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Teacher's Manual

Modern Consumer Law

First Edition

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Teacher's Manual

Introduction

The Preface to the book contains much of the content that often goes in the introduction to a Teacher's Manual. My belief is that little is gained (and much is lost) by hiding the strategy and themes of a book from the students. To that end, this Teacher's Manual contains discussion of the "answers" to the problems but also why those problems were selected for coverage. Before reading the Teacher's Manual, I encourage you to read the Preface—and to be sure that you assign it to your students.

Teaching from Problems

This book is designed to be taught nearly exclusively from the problems in the problem set at the end of each assignment. A discussion of the cases can occasionally be useful, but there is frequently a hook into the cases from one or more of the problems. The reasons for a problem-method approach to consumer law are both pedagogical and practical.

Most consumer law is statutory, and the problem method helps engage students in actively reading the statute, rather than skimming it for content. The problem method forces students themselves to apply the statutory text to the facts, rather than passively reading how a court did so. As a practical matter, consumer rights are rarely vindicated through litigation, particularly the kind of appellate litigation that results in published opinions. The reporters contain few cases even for the primary statutes, and frankly, many of those are aberrational, not typical. To rely primarily on published appellate opinions would suggest to students that this is where consumer lawmaking happens, when in fact most of it occurs by legislative process, dunning letters, threats of litigation, default judgments, and quick settlements. For some, these aspects of law may seem less complex than an appellate court's reasoning, but the problem method exposes the complex strategy and analytical reasoning that talented lawyers use when they approach consumer law outside the courtroom.

I recommend that you begin each class with a very brief overview of how the day's assignment connects to the prior topic—or represents a new thread in consumer law. From there, I dive right into the problems. Some teachers will spend time setting out the facts of the problem, while others will begin merely by asking a student the question from the problem and probing answers. Some teachers will want to do introductory lecture on the topic but this can leave too little class time to adequately work the problems. If you prefer to do more of a lecture style course, you will still want to review the problems and answers so that you lecture the students on the substantive points covered in the problems. Thus, it is possible to use the book without assigning any problems.

I think the problem pedagogy is better, however, in part because it lets the students practice applying facts to law, which is not only the key skill for their careers but also rehearsal for the exam. I also like that the problem method gets students speaking up in class. Consumer law tends to speak directly to the students' own life experiences, and they want to be heard on these topics.

I find these problems work best when I call on several students for each problem, allowing different approaches to be shared. For those who like to use panels, you can also assign a small panel to each problem, making the panel responsible for the teaching of the problem.

The Daily Assignment Approach

Each assignment is designed for a single class period. This eliminates the work of having to decide where is a sensible place to draw a line to end each class, and the difficulty of communicating the assignments to students. Rather than provide a syllabus of coverage to my students, I simply say that we'll do as close to one assignment per day as possible, and unless I tell them differently they can work ahead on that basis if they need to do so.

Many schools have consolidated teaching schedules so that true 60-minute hours are relatively rare. Additionally, adjuncts often need to teach in a single time block each week. The book's basic assumption is a 3-credit hour course, taught in two 90-minute periods. To that end, the book has 29 assignments. In a 14-week semester, you'll meet 28 times (often 27 because of holidays). In a 13-week semester, you'll meet 26 times. Either way, the 29 assignments means instructors can either consolidate two assignments or skip a few of their choice.

Each assignment contains about 20 pages of reading, which my students tell me they can prepare in 90 minutes, including studying the problems and necessary statutes. In general, the students will not spend enough time on the statutes or the problems, so that is a point to emphasize in the first weeks of class. Preparation for this class, unlike most courses and especially first-year courses, is not over when the reading is complete. I emphasize how the problems differ from the largely rhetorical or mystifying questions that are often labeled as "notes" at the end of a traditional "case"-type book.

Although the book is a modest length, there is ample material for discussion. Unless you are unusually taciturn, you can safely count on one assignment supporting one class of 90 minutes. I will warn users of either the Elizabeth Warren and Jay Westbrook, *The Law of Debtors and Creditors*, or the Lynn LoPucki and Elizabeth Warren, *Secured Credit* books that there is less material in this book. There are both fewer pages of reading and fewer problems. As someone who always had to push hard to get through the problems, I have found this textbook to be a refreshing break from running behind. But if you think some assignments run short or are too skimpy, send feedback. I will certainly add problems in subsequent editions, in part to permit professors to rotate problems in different years.

Adjusting Coverage for Different Credits

The 28 assignments are designed for a 3-unit course. A huge benefit of the daily assignment approach is that it is very easy to modify the coverage to suit a course of 4 or 2 units.

To expand the course to be 4 units, there are a couple of possibilities. The easiest choice is to teach in 2-hour blocks (meeting about 26 to 28 times) and simply take more time with each problem set. If you talk about the cases in depth, this works very easily. You can also add a problem yourself that looks at local or state law or that focuses the students on a current event in that area of consumer law.

Another way to build a 4-unit course is to add one or more writing or research projects into the curriculum. Students tend to like these, and in some situations, you can move this into the "skills course" requirement of the ABA, depending on how your institution is interpreting that requirement. Some exercises that have worked well for me include: 1) providing students with a Notice of Proposed Rulemaking and ask them to prepare a comment for submission. In doing this, there are some helpful guides out there on how to make an effective comment (there is one for the Federal Rules Committee that can be generalized); 2) asking students to draft a statute to address an emerging issue in consumer law. As part of this, I ask students to write a memo that explains their statute, defending any choices that they made, and containing references to any case law or other statutes that they relied upon in drafting the statute; 3) asking the students to search either the state or federal court docket and chose an example of litigation on a particular topic, bringing the complaint to class; and 4) preparing a policy memo to a representative of a state legislature advocating that our state needs to add a statute on a particular point (examples: banning payday lending, regulating auto title lending, changes to the private right of action for UDAP, etc.). An equivalent project can be designed at the federal level, for example, addressed to the Office of Servicemembers Affairs at the Consumer Financial Protection Bureau. For any of these projects, a guest speaker can add a lot of perspective to the class.

For a 2-hour course, some people will simply assign fewer problems or discuss them more quickly in class. Depending on class size and how much student engagement occurs, the move to two 60-minute classes can make each assignment work just right for some teachers. The alternative approach is to cut some assignments and consolidate others, which is probably the best approach for a once-per-week, 2-hour class meeting. Here are some suggestions, but I recognize that consumer law is a topic on which different instructors will want to do different things.

1) Eliminating some or all of Assignment 17 (Payday Loans), Assignment 18 (Student Loans), Assignment 19 (Banking Transactions) and Assignment 20 (Online Transactions). Each of these has benefits but you'll have covered the major consumer laws already when you get to these topics.
2) Eliminating Assignments 21 (Creditor Remedies) and 22 (Debtor Rights). Depending on the secured credit and bankruptcy courses offered in your institution, much of this material may be covered at least superficially in those courses.
3) Eliminating Part 5, Assignment 27 (The Future of Consumer Law).
4) Designing a course that focuses solely on consumer credit basics—this involves eliminating Assignments 8, 10, 19, and 20, and consolidating assignments 4-6.

References for Teachers and Students

The definitive guides for consumer law, keeping in mind that they represent one distinctive point of view, are the National Consumer Law Center's manuals. The set of manuals will fill an entire shelf, but I believe it is a worthwhile investment for a consumer law professor to have desk reference copies. They are updated regularly, both with printed supplements and online or CD content, and they contain extensive citations to the case law.

For students, there appear to be no recent hornbooks or short treatises as of this writing. <u>Consumer Protection Law</u>, part of West's Nutshell series, was last updated in 2006. It's a fine title but probably too out of date to recommend. The best choice might be <u>Consumer Credit and the Law</u> by Richard Alderman and Dee Pridgen, which is a single volume treatise. It appears to be available solely on Westlaw. An older volume by Dee Pridgen, <u>Consumer Protection and the Law</u>, is more comprehensive because it addresses non-credit and credit topics, but it was last been updated in 2009. I believe that Dee and others are hard at work on updating some of these books so be sure to check at the start of each semester.

Part 1

Overview of Consumer Law
Assignments 1–3

Consumer law courses typically open with the common law of misrepresentation or fraud and quickly move to UDAP statutes. While those are foundational topics, most students find them unfamiliar and quite difficult. This book starts with some big picture questions: What is consumer law? Who is a consumer? Who makes consumer law? These assignments provide a gentle, and hopefully engaging, introduction to the course. They can be skipped for those who want to have more time for statutory twists and turns later in the course. My own experience is that “saving the dessert for last” in a law school semester often means that such discussions simply never occur. I’ve moved them to the front in the hope that they better equip students to put the substantive discussions in better perspective.

Assignment 1

What is Consumer Law?

This assignment is designed for the first day, when there are inevitably administrative details to be addressed and when students may still be weighing whether a course in consumer law should be part of their study of law. Reflecting these concerns, the assignment tries to show off why the study of consumer law is intellectually rewarding and socially important.

That said, I think this material is vitally important. Consumer law has a serious identity crisis, and I think the effective teaching of consumer law needs to tackle this head-on, rather than mere hand-waving toward all the topics that are omitted or an assured "trust me, I picked the important stuff." The conceptual issues are really hard here; the subtle point is that the way that law schools and policymakers package a subject really does matter. (Adopters of the LoPucki, Warren & Lawless <u>Secured Credit</u> book will remember this point from their discussion of why teach mortgages and UCC 9 together, and not just UCC 9, despite the latter's coherent packaging that lends itself to a tidy course.) The text talks broadly about the types of consumer laws: disclosure regimes, substantive limits, remedy statutes. This is the high-level overview, provided mostly for student background, rather than class discussion.

Every casebook has some disclaimer about what it does NOT cover. I wouldn't want to be an outlier on this point, and Part D of the assignment does this. I try to avoid a laundry list of uncovered topics and admonitions to enroll in additional courses to avoid becoming a menace to the practice of law. Instead, the text tries to elucidate why these fields are cognate to or concentric to consumer law. The hope is that this discussion helps reinforce the existence of transactional commonalities and policy concerns that cohere disparate laws into a body of consumer law. I recognize that some will be unconvinced by the boundaries that I articulate. This section returns to the opening point of the chapter: consumer law has poorly defined boundaries and that creates both pedagogical and practical issues that I think are worthy of discussion, including right at the outset of the course.

The inclusion of *Carbolic Smokeball* and the FTC's action against Airborne serve two main purposes. The first is to illustrate the fundamental problems of consumer law are neither new nor resolved. The second is to expose students at the start of the course to different approaches to remedies in consumer law, including the administrative proceedings and settlements that they tend to have seen little of in their first-year courses.

I open class with a discussion of *Carbolic Smoke Ball* and the Airborne settlement. One catchy way to do this, if you have the technology, is to play the Colbert Report spot (2 minutes long) about the Airborne settlement. As you'd expect, it's funny, and students love it.

http://www.cc.com/video-clips/k8bsjv/the-colbert-report-airborne-lawsuit

The discussion can start by asking what it is about human nature that leads to the prevalence of scams. Despite more than one hundred years of legal efforts, it seems that consumers still need protection from their own optimism (or idiocy). One set-up for discussion is to ridicule the idea that there is a cure for the common cold, and then display or quote from this article that MIT scientists just had a break-through in that direction. http://news.cnet.com/8301-27083_3-20091738-247/superdrug-takes-out-common-cold-other-viruses/ It's a fine line between a Nobel Prize and quackery. How are consumers to navigate it?

I note that *Carbolic* was brought by a private litigant, whereas the *Airborne* case was a settlement that resulted from FTC action. While there is more on these issues to come, I ask students why some consumer did not sue the first time they took Airborne and promptly came down with a cold. This goes to issues of remedies and the limitations of consumers in pursuing their legal rights. It's a nice wake-up for students to the gulf between a law being violated and the filing of a lawsuit to remedy that violation. This also can lead to a discussion on private versus public enforcement in consumer law, and on the merits of litigation versus settlement. I ask how many of them were aware of the FTC action and point out that Airborne is still on the market today. This blog post discusses the change in packaging and whether it is effectively eliminating the harm the FTC was trying to remedy: http://boingboing.net/2009/05/27/lawsuit-losing-airbo.html.

I usually segue from this discussion into the boundaries of consumer law. I note that *Carbolic* was a contract action, whereas *Airborne* was brought under the FTC Act. While I avoid discussing the substance of that law in the assignment, you can simply say that it prohibits "unfair and deceptive practices" and ask why such a statute was needed if the common law has doctrines of unconscionability and fraud. The point to be introduced, which is a major theme of the course, is that consumer statutes are a response to the difficulty of private parties bringing and winning contract or tort claims.

Problem 1.1. This is a listing exercise designed to let many students talk on the first day of class. It can help students appreciate the degree to which consumer law operates in the background of their daily lives. These laws are so imbedded in routine life that people, even law students, fail to recognize them as law. A few things that may appear on their lists, or that you can use as conversation starters:

- Product safety laws that govern the food they had for breakfast;
- Banking laws that give protections for credit card or debit card use;
- Antitrust laws that have recently challenged issuer's arrangements with merchants;
- State gift card laws that apply to things such as Starbucks purchases;
- UCC warranty of merchantability for any goods they are using, for example, the laptops that they are using; and
- Privacy laws that may apply to any data collection or use from any applications they used on their phones or computers that morning (Facebook, Snapchat, Instagram).

The students' comments will also give you some sense of their backgrounds and perspectives on consumer law. You can also use the problem to launch a discussion about what is *not* consumer law, either in general or as covered in the text book, as some students will list things that are outside the scope of the course.

Problem 1.2. This problem is based on *Stambovsky v. Ackley*, 169 A.D.2d 254 (N.Y. Sup. Ct. 1991). It's a fun opinion, and reading an excerpt—or on the first day, asking some students to read aloud some excerpts—can make a good starting point for student involvement. The majority holds that the plaintiffs can rescind the deal, upsetting the rule of caveat emptor. The court notes that the plaintiff could not have inspected the property to detect the ghosts and that since the seller had informed the public about the apparitions (by participating in a haunted house tour), she should have made similar disclosures to the buyers. The dissent objects to discarding the doctrine of caveat emptor on the basis of a poltergeist and suggests they have overactive imaginations. ("The poltergeist is no more binding upon the defendants than it is upon this court.") The dissent also notes that the buyers were represented by counsel—geez, is ghost detection part of a real estate attorneys' job description?

The problem asks whether this is a consumer law issue and if so, what areas of consumer law are implicated. The deal was governed by a contract, and so this is an opportunity to review some basics from the first year here on rescission on the grounds of fraud. An alternate approach would be to plead negligent misrepresentation or omission and use a tort approach. The fact pattern illustrates the overlap of contract and tort law, a point often missed by the clear separation of these subjects into distinct first-year courses. Consumer law as a field reveals the fallacy of such tidy categories.

The fact pattern raises the question of how extensive the law should be on the duties to disclose. You can point out that this is a large transaction. Perhaps we should have disclosures even for rare situations like ghosts when we are talking about real property. If we had to disclose everything, how effective would the disclosure be? How does the law decide what is germane to a purchasing consumer? Maybe some consumers would be unbothered by such circumstances or even be searching for a haunted house? The general rule was caveat emptor, which would allow a seller to remain silent. An opposite rule would impose strict liability on the seller even if the seller had tried to warn the buyers of ghosts. If the seller had disclosed the ghosts and the buyers were skeptical of the ghosts' existence (but later revisited their beliefs in the supernatural) would the buyers be unable to rescind? Should the law protect people who are silly enough to believe in ghosts? (Cf. *Airborne* and *Carbolic*).

You can also mention related fields of law here. For example, would Ghostbusters be covered by the home warranty, if a warranty were provided by seller as part of this deal? What will happen if the couple stops paying the mortgage? Is bankruptcy a good option? What about damage to their credit report from a foreclosure? To open this discussion, I often posit that the student represented the buyer, sued, and lost—caveat emptor. I ask "now what?" and am usually met by deafening silence. This is a great opportunity to talk about the realities of client representation. Folks usually want more help, and other ideas, from their lawyer (who has just had to report the bad news that the court ruled against them). Students need to see that great lawyers think strategically about the third- and fourth-best options because sometimes those will need to be deployed. Here, a great option is to simply suggest that the buyers sell the home to someone else. Armed with a court ruling that caveat emptor applies, they can safely stay silent about the supernatural phenomenon.

Problem 1.3. This is a first pass at disclosure, which Richard Posner calls the "conventional consumer-protection function" of government. He may not be right on the history of this, a point that you can raise with students. My own view is that disclosure is a relatively recent phenomenon that replaced ancient ideas about substantive unfairness. It was only one generation ago we made the move away from usury law to a box with the APR in bold font. *See* James M. Ackerman, *Interest Rates and the Law: A History of Usury*, 1981 ARIZ. ST. L.J. 61 (1981).

Students are usually able to come up with examples, and a web search or look on Tumblr will produce more. One fun way to do this class, although it requires a little planning is to have each student email you a picture of a disclosure that they encountered as the first day's homework. You can make a PowerPoint of them, and throw in some humorous examples. Here are a couple to get you started:

The McDonalds "coffee is hot" warning frequently comes up. Baby products also yield some good examples, including the many warnings to not use things such as baby bathtubs as car safety seats. (I have it on good authority that a very famous consumer advocate (now Senator) once prided herself on securing her daughter in a laundry basket in the back of her car in the years before child safety seats were developed.)

California's carcinogenic warning is another good example. (http://oehha.ca.gov/prop65/background/p65plain.html) Prop 65 warnings are on every jet bridge in California airports, leaving one ample time to study the warning while trapped in the fumes waiting to board. Prop 65 also is the source of a posted warning in every Starbucks in California that warns consumers of the relationship between lattes and toxic chemicals—but the legally required notice doesn't seem to be changing the appetite for coffee. And, in fact, science now seems to be suggesting that coffee is not a carcinogen after all. Julie Jargon & Mike Estrel, *The World Health Organization Drops Coffee's Status as Possible Carcinogen,* WALL ST. J. (June 15, 2016), at *http://www.wsj.com/articles/world-health-organization-to-drop-coffees-status-as-possible-carcinogen-1465946753.* This illustrates another problem of disclosures; they can be wrong, even if they work as intended.

One interesting aspect of the disclosure on the tree is its mention of consequences. This is actually a departure from most consumer disclosures, which usually give facts but do not elucidate harms. Consider the difference between providing calories on a package and providing a warning that "consumption of this many calories is likely to produce obesity." Closer to the context of the cartoon, home mortgage disclosures provide detailed information on the cost of the loan. They do not say anything about foreclosure as the consequence of being unable to manage those costs. Foreclosure is buried in the mortgage or deed of trust as a consequence of nonpayment.

Problem 1.4. This problem asks students to think about the difference between financial products and physical products. A first point is that consumer law as a field covers both kinds of products, which may be partly why its boundaries are so difficult to define. While consumer credit has become the 800-pound gorilla of most consumer law textbooks, nearly all give substantial coverage to things like lemon laws, deceptive advertising, and door-to-door sales.

Warren's proposal was framed as an argument for "parity of treatment between ordinary physical products and financial products." Elizabeth Warren & Oren Bar-Gill, *Making Credit Safer*, 157 U. PA. L. REV. 1, 6 (2008). Yet, the analogy between financial products and toasters is problematic. Ronald Mann has argued that the difficulty lies with "operationalizing the concept of 'safety'" and explores ideas about what safety should mean for financial product regulation. Ronald J. Mann, *Unsafe at Any Price?*, PENNUMBRA 157, *available at* https://www.pennlawreview.com/responses/index.php?id=59 (2009). As a normative matter, we may believe that people should be permitted to inflict financial harm on themselves but not the physical harms that can occur with tangible goods. A burned arm from a toaster may be categorically unacceptable; bankruptcy caused by an auto title loan may not raise our ire in the same way.

The willingness to differentiate between financial products and physical product may stem at least in part from a lack of knowledge about the household-level consequences of dangerous financial products. There are no equivalents of emergency room reports of missing toes or statistics on crashed all-terrain vehicles to measure the damage of financial products. Bankruptcy filings, percentage of charge-offs, or foreclosure filings may be the closest analogies but even these are mostly visible signs of a problem, not evidence of the damage of credit. *See* Katherine Porter, *The Damage of Debt*, 69 WASH. & LEE L. REV. 979 (2012). This is likely to make the act of regulation by the CFPB even more hotly contested than the regulation of physical products.

In commenting on the CPSC as a model regulator, some students will point out that that agency recently has some notable failures (e.g., lead in kids toys). The response can be that this just means the agency is underfunded or poorly administered—not ill conceived. You might push the discussion toward whether other "safety" oriented regulators like the Food and Drug Administration (FDA) provide more apt analogies. For example, the CPSC largely uses a binary approach, either banning or approving products, without promulgating guidelines for their use. Pharmaceuticals, like credit products, are not easy to categorize as safe or dangerous on an across-the-board basis. The task is to calibrate the product to the consumer and to balance the benefits of use against the risks. The FDA has to contend with the hard reality that some people are willing to suffer grave side effects to cure grave diseases, just as some people are willing to suffer severe financial distress to relieve severe privations. The most difficult challenge of consumer credit regulation is not to deem products *per se* safe for use but to proscribe in detail the *way* in which they can be used safely. The FDA might be a better model for how to do this. *See* Katherine Porter, *The Credit Cure*, The Tobin Project (May 2009), www.tobinproject.com. Other analogies might be to the Morningstar fund ratings, a widely used non-government benchmark of quality, or to Consumer Reports and its function in the marketplace.

Assignment 2

Who Is a Consumer?

This assignment focuses on the conceptual and doctrinal issues in defining the consumer at issue in consumer law. These issues are not usually treated separately but instead the definitions of consumers are brought up when the substance of the statutes are covered, and perhaps some coverage is given to vulnerable people or special classes of consumers in the study of credit discrimination or predatory lending. This assignment brings these issues together, in part to direct students to pay attention to the way in which the laws on the books may differ from normative ideals about who deserves protection.

This is the first assignment that requires the students to read statutes and regulations. The discussion of the relationship between statutes and accompanying regulations is the subject of the next assignment. For now, I ignore the distinction, treating both as "LAW" and the students usually go along with that.

Problem 2.1. This is a standard hypothetical fact problem. It is designed to explore the definition of goods and services. It is inspired by cases like *Henry v. Cullum Cos.,* 891 S.W.2nd 789 (Tex. App. 1995), in which a consumer sued a grocery store after slipping on its floors, arguing that floors were a service "furnished in connection with the sale or repair of goods." In that case, the court held that the services were "not necessarily the principal purpose of the bargain between the person seeking to purchase goods and the prospective seller. Rather, the goods themselves are the primary benefit to be obtained as a result of the transaction and the services are merely collateral to that end." It offered warranties as an example of a service that would meet the statutory requirement of being "furnished in connection with the sale or repair of goods."

The fact pattern here may make it easier for the Professor to show that the Wi-Fi was the purpose of the bargain between her and the coffee shop. Indeed, for people like the Professor, the tea seems incidental in relation to the other benefits of parking at a coffee shop. On the other hand, the tea is the only item the store is charging for. Can a complimentary additional service or good be subject to UDAP? Or isn't the Wi-Fi priced into the tea, making it part of the paid-for bargain?

Another case on the scope of services is *Mother & Unborn Baby Care, Inc. v. State*, 749 S.W.2d 533 (Tex. App. 1988), which finds that antiabortion counseling services are services under UDAP. While the incidental purpose analysis wasn't relevant there, mentioning this case can open the students' eyes to the wide scope of UDAP and the range of things that end up coming under the purview of consumer law.

Another angle here is to ask whether, assuming the Wi-Fi was a service covered by the statute, there would be an exemption because her purpose of being in the coffee shop was not "personal, family, or household." Many coffee shops host a substantial amount of business meetings, and here, one could add a fact such as she had her official office hours at the coffee shop. Does that take it outside the personal, family, or household realm? On the other hand, the tea is almost certainly for personal, family, or household purposes, even if the Wi-Fi was not. That loops back around to what was the good or service being purchased here.

Problem 2.2. This problem is an opportunity to explore how courts decide if something is for business or personal use. The problem doesn't ask the student to make a determination, but rather to identity what are the relevant facts for making such a determination. What was the amount of credit given? (Note that Dodd-Frank raised the amount to $50,000 beginning July 21, 2011, with inflation adjustments to begin on January 1, 2012). How often did Ricardo use the card for consumer purposes? Is it number of transactions or dollar amount that constitutes "half," if that is controlling?

