' Bi-Model Penalties, 60 Law & Contemp. Problems 127, 133-36 (1997) (describing why the FTC decided to go to federal court to increase its monetary recoveries in consumer cases).
43. As Professor Calkins has noted, a wealth of information is available on the FTC website at www.ftc.gov.
44. Mary D. Pridgen, Consumer Protection and the Law (2003); and Mary D. Pridgen Consumer Credit and the Law (2009).
45. Consumer Law Cases and Materials (2d ed. 1991) (with Spanogle, Rhoner, and Rasor).
46. See also supra Pt.III.G.
47. See also supra Pt.III.F.
48. Id.
49. His publications include: Mark E. Budnitz, Consumer Banking and Payments Law (NCLC 2nd ed. 2002); and Mark E. Budnitz, The Law of Lender Liability (2004). He has also written numerous law review articles, including Mark E. Budnitz, Consumer Payment Systems: New Products and Services, New Laws and New Problems, 56 Consumer Fin. L.Q. Rep. 52 (2002).
50. 15 U.S.C. §§ 1693 et seq.
51. 12 CFR Pt. 205.
52. State of West Virginia ex rel. Darrell V. McGraw, Jr., Attorney General v. Telecheck Services, Inc., Civ. Action No. 00-C-3077 (Cir. Ct. Kanawa County, W. Va.). See also State of West Virginia ex rel. Darrell V. McGraw, Jr., Attorney General, v. Telecheck Services, Inc., 213 W. Va. 438, 582 S.E.2d 885 (W. Va. 2003) (reversing the circuit court's ruling denying the Attorney General's request for a preliminary injunction and remanding the case for proceedings on the merits).
53. Ronald L. Mann, Payment Systems and Other Financial Transactions (1999). Professor Mann was Reporter for the 2002 amendments to the uniform text of UCC Articles 3 and 4.
54. As noted below, the same basic dilemma is confronted in a Commercial Paper or Payment Systems course.
55. See, e.g., Miller, Harrell, and Morgan supra note 13, Ch. 3 ("Payment Devices").
56. See, e.g., supra note 6.
57. See, e.g., Jeffrey P. Taft, Internet-Based Payment Systems: An Overview of the Regulatory and Compliance Issues, 56 Consumer Fin. L. Q. Rep. 43 (2002); Alvin C. Harrell, Electronic Checks, 55 Consumer Fin. L. Q. Rep. 382 (2001).
58. See Final Rule, Availability of Funds and Collection of Checks (Check 21), 69 Fed. Reg. 47290 (Aug. 4,2004).
59. Professor Budnitz has correctly pointed out that the impact of Check 21 will be different (and somewhat less significant) for those bank customers who have agreed to check truncation and imaging, than for those who have not. Those who have agreed to receive check images will continue to do so, and will not receive substitute checks unless the bank wishes to do so. The bank could decide to provide such a customer with a substitute check, but likely will not do so because the check image the customer agreed to accept does not carry with it the recredit rights triggered by a substitute check. See Check 21 Final Rule, 69 Fed. Reg. at 47325.
60. As Professor Budnitz pointed out, customers who have agreed to truncation and imaging do not have a right to receive a substitute check, but if the bank provides a substitute check even though it does not have to, the Check 21 recredit right is triggered. See 69 Fed. Reg. at 47325.
61. During the 2004 Annual Meeting of the American Bar Association in Atlanta, Georgia, in August, 2004, FRB representative Adrienne Hurt indicated that within a few months the FRB may issue additional guidance on payroll cards.
62. See, e.g., Stephen K. Huber, Bank Officer's Handbook of Government Regulation (2d ed. 1989); E. Wendy Trachte-Huber Stephen K. Huber, Alternative Dispute Resolution Strategies for Law and Business (1996).
63. See, e.g., Stephen K. Huber, Confusion About Class Arbitration, 7 J. Tex. Consumer L. 2 (2003).
64. See, e.g., Trachte-Huber & Huber, supra note 61, at 805.
65. Usually called Check 21. See supra Pt. VIII.
66. Check 21 Act § 7. See supra Pt. VIII.
67. See generally George Melloan, Global View - Forget the Nightly News; Life is Getting Better, Wall Str. J., Aug. 17, 2004, at A19.
68. Citing John Grisham, A Painted House (Doubleday 2001). As recounted by Professor Huber, the story is told through the eyes of a 7-8 year old boy, growing up poor in Arkansas during the great depression and World War Two. The boy's family lived in a house that was not painted, and though they were better off than those without a home, the family's aspiration was a painted house. It is a testament to how far we have come, with the U.S. homeownership rate approaching 70% (and nearly all of them painted).
69. Perhaps not everyone at the 2004 Program would agree. See, e.g., Richard M. Alderman, Consumer Arbitration: The Destruction of the Common Law, 2 J. Amer. Arbitration 1 (2003); Richard M. Alderman, Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform, 38 Houston L. Rev. 1237 (2001).
70. Green Tree Financial Corp. v. Bazzle, 123 S. Ct. 2402 (2003).
71. See supra Pt. II.
72. The FTC "holder rule" is at 16 CFR Pt. 433. See also supra Pt. III.D., and notes 21 and 23.
73. See, e.g., Unico v. Owens, 232 A.2d 405 (N.J. 1967); Kaw Valley State Bank & Trust Co. v. Riddle, 549 P.2d 927 (S. Ct. Kan. 1976); Arcanum National Bank v. Hessler, 433 N.E.2d 204 (Ohio 1982).
74. Id.
75. See, e.g., the codification at UCC § 3-305(a)(1).
76. See also supra Pts. III.C.-E.
77. See supra Pt. VI.
78. For example, see Proposed Interagency Guidance on Overdraft Protection Programs, 69 Fed. Reg. 31858 (June 7, 2004).
79. A point also made in Mike Vorhees, Definitional Issues for Debt Collectors Under the FDCPA, 58 Consumer Fin. L. Q. Rep. _____ (2004).
80. See, e.g., id., and the FDCPA, 15 U.S.C. § 1692a.

81. Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993).
82. Avila v. Rubin, 84 F.3d 222 (7th Cir. 1996).
83. E.g., Model Rules of Prof'l. Conduct R. 5.3 (2003).
84. The "effects test" is referenced in a footnote to the text of Regulation B. See FRB Regulation B, 12 CFR § 202.6(a) n. 1. Regarding the litigation, see, e.g., Fortney and Chareq, supra note 22.
85. Id.
86. For example, the number of job openings is necessarily limited, and the pool of potential applicants is much larger, so it is relatively simple to allocate the available positions among the applicant pool on a proportionate basis. In contrast, the amount of credit is potentially almost unlimited and the pool of qualified credit applicants is much less so. So the scenarios are polar opposites to some extent.
87. But see the argument in Rahmaan v. FNMA, No. 02-1822, 2003 WL 21940044 (D.C. May 19, 2003) (alleging a disparate impact from the Fannie Mae credit scoring system).