Does the fact that he wasn't given any disclosures initially signal that the card was not for personal use? The Official Staff Commentary says that businesses can give out disclosures if they are not sure and that such precautionary disclosure does not dispose of the issue of whether it was for consumer use. *Gallegos v. Stokes*, which predates the Official Staff Commentary, takes the other approach, relying in part on the seller/lender having given Gallegos TIL disclosures to conclude that she was a consumer.

What about the liability provision? He is on the hook now, and so would it not have made sense for him to have been given disclosures so that he understood the costs of such credit? For a discussion of a similar situation, see *Martin v. Wells Fargo*, 91 Cal. App. 4th 489 (2001), in which a business card used time to time for personal use was held not to constitute extension of consumer credit. The court concluded "[a] cardholder may not have it both ways, apply for and receive a business credit card but use it for personal purposes and expect to receive consumer protection." *Id.* at 499. Some students may suggest that Ricardo has a defense as to the debts for personal use. This can be framed by arguing that each use of the card is a separate "extension of credit for personal use." Courts generally reject such transaction by transaction tests, in favor of the general purpose. While the case law is varied, a primary justification seems to be that the general purpose test is easier for the court to apply.

Problem 2.3. This problem can be taken in two directions. You can choose to focus on one, or cover both. First, it can be a substantive discussion about whether students are a type of consumer in need of specialized legal rules. You'll likely have a great deal of participation from the class for this discussion: when it is the student's wellbeing at stake, the discussion tends to be lively. You might ask what kinds of products the CFPB thinks students need particular guidance about, or whether it is just a general intuition about students as being unsophisticated people. The latter is somewhat odd, given that it is the over-18, not-in-college crowd that arguably needs more protection. That might suggest that student loans and credit card marketing on campus are the real targets here.

Second, Problem 2.3 can be a procedural discussion about the creation of the CFPB and the ongoing debate about its powers. This early in the semester, I like to open this class with some emphasis on actually "doing the problem." For me, that means that students do more than just read the problems and think "Gee, good question. I wonder what Prof. will say about that tomorrow." I start by asking students what the two specific units are in the statute. They are an Office of Servicemember Affairs and an Office of Older Americans. These are mentioned in Section 1013 of the Dodd-Frank Act.

I usually download and display the CFPB's current organizational chart (or sometimes pass it out.) Many students have little experience in government bureaucracy, at least at this high level. The CFPB as a new organization is a particularly interesting example of how a "21st century agency" might look (this was one of Elizabeth Warren's buzz words for the CFPB.) Notice that "human resources" is now "human capital," and there are several references to the lingo of the 1960s and 1970s civil rights and consumer movements—engagement, empowerment, etc. As a more recent historical note, in the few years since I conceived of this problem, the CFPB has changed its organizational chart to remove the reference to a student loan "ombudsperson" and to make it appear even more parallel to servicemembers and older Americans.

The problem asks if the CFPB may have additional offices or departments that are not contemplated in the Dodd-Frank Act. The statute would not seem to dictate every aspect of its organization. Surely, the CFPB can have a procurement department to obtain legal pads, even though Dodd-Frank did not so specify. Is it so different to add on students? On the other hand, what about an Office of African American Affairs (and not corresponding other offices for other racial or ethnic groups). Or how about an Undocumented Persons Liaison? Or a Limited English Proficiency Ombudsperson? Such creations would likely be impolitic, if not epic fails of political acumen. The empirical research, however, might support that consumers in these groups need as much, if not more, additional legal protection than older Americans.

Is the CFPB's structure a reflection of political intuition that Elizabeth Warren or the CFPB's employees or members of Congress think that students need protection more than others? Or is it a belief that students are unlikely to organize around the idea that it is offensive for the government to boss them around? Isn't this office just a backhanded way to do rulemaking and policy work on a substantive area that belongs to Congress? Does it take the CFPB into higher education finance, which is at least arguably the purview of the Department of Education, not the CFPB? These line-drawing exercises are part of what makes consumer law a particularly challenging area of policy work. Lobbyists on both sides need relationships with several federal agencies and several state agencies to shape the law.

Assignment 3

Who Makes Consumer Law?

NOTE: In problem 3.2 in the text, the statutory reference to 12 U.S.C. § 513 should be to § 5513.

Many students will enroll in consumer law without having studied regulatory or administrative law. This can be particularly true for second-year students. Even schools with a required first-year course on statutory interpretation or legislation have students who need a refresher on administrative law, and often courses on administrative law devolve into constitutional law, leaving students with little experience interpreting regulations.

This assignment also introduces the issue of preemption between federal and state lawmakers, and overlapping authority that brings with it questions about how and when an agency should defer to another (without creating a situation in which nobody does anything and consumers are left unprotected).

Professor Cathy Mansfield gave me the idea for this assignment, and it benefited from a review of materials that she developed with Alan White. It was their idea to study this topic early in the course, and while I cannot speak to their motivation, I know a good idea when I see one—especially from two of the most talented professors in the field.

The intuition behind the assignment is that without this overview of who makes law and by which processes the students quickly become confused by citations to both statutes and regulations, and by the ability of either state or federal actors to challenge business practices that harm consumers. Even in other areas such as antitrust and securities regulation, where state law exists and is used, most courses focus on federal law nearly exclusively. The reason for this is that it is much easier to ignore the states than address the constant question of whether state law also applies and any particular state's law. In consumer law, the state UDAP statutes are real workhorses, and state agencies remain key actors even after the CFPB's creation. Ignore state law at your student's peril.

One light way to open class is to review the basics of lawmaking. I sometimes play the Schoolhouse Rock "I'm just a bill" video. https://youtu.be/tyeJ55o3El0 While this may seem (literally) elementary, the foundation is useful. I use the video to go through some concepts that often needlessly confuse students such as public law numbers, popular names, codification, etc. You can use Dodd-Frank or TILA for such a purpose, as they will see both statutes frequently.

Another useful exercise to ground the students on the foundations of lawmaking is to visit www.congress.gov. You can pick Dodd-Frank, or any recent consumer law of interest, and walk through the bill text, the conference report, hearings, the public law, etc. Most students have little to no exposure to legislative research.

A less technical and more policy-oriented opening to class is to watch the video, "AGs 101" by former Maine Attorney General Jim Tierney. It's 22 minutes long and also makes a nice additional homework assignment for students. http://web.law.columbia.edu/attorneys-general/ag-101-brief-introduction-world-attorneys-general The page also contains a number of excellent short readings and handouts. Comparing the "generic AG organization" chart to the CFPB's and/or FTC's organization chart can help the students understand the different perspectives and tasks of federal and state actors in consumer law.

The coverage here is deliberately introductory. There are opportunities later in the book to revisit the thornier questions of preemption, such as with the study of usury. Similarly, the CFPB's new rules are raising questions—and creating litigation—about the scope of its authority.

Problem 3.1. This problem is designed to send students back to the description of the interaction between statutes and regulations. The substance of credit billing is dry stuff (at least to me), but the point of the problem is largely to serve as a launching pad for you to review the structure of consumer lawmaking. I start with the basic question: which is the law? The correct answer, of course, is both of them. I ask students which one is the statute, and how they know that. Or I ask which one was enacted first, which is essentially asking them to identify which is the statute. You can review codification of statutes and the Code of Federal Regulations here. Depending on what your school does in its legal research class, this may be the first regulation that students have seen.

I avoid all substantive discussion of the billing error but do ask the students to identify places where the regulation expands the statute. And in some cases, the regulation appears to narrow, rather than expand the statute. I usually make a side-by-side concordance using the exact words, showing what parts of the statute match up to what parts of the regulation. Most find this hard and tedious, at which point one can remind them that if being a lawyer was always fun, billing rates wouldn't be what they are for lawyers.

The problem suggests an interesting big-picture question. Why do regulations repeat statutes verbatim? Is the idea that the regulations should read as a stand-alone document so it is necessary to repeat statutes even if the agency has nothing to add? Perhaps this technique saves a “gotcha” trap for the unwary who might read only the regulations (but surely agencies are not encouraging weak lawyering). And the repetition always raises fear that maybe some little word, phrase, or punctuation differs between the statute and the regulation, itself a trap for the unwary.

Problem 3.2. Here the students are asked to take on a defensive posture, trying to fend off new rules and avoid the costs of compliance. First, the students should note that there was a missed opportunity to intervene here. Because the CFPB is subject to Administrative Procedures Act rulemaking, there was a Notice of Proposed Rulemaking. How is the firm going to explain to the Board of Directors of Opportunity Bank that the firm failed to alert the bank and draft on its behalf a timely comment, denouncing the regulation as bad for business and downright un-American? (Perhaps the response is that monitoring a rulemaking is the task of in-house counsel and the firm’s engagement didn’t obligate it to be alert to these kinds of developments; that response leaves though the issue of the unearned fees from the legal work that could have been done at the time of the rulemaking. While it is a very long shot that the CFPB did not actually follow APA procedures, it would not hurt to check the Federal Register.

Second, the students should see that section 1023 of Dodd-Frank gives a glimmer of hope. The Financial Stability Oversight Council (consisting of 10 voting members of heads of major financial regulators) may “on the petition of a member agency of the Council, the Council may set aside a final regulation prescribed by the Bureau, or any provision thereof, if the Council decides . . . that the regulation or provision would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk.” The bank here is federally chartered and presumably the Comptroller of the Currency may want to side with the bank, particularly if the bank can make a colorable argument that its business will topple if it is forced to comply. The students should also see that the Director of the CFPB gets one vote (and we know what direction it will go) so there are only 9 parties left to persuade. To achieve the 2/3 vote to set aside a rule, 7 members of the 10-person FSOC will have to support reversal.

You can explore the substance of the standard here a bit. One bill to “improve” the CFPB would change the standard for the FSOC to overrule the CFPB by *requiring it* to overturn CFPB regulations that are “inconsistent with the safe and sound operations of United States financial institutions.” Could inconsistent merely mean antithetical to the profit motive of banks? Putting the “stability of the financial system at risk” surely requires a more sweeping impact from a CFPB regulation than “inconsistency.” After beating up the FSOC standard as extremely difficult, I then point out that almost no other agencies have a similar risk of a rule override. I ask what the remedies are if someone doesn’t like a typical federal regulation. The students should respond that one would have to either litigate the rule in the courts as beyond the scope of a statute or as unconstitutional, or even more expensively, lobby Congress to explicitly overturn the regulation by statute. The point is that while FSOC veto may be difficult, it is an additional arrow in the quiver of usual actions to challenge rulemaking. In my mind, FSOC invalidation is an example of the checks and balances that are baked into the CFPB's design, and a reason why those who fear the CFPB will run amok are simply anti-consumer.

In terms of litigation, Opportunity Bank could obviously face suit by the CFPB. Per § 1053 of Dodd-Frank, this suit could be in federal or state court. The State Attorney General, which is already onto this bank, is also a threat. Section 1042 of Dodd-Frank gives the AGs the right to enforce CFPB rules, even against federally-chartered institutions in their states. The AGs could also rely on state law to sue the bank, on the theory that the bank's practices violate the state's unfair and deceptive practices act. There should also be fear that there are other state laws (such as fair lending laws) that are not preempted. Dodd-Frank codified *Cuomo v. Clearing House Ass'n*, 129 S. Ct. 2710 (2009), so that states can enforce non-preempted state laws against national banks in lawsuits (although not issue subpoenas for pre-investigation). Private litigants cannot use the CFPB's rules (no express private right of action) but the state UDAP statute may well permit a private lawsuit and provide for sizeable damages.

Problem 3.3. Building on Problem 3.2, this problem asks the students to consider the relative powers of the CFPB and comparable regulators. The text points out that the FTC is a commission, and that the CFPB is to have a single director, but it also hints at other reasons the FTC has been hamstrung in its consumer protection function, including several amendments designed to accomplish exactly such an outcome.

I start by asking students to outline the proposed changes: a 5-person commission; no more than 2 of one party; the Vice Chairman for Supervision of the Federal Reserve System is automatically a member; presidential appointment and senate confirmation for the other members; staggered five-year terms, etc. There are all kinds of potential for trouble here, including gridlock in ever confirming a fifth person, when such a result would essential hamstring the CFPB.

The proposed bill's most peculiar provision may be § 104(c)(4). It specifies that "one member of the Commission shall have as their primary responsibility the oversight of the Bureau's activities pertaining to protecting consumers, with a focus on consumers who are older, minorities, youth, or veterans, from unfair, deceptive, and abusive lending practices." From the bill, it isn't clear who gets to decide on the identity of this Commissioner, and since the whole point of the CFPB is to protect consumers, why put only one person in charge of this? It's a strange argument that the CFPB shouldn't be run by only one person, and that five heads are better than one, but then to put only one person in charge of the CFPB's most controversial task. Maybe the hope is that this one person will be a wet noodle and constantly be outvoted by the other four who somehow have a primary responsibility other than overseeing the CFPB's activities protecting consumers. Some attentive students might note the reference in § 104(c)4) to unfair, deceptive, or abusive "lending" practices but that the CFPB statute as enacted is not limited to lending but to "covered providers" in all of their activities concerning consumer financial services and products (debit cards are a good example here). Maybe the idea is that one Commissioner should focus on lending as opposed to other activities under the CFPB's purview. Again, lending is a huge portion of the CFPB's workload so the provision seems odd.

One major argument for a move to a commission is that diversity of thought is appropriate on these issues. Perhaps bad credit practices, like employment discrimination, depend on the eye of the beholder and so a broader group of people is more likely to respond to the mainstream perspective of consumers as a whole. The counter, of course, is that the move to a commission is simply an effort to defang the CFPB and ensure that its work proceeds slowly and very modestly. One major factual point for discussion is which structure is typical for financial regulators. Students may analogize to the FTC, which is a commission (query: does it work as we wish it to?); others to the Federal Reserve Board. The counter example might be the Office of the Comptroller of the Currency, which has a single person who serves as Director.

As Jeff Sovern noted in a blog post when the bill passed the House, "the bill is diabolically clever." http://pubcit.typepad.com/clpblog/2011/07/why-the-house-bill-to-improve-the-cfpb-would-cripple-it.html It is not easy to understand the practical effects of the changes that it proposes, making it a good statutory reading exercise for the students and a lively discussion.

Part 2

Consumer Meets Business: Getting Into the Deal
Assignments 4-8

This Part addresses how businesses attract and screen consumers as their customers. As with the other Parts, it covers both non-credit and credit topics. The first two assignments distinguish between efforts targeted at a particular person (solicitations) and efforts aimed at the larger universe of possible customers (advertising). A main concept is the degree to which consumers should be expected to be skeptical and investigate claims or offers, as opposed to requiring businesses to contour their marketing to try to eliminate or reduce consumer misunderstanding.

Assignment 6 contains the substantive coverage of identity theft. This fits into the theme of "getting into the deal" in that it examines a consumer's options when a business is misled as to the consumer's identity. Privacy is covered in the same Assignment because the relatively weak privacy laws in the United States facilitate identity theft. Privacy also provides an important foundation for credit reporting; without access to information about consumers, credit reporting would be transformed into a much smaller and more expensive industry than in recent decades in the United States. Credit reports also provide a mechanism for consumers to monitor the use of their identities and to learn of misappropriations.

The final assignment on credit discrimination is an opportunity to revisit issues of marketing, privacy, and identity data in the context of an important social issue: discrimination on a legally prohibited basis.

Assignment 4:

Solicitations

This assignment looks at how businesses attract consumers through targeted approaches, such as mailings, door-to-door sales, and telemarketing.

Technological advances are important here, and the Federal Communications Commission and Federal Trade Commission (make sure students know the difference) have made amendments several times in recent years to keep pace. In 2009, it prohibited "robocalls," which it defined as prerecorded calls to leave messages. In 2013, the Telephone Consumer Protection Act (TCPA) redefined "prior express consent, 47 U.S.C. § 227(b)(1)(A)(iii), to require *written* consent for using autodialed or prerecorded calls to wireless numbers. Because there was no grandfathering of pre-existing consent, companies had to obtain new consents—or cease telemarketing activity. In July 2015, the FCC issues a declaratory ruling and order that substantially expanded the TCPA's reach again. The key developments are listed below, but check the status of the law before class. It is under court challenge, with oral argument in the U.S. Court of Appeals for the District of Columbia set for late October 2016. The TCPA Blog provides frequent updates. http://tcpablog.com/

The FCC's Declaratory Order, FCC 15-72, is a glorious 166 pages of fun. Here are some key take-aways, with a focus on areas of ambiguity or industry angst. An excellent overview is John R. Chiles, Zachary D. Miller & Rachel R. Friedman, *TCPA Regulatory and Litigation Developments: The FCC Opens the Floodgates*, 71 BUS. LAWYER 649 (Spring 2016).

- Consumers have the right to revoke their consent to receive calls from autodialers in any reasonable way at any time. There is substantial debate, including among the Commissioners, about how to interpret this phrase.
- Callers must stop calling reassigned wireless and wired numbers after a single call—regardless of whether there is any message or answer that confirms that the number is reassigned. Some believe this means that no answer or a "you have reached 123-456-78900. Leave a message" recording is knowledge of change merely because you cannot firm that the number was *not* reassigned.
- The definition of automatic telephone dialing system is expanded, and arguably includes any smart phone (although this point remains contested.) The definition is equipment "which as the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (b) to dial such numbers." The FCC has stated that the equipment meets the ATDS definition "even if it is not presently used for that purpose."

- Prior express written consent is not required for certain on demand, single response text messages. A good example here is retail stores that have in-store ads where the consumer texts a number to receive a coupon code back via a one-time text message.

Students sometimes struggle to understand pyramid schemes. The controversy around Herbalife provides the foundation for a useful classroom discussion and some review of the law. The short story is that an activist investor, which is shorting Herbalife's stock, has been publicly proclaiming it a pyramid scheme, apparently in an attempt to encourage regulatory action. http://www.factsaboutherbalife.com/

As of summer 2016, Herbalife remains relatively unscathed, but the discussion gives students the opportunity to apply the legal tests for impermissible sales schemes, as described in the Skybiz case in the text. A more interesting, but advanced, point is to debate whether it is useful to have investors engaging in purported consumer protection such as the above anti-Herbalife site. Is enforcement weak and the activist investor providing another cop on the beat for consumers? Or is this naked capitalism masquerading as consumer advocacy?

Problem 4.1. This problem is a statute reader. Students should poke their noses deeply into 16 C.F.R. § 429.1, looking for what might be wrong here. Some might ask about whether the "prominent disclosure" is sufficient or whether it actually must be a bold-face type and 10-point font. The answer, of course, is that the rule means what it says. Italics don't get the job done here. The big problem with the paperwork is that while Ronald was given two copies of the Notice of Cancellation (and the facts suggest its language was proper), both notices were on the back of the contract. The rule suggests that the notices be "attached" to the contract (and requires slightly different contract language if they are not). However, the Notice of Cancellation must be exercisable while permitting the buyer "to retain a complete copy of the contract." Here, if Ronald fills out and sends in the Notice of Cancellation, he will be deprived of a copy of the contract. While one copy could be on the back of the contract, the other needs to be on a separate sheet of paper or on a perforated piece of paper that does not contain part of the contract.

The other obvious failure here—and students usually miss it because the facts do not point them in that direction—is that Lucy may not have given Ronald the required oral disclosure of his right to cancel. 16 C.F.R. § 429.1(e). This is mentioned in the text but students who are working the problems without reading may miss this.

You can use this problem as a springboard to go over a few other requirements in the rule, including the mechanics. How does Ronald exercise his right? He must mail or deliver the notice of cancelation. Assuming there is no tolling of the three-day right under federal law (although the *Pinnacle v. Price* case finds there is such a right under a state door-to-door statute), he must have it postmarked by "midnight on the third business day after the date of the transaction." The day of the transaction itself does not count as one of the three business days. Some students will emphasize the importance of getting a certified mail receipt to show the mailing date, thinking they are going to use this in a later lawsuit. If you want to make a detour into remedies here, you can point out that the federal UDAP statute contains no private right of action (something mentioned in Assignment 3). A counterpoint is that every state's UDAP does have a private right and many make violations of FTC rules *per se* violations of the state UDAP statute.

Once Ronald gives his notice, what are Lucy's obligations? She has 10 days to return any payments and "any goods or property traded in." 16 C.F.R. § 429.1(g). Presumably the traded in language will pick up the return of the couch cushion.

Problem 4.2. The Telemarketing Sales Rule remains important, even as technology has evolved and more marketing has moved online. The problem requires students to go looking for whether a behavior violates a statute, which often leaves them with the uncertain feeling that the behavior must be illegal but they are not finding it. I think Phijheeta complies with the law here, particularly if we add a couple of details about Beaches or Bust's practices. The students should note that she is making the required disclosures under § 310.4(d), including the identity of the seller (Beaches or Bust), the purpose of the call (to sell something), and the nature of the goods (vacation packages that include certain things).

The statute on deceptive acts or practices does not ban the use of fictitious names. Indeed, § 310.5 on recordkeeping seems to implicitly sanction the practice, requiring only that the company retain for 24 months "the name, any fictitious name used, the last known home address and telephone number, and the job title(s)" for all employees involved in solicitations, "provided, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee." § 310.5(a)(4). If Beaches or Bust does not know that Phijheeta is using a fictional name and is not keeping track of that use, there may be a violation.

Some students think it is wrong to allow people to "lie" to consumers and avoid giving their real name, but most have great sympathy for the privacy needs of telemarketers. You can probe at the latter by asking if the law would condone the use of fictitious names in other contexts, such as the name of bank loan officers or auto salespeople so long as the business owner controlled the use of the fictitious names. Some are uncomfortable here, expecting more honesty in face-to-face transactions.

Phijheeta is totally within her rights to refuse to disclose the remainder of her personally identifiable information, in case anyone asks. In fact, in this fact pattern, the abusive behavior might well be by the consumer trying to pressure her into giving out such information.

Problem 4.3. This problem is designed to help students think about similarities and differences between telephone calls and emails, with the goal of preparing them to be able to generalize about these issues to new forms of communication—either those yet to be invented or where unsolicited contact does not yet proliferate. On the forefront is text message spam. In 2010, the FTC brought the first case of its kind against a person who sent unsolicited text messages touting loan modification and debt relief services. The FTC argued the text messages were an unfair and deceptive practice, apparently concluding that neither the telephone or email statutes applied.

Governor Hudson's new idea is an old one. In the CAN-SPAM Act, Congress directed the FTC to report to it on whether a do-not-email registry was a good idea. 15 U.S.C. § 7708. The FTC's report concluded that it was not feasible and might actually increase the problem of spam. FED. TRADE COMM'N, NATIONAL DO NOT EMAIL REGISTRY: A REPORT TO CONGRESS (June 2004), available at http://www.ftc.gov/reports/dneregistry/report.pdf. It concluded that "spammers would most likely use a Registry as a mechanism for verifying the validity of email addresses and, without authentication, the Commission would be largely powerless to identify those responsible for misusing the Registry. Moreover, a Registry-type solution to spam would raise serious security, privacy, and enforcement difficulties." *Id.* at 6.

The concern is that the basic do-not-call model, in which users scrub their lists against the registry, would only allow spammers to verify that email addresses existed and were valid, thereby enabling spam. The FTC concluded that the lack of authentication (the receiving server of email sent via the SMTP (simple mail transfer protocol) does not demand authentication of identity from the sending servicer) would make it impossible for the FTC to track down those who used the email registry to find addresses for spamming.

The CAN-SPAM Act preempted state laws on spam. "This chapter supersedes any statute, regulation, or rule of a State or political subdivision of a State that expressly regulates the use of electronic mail to send commercial messages, except to the extent that any such statute, regulation, or rule prohibits falsity or deception in any portion of a commercial electronic mail message or information attached thereto." 15 U.S.C. § 7707(b)

The do-not-call registry did not preempt state laws, as the text points out. Is this distinction valid? Or does it reflect a political economy story (are spammers be more powerful than telemarketers?) Or merely that spam, at the time, was less of a problem for congressional representatives, than telephone solicitations? The reason given in the CAN-SPAM Act was that it was too difficult for legitimate email users to comply with state laws because email addresses do not contain geographic locators. This may be unconvincing, since such geographic information would not be needed to comply. Senders would need to scrub their lists of email addresses against every state registry but that would seem to take care of the problem.

If Governor Hudson were to propose such a law, assuming he could overcome the preemption barrier, an obvious consideration for him might be whether political spam should be covered. (Surely, he doesn't think emails from his reelection committee are spam.) The CAN-SPAM Act currently does not cover political e-communications; they do not fall under the definition of a "commercial electronic mail message." 15 USC § 7702(2)(A). Political spam is on the rise, however, both by candidates and political action groups. For more on this issue, see Vvek Arora, *The CAN-SPAM Act: An Inadequate Attempt to Deal with a Growing Problem*, 39 COLUM. J.L. & SOC. PROB. 299 (2006). The definitional boundaries are not easy, however, since presumably at least many consumers want to get messages from companies as from politicians. Consider the exception to the commercial electronic mail message definition for "transactional or relationship messages," 15 USC § 7702(17)(A)(ii), which permits bulk messages for things like product recall or safety notifications.

Problem 4.4. This problem probes the details of regulating referral schemes. The statute given after the problem is a slightly altered version of section 3.309 of the Uniform Consumer Credit Code. The main alternation is to eliminate the references to "consumer credit sales or leases" and to substitute in the sale of "goods or services." [Section 3(b)(11) of the Uniform Consumer Sales Practice contains very similar language that applies to goods and services.]

The initial deal of bringing friends with you and getting a discount seems permissible. The benefit of $10 off the initial membership fee is contingent on an event (friends accompanying her and joining) that occurs contemporaneously to Bethany entering into the transaction (not an event occurring after the transaction). One could wonder if this means they all need to sign the contract at the exact same time or wonder what happens if Bethany signs up and her friend backs out at the last minute.

The up-front offer of a discount in monthly membership fee in any month when Bethany has a friend join is not permitted under the statute. This will shock some students, and they may argue with you about it—precisely because they have all been members of health clubs and discounts similar to these are common. The key fact is that these "discount if your friend joins" schemes are legal if they are offered to members who have already joined. At that point, the contract is signed and Bethany is obligated. The referral discounts cannot be inducements for the sale of the goods or services, offered at the time that Bethany is considering joining. Why? Because the harm trying to be remedied is Bethany making discount calculations in her head about the cost of joining Massage Mates based on anticipated friends joining.

At the end of the discussion, I return to the question about whether Bethany should join. The fact that Massage Mates is violating the law does not mean that Bethany would not benefit from joining. The advice to her is that she should budget and plan on paying the full $50 each month, rather than counting on a discount. Query whether she can really "hear" that advice; isn't the point of the statute banning the practice that cognitive barriers cause people to overestimate the chances of good things happening?

I sometimes ask the students what they do after they finish advising Bethany. Most say that they would report it to the attorney general or the FTC. I kid them about being goody-two-shoes, and suggest that an enterprising young associate would trot down to Massage Mates and pick them up as a client for the firm. They clearly need better legal advice.

Assignment 5

Advertising

This assignment looks at advertisements in media, as opposed to the more personalized marketing (solicitations) that were covered in Assignment 4. While most recent Supreme Court decisions on free speech are about advertisements or mandatory disclosures, most constitutional law courses still focus on classic anti-government free speech issues. Advertising is an easy place for ill- or unadvised businesses to step into trouble. The FTC and state attorneys general launch hundreds of investigations or initiate cease-and-desist proceedings each year in response to advertisements.

At least for now, the FDA is back to the drawing board with regard to graphic image warnings for cigarettes; it did not appeal the D.C. Circuit's ruling in favor of tobacco manufacturers. Steve Almasy, *FDA changes course on graphic warning labels for cigarettes,* CNN (Mar. 20, 2013) http://www.cnn.com/2013/03/19/health/fda-graphic-tobacco-warnings/. The story shows two other images, besides the "lung comparison" image shown in the textbook. Students may enjoy debating whether the FDA was too aggressive, and if, for example, the lung image might have survived challenge but once you start showing babies and stomas. (Students may remember the famous California public health ad showing a woman breathing through a stoma. She passed away at age 62. https://youtu.be/wAaGbsHBacE). Notably, the FDA already retreated somewhat from its initial rulemaking, in which it offered 36 images for public comment. You can do a slide show of the rejected images. http://www.cbsnews.com/pictures/27-cigarette-warning-labels-nixed-by-the-fda/ The nine written warnings that accompanied the images were specified by Congress in the Family Smoking Prevention and Tobacco Control Act of 2009, and were not the FDA's creation. At present, neither visual images nor the nine new statements appear on packaging.

Several new papers examine the benefits of mandatory disclosure. While advertisements are not the same thing—and credit disclosure gets its own treatment in Assignment 12—the work is still interesting for what it suggests about how consumers do and do not use information in the marketplace—and whether that should guide lawmaking. Thoughtful papers are EXECUTIVE OFFICE OF THE PRESIDENT, NATIONAL SCIENCE AND TECHNOLOGY COUNCIL *Smart Disclosure and Consumer Decision Making (2013), https://www.whitehouse.gov/sites/default/files/microsites/ostp/report_of_the_task_force_on_smart_disclosure.pdf*; Joshua Mitts, *How Much Mandatory Disclosure is Effective? (Oct. 4, 2014)(available at SSRN: http://dx.doi.org/10.2139/ssrn.2404526)*; and Seana Shiffrin, *Deceptive Advertising and Taking Responsibility for Others* (Oxford Handbook of Food Ethics, ed. Tyler Doggett, Anne Barnhill and Mark Budolfson (forthcoming), UCLA School of Law Research Paper No. 15-28, available at SSRN:

http://ssrn.com/abstract=2658450. The best book is Omri Ben-Shahar & Carl E. Schneider, MORE THAN YOU WANTED TO KNOW (2014). For a serious dive into advertising, point your students toward a marketing class aimed at MBAs—they'll find no mention of deception law, I wager.

Problem 5.1. This problem is an opportunity to discuss the Kraft case in the text and to explore the risks a business may have liability for making a deceptive claim, even if it complies with the extensive required labels for foods. http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm2006828.htm

In September 2010, the FTC sued POM Wonderful, the promoters of 100% pomegranate juice that advertisements claimed is "proven to fight for cardiovascular, prostate and erectile health." POM Wonderful defended itself vigorously, claiming to have spent $34 million over ten years on scientific studies of the health benefits of pomegranates. Ben Rooney, *Pom Wonderful charged with selling snake oil*, CNN.com (Sept. 27, 2010), http://money.cnn.com/2010/09/27/news/companies/POM_Wonderful/

The legal issue is the degree of substantiation that advertisers must have for health claims made in their ads. In *Sterling Drug, Inc. v. FTC*, 741 F.2d 1146 (9th Cir. 1984), the Commission outlined three types of substantiation claims: 1) scientific establishment; 2) superiority; and 3) puffery. While no evidence is required in the latter situation, the FTC requires substantiating evidence for the first, and at least a reasonable basis for the second. *See* FTC Policy Statement Regarding Advertising Substantiation, 40 Fed. Reg. 30999 (1984). One line of defense is to argue that the statements in Bliss Berry's ad are puffery, for which no substantiation is required. The "fights depression" language is fairly vague, likely more so than claims such as "has been proven to fight" that courts have found to have asserted the establishment of a scientific fact. You can vary the language a bit to play with the substantiation analysis. What if the advertisements said "tests prove"? Is that stronger than "studies show"? How much law does a modern day Don Draper "ad man" need to know?

You might ask Phoebe if Amazing Amazonia did marketing surveys that could show that consumers did not think the product had been scientifically tested. The analytical difficulty is that if the "fights depression" language did not influence consumer behavior toward purchasing Bliss Beer, it likely would not have been included on the valuable visual real estate of an advertisement. In fact, any market research of its advertisements is likely to hurt Amazing Amazonia, and the FTC is very likely to try to obtain such documents in discovery.

A different tactic is to concede scientific establishment, but instead offer up substantiation, and contest how much substantiation is required for the claims made. The relevant documents that might be used to defend the suit include any in-house or external scientific studies. In particular, you will want to look for things that carry external markers of validity, such as publication in a peer-reviewed scientific journal or random (or at least well-controlled) clinical trials. You might also want to ask Phoebe Max about potential experts, such as physicians or nutritionists, who could be used as witnesses. These will be particularly helpful if they had made reports prior to the advertisements that back up on the claims.

The POM Wonderful decision, despite running to 300+ pages, did little to clarify the issues. *In re POM Wonderful LLC, No. 9344,* Initial Decision (FTC May 17, 2012), available at http://www.ftc.gov/os/adjpro/d9344/120521pomdecision.pdf. The judge did make clear that the FTC cannot necessarily required FDA approval of certain health-related claims and cannot mandate support of such claims by randomized controlled clinical trials. The court did suggest, however, that for at least some health claims some human clinical study or research may be needed. Of course, the court affirmed that it is all very fact-specific, expert-intensive, and other words that create lots of expense and uncertainty for those seeking to bring new products to market.

Some students may suggest that the product is deceptive, independent of the health claims, because its name suggests it contains alcohol. Root beer, birch beer, and similar products do not have labels stating that they are non-alcoholic, but perhaps the use of the adjective "bliss" is more likely to suggest alcoholic content. If the FTC pursued this, one remedy would be to require a label—a mandatory factual disclosure—that it "contains no alcohol." This can lead you into a discussed of the compelled speech standard for advertisements in *Zauderer*.

If the students ask, the general labeling requirements for bliss beer will come from the Food and Drug Administration, U.S. Department of Agriculture. These will include required statements about net quantity, ingredients, and nutrition. Additionally, alcoholic beverages must bear the familiar "GOVERNMENT WARNING" label regarding the consumption of alcohol during pregnancy. 27 C.F.R. § 16. Despite the mention of the Surgeon General (which the law specifies must use an initial capital letter), violations of this warning are—of course—the job of the U.S. Treasury, via the Alcohol and Tobacco Trade and Tax Bureau.

Problem 5.2. This problem looks at advertisements and sales of "free" merchandise or services. Section 251.1(i) makes clear that "bonus" products are "free" and come under the guideline. The term used by the company doesn't matter; it is the substance of the transaction. There may be liability issues with regard to the permanence of Masculine Masks pricing scheme. Section 251.1(h) says that in order to make free offers meaningful, they should not be advertised in a trade area for more than 6-months in any 12-month period. Melissa might respond that she doesn't advertise any free products, and that the mention of bonus products and gifts in the advertisement is not the kind of concrete free offer that the frequency of offer guidelines is designed to apply for.

The company's personalized pricing scheme raises issues. Section 251.1(g) applies here because these are negotiated prices, rather than fixed prices. The guide says "If a product or service usually is sold at a price arrived at through bargaining, rather than at a regular price, it is improper to represent that another product or service is being offered 'Free' with the sale." The bonus offer as a deal closer seems to violate the guide. This is a good opportunity to ask the students "does it violate the law?" and point out that the guide—unlike a regulation (a legislative rule made under the FTC Act)—does not have the force of law. The complaint here would plead an unfair or deceptive practice as the substantive legal violation but likely cite the guide for additional support.

Problem 5.3. This problem picks up on the issues involving things advertised for "free" and considers the ongoing skirmish between the FTC and several credit reporting companies. Experian owns the website www.freecreditreport.com. The official site for the legally-required once-per-year credit report is www.annualcreditreport.com. If you type "free credit report" into Google or Bing, you bring up both sites near the top, and some "marketed" top-level links, including this one (whose use of the word "official" is pretty sneaky, in my opinion.)

> FreeCreditReport.com®
>
> *www.FreeCreditReport.com/Official*·See Your **Credit Report** in Seconds! Easy to Read and Viewable Online.

The FTC has been battling with Experian over the freecreditreport.com site for years. The company paid a total of $1.25 million in 2005 and 2007 to settle two sets of charges from the Federal Trade Commission that it was misleading consumers who were seeking the free credit reports. At one point, it reputedly asked Equifax to give it the URL. Equifax refused, perhaps because creditor monitoring is estimated to generate $700 million in annual revenue each year, with Equifax's share being twice that of its three main competitors combined. *See* Ron Lieber, *A Free Credit Score Followed by a Monthly Bill*, NEW YORK TIMES, Nov. 3, 2009. http://www.nytimes.com/2009/11/03/your-money/credit scores/03scores.html?pagewanted=all

The Credit CARD Act, signed in 2009, directed the FTC to write new rules for sites that offered free credit report. Those rules require sites to include a prominent notice across the top of each Web page that mentioned free reports declaring that the only authorized source under federal law for such reports is annualcreditreport.com. 12 C.F.R. § 1022.138b(4). In response, Experian announced that "due to federally imposed restrictions, it is no longer feasible for us to provide" consumers with a free credit report.

Instead, they started charging $1 for the report, claiming that the FTC rule no longer applies. *See* Ron Lieber, *Free Report on Credit? No Longer*, NEW YORK TIMES (Apr. 7, 2010).

Not mentioned in the article is the potential action for deceptive advertising for having a site called "freecreditreport.com" that in fact charged for many services, including credit monitoring. Back in 2010, the Experian site offered dueling options: the left side was what appeared to be a free option for a credit report delivered in 2 days, while the right-hand side of the page was an option that "costs $1" that enrolled the consumer in a 7-day trial membership in freecreditreport.com. If the consumer doesn't cancel within the 7 days, Experian billed the consumer $14.95 each month until cancelled. On my summer 2016 visit to the www.freecreditreport.com, I noticed that it touts "no credit card is required" to access the "free" report. When I clicked to get my report, however, the Terms & Conditions so terrified me that I was deterred from checking it out further. At minimum, consumers who use www.freecreditreport.com, instead of the government-mandated site, are agreeing to being bombarded with solicitations for expensive credit monitoring services.

Students might ask "why isn't the FTC shutting this down?" and enforcing the web disclosure that directs people to annualcreditreport.com. I puzzled over this, and did not come up with an answer, other than that battling Experian is probably exhausting for the FTC. At that point, you might show them the FTC's response tactic to Experian's advertisements from several years ago. Not to be outdone by a catchy jingle, the FTC created a series of public service announcements that were parody ads of freecreditreport.com.

Experian ad: http://www.youtube.com/watch?v=zMXv0__CYSU

Parody FTC ads: http://www.ftc.gov/multimedia/video/credit/annual-credit-report-videos.shtm

This is corrective advertising on the taxpayer dollar. Is it an effective remedy? As the FTC's website observes, "Anyone can write a catchy jingle, but only AnnualCreditReport.com provides you with a truly free credit report." The problem remains getting consumers there.

Problem 5.4. This problem looks at two new additions to the rules on credit card marketing. The first is advertisements and solicitations aimed at college students. The second is the use of the term "fixed rate." Start by establishing whether this is a "college student credit card," a defined term in "Reporting and marketing rules for college student open-end credit." 16 C.F.R. § 1026.57(a)(1). "The term 'college student credit card' as used in this section means a credit card issued under a credit card account under an open-end (not home-secured) consumer credit plan to any college student." Arguably, the situation described does not involve a "college student credit card" because no credit card has been issued; Jaime merely has an application.

Jaime is unquestionably a "college student", and his college is probably an "institution of higher education." 16 C.F.R. § 1026.57(a)(2) and (3). However, Jaime is 22 years old, and therefore is not a "younger consumer" subject to special ability to pay considerations, such as the co-signer requirement. 15 U.S.C. § 1637(c)(8); 16 C.F.R. § 1026.51(b). The Credit Card Act of 2009 banned offering tangible items to college students "near the campus of an institution of higher education." 12 C.F.R. § 1026.57(c). The official interpretation defines a 1,000-foot perimeter around campus as a no-card zone. Students may miss the fact that banner and tent are "across the street" from campus; the precise distance is actually a key fact to clarify (I love the image of a young law associate grasping a theodolite surveying the borders of campus, with a phalanx of peppy marketing people in the lawyer's wake).

Assuming the tent is "near the campus," the law prohibits "*inducements."* The regulation says that "No card issuer or creditor may offer a college student any tangible item to induce such student to apply for or open an open-end consumer credit plan offered by such card issuer or creditor" within the campus geographic restriction. 16 C.F.R. § 1026.57(c). Perhaps, however, Trixie did not "induce" Jaime to apply with the tangible item, the iPhone cover. They were apparently disseminated freely without any obligation to apply for the card. Indeed, the fact pattern suggests that applications were not even accepted at the campus location but had to be mailed to College Bank for processing.

The banner is clearly an advertisement. The law does not prohibit general advertisements by credit card companies on college campuses (indeed, imagine how barren of décor athletic stadiums would be with such a rule). The issue with the banner is whether its use of the term "fixed" is misleading under § 1026.16(f). It prohibits using the term "fixed" to describe an APR "unless the advertisement also specifies a time period that the rate will be fixed and the rate will not increase during that period, or if no such time period is provided, the rate will not increase while the plan is open." Here, perhaps the advertisement is promising the fixed rate will only last as long as the consumer is a "college student." For Jaime, graduation might be looming. Can the bank increase the rate at that point? Or does its advertisement commit the bank to keep the 6% rate as long as the plan is open because it has failed to "specify a time period that the rate will be fixed"? Does time period need to be expressed in years or months or can it be measured by life progress?

Assignment 6

Consumer Privacy and Identity Theft

Privacy is a tough topic, cutting across several areas of the law school curriculum, and often receiving substantial coverage in constitutional law courses. An excellent primer is Daniel J. Solove & Paul M. Schwartz, Privacy Law Fundamentals 2015. Chapter 2, Privacy Law Fundamentals, gives all the basics in about a dozen pages and contains a useful bibliography for additional reading.

The focus in this assignment is on the use of consumer information by businesses not the government, and on, yet again, the reliance of consumer law on disclosures as a remedy. Recent papers have critiqued this approach to privacy. Jane R. Bambauer et. al, A Bad Education, 2016 U. ILL. L. REV. ____(forthcoming), http://ssrn.com/abstract=2795808, (arguing that privacy disclosure regimes have underestimated the consumer risks of ineffective, incomplete, or incoherent disclosures); Omri Ben-Shahar & Adam S. Chilton, "Best Practices" in the Design of Privacy Disclosures: An Experimental Test (Oct. 5, 2015), http://ssrn.com/abstract=2670115, (examining different formats of privacy disclosures to test which formal properties of purported best practices in privacy disclosures change consumer behavior).

The laws on privacy, particularly at the federal level, are outdated. This is a place where one can emphasize the benefit of state law being more nimble or experimental. California law is used throughout the assignment as the state has long been a leader in privacy rights. The FTC has been making the most of the law that it has. In 2014, a federal court upheld its authority to punish companies that failed to protect consumer information. Brent Kendall, *FTC Wins a Round Over Data Security*, WALL ST. J. (Apr. 8, 2014) (rejecting arguments of Wyndham hotel that FTC could not challenge data-security practices, such as weak passwords and wrongly configured software, as an unfair or deceptive act or practice).

Big data may be new to some of you, particularly who teach commercial law as a primary subject. It's a key topic as it is revolutionizing advertising and solicitations. The FTC has held a series of conferences on the topic, a decent indication that the area is ripe for lawmaking or litigation. My favorite article on the topic—because it frames big data as a consumer protection problem—is Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail,* 163 Penn. L. Rev. 1311 (2015) (describing complexity of pricing and product choice for simple tangible goods in modern retail environment that is facilitated by big data).

The identity theft material, usually covered as a subtopic of credit reporting, is put here to emphasize that the harms of identity theft go beyond credit damage. At its core, identity theft is really a tort—it's the taking and use of someone's self. Emerging issues include whether it is identity theft to publish fake content on another person's social media account—either via a third party password or simply by using an account left open. The American Bar Association panel on "Privacy Rights and Responsibilities in the Social Media World" provides an introduction to the difficulty of applying the FTC's conceptual framework for privacy to social media. Section of Intellectual Property Law, 26th Annual Intellectual Property Law Conference (April 6-9, 2011)(on file with author).

Putting identity theft here also allows more time for coverage than is usual. Identity theft remains the number one complaint to the FTC each year, and much of it is enabled by businesses' collection and use of data. It deserves substantial coverage in a consumer law course.

Problem 6.1. The problem sends the students to a relatively obscure law, the federal restrictions on the disclosures of video tape rentals. The point is not that this statute is so important, but rather that privacy protections are scattered throughout the law. At the beginning of the problem, you can detour here into some lively history, as the law is the result of the disclosure of Robert Bork's video rental records during his confirmation battle. While his rentals were unremarkable, Congress responded to a journalist obtaining and printing the list with the statute. (Your students will likely not have heard of Robert Bork, and you can thus enjoy teaching them the verb "borked," a term which, while largely forgotten, is almost certainly apt to be useful in upcoming congressional debates about nominees. To educate your students on the enduring legacy of the videotape controversy for business lawyers, see Andrea Peterson, *How a failed Supreme Court bid is still causing headaches for Hulu and Netflix,* WASHINGTON POST, (Dec. 27, 2013), https://www.washingtonpost.com/news/the-switch/wp/2013/12/27/how-a-failed-supreme-court-bid-is-still-causing-headaches-for-hulu-and-netflix/.

Streams Co. doesn't rent VCR tapes, but the statute is likely broad enough to capture online streaming of movies. It defines "video tape service provider" to include prerecorded video cassette tapes or "similar forms of audio visual materials." 18 U.S.C. § 2710(a)(4). Streaming almost certainly counts. The books are a tougher fit. Books existed when the statute was passed and are not included in the statute; Congress clearly knew about books and excluded them. *Cf.* Cal. Gov't. Code § 6267 (imposing duty on public libraries to keep records confidential). And in 2001, the USA Patriot Act expanded federal law enforcement agents to obtain library records, overriding state law library policies to the contrary. While the Patriot Act includes videos from libraries, it only excludes law enforcement from the "persons" covered by the video tape law. Private parties, such as Bellow and Streams, are still bound by the Bork-era video law. The question remains, however, if e-books are "similar audio visual material" in §2710(4).

If books are not covered by the video tape law, the remaining option is a state law or federal law action alleging that disclosure is an unfair or deceptive practice. The statute also does not preempt state law, which could be more protective and cover books.

It is possible—indeed, perhaps likely—that Streams obtained consent for the disclosure in a standard form electronic contract that the consumer was shown at sign-up. In all likelihood, the consumer did not read the terms and conditions but did check the box to assent to the terms. (Click-wrap agreements are covered more in Assignment 20, Online Transactions). The law is stringent, requiring "informed, written consent of the consumer given at the time the disclosure is sought." 18 U.S.C. § 2710(b)(2)(B) A pre-obtained consent would not seem to suffice. Probably a screen of text counts as written consent in today's world, but "The time disclosure is sought" raises issues about whether a company can rely on a year's prior consent. Some students may suggest that if Streams and Bellow had a longstanding relationship that the disclosure from Streams to Bellow would fit under the 18 U.S.C. § 2710(b)(2)(E) exception for "disclosure incident to the ordinary course of the business of the video tape service provider." I doubt it and offer up the example of outsourcing electronic barcoding for better tracking videos as perhaps a permissible example of ordinary course disclosure.

Problem 6.2. This problem looks at the definitions of public and nonpublic information in Graham-Leach-Bliley. The disclosure given comes right from the Appendix to the regulation, Sample Clause A-3. At least in some circumstances it likely suffices. The question is whether it is appropriate given what the financial institutions disclose to Foreclosure Facts. The statutory definition of "nonpublic personal information" includes "any list" of consumers "that is derived using any nonpublic personal information other than publicly available information."

Statutorily, the issue isn't how sensitive the information is but rather its source. Property addresses, tax assessments, names of debtors, amounts of the mortgage, and foreclosure status are, in fact, things available in the public record, albeit in a difficult format to obtain. But the bank is gathering this public info using a "list derived from its nonpublic information." While the bulk data set is anonymized and may be less offensive, the legal analysis of the privacy issues under GLB seems to be identical. For a provocative discussion of the limits of the concept of "personally identifiable information," see Paul M. Schwartz & Daniel J. Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814 (2011). The authors argue that the lack of a uniform definition of personally identifiable information and the ability to re-identify people are serious weaknesses in the current legal scheme.

If the financial institutions are using their own records to generate the data, as opposed to trolling the websites of county recorders, I think the data set is definitely "derived" from nonpublic information and cannot be disclosed without a more robust privacy disclosure. The regulation just parrots the statute on this point, providing no help. 16 C.F.R. § 313.3(n)(1)(ii). The next provision of the regulation, § 313.3(n)(2)(ii) seems to merely state the inverse; public information can be disclosed. While a student reading the definition of "publicly available information" in § 313.3(p)(1)(i) may conclude that the data can be disclosed, assuming the financial institutions have a "reasonable basis" to believe it is available in the jurisdictions' mortgage records, § 313.3(p)(iii)(A), I think the derivation from the nonpublic data remains troublesome.

Problem 6.3. This problem is based on the real-life drama of bankruptcy attorney Mark S. Zuckerberg, whose Facebook page was shut down due to confusion with the "famous" Mark E. Zuckerberg. The issue got a lot of press. You can read up on it here: http://usat.ly/28SkMKP. As the headline said, "Talk about Being De-Friended."

The problem points to a recent California statute that criminalizes an activity called "e-impersonation." The statute probably doesn't apply to this situation because it requires a purpose of "harming, intimidating, threatening, or defrauding another person." Cal. Penal Code § 528.5(a). The use of the photo and the responses to the friend request don't seem to have a nefarious purpose. They were, however, likely "credible," as defined in the statute since people reasonably could have or did believe that they were in communication with Facebook founder Mark Zuckerberg. The statute was authored by a California politician whose name was being used by another person in a way that the politician deemed harmful.

Putting aside the criminal issue, the problem asks what the "real" Mark Zuckerberg is supposed to do. On the one hand, the Facebook founder surely has a legitimate interest in avoiding confusion and an understandable desire to control his public image. Facebook's terms probably permit it to shut the account down for any reason (although in this era, one should wade through the fine print of Facebook's current and evolving privacy and operations policies). On the other hand, the bankruptcy attorney also could be operating the Facebook page out of genuine frustration at being confused frequently with the other Zuckerberg. If you can't beat them, join them!

The bankruptcy attorney probably has no remedy here, depending on Facebook's policies. The real-life character used a variety of approaches, including putting up his own website, I am Mark Zuckerberg. http://iammarkzuckerberg.com/media.html. Perhaps another example of corrective advertising?

The entire question of one's right to control social media is hotly debated. Does the "social" aspect of the activity inherently require surrendering a significant amount of one's privacy? A nefarious example of the potential harms is the now-defunct Jerk.com site. Elizabeth Dwoskin, *FTC Sues Jerk.com, Alleging It Took Information from Facebook Users,* WALL ST. J.

at B3 (Apr. 8, 2014). After Napster's peer music sharing was shut down, John Fanning harvested information from millions of Facebook users to create profiles of "jerks." To remove or change the profile, Jerk.com required the individual to pay a $30 membership fee. The FTC sued, probably to the relief of Facebook, which had tried but failed to get Jerk.com to stop violating its own privacy policies. Facebook itself had faced the FTC's fire just a few years before, resulting in a settlement that strengthened its privacy policies.

Problem 6.4. This problem is a real life look at the world of big data. Acxiom is a major data broker, used by many retailers and other businesses. In 2013, it launched www.aboutthedata.com as an educational tool to teach people how big data works and to let them look at their own data. The CNN story has an explanation and screen shots of a prior version of the site. http://money.cnn.com/2013/09/05/pf/acxiom-consumer-data/. Some of the data elements such as ages of your children no longer appear on the site, undoubtedly due to public pressure to keep children's information more private.

The problem does *not* instruct the students to register at aboutyourdata.com but many will. I did so and reproduce below several screen shots. If you want to cover this material but not get the students entangled in the site, you can reproduce the images below when you assign the problem. (I figure if Acxiom knows this much about me, you all might as well too.)

A key part of teaching this problem is emphasizing the process of researching a real operation such as this site. Investigation is usually not taught, or taught in a very limited way in law school, but it is a major task of lawyers. I like to begin by asking them to describe how they will gather information. Here is a list of steps that students may have taken or suggest:

- Read the site's privacy policy. Ironically, given the assignment's content, many fail to do this! Where is the policy? Bottom of the homepage. What does it say? Depends on which policy—there are three given. The most obviously applicable one is the www.aboutthedata.com policy but because that site shares information with affiliates, students should read the Acxiom privacy policy as well. Even the most passionate defenders of disclosure and commercial use may give up trying to read the banal policies.
- The "Resources" section at the bottom, near the privacy policy, has a few other links worth exploring.
- The "Learn" section, available at the top of the site, leads to questions and answers about the site.
- Googling the site produces some news articles about it. Most of them are dated and things may have changed.

- Checking with peer consumer organizations to see if they have done research or had experience with www.aboutthedata.com.
- Looking up www.aboutthedata.com at the Better Business Bureau or Yelp or similar kinds of sites.
- Checking government sites, such as ftc.gov to see what, if anything, they say about the site. (One idea that likely will not work is calling the government regulators, such as the Attorney General of your state or the FTC. Unless the intern knows someone personally, they will not get through.) Note too that while the CFPB makes complaints that it receives about financial services companies available in a public database, the FTC and other agencies do not do so. Only law enforcement can access FTC Sentinel, for example.
- Last, but certainly not least, is registering at the site and seeing for oneself how it works. If some students did this, you can ask about 1) whether they read the privacy policy first!, 2) what information about themselves was on the site, 3) whether it was accurate, 4) if any was inaccurate, whether they suppressed it; and 5) whether they opted out entirely.

To close class, I ask for a show of hands. Should consumers be advised of the existence of www.aboutthedata.com? That is, should the organization issue a consumer education alert? While some may see no harm in factual education, the reality is that if advised about it—even against the site—curiosity will get the better of many, and they will register. The decision to issue a bulletin may require an understanding of how consumers behave in the wake of information as much as honoring a normative commitment to consumer empowerment through education. Is registering and viewing your information useful? Or are you just feeding the big data machine at your expense and at its benefit? By confirming the information, you are improving its accuracy and the value of Acxiom's service to marketers. One could cynically claim that the actual purpose of the site is not to empower consumers but to entice them to give Acxiom additional data.

Regardless of where your class comes out, I think some knowledge of big data will be useful to nearly all lawyers in the future, whether they practice consumer law or not.

Privacy Policy for this Website (www.AboutTheData.com)

This privacy statement applies solely to information collected by Acxiom Corporation on www.AboutTheData.com and is designed to ensure that visitors to this website understand how and why Acxiom collects and uses information provided by users of this site.

INFORMATION COLLECTION AND USE

Use by Acxiom Corporation

This website allows you to view, edit and remove information about you in Acxiom's marketing data products that we make available for digital advertising and to learn about Acxiom's digital marketing data products and services. The information you provide during registration, name, address and email address, along with edits made to elements, may be included in Acxiom's marketing to you, Acxiom's marketing data products and shared with our partners. This will enable our clients and partners to deliver more relevant marketing and advertising to you.

To access data about you, you are required to provide personally identifiable information, so Acxiom can verify your identity. The information you provide will also be used to support your relationship with Acxiom on this website, including making the site easier for you to use and informing you of services, products or site updates, new services or products and other related information from Acxiom.

To fulfill a particular request, the information you provide may be shared within the Acxiom Corporation family of businesses.

Use by Third Parties

The information you provide during registration, your name, address and email address, along with edits and removals made to elements, may be reflected in Acxiom's marketing data products which are used by Acxiom and our clients. Acxiom provides marketing data products to our clients, partners and qualified businesses, non-profit organizations and other entities to enable them to deliver more relevant marketing and advertising to you. The resulting marketing offers and advertising you may receive may be via the mail, email, telephone and, if you opted in, on your mobile phone. To learn more about any of these uses and the privacy policy associated with them, here.

Acxiom may share aggregated information, such as the number of visitors to the site, with our partners and third parties to develop suggestions to improve our website accessibility and the services provided on the site. Aggregated data is not linked to any personally identifiable information.

Acxiom may use contractors and other service providers to help us deliver content and fulfill requests made on this site. However, in these instances, the information you provide remains the property of Acxiom Corporation.

Categories of Data

Here are the categories of marketing data used. To view, edit or remove data, click a category below.

Characteristic Data	Home Data	Household Vehicle Data	Household Economic Data	Household Purchase Data	Household Interests Data

Review and edit the marketing data about you below. Acxiom collects data from a variety of sources such as public records, surveys, and online and offline registrations. The accuracy and completeness of the data is determined by these sources. The data may not be complete and in some cases the data may not be current due to the timing of updates from these sources. Please remove or correct any data that is in error.

Element	Details	Action
Date of Birth	**01/30/1974**	Edit/Remove
Gender	**Female**	Edit/Remove
Education	**Completed College**	Edit/Remove
College Graduate	**Yes**	Edit/Remove
Occupation	**Sales/Service**	Edit/Remove
Marital Status	**Inferred Single**	Edit/Remove
Number of Adults	**1 Adult**	Edit/Remove
Political Party	**Voter - Democratic**	Edit/Remove

Mail Order Buyer	**Mail Order Buyer**	Edit/Remove
Mail Order Responder	**Mail Order Responder**	Edit/Remove
Children's Products - General	**Purchased**	Edit/Remove
Children's Toys	**Purchased**	Edit/Remove
Toys	**Purchased**	Edit/Remove
Apparel - General	**Purchased**	Edit/Remove
Infants and Toddlers Apparel	**Purchased**	Edit/Remove
Children's Apparel	**Purchased**	Edit/Remove
Children's Apparel -Accessories	**Purchased**	Edit/Remove
Girl's Apparel - Unknown Age	**Purchased**	Edit/Remove
Boy's Apparel - Unknown Age	**Purchased**	Edit/Remove
Sports and Leisure Apparel	**Purchased**	Edit/Remove
Women's Apparel	**Purchased**	Edit/Remove
Women's Apparel - Underwear and Hosiery	**Purchased**	Edit/Remove
Gifts/Holiday Products	**Purchased**	Edit/Remove
Halloween	**Purchased**	Edit/Remove
Home Owner/Renter	**Home Owner**	Edit/Remove
Detailed Type of Home Ownership	**Residential Owner - Mail/Site Address**	Edit/Remove
Dwelling Type	**Single Family Dwelling Unit**	Edit/Remove
Property Type	**Apartment**	Edit/Remove
Length of Residence by Year	**4 years**	Edit/Remove
Home Owners Insurance Expiration Date By Loan	**June**	Edit/Remove

Assignment 7

Credit Reporting

Privacy and identity theft are the principal concerns that have motivated the regulation of credit reports. While initially the concern was privacy itself, such as with invasive investigative credit reports, the focus today is on the ways in which limited privacy facilitates credit reporting and identity theft opportunities. Another hot topic related that ties together privacy and credit reporting is the use of non-traditional inputs into credit scores and reports. Efforts to expand the credit box and create scores for more people can require drawing information from sources that many view as private—and irrelevant for credit purposes. Such information, however, apparently has a predictive value of "not much, but more than zero." Ben McLannahan, *Being 'wasted' on Facebook may damage your credit score*, FINANCIAL TIMES (Oct. 15, 2015, 6:36 AM), http://on.ft.com/2agfRWx. For those who want to spend more time here, you can ask your students to research the components of a basic FICO score, and its main competitor, VantageScore. For FICO, visit www.myfico.com and check out this publication, *Understanding Your FICO Score*. MYFICO, available at http://www.myfico.com/Downloads/Files/myFICO_UYFS_Booklet.pdf. If they were the head of Fannie Mae, would they change policy to accept VantageScore as an alternative (certainly as of 2015, VantageScore was pressing hard to make it so, claiming that an additional 9.5 million Hispanic or African American consumers could be accurately scored by its product compared to normal FICO scores.) VantageScore, *Universe Expansion: Is the Way You Score Customers State of the Art or State of Denial?,* White Paper Series (Mar. 2014), available at http://bit.ly/2axnzfU. Credit reporting is increasingly (and appropriately in my view) seen as a civil rights issue.

As mentioned in the prior assignment in the section on big data, the principles behind credit reporting are being used in new ways, such as a Medication Adherence score, which health care companies could use to determine who should follow-up calls. Scott Thurm, *Data Mining Your Mind: The Next Frontier is Predicting Personal Behavior; the 'Ability to Pay' Index*, THE WALL ST. J., Oct. 27, 2011, at B1. While the law on credit reporting definitely lags the industry practice, see Ginger Chouinard, *The "Other" Credit Report: What You Don't Know Can Hurt You*, (U. of N.M. Sch. L. Paper Series, Paper No. 2013-05), http://ssrn/com/abstract=2222822 (reporting that 90% of financial institutions use ChexSystems to screen for account opening but there is little consumer awareness of these reports), there is virtually no law on these other practices. Teaching students the legal framework that regulates credit reporting will help equip them to think about how to craft laws that may be created for other types of scores and reports.

The Fair Credit Reporting Act is long, detailed, and after repeated amendments, more than a bit of a mess. The text lays out the basic rules but certainly does not address every twist and turn. In particular, it only skims the issue of preemption. For those who want to read more on this, the National Consumer Law Center's Fair Credit Reporting manual contains about 30 pages on the subject. *See* NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING, § 10.7 (6th ed. 2006). It also touches enforcement very lightly, with more general coverage of private litigation by consumers coming later. Some will want to spend more time here on the different remedies against, and defenses of, credit reporting agencies, furnishers, and user.

You may want to have students obtain one copy of their credit report (from any one of the big three) as an out-of-class exercise. In recent years, more students know their score because of their appearance, as a courtesy, on some issuers' credit card statements. But many students have not seen an actual report, although some who are older students or homeowners may have. Obtaining their reports tends to strongly motivate some students to master this material, and it prompts a few to take action to try to eliminate incorrect information.

The problems are equally split between accuracy issues, which has been a big focus of legislation and litigation in the last decade, and the expanded uses of scores, which seems to be the forefront of tomorrow's lawmaking in this area.

Problem 7.1. This problem is a statute reader on the content of reports. It covers an issue not mentioned in the text, which are legal requirements on removing certain information after a given period. The basic requirement is simple. Adverse information should be removed after seven years. 15 U.S.C. § 1681c. [In defense of this problem, FCRA is hard, and every teacher knows they need a few questions they can ask the students in the back row who never seem to know what is going on. Perhaps success here will beget further student engagement? Or if they miss this, you know the student is truly not preparing.]

As to the five items:

1) A bankruptcy dated eight years ago: § 1681c(a)(1) says this may not appear on a report more than 10 years old. As a matter of policy, the agencies remove some bankruptcy information after seven years. *See* Ask Experian Bankruptcy website, http://www.experian.com/credit-advice/topic-bankruptcy.html (last visited June 24, 2016) ("Chapter 13 bankruptcy remains on your credit history for seven years. Chapters 7 and 11 are reported for 10 years."). This differential treatment of chapter 13 bankruptcy suggests that lenders are interested in an incentive or reward for choosing chapter 13, or that they think it indicates something different about creditworthiness in the future. However, the statute makes no such distinction. The fact that the agencies remove some bankruptcy information earlier, and that it is apparently acceptable to users to do so, suggests that the limits in the law on when something becomes obsolete are pretty arbitrary. The early removal makes another point. These are the outer

bounds for keeping information there. Nothing requires such adverse information to be included in a report at all, much less for any given period. See FTC Official Staff Commentary § 605, item 4.

2) A foreclosure dated seven years ago: Depending on today's date, if seven years have elapsed from the date of the foreclosure, this should not appear in Harold's report. In a judicial foreclosure state, it might be a civil suit under § 1681c(a)(2). In a nonjudicial foreclosure state, it is "any other adverse item of information." 15 U.S.C. § 1681c(a)(5).

3) A mortgage account that was closed seven years ago while in delinquent status: "Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years" should be excluded from a consumer's report. 15 U.S.C. §1681c(a)(5). Section 1681c(c)(1) explains how to calculate the 7-year period. It begins to run "upon the expiration of the 180-day period" beginning on the date of commencement of the delinquency which immediately preceded when an account is "placed for collection" or "subjected to similar action." What looks like 7 seven years is not really seven years for adverse information under § 1681c(a)(4) or (6). Instead, it's 7 years and 180 days from the beginning of the delinquency, and that moment can be difficult to pin down. The most consumer friendly reading is that the clock starts ticking from the first act of collection, such as dunning. The date of collection or similar action may or may not be the date the account is shown as closed on the report, but it is difficult for Harold to know when the creditor made the internal decision to give up on collecting from him. The referral of the mortgage to a foreclosure attorney is presumably the placement for collection here, and this could have occurred months or even a year before the foreclosure. On that other hand, the creditor may not have charged any unrecovered balance off on the mortgage until after the foreclosure.

4) A revolving account with Sears that was opened in 1971 and closed in 1982, shown paid up in full and closed by consumer: This is not adverse information and so can remain on the report indefinitely. If Harold disputed this, the agency may have a hard time verifying the debt, given its age. This seems like a prime candidate for the agency to simply delete the information and avoid the reinvestigation duties.

5) A criminal conviction for disturbing the peace from 1942 just before Harold entered the Army: This can stay on the report forever, per the exception in 1681c(a)(5) for "records of convictions of crimes."

While this is primarily a statute reader, there is a big policy question here: why should the law require the removal of perfectly accurate, relevant information? Presumably, the agencies and users have incentives to remove information that they do not find relevant or useful. After all, they pay the costs of maintaining such information and processing it for scores. Aren't the agencies, based on feedback from users and companies that create scoring algorithms, in the best position to determine what information is obsolete in that it conveys no information? The legislative intent seems to have been a concern that "the consumer should not be indefinitely burdened," and that such burden would be unfair if the consumer improved his or her credit performance. 91 CONG. REC. 35940 (1970). Such concerns, while favorable to consumers, do not themselves justify why accurate information becomes unduly burdensome merely because of the passage of time. The legislative history refers to such information as "obsolete" but it seems to me that the entire premise of the powerful analytics of credit reporting and scoring is that it is the algorithm, not normative principles, that should determine when information is not relevant.

Problem 7.2. This problem examines when something becomes a credit transaction, such that it is permissible to disclose a report. The auto dealer hypothetical is based on a discussion of what constitutes an "extension of credit" in the National Consumer Law Center manual. CHI CHI WU & ELIZABETH DEARMOND, FAIR CREDIT REPORTING, § 7.2.3.2 (2006).

The FTC's new commentary on the FCRA attempts to provide dealers with some guidance on when it would be reasonable under the circumstances to pull a consumer's credit report. The FTC opines that:

> "The dealer would thus have a permissible purpose to obtain a credit report on a consumer who offers to pay for an automobile with a personal check or asks about credit options to finance a specific purchase. However, this section would not allow the salesperson to obtain a report on "window shoppers" for bargaining purposes, deciding whether to spend time with consumers, or to respond to general questions about available products or financing, because there is no "transaction . . . initiated by the consumer" in those scenarios. For the same reason, a consumer's request to "test drive" a vehicle, where he or she has not demonstrated an intent to initiate the purchase or lease of a vehicle, does not give rise to a permissible purpose under this section."

FEDERAL TRADE COMMISSION, 40 YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT: AN FTC STAFF REPORT WITH SUMMARY OF INTERPRETATIONS 14 (July 2011).

I added some facts here that might muddy the waters a bit from a mere test drive. The question is how persuasive would Al's argument be that a consumer's expression of a serious interest in purchasing a car constitutes a reasonable belief that the consumer is necessarily also seeking an extension of credit. One interesting counter twist to this line of thinking is that perhaps the dealer has a separate purpose to obtain a credit report for those seeking a test drive: if insurance companies use credit reports on the theory that a credit is a valuable proxy for a careful driver, surely dealerships care who is out careering around in their new vehicles.

Students sometimes think the issue here is the consumer's lack of consent to the credit check. Unlike in the employment context (15 U.S.C. § 1681b(2)(A)), a consumer's consent is not required for credit. However, the statute requires that the agency only furnish a report "to a person which it has reason to believe intends to use the information in connection with a credit transaction." 15 U.S.C. § 1681b(a)(3). Under the statute, a consumer's written instructions allow an agency to furnish a report. The signature on the form is meant to hint at a possible argument that the consumer consented, although without knowing if there is fine print, and what might be buried in it, it seems like a stretch.

The question asks whether Al's AutoBarn violated FCRA? Yet, the obvious statute on "permissible purposes" applies to consumer reporting agencies and their beliefs. 15 U.S.C. § 1681b(a). What would an agency need to show on these facts? Isn't it entitled to think that requests from Al's AutoBarn are permissible, or does it need some type of showing for each request that is more specific? If the agency's contract with Al's AutoBarn recited that Al's would only make requests if permissible under the statute, would that shield Al's from liability? The answer seems to be no, although it would seem to give the agency a breach of contract claim against Al's if the agency were held liable.

Finding the statutory requirement that users have a permissible purpose is difficult. It is not, despite the label, in 15 U.S.C. § 1681m, "Requirements on users of consumer reports." It's buried in 15 U.S.C. § 1681(b)(f) "Certain use or obtaining of information prohibited." In addition to having a permissible purpose, the statute requires users to certify that fact to agencies. Under FCRA, the agencies are required to give each user a statement of the user's responsibilities under the Act, including that the user must have a permissible purpose. 15 U.S.C. § 1681e(d). If the agency complied with this requirement, it will defeat any attempt by the user to claim it did not know the law's requirements. The elements of an action against Al's AutoBarn for liability are 1) the report was a consumer report (see below); the user obtained the report for use other than a properly certified use; and 3) the consumer suffered damages substantially attributable to the unauthorized access. *See Korotki v. Attorney Servs. Corp.*, 931 F. Supp. 1269 (D. Md. 1996).

You can review damages here. If the consumer can prove willful noncompliance, the remedy here is the greater of $1,000 dollars or actual damages. 15 U.S.C. § 1681n(a)(1)(B). For negligent noncompliance, the remedy is just actual damages (query what they would be here) and reasonable attorney's fees and costs. Because the substantive obligation on users here is not in 15 U.S.C. § 1681m, the controversy over whether FACTA eliminated a private right of action or whether there is a scrivener's error does not arise.

On these facts, Al's AutoBarn seems to be pretty clearly obtaining the report for the purpose of underwriting the loan. But what if there was no short data form, and instead as a matter of standing policy, AutoBarn just ran a quick credit check, without permissions, while it was locating the keys for the vehicle and copying the driver's license. Query if they could justify the credit check as part of a risk management program to assess whether a prospective buyer was responsible enough of a person to conduct a test drive. It's hard to imagine in a world of "no credit, no problem" auto dealers, but perhaps Al's AutoBarn doesn't want to do business—even a cash sale—with someone who is not an upstanding citizen in all respects. Would either of these constitute a "legitimate business need" under § 1681b(a)(3)(F)?

A clever attorney representing Al's AutoBarn may articulate another theory—that the very definition of a consumer report requires a permissible purpose. 15 U.S.C. § 1681a(d)(1). Arguing in the alternative, the attorney could say that the effect of Al's lacking a permissible purpose is to remove the information gathered from the credit bureau from the scope of FCRA. While this may defy the common understanding of a credit report and most courts haven't bought it, the statute makes it at least a plausible argument. *See, e.g., Ippolito v. WNS, Inc.*, 864 F.2d 440 (7th Cir. 1988).

Problem 7.3. This problem is a statute reader on the requirements that a credit score be disclosed upon consumer request. The punchline is that InsureAll doesn't appear to calculate "credit scores" as defined by 15 U.S.C.§ 1681g(f)(2)(A), "a numerical value or categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan to predict the likelihood of certain credit behaviors, including default." The fact that they call their proprietary calculation a RiskScore rather than use the term "credit score" doesn't matter under the statute. Nor does the fact that is a letter system; the RiskScore is a categorization derived from a statistical tool or modeling system and so covered by the statutory definition.

The RiskScore falls out of the statute's reach, however, because InsureAll does not use its models, nor supply them to someone, who "makes or arranges a loan" to "predict the likelihood of certain credit behaviors." 15 U.S.C. § 1681g(f)(2)(A). InsureAll will argue that it is predicting insurance claims, not credit behavior. On the text of the statute, I think InsureAll is not covered. Thus, the requirements for supplying the range of scores, the key factors, etc. do not apply. To drive home the point, I ask whether the analysis would be different if InsureAll had simply ignored Kristine's request, throwing her letter in the trash. The answer is the same, no liability. Federal law doesn't seem to provide the right to these kinds of non-credit scores, even if they are derived from credit information. Section 1681g(f)(4) supports this conclusion: "This subsection shall not be construed so as to compel a consumer reporting agency to develop or disclose a score if the agency does not . . . (B) develop scores that assist credit providers in understanding the general credit behavior of a consumer and predicting the future credit behavior of the consumer." InsureAll does not seem to be in the business of predicting the future credit behavior of the consumer nor is it assisting credit providers (remember that insurance is prepaid and explicitly not credit).

In teaching this problem, how you proceed will depend on the responses of the first few students who speak. If they start analyzing the twists and turns of the statute for compliance, I go with that, spending time on all of them (discussed below) and then hoping eventually some student, who spent time with the definition of credit score, will raise their hand. If not, you can announce the spoiler at the end of the discussion and remind them of the importance of looking for definitional issues in statutory interpretation. If the first student launches into an analysis of whether the statute is applicable, I have that discussion, and then turn to two questions: 1) if the statute were applicable, would InsureAll's response have sufficed, and 2) should there be such a requirement for disclosure of insurance scores.

The statute does permit InsureAll to charge a "fair and reasonable" fee, as determined by the Consumer Financial Protection Bureau, for providing details on the score. 15 U.S.C. § 1681g(f)(8). Several pieces of information must be supplied to the consumer besides the current credit score. These include the range of possible credit scores under the model used, all "key factors that adversely affected the credit score" (not to exceed 4 factors, although if the number of enquiries is a key factor that can be an additional fifth factor), and the date the credit score was created. 15 U.S.C. § 1681g(f)(1)(a).

Problem 7.4. This problem asks students to make a policy recommendation about the desirability of using credit scores in employment decisions. The discussion about racial disparities in the insurance context should tip the student off to the fact that similar issues are alleged to exist in the employment context.

Demos has an accessible policy paper, arguing against credit checks. Amy Traub, *Discredited: How Employment Credit Checks Keep Qualified Workers Out of a Job*, DEMOS.ORG (February 2013), http://www.demos.org/discredited-how-employment-credit-checks-keep-qualified-workers-out-job. Be sure to check for updates to federal law before teaching this problem. In each recent Congress as of this writing in 2016, Congressman Steve Cohen (D-TN) has introduced the Equal Employment for All Act (in the 2015-2016 Congress, it was H.R. 3524). To date, his efforts have been futile but politics are, well, political. The Equal Employment for All Act would prohibit the use of credit checks for employment decisions outside of a narrow category of employment contexts. The proposed statute in the problem is based on the bill. Several states have such laws, including Illinois, Oregon, and Hawaii.

In class, I ask students what credit scores tell us about people. Often a risk for theft or fraud goes on this initial list; people in financial trouble might steal. Some students give vague answers that credit scores might reflect things like responsibility, character, or morality.

Then I press harder on what we mean by those terms, with the list usually reflecting more detailed and concrete behaviors: being organized, being a good manager, meeting deadlines, following directions. Students also sometimes observe that a bad credit score can be a tip off that someone has a family/medical/job problem, and that might be undesirable for an employer. When we think credit tells us something generic about a person, students are pretty reluctant to sanction the use of credit scores. When you make the connection to what credit behavior might have to do with employment, the case for using credit scores in employment screening is a closer call.

One factual point to draw out is that with insurance, it may be that the scores being used are specialized for underwriting (as in Problem 7.3 with InsureAll's RiskScore), rather than the typical FICO score that purports to predict creditworthiness. I am not aware of employment-specific algorithms, meaning that employment decisions are being based on a number that does not even purport to predict employment. Indeed, at a legislative hearing in Oregon in 2010, a representative of TransUnion conceded that ". . . we don't have any research to show any statistical correlation between what's in somebody's credit report and their job performance or their likelihood to commit fraud."

Another empirical point is how frequent the use of credit checks is and when they are being used. The trend seems to be on the decline, with about half of employers in 2012 saying they relied on credit checks for at least some positions. SOCIETY FOR HUMAN RESOURCE MANAGEMENT, *SHRM Finds Fewer Employers Using Background Checks in Hiring* (Jul 19, 2012), http://bit.ly/2aCWfQ8. Many fewer employers, approximately 15 percent, conduct credit checks on all candidates; this is heavily concentrated in some industries. Part of the decline is undoubtedly the rise of state legislation banning the practice. As the practice has become more widespread, it has expanded into some surprising corners. In 2008, there was a dust-up over an effort by Charlotte-Mecklenburg Schools to have all its employees, including teachers, sign forms authorizing credit checks. Experian has a specialized product for employment, called Employment Insight. EXPERIAN, *Employment Credit Checks for Effective Hiring*, http://www.experian.com/consumer-information/employment-credit-checks.html (last visited on July 29, 2016). It boats offering information such as "maiden names," which I think would violate employment law to consider as related to marital status.

A key policy issue is whether the consequences in the employment context are sufficiently more important than paying higher insurance rates such that lawmakers should enact a ban on credit scores for employment. The purported racial disparities have prompted lawsuits in the employment context. In 2010, the EEOC sued a company alleging that its use of credit scores discriminated against black applicants. Steven Greenhouse, *EEOC Sues Kaplan Over Hiring*, NY TIMES (Dec. 21, 2010), http://nyti.ms/28VT2tP. In its statement responding to the suit, the company relied in part on employment being a permissible purpose under FCRA to justify its actions.

While California prohibited credit checks for most jobs in 2011, just a few years prior when the legislature acted, Governor Schwarzenegger vetoed the bill. He acted under pressure from the Chamber of Commerce, which labeled prohibitions on credit checks for employment as "job killers." NBCNEWS.COM, *States May Ban Credit Checks on Job Applicants* (Mar. 1, 2010), http://nbcnews.to/2aiPa7r. Perhaps employers would shop for something like this on a state level; it seems incredible to me to think this would cause companies to off-shore jobs. Unions and consumer groups have supported the bill, in part on the grounds that it will prevent applicants from being denied positions for which they are otherwise qualified and will encourage people to look for work even after a period of financial hardship. I have heard stories from lawyers of clients whose legal fees for bankruptcy were paid by a prospective employer who wanted to hire the candidate but the company had a policy against hiring someone with delinquent debts. *Voila!* After Chapter 7, the person is a perfect job candidate. Those stories reveal how murky the thinking is about the relationship between creditworthiness and employment behavior.

Beyond the employment context, what other "off-label" purposes—i.e., those not concerning a decision to grant credit—might loom in the future? How about credit checks on prospective spouses, as part of dating match-ups by online services, for admission to graduate school, etc.? Ana Swanson, *The One Number That's Eerily good at Predicting Your Success in Love*, THE WASHINGTON POST (Oct. 6, 2015), http://wapo.st/2aCW5rZ.

Assignment 8

Credit Discrimination

This is one of the most intellectually and socially important topics in consumer law. It is also an area that may produce the least litigation, certainly the fewest published cases. *See* Letter from National Consumer Law Center to Congressman Mel Watt (July 16, 2008) (stating that *Borlay v. Primus Automotive Fin. Serv.*, Civ. Action 3:02-0382 (M.D. Tenn.) was "first, and to date, only successful effort to obtain a judicial finding of disparate impact discrimination in a private, non-mortgage related" ECOA case)(on file with author).

While litigation has been a slog, intellectual creativity on credit discrimination abounds. Both technological advances and newer conceptualizations of rights are being applied to credit decisions. With regard to technology, widespread access to statistical tools is opening up debate about the appropriate methodology for detecting discrimination. An example is the debate over "proxy" data for protected classes. *See* Rachel Witkowski, *CFPB Overestimates Potential Discrimination, Documents Show*, AMERICAN BANKER (Sept. 17, 2015). For an example of the latter, see Christopher P. Guzelian, Michael Ashley Stein & Hagop S. Akiskal, *Credit Scores, Lending, and Psychosocial Disability*, 95 B. U. L. REV. 1807 (2015) (analyzing how Americans with Disabilities Act, Fair Housing Act, and United Nations Convention on the Rights of Persons with Disabilities may protect those with conditions such as depression from both credit discrimination and predatory credit marketing.)

This is an area where people may want to make different choices about coverage. Problem 8.1 gives a window into the ECOA statute, hopefully just enough to sensitize students to these issues. Richer coverage comes from discussing the difficult issues of liability and proof, discussed in *Texas Dep't of Housing* (complete with a dissent that focuses on rodents.) A useful discussion of the "legitimate business objective" defense to a finding of disparate impact is Dubravka Ritter, *Do We Still Need the Equal Credit Opportunity Act?*, (Sept. 2012), *at* https://www.philadelphiafed.org/...credit.../D-2012-equal-credit-opportunity-act.pdf

I also want to make a plug for Problem 8.4, or your own similar creation of hypotheticals for discussion. It gives students exposure to counseling a client to avoid or limit potential liability, and it can support a discussion of the tension between expanding access to credit through sophisticated technology and enduring concerns about discrimination.

Another useful idea for class can be to review the CFPB's most recent activities on fair lending. I think it is fair, and probably an understatement, to say that the CFPB has been significantly more engaged on this issue than its predecessor regulatory agencies. Some examples of its activities include rulemaking that requires mortgage borrowers to be informed of their right to receive the property appraisal used in evaluating their credit application

Problem 8.1. This problem has two purposes. First, it raises the issue of what is credit. If nobody raises this point or you want to save time, you can save this point for problem 8.2 below. Otherwise, it is pretty quick to point out that a debit card, in its ordinary use, does not involve a right to defer payment. The easy analogy is to checks, which courts have held are not credit under ECOA. *See Roberts v. Walmart Stores, Inc.*, 736 F. Supp. 1527 (E.D. Mo. 1990). Many debit cards do come with lines of credit or overdraft protection, however, making them credit under the ECOA definition.

Second, the problem asks students to consider when age can be a factor in credit decisions. Unlike race, religion, national origin, and other bases, age is not prohibited outright as a consideration. Instead, the use of age is regulated to protect elderly applicants and encourage grants of credit to them.

Here Sunshine is applying a blanket fee to everyone over a certain age. This does not seem to be an "empirically derived, demonstrably and statistically sound, credit scoring system." But maybe Sunshine could use its records showing higher costs for older consumers to generate such a system. If it used a valid credit scoring system, then Sunshine can use age as a predictive variable—"provided the age of an elderly applicant is not assigned a negative factor or value." 12 C.F.R. § 1002.6(b)(ii). Sunshine could argue that it is using a judgmental system of evaluating creditworthiness here because that is defined in § 1002.2(t) to essentially be any system other than an empirically derived, demonstrably and statistically sound system. With this blanket policy, it seems hard to think of Sunshine as making any evaluation at all; judgment seems like a poor fit because it is using its "records" to decide to institute the blanket policy of a fee for older customers. In a judgmental system, age may be considered. 12 C.F.R. § 1002.6(b)(iii).

Regulation B defines elderly people to be 62 years or older. 12 C.F.R. § 1002.2(o). Sunshine's policy applies to those 55 or older. Even if this practice is banned against elderly applicants is it acceptable for those in the 55 – 61 years range?

Problem 8.2. This problem examines a hot issue in the last couple of years: whether a loan modification decision is covered by ECOA. [There are parallel issues for other consumer credit statutes that people have tried to use in the loan modification context.] The issue here is whether reasons were provided. The definition of adverse action covers a denial of credit or a change in terms of an existing credit, or a refusal to grant credit on terms requested. 15 U.S.C. § 1691(d)(6).

Does a loan modification constitute credit? ECOA defines credit as the right to "defer" payment. 15 U.S.C. § 1691a(d). Most mortgage modification requests will fit in this category but lenders have argued that what is requested is forgiveness via a reduction in principal balance or a lower interest rate and therefore the loan modification does not seek credit.

The definition of adverse action excludes the "refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default." 15 U.S.C. § 1691(d)(6). The Federal Reserve has said that adverse action letters are not required for those with current delinquencies. The problem doesn't say that Todd and Allison have missed payments but it suggests the possibility by saying they are worried about foreclosure.

Another statutory defense might be that the request for a loan modification was not an "application" or that Todd and Allison are not "applicants." 12 C.F.R. § 1002.2(e) and (f). The former argument rests on whether the request was made "in accordance with the procedures used by a creditor." It's not a winner on these facts, where Todd and Allison seem to have compulsively followed the rules, but this defense might work if a loan modification is offered and rejected as part of a settlement negotiation in a foreclosure lawsuit or if the consumer simply sent a letter requesting a loan modification. The 7th Circuit has ruled that a person denied a loan modification is an applicant under ECOA because they have requested or received an extension of credit from a creditor. *See Estate of Davis v. Wells Fargo Bank*, 633 F.3d 529 (7th Cir. 2011) (dismissing the plaintiff's claim because although she was an applicant under ECOA, she lacked any evidence other than her own testimony of racial discrimination). This provides some support to defeat another position raised by lenders, which is that loan servicers are not always "creditors" under 15 U.S.C. § 1691a(e) because they are not regularly responsible for making credit decisions. However, courts have accepted the lenders' argument. *See Wenglicki v. Tribeca Lending Corp.*, 2009 WL 2195221 (E.D. Pa. July 22, 2009); *Flowers v. South Western Motor Sales Inc.*, 2008 WL 4614307 (N.D. Ill. Oct. 14, 2008).

I usually ask students what race Todd and Allison are. They mostly start reading, trying to remember this fact. I ask if it was a mistake by the textbook author not to mention race. The answer is that it doesn't matter. Todd and Allison could be bringing this claim based on marital status or some other protected basis. More importantly, the adverse action requirement applies to all applicants. Todd and Allison are names strongly associated with being white. White applicants are protected from racial discrimination under ECOA, as mentioned in the text, and the adverse action notification applies to everyone.

If students ask about evidence of problems with discrimination in loan modifications, you can mention a study that finds there is no evidence that black borrowers are less likely to receive a modification or less aggressive modification, holding loan characteristics equal. J. Michael Collins & Carolina Reid, *Who Receives a Mortgage Modification? Race and Income Differentials in Loan Workouts* (Jan. 18, 2011), at http://bit.ly/28YawnX.

Problem 8.3. This problem is an exploration of the special purpose credit program exception to ECOA. As a preliminary matter, Native Americans are a race for purposes of ECOA. *See Davis v. Strata Corp.*, 242 F. Supp. 2d 643 (D.N.D. 2003).

ECOA has exceptions for special purpose credit programs that allow explicit discrimination on bases that include race. While the problem hints that Cherokee Credit Tribe is a non-profit organization, Shanna will want to verify that, as it matters to the analysis. Under 1002.8(a)(2) non-profit organizations need only be offering a "credit assistance program . . . for the benefit of its members or for the benefit of an economically disadvantaged class of persons." The fact that financial need is not considered in the loans suggests that the purpose here is serving membership, rather than the economically disadvantaged. If Cherokee Credit Tribe is for-profit, a substantial number of additional requirements apply, including that the program be offered pursuant to a written plan submitted to the Federal Reserve (now CFPB), and a showing that the program serves a class of persons who probably would not receive such credit or on such favorable terms.

Some students maybe be uncomfortable with the special purpose credit program exception, feeling they are dangerous or unconstitutional. They may argue that the membership requirement for non-profits is an insufficient standard to permit discrimination. Perhaps special purpose credit programs should be limited to an "economically disadvantaged class of persons, as the membership requirement is too loose?

The information requested is permissible under § 1002.8(c). It permits the gathering and consideration of information that a person "possess[es] one or more common characteristics (for example, race, national origin, or sex)" if the program has membership as a requirement.

Despite the special purpose credit program exception, Cherokee Credit Tribe may be in trouble under ECOA. Section 1002.8(b)(2) says that any program (including one by a non-profit) qualifies as a special purpose credit program only if it is "administered so as not to discriminate against an applicant on any prohibited basis; however, all program participants may be required to share one or more common characteristics (for example, race . . .). Here, the question is how to define race. If it is construed as Native American, then the discrimination against Shanna as a Sioux member is perhaps impermissible. I'm inclined to think most courts would construe race here quite specifically to permit discrimination against a particularized category (Sioux) in order to serve Cherokee members. You can point out to the students that the reference to "one or more common characteristics" means that programs can be quite narrow—a program presumably could discriminate by lending only to married, black, Brazilian women.

Problem 8.4. ECOA was written in an era of paper applications, credit interviews, and concerns about overt discrimination. This problem looks at how technology is again changing the ability of parties to access information that could be used to discriminate in credit extensions. The problem is generically based on the business model of online lender, Prosper. http://www.prosper.com/. There are several angles to the problem.

For many years, the rise in the use of credit scoring and ability to borrow long-distance were thought to remove opportunities for discrimination that can occur in face-to-face lending. While zip codes, names, and other information are cues about race, they at least arguably require lenders to make assumptions, whereas in-person applications may give the lender a sense of confidence about racial identification (even though such assumptions based on appearance may be incorrect). In the online lending marketplace, the use of photos is a throwback to the face-to-face effect of assessing applicants' personal characteristics that are prohibited bases for credit decisions, including race, sex, and age.

Do lenders actually base their decisions on these factors? There is some evidence from the small loan, online marketplace that they do. In a study of over 7,000 borrowers who made nearly 12,000 loan requests, Enrichetta Ravina found that black borrowers pay much higher rates, and beautiful borrowers are more likely to receive funds and at a lower cost, controlling for credit score, credit history, income, employment status, and homeownership, and personal characteristics. *See Love & Loans: The Effect of Beauty and Personal Characteristics in Credit Markets* (March 2008), at http://bit.ly/28Th4m3. The study finds that black borrowers are as likely to receive a loan as white borrowers, albeit at higher rates. You can add this fact to the problem as well, making sure that the new in-house counsel would request information not just about who gets credit but about the specific terms. ECOA covers a higher rate based on a prohibited basis, not just credit denials. Interestingly, the study concludes that the "reason why Black borrowers pay more is that lenders prefer borrowers of the same race, and there are proportionally more Black borrowers (11.78%) than Black lenders (1.13%). *Id.* at 4. [Perhaps most interestingly, the paper never mentions ECOA or any other law that might be applicable to this situation!]

You can play with the beauty example with your students, asking how they would feel about a site called Bucks to Babes (instead of Dollars on Demand) and that explicitly posted its statistics about beautiful borrowers (both men and women can be "babes" in this world) faring better. Putting aside public relations issues, such a company is clean as a whistle as a legal matter because appearance—other than along the prohibited bases—is an acceptable factor in credit consideration. This drives home the point that ECOA is not about making credit *fair* in some generic sense but like all discrimination law works only along protected categories. (By the way, a few of my male students volunteered that they think something like Bucks to Babes already exists for women who are seeking financing for breast enhancement surgery; I did not pursue this further because one never knows where these discussions go!)

The second issue raised in this problem is whether Dollars on Demand is covered by ECOA. The credit decisions here are being made by the loan suppliers, not Dollars on Demand. ECOA does not just cover creditors, however, including any "person who regularly arranges for the extension, renewal, or continuation of credit." 15 U.S.C. § 1691a(e). While there is a fair amount of litigation over "regularly," it is the sole purpose of this business.

The good news for Dollars on Demand is that Regulation B limits liability for arrangers' whereas creditors are liable for all provisions of ECOA and Regulation B. This is a good opportunity to contrast the statute and the regulation. I do this by displaying them both one above each other (§ 1691a(e) and § 1002.2(*l*)) and asking the students whether the regulation is consistent with the statute. This is a good opportunity to revisit the discussion in Assignment 3 about who makes consumer law and the interaction between statutes and regulations.

Per § 1002.2(*l*), Arrangers are not required to comply with the notice and record keeping requirements—so the in-house counsel need not go looking for these documents. On the list of information, the counsel would want to review students often suggest these things, providing an opportunity to point out this limitation. Arranger liability is limited to §§ 1002.4(a) and 1002.4(b). The big issue may be discouragement if there are statements on the company's website that post statistics on the likelihood of getting credit. I ask students to imagine a website section: Tips and Tricks for Getting Funded: 1) Be White; 2) Be Beautiful; 3) Post a Picture. The first is a violation, the second is not, and the third raises issues about discouragement—even without the other two statements about race and beauty, given the history of credit discrimination, black people, women, etc. might be reluctant to use the site. If so, there could be arranger liability for discouragement.

A third issue raised by the problem is the potential for discrimination actions based on the company operating exclusively on the web. The National Consumer Law Center's manual, Credit Discrimination, has a discussion of whether offering exclusive credit to people who apply online may violate ECOA. *See* NATIONAL CONSUMER LAW CENTER, CREDIT DISCRIMINATION § 3.8.2 "Discrimination and the Digital Divide" (5th ed. 2009). The thrust of the argument is that given disparate in Internet access and use, that preferential treatment to online applicants has a disparate impact. The practice has been termed "weblining," which is catchy but has not yet caught on as a legal theory.

Part 3

Overview: Doing the Deal: Terms and Financing

Assignments 9–20

The third section of the book covers the major laws requiring that goods and services, including financial products, meet certain standards. I find it helpful to lecture for a few minutes on this transition, reminding students what we've studied to date and what is to come. I tell them that assignments 9-20 are a mix of approaches. The first few assignments study a particular law, such as the UDAP assignment for today, while the latter assignments 13-20 are oriented to a specific issue, considering all the different laws that might apply to that type of transaction. The pedagogical idea here is that a second pass at the major laws such as UDAP, disclosure, and warranties in the context of a particular product provides a review of the complex laws. As the assignments continue, students also can compare and contrast how a widely applicable law, such as UDAP, or a commonly used approach, such as disclosure, works or fails for different transactions.

Assignment 9

Unfair or Deceptive Acts or Practices

This assignment—about 1/3 of the way through the text—contains the material that is at the beginning of other course texts, which often start with common law fraud and then compare that to UDAP. While this approach reflects the historical development of the law, it can be pedagogically difficult for students. They may struggle to see how consumer law differs from torts, as well as to untangle the complex schemes that are often subject to challenge as unfair or deceptive acts or practices. This book's initial overview of consumer law exposes students to overarching themes, which come into play in the UDAP material, such as the level of consumer sophistication we should assume in evaluating deception.

The discussion of common law theories is quite truncated. There are dozens of cases that could be added to that section but they are mostly decades old, reflecting in large part the rise of statutory solutions. Instead, the assignment focuses on how UDAP law attempts to fill gaps in common law theories when applied to the consumer-business context.

Several of the prior assignments touched on deception and many of the previously discussed practices, such as credit reports and high-pressure sales tactics can be attacked as UDAP violations. The particular focus here is on the meaning of unfair and deceptive, and on comparing various approaches to UDAP at both the federal and state level. My favorite problem is 9.1, but 9.2 is important for those who want to teach the TSR rule on debt relief.

This is a place where some teachers will want to look at their state's law with some specificity. Problem 9.4 is an explicit vehicle for doing so, but it also works well to skip that problem and instead ask the students to do the analysis for the other problems using your state statute—or to compare analyses under federal and state law. The best overall reference for UDAP, in my opinion, is the National Consumer Law Center's treatise. CAROLYN L. CARTER ET AL., UNFAIR AND DECEPTIVE ACTS AND PRACTICES (8th ed. 2012). Appendix A, the State-by-State Analysis of State UDAP Statutes, is a treasure for any teacher of consumer law, but especially one who did not practice consumer law in the state where they teach.

To supplement Part D of the text, "UDAP in Context," check either the FTC's website or your state attorney general office's website for any recent press releases on UDAP. Students are often surprised to see products that they know and used that were attacked as unfair or deceptive. If a case is at the investigation stage, you can display the website, advertisement, etc. at issue and ask the students to go through the elements of unfairness/deception/both and apply them to the situation. That's the basic tactic of the problems below.

Problem 9.1. This problem is based on a real-life growth industry: so-called penny auctions. You can check out some examples at beezid.com, quibids.com, bidsauce.com, or bidcactus.com. The *Wall Street Journal* had an article on the auctions featuring a consumer surrounded by electronic items that he had won for bargain prices on the sites, but noted that he lost $350 in his first week "before he figured out how to win." Ann Zimmerman, *Penny Auctions Draw Bidders With Bargains, Suspense*, WALL ST. J. (Aug. 17, 2001) at D1, at http://on.wsj.com/291ENBD. The article highlights certain practices for criticism, including using fake bids or bots to artificially run up prices, or failing to ship winners their items. These seem like easy UDAP violations. There is a watchdog site for these sites called www.pennyauctionwatch.com that collects allegations against particular sites.

The problem asks the students to consider whether the basic structure of the auction could be attacked as an unfair or deceptive practice. Deception is likely the more challenging claim, since the problem does not give any specific statements for the students to consider. Omissions, such as the failure to explain auction proceedings, might support a challenge, but doctrinally, the students should see that unfairness is the better theory on these facts. The *Wall Street Journal* article does mention a lawsuit brought alleging violations of the Oklahoma Consumer Protection Act. The thrust of the suit is that one such penny auction site fails to "disclose the overwhelming majority of customers will lose money," and that it "offers nothing more to its customers than a low probability of purchasing merchandise at a discount." WALL ST. J., *supra,* at D5.

One criticism of the penny auction sites is that they are basically online gambling operations but that this feature is not disclosed clearly enough to be understood. Because consumers pay for the bids, they are making a monetary wager that they will win. This is an important distinction over other e-auctions in which bidding is free (eBay being the most well-known example.) The Washington Attorney General's office shut down some of these sites for deceptive practices. Wash. State Office of the Atty. Gen., *Pennybiddr Agrees to Cash Out and Refund Consumers Under Agreement with Washington Attorney General*, (Sept. 28, 2010), http://bit.ly/2aQMSt3. It has proven more difficult to challenge penny auctions as gambling under state law. Michael Caldara, *Should Penny Auctions be Regulated under Gaming Law?*, REGULATION 20 (Summer 2014), http://bit.ly/2aGORk2. The sites themselves claim it takes "skill" to win, giving this as a reason the sites are not gambling (I'm guessing professional poker players would take issue with the legal characterization of true gambling as devoid of skill). A twist on the gambling theory is to challenge penny auction as unlicensed raffles or lotteries.

Most of your discussion will be talking through the application of the unfairness standard to these auctions. Do they cause substantial injury to consumers? What is the nature of that injury? Monetary loss exists here, which is not required for unfairness, but usually increases the chance that public enforcement will occur. Reasonable avoidance here may involve an analysis of the site's disclosures, since that is a primary way that consumers could educate themselves about the consequences of bidding. This is an example of how deception and unfairness can be intertwined, even though they are legally separate. Finally, what are the countervailing benefits to consumers or competition? The latter seem weak to me since the site is selling relatively few items of merchandise; it certainly is not a major purveyor of the items in competition with the big box stores to drive down prices. The benefits to consumers from the site have to include the bargain obtained by the winning bidder, but much larger swath of consumers seem to have as a benefit only the fun of entering the auction. This discussion can expand to list the kinds of evidence that an agency might need before bringing a suit.

To close this problem, I ask students what they will do if the agency is not interested. The answer, of course, is to consider bringing a lawsuit as a private attorney general, which is permitted under the laws of all states.

Problem 9.2. This problem is another opportunity to consider the applicability of UDAP. These debt settlement or debt negotiation companies have been repeatedly sued by the FTC and state Attorney Generals for UDAP violations but they are still floating around. I did a blog post at *Credit Slips* using this particular disclosure a few years ago. Katie Porter, *Paying for the Privilege to Pay More*, CREDIT SLIPS (May 30, 2007 2:30 PM), http://bit.ly/295gCT5. At the time, the FTC hadn't taken action against such companies, instead warning that they were "risky" on its website. As discussed below, in 2010, the FTC issued a rule amending the Telemarketing Sales Rule that directs addresses Death to Debt's product. The students benefit from attempting to find liability under the general UDAP statute, and then seeing the specific, on point regulations.

Beginning with deception, the list of statements can be evaluated separately as well as taken together to assess deception. Even if individually in a certain context they might be true, the entire scheme may be deceptive. Consider the statements in turn:

"When you are in our program, you will not have to make payments to all of your creditors anymore." This statement is true, in the literal sense that consumers will send payment to Death to Debts, rather than to their creditors. Death to Debts will then parcel the money out to creditors. But would consumers understand the statement to have such a limited effect?

"We help 100 percent of the people who enter this program attack their debts." Again, true, in that Death to Debt is certainly willing to "help 100 percent" of people—certainly to enroll them and take their money. The problem is whether the help is really attacking the debts, given the set-up.

"Settle your debts for less than half of what you owe and avoid the stigma of bankruptcy." The stigma of bankruptcy part may be right, although there is some evidence that many people who try debt settlement may wind up filing bankruptcy as a solution when debt settlement fails to work. The "half of what you owe" is perhaps the most egregious statement. Despite the 40 cents on the dollar of the plan, the issue is that Death to Debts actually cannot and does not promise to get the creditors to agree to that amount. Notice the reference to the "Estimated Settlement Amount" on the disclosure. It is very unclear when, if ever, Death to Debts actually negotiates with creditors and gets a release on any unpaid amounts.

In addition to an unfairness analysis, this situation seems to be an ideal candidate for attack under the abusive prong of the CFPB's law. You can do both state and federal, asking students which standard will be easier to meet on these facts. I think § 1031(d)(2)(C) is particularly suitable here. It allows the CFPB to regulate or take enforcement actions against practices that take "unreasonable advantage" of "the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." These companies definitely promote themselves as pro-consumer entities, and, unlike traditional credit counseling agencies, are not funded by the credit industry. Death for Debt is a for-profit, however, certainly generating a handsome upfront fee if Cassie accepts its proposal and enrolls in the program.

You can also discuss unconscionability here, asking whether it might be more useful than either unfairness or deception. Certainly the bare amount of the fee is hair-raising; add to that the fact that it is paid up front before a single penny goes to a consumer's debts. At a 2010 congressional hearing on debt settlement companies, a representative from the United States Organization of Bankruptcy Alternatives responded to criticism by offering to "join as best as we are able to do" in helping come up with solutions. Elisabeth Leamy, *Fed Investigation of Debt Settlement Finds 'Fraudulent, Abusive and Deceptive' Practices*, ABC NEWS (Apr. 23, 2010), http://abcn.ws/2aLrGq9. The response from Senator Jay Rockefeller, D-W.V., just before adjourning the meeting: "That was a touching closing statement. I guess mine would be, I don't know how you sleep at night." *Id.*

In late 2010, the FTC prohibited for-profit companies from charging upfront or advance fees by issuing a rule under the Telemarketing Sales Rule ("TSR"). FED. TRADE COMM'N, FTC *Issues Final Rule to Protect Consumers in Credit Card Debt* (July 29, 2010), http://bit.ly/2asTmvr. The students covered the TSR in Assignment 4, and looked at 16 C.F.R. 310.4, which covers "debt relief services." In my experience, very few of them remember this, although the statute was assigned as part of Problem 4.2.

The rule requires that no fee may be charged until:

- the debt relief service successfully renegotiates, settles, reduces, or otherwise changes the terms of at least one of the consumer's debts;
- there is a written settlement agreement, debt management plan, or other agreement between the consumer and the creditor, and the consumer has agreed to it; and
- the consumer has made at least one payment to the creditor as a result of the agreement negotiated by the debt relief provider.

16 C.F.R. § 310.4(a)(5). There are also limits on how a fee may be collected on each settled debt to prevent the front-loading of fees. Any service fees for a particular debt must be in proportion to the total fee that would be charged for all debts. The TSR regulation also imposes constraints on the use of dedicated accounts for fees and savings, labeled in the settlement plan in Problem 9.2 as "personal savings deposits." These accounts must be held at non-affiliated, insured financial institutions, and the funds, including accrued interest, must be available to the consumer without penalty upon request. 16 C.F.R. § 310.4(a)(5)(ii).

The weakness of the FTC's approach, which may elude students despite the TSR's name, is that it only applies to companies that sell debt relief services over the telephone. The facts of this problem say that "Cassie has contacted Death to Debt." If Death to Debt limits itself to mailing or Internet, is it outside the Telemarketing Sales Rule's prohibitions? Surely, this is evading the spirit of the law, which is precisely where UDAP comes back into play. The FTC foresaw this and extended the TSR to cover calls that consumers make to debt relief firms in response to non-telephone debt relief advertising. While the regulation defining "telemarketing" focuses on outbound calls, 16 C.F.R. § 310.2(gg), the regulation on exemptions makes clear that only some inbound calls are excluded. 16 C.F.R. § 310.6(b)(5) and (6). The FTC's Compliance Guide for Businesses further discusses this issue. FED. TRADE COMM'N, *Debt Relief Services & the Telemarketing Sales Rule: What People Are Asking,* *https://www.ftc.gov/tips-advice/business-center/guidance/debt-relief-services-telemarketing-sales-rule-what-people-are* (last visited on Aug. 2, 2016).

The TSR rule applicable to debt service providers also requires certain disclosures. 16 C.F.R. § 310.3(a)(1)(viii). Working together in class decide whether Death to Debt's disclosure that is reproduced meets the requirements, including mandatory disclosure of how long it will take for consumers to see results, how much the debt services will cost, the negative consequences that could result from using debt relief services, and any key information about dedicated accounts if they choose to require them.

One debt firm, Morgan Drexen, responded to the TSR by creating a "dual program." Debt settlement was free but bankruptcy services required hefty advance fees. The CFPB brought an action under 12 U.S.C. § 5531, challenging the dual program as an evasion of the

TSR's requirements, relying in part on the very small number of consumer who ever made use of the bankruptcy services. CONSUMER FIN. PROTECTION BUREAU, *CFPB Files Suit Against Morgan Drexen for Charging Illegal Fees and Deceiving Consumers* (Aug. 20, 2013), http://bit.ly/2ajEWho. The case ended when the defendant manufactured evidence, and the court issued a judgment in the CFPB's favor as a sanction. Guess what the company did next? Go out and get *itself* some bankruptcy services. Rachel Witkowski, *CFPB Winds Final Judgment in Long-Running Morgan Drexen Battle*, WALL ST. J. (Mar. 18, 2016), http://on.wsj.com/1pFlQue.

Problem 9.3. NOTE: The book contains a mistake (blush.) It sends students to 15 U.S.C. §45(a)(4), which has to do with the extraterritorial reach of the UDAP statute. The correct analysis is under the deception and unfairness standards, set forth in the text and 15 U.S.C. §45(n), respectively.

This problem hits uncomfortably close to home for most of us. In addition to the specific situation described here, there have been a number of "law school scam" blogs that have accused law schools of misconduct in failing to disclose sufficient information about employment after law school. Many of these scam allegations are short on law (somewhat surprising given the identity of the complainants.) The point of this problem is to consider whether the complaints rise to the level of UDAP violations.

Not every misleading statement is a UDAP violation. The facts here give no wiggle room; a false statement was made. It is ambiguous whether the misstatement was intentionally incorrect or a result of error, but that does not matter under UDAP. Intent is irrelevant. It certainly might matter in a jury's mind but it is not an element of the cause of action for either deception or unfairness.

The claims are likely stronger under deception, and this is an important conclusion the students should reach after applying the relevant tests. With regard to unfairness, the sticking point is difficulty in alleging—much less proving—"substantial injury to consumers that is not avoidable by consumers." The letter containing correct information was sent. At least for students who have not yet applied, that should prevent injury if consumers read the letter. My students suggested a few additional defensive strategies to prevent substantial injury. (Recall that in the problem the student is advising the University General Counsel, so strategy is important in this pre-litigation situation.) They recommend that the University should refund admission fees for any students who applied to eliminate any financial harm as a result of a misinformed application. Another suggested waiving all admission seasons for the year as an additional contrite gesture.

The deceptive claim here comes from an affirmative misrepresentation, which is always easier than an omission. Students surely act reasonably in interpreting the information. It was just wrong, and they had no reason to know otherwise. The hardest prong might be materiality. At least some students may have relied on the scores but note that they didn't make it into the rankings or official reporting so maybe students did not rely on an admissions mailer. The letter containing correct information also may have replaced the incorrect info and reached students in time such that no decisions were made from the wrong information. The biggest concern is whether the corrective letter went far enough. Is a statement that information "should not have been printed" sufficient to alert prospective students to the problem? Many a financial institution or other business has realized—too late—as a public relations nightmare exploded that a weak or sly apology can only further inflame things.

One controversy here is likely to be over whether the misstatements were material. How heavily do prospective students weigh grades and LSAT scores in making a decision to attend a particular law school? The problem makes clear that the misstatement did not contaminate the school's US News and World Report ranking; are these really paramount? What about financial aid, geographic considerations, and—gasp—quality of faculty? Do those things overwhelm the misstated LSAT scores in a school mailer to keep the incorrect statements below the materiality threshold?

This is also an opportunity to apply the reasonable consumer standard, remembering that the consumers are those who are typical to the marketplace under consideration. Prospective law students are certainly a relatively sophisticated audience; by definition they have at least university degrees or are about to. There is also a wealth of information about law schools out there, including the U.S. News data and the aforementioned scam blogs that highlight the weakness of much of the disclosed employment data. Should the prospective students have done a web search on "law school scam" before applying?

Problem 9.4. This is a fun problem, partly to see what the students come up with. I often call on all of them in pretty rapid sequence and make a long list of the practices on the board. Then I pick a couple that seem interesting and ask those students to share their analysis. You may get a few students who will say that they have never felt wronged, but this is mostly a dodge to avoid participation. Millennials have a strong sense of justice *qua* entitlement. For those who really resist, direct them to the CFPB's database and have them filter on your state and read some complaints.

In terms of pre-class preparation, you'll need to find your state's UDAP law and perhaps do a quick search of case law for guidance on interpreting the elements. I've had great luck involving my school's reference librarians in helping me prepare for this problem. With that preparation, I'm also ready to throw out some recent UDAP actions as examples if the class is less than inspired. Another approach is to use this problem to do skills learning. Ask the students not just to identify a practice before class, but also to locate your state's UDAP statute and leading case law. You can even turn this into a writing assignment and have them prepare a 1-2 page memo on the issue. I often have them "grade" these by assigning partners in class, with the partner playing the attorney representing the business whose practice is being challenged. My recommendation is that you always collect and at least skim written work done by students; they appreciate the validation of their efforts.

Problem 9.5. This problem is inspired by a newspaper article that described university admission practices. Rachel Louise Ensign & Melissa Korn, *Colleges' Tough Waiting Game*, WALL ST. J. (Apr. 9, 2012), http://on.wsj.com/2ajFRyC. There is no suggestion in the article of any legal violation, and the conclusion may be that Luz would fail in a suit alleging either unfairness or deception by Williston College. That acknowledged, UDAP law requires creativity in its application. While *per se* violations of regulations may be easy UDAP victories, they also do not reshape the landscape for consumers in the way that a novel application of UDAP might. The Wall Street Journal article shows that it would be difficult for Luz to accurately gauge Williston's waitlist rate. For example, a very highly ranked school, Cal Tech, admitted 11% of students off its waitlist, while the lower ranked (although still excellent) Notre Dame, admitted 0.7%. There is also substantial fluctuation from year to year. In 2011, Stanford waitlisted 1,078 students and admitted 13. Apparently to "improve" the situation, it cut the waitlist down to 789 students, but there is no sign that the chance of admission is anything from grim. The savvy, who read the Wall Street Journal, are advised to view the waitlist in a lax admission year as "playing the state lottery versus the national lottery. It's a million to one instead of a billion to one." *Id.* But is this description, perhaps accurate, consistent with the concept of a waitlist, especially where students are required to confirm their continued interest and sometimes provide updated grades or the like?

An unfairness claim here is weak. Surely Luz could have avoided "substantial injury" simply by paying the tuition deposit at the state university. Williston did nothing to discourage her from doing that.

Some students give short shrift to the deception analysis, noting that the University was truthful. That may not be enough, however, as a deception claim may arise from a "practice" or an "omission." An affirmative representation is not required. There is usually a lively debate about whether Luz's interpretation was reasonable. Here I point out that she is not suing because she was not admitted; a waitlist is surely not reasonably understood as a guarantee. But was she reasonable to think that a waitlist suggests a chance of getting in, and if so, what kind of assumption is reasonable. Going through the statistics above usually outrages the students, many of whom are familiar with law school waiting lists, where I think there is a higher likelihood of admission (then again, maybe I am being deceived).

Should schools have to disclose the number of people on their waitlists? Should they have to disclose where a student ranks on that list, if the school ranks at all? (Many schools purport to not do so).

Was Luz's expectation reasonable with regard to the waitlist? Perhaps not but is this practice "oppressive" to young people? Does it "offend public policy"? These are relevant terms from the *S&H standard* for unfairness, mentioned in the text at page 171. While it does not apply at the federal level after the enactment of 15 U.S.C. §45(n), S&H factors may still be used by many state courts or law in interpreting their UDAP statutes. Similar ideas are embodied in the abusive prong of the CFPB's UDAAP law. Does the waitlist process take "unreasonable advantage" of "a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service?" The university is not a "covered person" and not subject to CFPB enforcement or rulemaking but the comparison of the different standards is useful.

Another way to take the discussion is to explore the degree to which a claim on Luz's behalf would be an effort to use the law to protect her from her own optimism bias. The fault is arguably Luz's for not asking more questions about the waitlist before continuing to wait. Certainly, Williston did not stop her from making the tuition payment to the local state university, although it would certainly have been a nonrefundable payment. Is the result that wealthier kids can afford to play the waitlist game while poor ones cannot? And if this is the case, should disparate risk of harm to poorer people matter to the UDAP standard? One's instinct might be "no" but several states equate "unfairness" with "unconscionable," and students may recall from *Williams v. Walker-Thomas Furniture*, 350 F.2d 445 (D.C. Cir. 1965) that the court described Ms. Williams' background at some length. A strong scholarly look at this issue is Anne Fleming*, The Rise and Fall of Unconscionability as the 'Law of the Poor'*, 102 GEORGETOWN L.J. 1383 (2014).

Assignment 10

Warranties

It is difficult to know where to cover warranties in a consumer law course, particularly as credit-related topics have become the 900-pound gorilla of coverage. The UDAP assignment precedes warranty coverage because UDAP can be a better option for remedying the sale of defective merchandise, given the relatively few instances that warranties are offered at all. You can contrast Magnuson-Moss (M-M Act) as a disclosure approach with the next assignment, usury, which is a substantive regulation. You can also wait until Assignment 12 on credit disclosure and compare the detailed, prescriptive approach of Truth in Lending with the generic guidelines in M-M.

In approaching this assignment, you may want to inquire about how much UCC coverage the students had in their first-year contracts classes, or if any took a sales course. If any students balk at this revisit of contracts, you can tell them to appreciate the free bar preparation. The multistate exam is loaded with UCC questions. That said, if their sales knowledge is strong, coverage of Problem 10.4 is unnecessary, and you can go more quickly through Problem 10.1. One other note on coverage is that both Problem 10.2 and 10.4 are vehicles for talking about pre-sale availability of warranties. I confess that it may not be worthy of two problems, but you can either avoid that issue in your discussion of 10.2 and assume the disclosure was pre-sale, or assign 10.2 and 10.4 in alternate years for variety.

Teachers, too, may be more familiar with the UCC than M-M. Two good resources, besides the National Consumer Law Center manual cited in problem 10.1, are: *12 Reasons to Love the Magnuson-Moss Warranty Act*, 11 J. OF TEX. CONSUMER L. 127 (2008), and Janet W. Steverson & Aaron Munter, *Then and Now: Reviving the Promise of the Magnuson-Moss Warranty Act*, 63 KAN. L. REV. 227 (2015). The latter contains an empirical analysis of written warranties that concludes that many violate M-M.

Problem 10.1. When Willett bought the eFone, what warranties existed? I recommend tackling express warranties first. Here the question is whether the statement "fine as far as she knew" is sufficient to create an express warranty. Her statement probably qualifies under UCC § 2-313(1) as an "affirmation of fact or promise that relates to the goods," as opposed to mere puffery or product description. Neither of the latter meets the criterion for a written warranty, which M-M Act defines as description that the produce is "defect free" or "will meet a specified level of performance over a specified period of time." 15 U.S.C. § 3201(6)(A). See *In re Shop-Vac Marketing & Sales Practices Litigation*, 2014 WL 3557189 (M.D. Pa, 4:12-md-2380) (holding that sales representatives statements regarding the vacuums were product descriptions and did not create an express warranty under M-M).

The harder issue is just what was the exact promise that Kami made. How much wiggling out of liability did Kami do when she said "as far as she knew?" The ability to hold a charge is certainly not a latent defect. But if she threw out the charger, it is possible that she was not aware of the problem because she hadn't tried to charge the phone recently herself. What should we expect an ordinary seller to know about a complex electrical product such as the eFone.

After discussing the express warranty, I like to review the other types of warranties. Even though some of these do not apply, in this first problem it helps to get all the possibilities on the students' radar. It's pretty straightforward on these facts that there was no written warranty under Magnuson-Moss. And while it does require having read the text or the UCC, it is not also easy to exclude the implied warranty of merchantability on the grounds that Kami is not a merchant. Sometimes I talk about how the burgeoning resale market on eBay and similar sites might be turning more of us into merchants than we realize. This also is a serious problem in developing countries that enact consumer protection legislation; in a land of street vendors, merchants nearly outnumber consumers. The remaining option, which at least could apply on these facts, is the warranty of fitness for a particular purpose. The issue for discussion is whether the ordinary purpose to which Willett intended to use the phone, that is to talk on, can be a "particular purpose"? The National Consumer Law Center manual, CONSUMER WARRANTY LAW (5th ed. 2015) has a good discussion of this issue in section 4.3.2.4. The authors describe the split in case law and discuss how an everyday purpose might be recharacterized as a particular purpose to impose a warranty in situations where otherwise there would be no remedy under the UCC.

Assuming a warranty of fitness for particular purpose here, there is still the issue of remedy. Students sometimes do not get this far in their preparation, happily concluding that this law applies, without considering just what their determination of liability means in terms of damages and rights. This is a powerful point that the book tries to make repeatedly, and which the problem method is pedagogically useful. You can play Willett and repeatedly respond to explanations of the law with "I want my $45 back."

The M-M Act has a limitation of $25 in § 2310(d). Also, even if there were an express warranty here based on the "fine as far as she knows" statement, the M-M Act seems to make express warranties actionable only if they meet the standards for a written warranty. The key point in raising the M-M Act is to drive home to students that a consumer can find their warranty in/under state law, but look to the M-M Act to find their remedy. That's an unusual hybrid and while it may not work on these facts because Willett paid only $15 for the eFone, I usually spend some time asking why M-M Act sets up this dynamic. If the problem is that the UCC remedies are not generous enough, why not just amend the UCC? In a consumer protection class, students may need a reminder of the UCC's broad sweep of both businesses and consumers. The M-M Act is strictly a consumer protection statute.

Assuming he cannot somehow use the $30 he spent on the charger to get above the $25 limit in M-M, the only remedy for Willett lies with the UCC. Generally, those remedies are: 1) canceling sale (by rejecting goods or by revoking acceptance); 2) deducting loan balance for damages; or 3) suing for damages. Courts consider revocation of acceptance to be a fairly harsh remedy, but here Willett may be helped by the fact that he never used the phone. One important fact will whether the revocation is occurring within a reasonable time. The problem says only that he "recently" purchased the phone. Willett must tell Kami that he is rejecting the phone or revoking his acceptance of the phone to invoke those remedies.

In calculating his damages, Willet can probably include as consequential damages the amount that he paid for the charger, which is useless to him in light of the broken phone. He would not have incurred the cost of the charger "without the concurrence of some other event attributable to the same origin or cause." UCC § 2-715.

Problem 10.2. This problem picks up the lesson of Assignment 3 about reading both the statute and the regulation to understand the applicable law. The M-M statute has no prohibition on post-sale conditions on returning warranty cards, but the regulation explicitly bans making the return of warranty cards a post-sale condition on a warranty. "A warrantor offering a full warranty may not impose on consumers any duty other than notification of a defect as a condition of securing remedy of the defect or malfunction, unless such additional duty can be demonstrated by the warrantor to be reasonable." 16 C.F.R. § 700.7(a). "A requirement that the consumer return a warranty registration card or a similar notice as a condition of performance under a full warranty is an unreasonable duty." 16 C.F.R. § 700.7(b). Many students will have had the experience of seeing a postcard enclosed in a box, have intended to fill the postcard out, and later giving up on the warranty because they could not find the postcard or had not returned it within so many days of sale. Assuming there was a written warranty that qualifies under Magnuson-Moss, consumers are wrong to believe the registration card is required for an express warranty. Sometimes I talk about the point of those postcards, which often ask for information such as one's age and income. Are the cards there to gather these useful marketing data or to discourage consumers from pursuing a warranty?

In the context of TechTown, one argument is that the point of sale process is not equivalent to a warranty registration card. Unlike with cards, the point of sale terminal does not require consumers to remember to take action later, after leaving the store, when they may be more likely to forget. TechTown does seem, however, to condition the warranty's existence on the consumer's willingness to provide information. The FTC regulation seems to bless this practice, concluding that its interpretation on registration cards does not prohibit a seller from obtaining from purchasers at the time of sale information requested by the warrantor." 16 C.F.R. § 700.7(c). Is this a situation of technology solving a problem, or creating a new one by simply moving a burden from one point in time (at home) to another point in time (sales terminal)?

TechTown's display of the warranty on the terminal screen raises the issue of pre-sale availability of warranty information. The students typically do not see this because, gasp, the problem does not point them directly to 16 C.F.R. § 702. Generally, I save this coverage for Problem 10.4, which does cite that statute, but include the discussion here, as you may want to alternate problems or cut 10.4 and cover pre-sale here to streamline coverage.

Does display at point of sale satisfy the FTC's Pre-Sale Availability Rule, 16 C.F.R. § 702? TechTown's counsel may argue that the terminal display is surely at least as reasonable as a hyperlink. The facts of the problem suggest that, unlike online, the consumer actually is shown the warranty, rather than merely being given the option to click to read. On the other hand, aren't shoppers in store being rushed along, whereas online shoppers face less pressure to buy immediately so they actually have more opportunity to read the warranty?

Another possible debate is whether TechTown's "point of sale" warranty information form qualifies as "post-sale" and therefore violates the pre-sale availability rule. The problem is intentionally ambiguous about when the form appears: after the consumer has paid, making it post-sale? Right before the receipt that the consumer must sign to own the product, in which case it is arguably pre-sale?

The five-day period of the warranty is okay under M-M. There is no duration requirement for something to qualify as a full warranty. This often surprises the students, especially because length may be the key term that they—and other consumers—shop for in evaluating the benefit of a warranty. Perhaps the five days is so short as to be an unfair or unconscionable practice under a state UDAP law but I think that is a stretch. Be aware that certain states, including California by its Song Beverly Act, have minimum durations for warranties on certain goods, including used goods, wheelchairs, and cars, and a standard 60-day warranty on new consumer goods to a retail buyer. Cal. Civ. Code § 1791.1(c).

I think the better UDAP attack on TechTown is around the circumstances of the warranty information gathering. The goal of M-M disclosure is to give consumers information before they make a purchasing decision. Depending on the exact circumstances in terms of the point of sale, a consumer here could presumably balk and not finish the transaction. This makes it less likely that it is an unfair and deceptive practice. A consumer lawyer also should carefully investigate the business' practices in terms of what cashiers say, and are trained to say, about this warranty and its applicability. This kind of fieldwork is a far cry from the legal research in computerized databases but fact gathering is a crucial part of compliance lawyers' jobs.

Problem 10.3. This problem examines the practice of "tying," which is when a manufacturer conditions a warranty on the consumer's using any article or service specified by brand or trade name. It's patterned off the FTC's settlement with BMW of North America with regard to the warranty booklet issued to purchasers of MINI cars. Lesley Fair, *FTC to BMW: Don't MINImize Mag-Moss Warranty Compliance*, FED. TRADE COMM'N (Mar. 19, 2015, 11:17AM), https://www.ftc.gov/news-events/blogs/business-blog/2015/03/ftc-bmw-dont-minimize-mag-moss-warranty-compliance. In fact, the language printed in the book is exactly what MINI owners read.

Start the problem with the statute, however, and work back to analyzing the warranty booklet and dealer's statements. M-M prohibits warrantors from requiring use of a particular part or repair service to retain the validity of the warranty. 12 U.S.C. § 2302(c). The exception, when tying is permissible, is if the parts or service are free of charge from the warrantor to the customer. The Kruz came with a "bumper-to-bumper" warranty, which likely would have allowed Everett to take the Kruz in for a free repair. Thus, does this fall into the exception where tying can be required. I think the answer is that Kruz is probably still in trouble.

The issue is the warranty booklet may have deceived Everett about the consequences of going to a non-Kruz dealer. It did not clearly direct the consumer to go to the dealer for free repairs or service—or else, no warranty! Instead, the tying was implied. The language is imperative, so grammatically it is a command. But wouldn't most consumers read this as merely advisory, e.g. "We recommend that you have all maintenance . . ." On that basis, the FTC challenged the warranty as deceptive and ordered BMW to send all MINI owners corrective additional information about their rights to use third-party parts and service without voiding their warranties.

In amending its regulation, the FTC relied on its determination that statements such as the pamphlet's "requirement for warranty claims" were deceptive in that they did not advise consumers that a warrantor would avoid all liability, even when the defect or damage is unrelated to the consumer's use of an "unauthorized" part or service. The FTC now explicitly prohibits "warranty language that implies to a consumer acting reasonably in the circumstances that warranty coverage requires the consumer's purchase of an article or service identified by brand, trade, or corporate name . . . 16 C.F.R. § 700.10. The impression of tying is itself a deceptive practice, and handily, a violation of M-M (thus permitting a private right of action by consumers and the recovery of attorneys' fees, neither of which is available under the FTC's UDAP statute to litigants).

Kris, the mechanic, offered Everett the best business justification that tying should be permissible. It does clearly provide more quality control over the goods and services and advance information of possible problems to a manufacturer than allowing consumers to go elsewhere for repairs. The FTC seems to recognize this benefit but in its balancing, have required that businesses essentially compensate consumers by making any tying requirement benefit the consumer with free repairs. Going forward, Kruz can have a policy that requires its dealers to be used to retain the warranty, but it must be clear about that point and advise consumers that such repairs and service are free.

As someone who grew up in a rural place, this is why you always bought a Ford car. It was the only dealer in the county, and nobody wanted to tow 100+ miles to another manufacturer's dealer for a minor problem, solely to retain a warranty.

Problem 10.4. This problem is a straightforward UCC reader. It's quick though, and a good check on student understanding. As noted above, you can also assign it in alternate years in lieu of Problem 10.2 to study the pre-sale availability issue.

Ask the students to establish the elements of a claim for breach of the implied warranty of merchantability. They should be able to identify, for example, that the towels are "goods," that the online purchase was a "contract for their sale" and that the seller is a "merchant with respect to goods of that kind." The facts also are pretty clear in characterizing the towels as not meeting the standard of merchantability set forth in UCC § 2-314(2). The towels are "threadbare" after a single laundering. They are not "fit for the ordinary purpose" of drying.

The trickier issue is whether the disclaimer was sufficient to exclude the towels from the implied warranty of merchantability. UCC § 2-316 covers disclaimer. To disclaim merchantability, the general requirements are that the word "merchantability" must be mentioned and the writing must be "conspicuous." UCC § 2-316(2). This is a higher standard than for disclaiming warranties of fitness. Paragraph 3 overrides the general rules and says that expressions "as is" or "with all faults" or "other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty. . ." is sufficient.

The exception pertaining to examination of goods presumably does not apply in online shopping, although maybe one could say that by choosing to purchase online a consumer "has refused to examine the goods." But surely that argument only works for retailers that are both brick and mortar, and online. It's hard to see how someone could examine an Amazon product before purchase, although maybe there is such a thing as "virtual examination"—one certainly get more detailed product information (measurements, etc.) than one can get in a store.

Happy Home put "Warranty Information" on the bottom right of its homepage, with that text linking to the disclaimer. Does the existence of the words "Warranty Information" suggest that, in fact, there is some kind of warranty, rather than that one is being disclaimed? Should consumers be held accountable for not having clicked? This blends into the pre-sale availability issue (or non-issue, as it turns out).

Assuming that a consumer did read or should have read the warranty, does it meet the standard? It uses the word "merchantability," so that is easy. Query though why the UCC drafters thought the use of this word was useful; I seriously doubt any consumers know its meaning and it certainly has not become part of retail parlance. "Disclaims" is also strong, and if one knows the meaning of the word, crystal clear. If the conspicuous test is really one of clarity, then Happy Home is safe. Since conspicuous only applies in the case of a "writing," however, I think Happy Home may incur liability because its hyperlink under the heading "Warranty Information" was not conspicuous. First, it should have been labeled "No Warranty: Read More" or something similar. Second, the information should have been on the point of sale page, not the company's homepage. This is a grave problem, although so is larding down point of sale pages with so many details that consumer cannot absorb the information. The space issue becomes even more excruciating in a mobile world. Third, Happy Home may have a harder time defending itself given that the UCC provides some alternatives that give better disclosure, such as labeling the product "as is." A quick search of eBay or the like shows how widely used that label is. The conspicuous requirement would seem to require more than the pre-sale availability rule below, although perhaps the latter would inform the former. But, the FTC does not enforce or interpret the UCC, adding another twist.

The FTC's rule, 16 C.F.R. § 702.3, requires that "the seller of a consumer product with a written warranty shall make a text of the warranty readily available for examination by the prospective buyer by: (1) displaying it in close proximity to the warranted product, or (2) furnishing it upon request prior to sale and placing signs reasonably calculated to elicit the prospective buyer's attention in prominent locations . . ." The FTC has explained that the pre-sale rule applies on the Internet. In that context, its guidance says that a seller can comply with making warranties available at the point of purchase, for example, by using a clearly-labeled hyperlink, in close proximity to the description of the warranted product, such as 'get warranty information here' to lead to the full text of the warranty." FED. TRADE COMM'N, Press Release, *As Holiday Shopping Season Gets Underway, FTC Reminds Internet Retailers to Ensure Consumers Have Access to Warranty Information*, (Dec. 2, 2013), https://www.ftc.gov/news-events/press-releases/2013/12/holiday-shopping-season-gets-underway-ftc-reminds-internet. The issue here is that there is no warranty. In fact, Happy Home's "Warranty Information" led only to a disclaimer, not a warranty. Thus, it seems it did not have to comply with the pre-sale rule, which applies only to written warranties, not the implied warranty of merchantability. This is the dreaded red herring.

Assignment 11

Usury

Students can be skeptical that the world they know best (the U.S. in the last two decades) is truly an outlier in historical and comparative context because it has almost no regulation of interest rates. This can be a good place to start discussion, and thematically one can refer back to other areas where the U.S. approach is distinct from Europe such as privacy regulation. For good background on the history of usury, I recommend Sidney Homer & Richard Sylla, A HISTORY OF INTEREST RATES (2005).

This assignment is longer on articles and text than some, but there are few cases because, well, there are few applicable usury laws in consumer lending. In fact, the first case in the assignment, *DeCristoforo*, is not even good law. While that may strike some as a pedagogical sin, I think the discussion of unconscionability as a work-around to usury drives home the point that usury is has moral foundations. It is about ideas of fairness and justice, as is unconscionability as a doctrine. Probably not coincidentally, neither has fared well in recent decades.

The latest developments in usury are the expanded definition of "consumer credit" to which the "military annual percentage rate" applies, and a Second Circuit case regarding the applicability of the National Banking Act's usury rules to nonbanks. With regard to the former, as of late fall 2016, there should be some reporting on how credit markets to military servicemembers have evolved. In advance of October 1, 2017, one should also check whether the regulation became applicable to credit cards, or if the Department of Defense exercised its reserved discretion to further extent the regulation's applicability to credit cards. In addition to checking for amendments to 32 C.F.R. § 232, I anticipate that the DOD's website and the National Consumer Law Center will have coverage of any new issues.

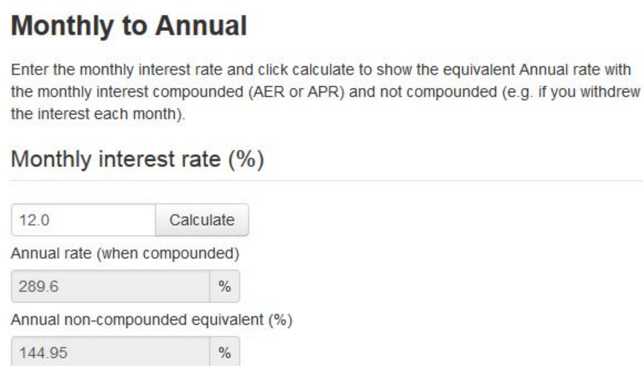
The Second Circuit case is *Midland Funding, LLC v. Madden*, 786 F.3d 246 (2d Cir. 2015) (cert. denied, June 27, 2016). The defendant, Midland Funding, one of the nation's largest debt buyers, was charging the consumer interest at a rate that violated New York's criminal usury statute, on the belief that the default rate in the contract was permissible because the debt was originated by a national bank, to which the usury law did not apply. The court held that federal law does not preempt generally applicable state usury statutes when a debt purchaser is a nonbank. The National Bank Act's preemption of usury does not apply to a non-national bank purchaser of a debt originated by a national bank unless the purchaser is subsidiary or agent, or otherwise acting on behalf of, a national bank. The Solicitor General and the Office of the Comptroller of the Currency filed a brief discouraging review, and the Supreme Court took the out. The *Madden* decision at least is in tension with *Krispin v. May Dep't Stores Co.*, 218 F.3d 919 (8th Cir. 2000) (finding that when a national bank became assignee of credit card accounts that it was thereafter entitled to be treated as the originator of the account for purposes of the application of the National Bank Act). The decision will certainly produce more legal work for those who counsel consumer financial services companies. Andrew C. Glass & Roger L. Smerage, *U.S. Supreme Court Declines to Consider Whether National Bank Act Preemption Extends to Purchasers of Debt Originated by National Banks*, K&L GATES (Jan. 28, 2016), http://bit.ly/2bvW1XY. Going forward, perhaps debt purchases will be scrubbed for debts for borrowers who reside in the Second Circuit or such debts will be sold at a discount to reflect greater risk and lower interest rates that can be accrued. A paper examines whether the decision is affecting credit availability and default rates. Colleen Honigsberg, Robert J. Jackson, Jr. & Richard Squire, *The Effects of Usury Laws on Higher-Risk Borrowers*, (Colum. Bus. Sch. Research Paper No. 16-38), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2780215. At least in the marketplace lending platforms, the answers are, respectively, yes and no. The impaired credit is limited to borrowers with the lowest FICO scores. *Id.*

Problem 11.1. This statute reader shows how difficult it is to interpret a usury statute. I confess to having refused interest from more than a few friends and family members because it seemed easier and safer to forgo the interest than to examine the usury statute.

Florida's statute applies broadly to "any person making an extension of credit to any person." How many people are aware of usury statutes? Probably very few, which under Florida's statute will be an important fact. This is a criminal statute; a person only violates it when he or she acts "willfully and knowingly." This is not a trick question. The statute makes clear that a violation is a "felony of the third degree." Some may say that Ward, formerly a laidback guy named Willow, likely has no knowledge of interest rate caps. He almost certainly just takes distributions from a trust fund instead of strolling up to a payday lender. The reference to "investment profit" in the cocktail "note", however, is a classic usury evasion technique. You can detour here to talk about Sharia law and usury workarounds, both historic and contemporary (the latter is the subject of the next problem).

The next issue is figuring out the annualized interest rate. The statute prohibits charging a rate exceeding 45 percent per annum. While this statute appears to avoid the sleight-of-hand that Chris Peterson discusses in his article, the consumer (or her lawyer) must still figure out how to compare the rate stated in the note (12 percent per month) with the annualized figure in the statute. This requires math—often an anxiety-producing exercise for students. You can teach the students the basic formula for interest, I=PxRxT, where I = interest in dollars, P = principal in dollars, R = rate of interest as a percent, and T = time. This works to calculate simple-interest for a one-payment transaction but Annie was to pay over 12 months, so the formula becomes much more complicated.

Another route, and one likely to appeal to students, is to see if they can "Google" their way to an answer. There are several online tools but none that I could locate is precisely suitable for these purposes. Below are the calculations from "stoozing.com," http://www.stoozing.com/calculator/apr-rate-converter.php. With the inputs from the problem, the outcome suggests a rate wildly exceeding 45 percent annualized (either compounding or non-compounding). This calculator is designed for deposit accounts, not loans.



An intermediate approach, which is what I recommend, is to replicate the spreadsheet below (email me if you want an electronic version) and show them the need to make some key assumptions about the transaction to calculate the interest rate. The note does not specific when the principal is due. Are payments interest-only, with a balloon payment that includes the $20,000 principal at the end of one year? If so, she should have paid 12 level monthly payments of $2,400 each month that reduce the balance to $20,000. The lost "investment profit" here is $28,800. Alternatively, were no payments to be made until the end with the interest compounding over time, creating a much higher annualized rate.

Principal	$20,000					
Monthly rate	12%					
		Months			Months	
		1	$2,400	$22,400	1	2400
		2	$2,688	$25,088	2	2400
		3	$3,010.56	$28,098.56	3	2400
		4	$3,371.83	$31,470.39	4	2400
		5	$3,776.45	$35,246.83	5	2400
		6	$4,229.62	$39,476.45	6	2400
		7	$4,737.17	$44,213.63	7	2400
		8	$5,305.64	$49,519.26	8	2400
		9	$5,942.31	$55,461.58	9	2400
		10	$6,655.39	$62,116.96	10	2400
		11	$7,454.04	$69,571.00	11	2400
		12	$8,348.52	**$77,919.52**	12	2400
		289.60%	**$57,920**		**144.00%**	**$28,800**

Finally, perhaps the note was fully amortizing, with a monthly payment due that eventually reduces the balance to zero with the final payment? You can play around with the advanced loan calculator here: http://www.calculatorsoup.com/calculators/financial/loan-calculator-advanced.php and produce tables such as the one below. This is calculated as a 12% annual rate, which is why the interest is so much lower. With this situation, the note does not violate the usury law, and Ward can collect.

Amortization Schedule
$20,000.00 at 12% interest
with 12 monthly payments
Total Payments: $21,323.70
Total Interest: $1,323.70

CalculatorSoup.com

Period #	Payment Amount	Principal Part	Interest Part	Balance Owed
1	1,776.98	1,576.98	200.00	18,423.02
2	1,776.98	1,592.75	184.23	16,830.27
3	1,776.98	1,608.68	168.30	15,221.59
4	1,776.98	1,624.76	152.22	13,596.83
5	1,776.98	1,641.01	135.97	11,955.82
6	1,776.98	1,657.42	119.56	10,298.40
7	1,776.98	1,674.00	102.98	8,624.40
8	1,776.98	1,690.74	86.24	6,933.66
9	1,776.98	1,707.64	69.34	5,226.02
10	1,776.98	1,724.72	52.26	3,501.30
11	1,776.98	1,741.97	35.01	1,759.33
12	1,776.92	1,759.33	17.59	0.00

CalculatorSoup.com

The loan's reference to "12 percent per month" seems pretty contradictory to an interpretation of the rate as 12 percent per annum. But with this kind of drafting, Ward will have trouble suing on the loan even without the usury issue.

The point of the problem is not to drive the students—or you—over the edge with math. It is instead to see how easy it can be to violate the usury law—after all, Annie's likely focused on the number "12 percent," which seemed reasonable enough. For those who want to go deeper into the math and have the students work more exercises, I highly recommend Chapter 4, Credit Math for Practitioners: Calculations of Interest Rate and Other Charges, in The Cost of Credit. Nat'l Consumer L. Ctr., 161 (4th ed. 2009).

A larger theme to touch on in this problem is the fact that usury statutes, such as Florida, typically do regulate consumer-to-consumer transactions. (Recall that in Assignment 1, a definition of consumer law was that it was about business-to-consumer transactions.) Usury is an outlier in this area; I take this as additional evidence that the concerns motivating usury have foundations outside the typical consumer law issues of asymmetry of information, repeat player advantage, etc.

Problem 11.2. As a preliminary matter, this problem would be clearer if it specified that Senator Mendieta was not from Nevada. Students should infer that from the fact that the problem explains that her state's major industry is brokerage and mutual funds (not gambling and mining as in Nevada).

This problem is based on a Boston-based bank's decision to open a small branch in Delaware. Todd Wallack, *Sovereign skits banking rules with Del. Branch*, BOSTON GLOBE (Aug. 12 , 2012), http://bit.ly/2bqGA17. Sovereign was purchased by Spanish banking conglomerate Santander and now operates under that name. You can visit its branch locator and see the disparity in Delaware v. Massachusetts locations. http://locations.santanderbank.com/.

This policy problem offers two channels for discussion. To get to either, the first step is for the students to see the legal maneuver being used by Independence Bank. An initial fact question is to determine if Independence Bank holds a national charter. Assuming it does, it may charge customers in any state the maximum rate permissible in its home state. The students should have had enough discussion of *Marquette* in the *DeCristoforo* case and the following text to know this legal rule, and that Nevada has no usury law. If Sovereign Bank has properly designated its little strip-mall operation as its main office with federal banking regulators, such as the Office of the Comptroller of the Currency, it can "export" Nevada law to all customers, including the thousands in Senator Mendieta's state where the bank has most of its branches and operations.

One policy issue is whether Senator Mendieta wants to tackle Independence Bank's action. Her constituents—the consumers who vote—will be charged higher rates of interest than permissible in their home state. This could hurt financially vulnerable families and drive up reliance on social programs as these families divert scarce dollars to interest charges instead of necessities. Independence Bank is also a major employer; what if this branch in Nevada is just the first step of many to follow in relocating the bank's entire operations? Perhaps a lunch is in order between the Senator and Independence Bank's CEO to discuss the issue? If at the lunch, the CEO is straightforward and says, "No worries about our headquarters changing; we just wanted to charge consumers more," is Senator Mendieta okay with that response? As a federal legislator, she has limited power here. Congress could not have been more pointed on its position that it does not support any federal usury law in Dodd-Frank. As a first-term Senator, would she be unwise to try to introduce a federal usury law, which would eliminate the "export" practice. Who, precisely, would support her doing so? Perhaps labor unions and a few consumer groups? As with many consumer issues, one problem is an inadequate lobby to counter the financial services industry.

Another risk is that any federal usury law that does get introduced would actually permit higher rates than in the more protective states; it would do more harm than good. On many issues, consumer advocates have disfavored federal initiatives—even those aimed at helping consumers—for fear that any law that could pass Congress would reduce the level of consumer protection in at least some states. The core tension is federalism. With usury, the federal government (through the National Banking Act and the Supreme Court's interpretation thereof) is effectively allowing one state law to trump another's state law. This is odd, to say the least.

Senator Mendieta has an intermediate policy response. She might at least move her accounts to a state-chartered bank. Then, if there is an uproar over Independence Bank's regulatory arbitrage, she can point to her act of protest. Some localities joined the "move your money" campaign that followed the financial crisis. INSTITUTE FOR LOCAL SELF-RELIANCE, *Local and Responsible Banking Resolution – Portland, OR* (Aug. 17, 2012), https://ilsr.org/rule/depositing-public-funds-in-local-banks/local-responsible-banking-resolution-portland/.

The related policy point is the difficulty of creating enforceable usury laws. You can posit that, before she was elected Senator, Ms. Mendieta was a state legislator who co-sponsored a bill to limit the exemptions in the state's usury law and to move the cap down from an equivalent 45% annualized rate to a 36% one. Not only does this complicate her position now that she is in the Senate—with the ability, if not the political will, to amend the National Banking Act—but it shows that all her work as a state legislator was for naught. Independence Bank, for the cost of a few thousand in monthly commercial space in Nevada will evade state law. These problems, discussed with regard to Ohio in the text immediately before the assignment, are serious ones. Even with regard to institutions that lack a federal charter or the ability to obtain one (they are not qualified entities for national banking supervision), there are cases of affiliate relationships that may be used to evade usury law. In fact, the story that inspired this problem explains that even before it opened its Delaware office, Sovereign bank was able to charge any rate it wished on its credit card accounts. How? By outsourcing the issuance of credit cards for its customers to Bank of America, FIA Card Services, which of course is headquartered in Delaware. But even that may not be the safe haven that it once was, as public opinion on interest rates seems to continue to swing against banks. Even Delaware is considering a usury cap—of 100%!

Jessica Masuilli Reyes, *Lawmakers eye caps on changing payday lending industry,* DELAWAREONLINE (Aug. 26, 2016 3:16 PM), http://bit.ly/2bNoeKA.

NOTE for Assignment 12: In printing the sample disclosures in the textbook, they are not clearly identified for the applicable problems. The class before you cover Assignment 12, you may want to tell students that the credit card disclosure for Problem 12.3 can be found on page 238. The "longer" disclosure (which represents a new shorter version of a closing statement) on pages 239-243 is for problem 12.4.

Assignment 12:

Credit Cost Disclosures

TILA's rules about disclosure are incredibly complex and can chew up a couple of weeks of class. This book condenses and limits the coverage for two reasons. First, the students lose the key theoretical concept—that disclosure should shape behavior—if they get bogged down too much in the details of what must be disclosed. Second, these disclosures vary a great deal by credit product; each cycle of amendments to TILA has continued that trend, including Dodd-Frank's new mortgage disclosures. In the upcoming assignments that are product-specific, the book makes subsequent passes at TILA (studying, for example, the private student loan disclosures in Assignment 18 on student loans).

The text and problems focus on the core concepts of price disclosure, which make a nice link back to usury. If we aren't going to regulate price, consumers should at least know the price—and shop on it. The remedies of TILA, such as rescission, are saved for enforcement, where this kind of remedy can be compared to others.

Problems 12.1 and 12.2 are quick and provide a check-up on whether students got the basics. Both 12.3 and 12.4 ask students to study disclosures and can facilitate a discussion of the policy behind credit cost disclosures. You can easily assign one or the other, if you are running short on time. If you assign both, there is the additional benefit of being able to note the difference that careful design and consumer testing might make to the usefulness of disclosures.

Problem 12.1. This problem is designed to illustrate how Regulation Z provides clarity on the definition of what is a finance charge. Auto Advance offers the option of life insurance, sold by Auto Advance's subsidiary. A good place to start the problem is to ask someone to define and explain credit life insurance, as they may not know how it is different from regular life insurance. Typically, credit life insurance is payable to the lender and the value of the benefit declines in proportion to the loan balance. It also is expensive compared to term life insurance and, obviously, provides less flexibility and usually a shorter term of coverage. A helpful overview is Anthony Rollo, *A Primer on Consumer Credit Insurance*, 54 Consumer Fin. L.Q. 52 (2000). More recent articles note the decline of the industry, although I was shocked to learn that in 2000, about 14% of non-mortgage consumer debt was covered by credit insurance. (I think I was taught that credit insurance was a dead product back when I was in law school, but that's a non-trivial market share, and this may be a product that just will not die without an outright ban.)

The question asks whether Auto Advance has to include the insurance premium in the finance charge. The first place to go to determine if something is a finance charge is the definition in the regulation. The students have seen the basic definition in the first sentences of the regulation and may want to stop there to discuss whether the charge is "imposed indirectly" by the creditor or whether it is "incident to . . . the extension of credit." The answer is likely "yes" in both regards. If they read on, Regulation Z explicitly addresses charges by third parties. 12 C.F.R. § 1026.4(a)(1). The problem is ambiguous on whether Auto Advance is being paid to sell the insurance. Presumably it gets some financial benefit, and so the premiums must be included in the finance charge "to the extent of the portion retained." § 1026.4(a)(1)(i). This will be difficult for a consumer to discern, making it easy for Auto Advance and Insure Advance to frustrate the disclosure regime with intercompany transfers. Alternatively, perhaps a court would not consider a charge by a subsidiary to be a third-party charge at all and, therefore, would hold it to be part of the finance charge.

Section 1026.4(b) is labeled "Examples of Finance Charge." The list is not exclusive, but if a cost is on the list, it is almost certainly a finance charge and would be so held by a court, given the deference to Regulation Z that is illustrated by *Household v. Pfenning*. The premiums are "charges for credit life, accident, health, or loss-of-income insurance, written in connection with a credit transaction." 12 C.F.R. § 1026.4(b)(7). Some students will stop there, and they will have made a mistake. Indeed, one seemingly quick way to teach this problem is to announce that the insurance is a finance charge per § 1026.4(b)(7) and move on to Problem 12.2. If nobody challenges you, you'll learn something about class preparation and need to emphasize reading the entire statute.

Section 1026.4(d)(1) has specific rules pertaining to insurance that refine the "insurance is a finance charge" rule of subsection (b). There are three conditions that must be met to exclude insurance from the finance charge. First, the insurance must be "voluntary" and that must be disclosed in writing. Second, the premium for the initial term of insurance must also disclosed in writing (d)(1)(ii). Third, the consumer must "sign or initial an affirmative written request for the insurance" after receiving disclosures (d)(1)(iii).

The problem is clear that consumers are given an insurance information sheet so we have some written disclosure here. It seems to contain the required information on the premium, but it is much less clear whether consumers must affirmatively indicate in writing that they want the insurance. Also, while the problem says that borrowers are offered "the option" of purchasing the insurance, suggesting it is voluntary, the problem does not say whether that fact is disclosed in writing. One can also explore just how "voluntary" something is when 99% of consumers are apparently opting for it. Also, there may be additional disclosures required by insurance law, another example of a possible consumer law not covered in the course.

Bottom line: the insurance premiums probably should be included in the finance charge, subject to the missing information about the transaction identified above.

Problem 12.2. This is a straightforward problem that simply tests whether the students mastered the text. There are two blank fields, and the book explains both concepts. The "Amount Financed" is calculated by subtracting the finance charge from the Total of Payments (because the "finance charge" and the "amount financed" are the two exclusive categories into which everything that is paid should go.) It is $6,107.50. The other field, "Amount of Payments", is simple math. There will be 36 monthly payments, assumed here to be equal, and the total to be paid is $7,604. Each payment will therefore be $211.23.

If you are not covering Problem 12.4, you can pause here to ask how are Annual Percentage Rate and Finance Charge given differently in the disclosure than other terms. The answer is that the all capital letter font is supposed to be making them "more conspicuous" as required by 15 U.S.C. § 1632. You can also ask "What is the interest rate?" and see if you can get anybody to bite that it is 14.84%, which is the APR—and unlikely to be the interest rate. To determine whether the interest rate is identical to the APR, the student would have to know what types of fees might be included in the finance charge that would up the APR from the stated interest rate in the note. The fees that are often larded onto transactions that dramatically increase the APR compared to the interest rate discussed in Assignment 16, Automobile Transactions.

Problem 12.3. This is the dreaded "no correct answer" problem. Students should see that Haynes cannot possibly recommend a card with precision without a crystal ball that reveals Clarice's future use of the card. The best that can be done now is to look at her current priorities, which the problem identifies as "lowest cost" and "least risk of fees." But even these are difficult as they both again depend on what she does with the card. The annual fee, however, is as certain as the next faculty meeting having some component of wasted time. If Clarice takes the Titanium card, she pays $99, right away. This will undoubtedly push her toward the Kryptonite card with its no annual fee structure. The "lowest cost" may point the other direction, however, as the Titanium card has a 7.75% APR for purchases versus the Kryptonite card's 13.9%. Haynes needs to know whether Clarice will pay off the balance every month, which will make the interest rate a non-existent cost due to the grace period.

There are a number of permutations to explore, depending on time. What is the likelihood that the Titanium card rate stays below 13.9%? (Interest rates can only go up from 2015, as the Fed keeps warning). Will she travel internationally? That favors the Titanium card. Will she take out cash advances? Notice that Titanium's rate there is 17.75%, not 7.75%, which makes Kryptonite 13.9% look reasonable. Will Clarice pay late? If so, the Kryptonite card is clearly preferable in terms of lower late fee. And regarding late fees, while the students are unlikely to catch it (and maybe some teachers too), there is a flat-out illegality in the late fee for the Titanium card. Under the regulations that the Federal Reserve promulgated after the enactment of the Credit CARD Act of 2009, an initial late fee cannot generally exceed

$25. The CARD act required that late fees be "reasonable and proportional." The Fed created a complicated "cost analysis" rule but there is an easy safe harbor; initial late fees cannot exceed $25. Without knowing more here, the $34 late fee is probably a violation. The disclosure may correctly reflect what Titanium Bank intends to do, but the charge itself is impermissibly high. The substantive restrictions are in 12 C.F.R. § 1026.52(b).

One nice detour is to the CFPB website that appears in the middle of the disclosure. In my classes, the students never visit the site while doing their homework, which gives me little hope that consumers (who aren't angling for an A grade) would ever do so in real life. There are some interesting things on the site, including a semi-annual survey of terms. http://www.consumerfinance.gov/data-research/credit-card-data/

You can ask the students to comment generally on the disclosures. Assuming someone like Haynes will carefully review them, are they clear? It turns out that even the standard for assessing clarity is unclear. There is a split of authority on whether that is a question of law for a court or a question of fact for the factfinder. See Brandon Mohr, *Who Decides Whether Clarity is Clear?: An Analysis of TILA's Clarity of Disclosure Requirement in Actions by Consumers Against Creditor Card Companies,* 32 PACE L. REV. 188 (2012).

The takeaway here is that the complexity of credit cards makes disclosure—and consumer choice—very difficult. This is the point of the general book on disclosure by Ben-Shahar & Schneider, and made in more detail with regard to credit cards in Ronald Mann's *Charging Ahead* (2006). In particular, chapter 12 on Contract Design contains a discussion of the barriers to outsmarting the card issuers.

Problem 12.4. This problem has two purposes—and a caveat. The main purpose is to invite a discussion about the usefulness and relevance of TILA's core concepts: finance charge, amount financed, and APR. This is discussed below. The other purpose—which I feel strongly about—is to show the students a completed disclosure. Too often, students read laws without a sense of how they translate into working documents or at most, flip through empty model forms. The CFPB's model disclosure for a fixed-rate mortgage brings home the abstract concepts in the statutes and regulations. The caveat is that the students have not yet learned about mortgages. Go lightly here and do not spend time on the closing costs or RESPA or the like, and avoid general questions like "what in this form do you not understand?" If students start to ask mortgage-specific questions, say that it is coming up. Alternatively, this is a great problem to carry over for Assignment 13 or use as a transition.

The starting place should be the statute. This is a nice reminder from Assignment 2 on administrative law. Section 1632(a) requires that the finance charge and APR be "more conspicuous" than other terms, data, or information in the disclosure. Section 1638(a), applies to "transactions other than an open end credit plan," so you can begin by reviewing that the fixed-rate mortgage shown in the disclosure would fit that category because it is a closed-ended transaction. The statute then provides a long list of items that the creditor "shall disclose." Subsections 2(A), 3, 4, 5, and 6 are all particularly relevant as these ideas were covered in the text or prior problems. You might also note that some disclosures apply only to mortgages, such as subsection 13, while some apply only to secured credit, such as subsection 9.

A visual and interactive way to teach the problem is to display all five pages of the disclosure on a white board or smart board, and ask several students to come up and annotate the form with the statutory subsections that require the information. What should quickly become clear—through this exercise or your discussion—is that the required stuff is on page 5 (of a 5-page disclosure). I wouldn't personally characterize it as "buried" but it certainly is an uphill battle to say it's "more conspicuous" (in fact, you could suggest that based on *Smith* this is the exact info that will be hard to read in the upper left corner when the disclosure is stapled.) It's also labeled "Loan Calculations," which is not a particularly helpful title and located near the "Other Disclosures" section (a snoozer of a title for sure). Many of the other disclosures are also required by TILA (e.g., consult with a tax adviser (§ 1638)(15)).

The CFPB confronted §1632(a)'s "more conspicuous" requirement directly in the revisions to Regulation Z to accompany the new mortgage disclosure. It simply added a prefatory clause to its regulation, §1026.17(a), that provided that the conspicuousness requirement is inapplicable to disclosures required by §1026(e), (f), and (g). Those regulations, in turn, require the disclosures described in 1026.38 "Content of Disclosures for Certain Mortgage Transactions (Closing Disclosures)". The relevant sections on APR, finance charge, and amount financed are in subpart (o). It's a long regulation, and some students will not have waded through to find it. But come on, their role here is deputy compliance counsel; those people live for long regulations!

The discussion can then turn to whether the CFPB exceeded its authority in relegating the APR and finance charge to page 5—demoting them from the "more conspicuous" level that Congress mandated in TILA. The CFPB, in its rulemaking, relied on its general authority to prescribe regulations for TILA (15 U.S.C. §1604) as well as Dodd-Frank's mandate to create a new mortgage disclosure. These may not be sufficient to override a specific statute. Upworthy could threaten to challenge the legality of the form as a way of taking the heat off of it during an examination.

Of course, the CFPB might be undaunted by such a lawsuit. It will certainly have a great deal of evidence for a court, as the CFPB did extensive consumer testing for the mortgage disclosures. In fact, it is that very testing that led the CFPB to a determination that the key aspects of a TILA disclosure—in point of fact—were confusing to consumers. In its 553-page Report on Consumer Testing, the CFPB concludes that "Most consumer participants were confused by the APR and could not explain the difference between the APR and interest rate." (p. 61). The CFPB found, "When asked what APR was, most could only recite the definition provided. When probed about its meaning, almost all consumer participants struggled."

> *Well the annual one is maybe once a year or something and the interest rate probably is…I don't know. I am not sure.* (CA-004)
>
> *Maybe they figured it [APR] in as this is the interest rate but maybe it is calculated on the year? This is maybe per month; that is per year. I am not sure.* (CA-006)
>
> *I'm looking at the APR. Your interest combined with the fees over 30 years has a yearly value, so I'm not exactly sure—I assume but I'm not entirely sure if we're talking interest rate of 2 and 3/4 and then I see here the APR of 3.28…if this is the one that relates to this. It appears that way, but I'm not sure.* (CA-007)
>
> *The APR. I am not sure what that would be.* (CA-008)

Some of these answers sound eerily like final exams testing student knowledge of APR.

The reality is that APR it is a very hard concept, a fact that the CFPB demonstrated with testing. The entire report is available at http://1.usa.gov/1Ppoqex. The difficulty with APR and finance charge—and the better ways to express these ideas that the CFPB came up with in the first few pages of its disclosures—illustrate the difficulty in designing disclosures. Without extensive testing, the disclosures often add to confusion. Congress, and even agencies, have little expertise in cognitive capacity and behavioral decision-making (notice that the CFPB hired outside experts to test the mortgage disclosures). While the CFPB may be disobeying the letter of TILA laws §§ 1632 and 1638, it is certainly acting in the spirit of creating meaningful disclosures that encourage consumer understanding of product terms—by putting the very information that TILA mandates in a discrete, rather than conspicuous, location. In fact, the initial empirical evidence seems to be that the new mortgage disclosures are working. The American Land Title Association found that 92% of homebuyers said they reviewed the disclosures after the effective date in October 2015, versus 74% of homebuyers in a similarly sized sample before the new disclosures became effective. Jacob Passy, *Post-TRID, More Homebuyers Reading Their Mortgage Disclosures*, AM. BANKER (May 23, 2016), http://www.americanbanker.com/news/consumer-finance/post-trid-more-homebuyers-reading-their-mortgage-disclosures-1081132-1.html.

Final note: The above site also has a "before and after" comparison of the closing disclosures, which can be a useful way to end this problem or to use in Assignment 13, Home Purchases. Try to resist teaching them about the old disclosures—the new world of a combined TILA-RESPA disclosure is the only one that students will know, so walking them through an old HUD-1 is just at painful trip down memory lane.

Assignment 13:

Home Purchases

These two Assignments on homeownership were a challenge, given the state of the law and market. In many respects the case law is truly nonexistent, and the market is nascent or even comatose. As this book went to print, here was the state of things:

- The new TILA/RESPA integrated disclosure ("TRID," in industry speak; "Know Before You Owe" in CFPB speak) became effective October 3, 2015, so there is very limited information on how they will work in operation.
- Fannie and Freddie remain in conservatorship with FHFA as their overseer. While there is widespread agreement that nothing will be done until Congress "does its job," there is no sense of when that might occur.
- Private label securitization remains dormant, but the legal framework is there for it to spring back to life. It seems unlikely, in the long term, that the government will provide all the liquidity that the housing market will seek.
- The qualified-mortgage and ability-to-repay (ATR) standards are relatively untested. While the rules took hold a while ago, the CFPB rule that any loan guaranteed by Fannie or Freddie is deemed a qualified mortgage means that until the private market heats up, there is only a small market of lenders having to apply the QM standard as written. The non-QM market is even smaller, leaving more uncertainty about ability-to-repay.
- The small numbers and recent origination of the non-QM/ATR loans means that the enforcement mechanisms, including defense to foreclosure, for these loans are untested.
- Foreclosures are on the decline. The loss mitigation rules from the National Mortgage Settlement of 2012, and the CFPB rules in 2014 and successive updates thereto, seem to have taken hold. However, the mac-daddy of loan modification programs, HAMP, expires December 2016. Nobody is certain whether its fundamental principles such as net present value will endure, and what options will be available.

Despite all that uncertainty, I tried to focus on the future. It is sorely tempting to let these assignments turn into a lecture on the financial crisis. While students can benefit from that background, and I open the assignment with a quote from the Financial Inquiry Commission Report, the reality is that many of them were in high school in 2008 when the crisis occurred. They never experienced a world of subprime loans as consumers. That said, many have "seen the movie" such as The Big Short are keenly interested in the topic. The "new" law of Dodd-Frank, with its qualified mortgage, CFPB, revised mortgage disclosure, etc., is the only law that they know. Forge ahead, and try to resist too much reminiscing about past illegal practices.

This is one area where we are all scrambling to keep up with events. One of the best sources is the CFPB's website itself. They do a nice job of creating summaries, charts, and compliance guides that are easier to parse than the regulation. Another great source is found in the ABA's annual Survey of Consumer Financial Services. The most recent is Jonathan W. Cannon et al., TILA-RESPA Integrated Disclosures, *Survey of Consumer Financial Services*, 71 BUS. LAW. 639 (2016). It contains an excellent summary of the Loan Estimate and Closing Cost disclosure regulation, replete with statutory citations, as well as a look at specific implementation challenges. As of October 2016, the CFPB is also proposing yet more changes to the disclosures. While these are in response to complaints from industry, and likely will be improvements, the pace of change is tough. I've tried very hard to create problems that will withstand such changes, and problem 13.3 is an explicit nod to the implementation difficulties.

Another challenge with these assignments was trying to divide the material. While debt collection and enforcement are saved for Part IV of the book so that students can compare remedies across laws, there was just too much in the way of specialized mortgage remedies to save it all for there. As a result, in the second assignment, there is a look at loan modifications in the context of servicing and looks at two special defenses to foreclosure: TILA rescission and violation of ability to repay.

Much of Assignment 13 is devoted to background knowledge and vocabulary. The focus is on legal issues such as home warranties that arise even in a cash purchase. The second homeownership assignment focuses on mortgage lending, particularly underwriting standards, and mortgage servicing.

Some may feel that the introductory section is too basic. I caution against that impulse. In my public role as mortgage monitor for the state of California, I did dozens of public outreach events. Most people, even those who had caught onto the idea of some legal theory like "show the note," were themselves fuzzy on exactly what the documents and actors are in a mortgage transaction. Without the basic vocabulary, the law becomes rules to be memorized, rather than a system of protection imbedded in a functioning market. As a final pitch for starting at the very beginning (what is a note? what does a realtor do?), remember that law students often are about to be first-time homebuyers. If we are counting on the educated few to police the market for the unknowing many, we need to do our part in creating the educated few.

Problem 13.1. This problem involves the timing of disclosures. The dates start running from the "application" for the loan, defined in 12 C.F.R. § 1026.2(a)(3). At that point, the originator must get the Loan Estimate to consumer no later than the third business day. 12

C.F.R. § 1026/19(e)(1)(iii)(A). It may be delivered or placed in mail, and is deemed to have been received three business days after delivered or placed in mail. 12 C.F.R. § 1026.19(e)(1)(iv).

The lender also must deliver a Closing Cost disclosure. This is the five-page document (example shown in problem 12.4) that represents what used to be shown on the separate TIL/HUD-1 disclosures. The law requires that the Closing Disclosure must be given out at least three business days prior to "consummation." The latter term is also statutorily defined, but generally represents when the consumer becomes obligated under the loan.

The challenge here is how you count days, especially given the weekend days and holidays. Students who quickly concluded that the answer was just "three" are in for a ride. The Kirks submitted their application on Wednesday December 30th. In response, the loan officer, Alberto, mailed the Loan Estimate to the Kirks on January 4th. This is clearly more than three days in the ordinary sense, but the regulation defines "business day" for this context as day on which the creditor's offices are open to the public for carrying out substantially all of its business functions. 12 C.F.R. § 1026.2(a)(6). That definition, however, only applies for the Loan Estimate. There is a different—inconsistent—definition of business day for determining the last possible time to deliver the Closing Disclosure. Section 1026.2(a)(6) says that it does not apply for purposes of §§ 1026.19(f)(1)(ii) and (f)(1)(iii). In those situations, "business day" means all calendar days except Sundays and federal public holidays. Section 1026.19(f) is the Closing Disclosure, "disclosures in 1026.38 reflecting the actual terms of the transaction."

This means that the three-day count needs to be done separately for the Loan Estimate and the Closing Disclosure. For the Loan Estimate, the application was received on December 30th and placed in the mail to them on January 4th. Was the mortgage lender "open to the public for carrying on substantially all of its business functions" on the days of December 31? January 1? January 2? January 3? The problem specifies that January 4th, when the Loan Estimate was mailed, was a Monday, so if the lender is not normally open weekends and is closed federal holidays, only one day has elapsed December 31. But if the lender is open weekends, including even weekends near holidays, the three-day limit was exceeded (the 31st, 2nd, and 3rd—those are the three days in which the lender needed to act.

This opens up the Pandora's box of how one should count days, which the students may have seen in Civil Procedure. The rule for the good faith Loan Estimate says the creditor shall act "not later than the third business day after receipt of the application." I think that means the day of receipt does not count, but at the start of the fourth day after receipt, the creditor is late. Here, receipt on December 31; this date does not count. But if the lender is continually open for business, including weekends and holidays, then January 1, 2, and 3 is the three days and day 4 is too late.

With regard to the Closing Cost disclosure, it was mailed on Friday January 15th. Here, the clock runs backward from when the consumer consummates the loan. This means if there is a procrastinating consumer or delay in the sale for any reason, the lender will need to double-check the count, and possibly resend the Closing Cost disclosures. There is one easy evidentiary issue for the lender here, which is that the Kirks replied back on Friday January 15th. That email response of "Thanks!" can be offered as evidence of receipt. Comments to 12 C.F.R. §§1019(f)(1)(iii)-1 and -2. So the consumer received it on Friday the 15th—if the lender is open the 16th, 17th, 18th, such that those are all business days under the general definition of § 1026.2(a)(6), then the 19th seems to run into the three-day window. But wait, the delivery of Closing Cost disclosures can be early—it just cannot be "*later* (emphasis added) than three business days before consummation." 12 C.F.R. § 1026.19(f)(1)(ii). So delivery on January 15th for a loan closing January 19th is just fine, assuming the lender was open 16th, 17th, 18th, and 19th.

One thing that is *not* an issue in this problem, but lenders have raised concerns about, is that there is also a waiting period between delivery of the Loan Estimate and when the loan may be consummated (formerly called "closed.") The period between January 4 and January 19th is clearly longer than 7 days.

This problem is highly technical by design, and some will choose to skip it for that reason. The point of the problem, however, is to expose students to how exacting mortgage regulation is today. If the students think these rules are tricky, ask them to imagine that they are a junior compliance officer (a role typically held by early-career lawyers at a huge lender). How will they teach these rules to the kind of workforce that may process loans? How will they monitor if things are being done correctly? The problem's most artificial aspect is that a loan officer could ever get up the chain of command to a chief compliance officer for review work. A lot of actual compliance with these rules will rest on the quality of originator's technology.

Another important discussion to have with regard to this problem is to ask *why* there are time limits. What are consumers supposed to be doing with their three days? I think there are at least two good answers. The traditional one is that the consumer is supposed to take the Loan Estimate and shop against other lenders. I am dubious this will ever occur. The second one is for the consumer to have a chance to read, review, get help, ask questions, etc. as part of understanding the transaction. The rule that the Closing Disclosure must be delivered at least three days before consummation could be important in this regard. Prior to this regulation, people saw the Closing Disclosure right on the day of consummation; this is a tough time to walk away and most people are weary of reading and signing documents at that point. Consumers should also be comparing the Loan Estimate to the Closing Disclosure and being sure that nothing changed, or if so, the change was proper. The industry response is that having to give a three-day waiting period after providing a corrected Closing Disclosure—because the previously disclosed information became inaccurate—can lead to numerous delays in closing.

Problem 13.2. This is an opportunity to talk about *Horiike* and real estate agents. I think this material gets short shrift in most consumer law books (often not covered at all) but that many consumers fail to understand the duties, and limitations on the duties, of realtors. This is also one of the few areas of homeownership law that did not change dramatically after the foreclosure crisis. Whether that means the law was sound or that the political power of Realtors® is big, I do not know.

The theory of recovery against Clinton Realty would be breach of fiduciary duty. The hard issue is figuring out who owes a duty to whom. It doesn't hurt to start the problem by reviewing the rules outside the dual agency space. Explain that a seller's agent (listing agent) acts on behalf of the seller, but that they also have duties to the buyer—and to the buyer's realtor who is an agent of the buyer. *Horiike* explains. "The seller's agent has obligations to both the buyer and the seller to exercise reasonable skill and care, as well as a duty of fair dealing and good faith, and a 'duty to disclose all facts known to the agent materially affecting the value or desirability of the property that are not known to, or within the diligent attention and observation of, the parties.'" *Horiike* at 249.

In *Horiike*, the issue was the different typologies of real estate people. In California, an "agent" is a licensed real estate broker, whereas an "associate licensee" acts under the agent (usually because of a contract to act as the broker's agent). Cortazzo, the seller's representative, was an associate licensee of Coldwell Banker. Namba, the buyer's representative, apparently was also an "associate licensee" of Coldwell Banker, although the case describes him only as a "salesperson," which does not fit into the California Civil Code descriptions of actors. The court determined that because Cortazzo owed a fiduciary duty to his principal—Coldwell Banker—and that same principal owed duties to the buyer (Horiike) by virtue of Namba's being his salesperson.

If the court hearing Hubert's dispute followed *Horiike*, it would hold that Clinton Realty was a dual agent that had a fiduciary duty to both the seller and the buyer. The dual agency agreement obligated Clinton Realty to disclose all "material defects" in the property. But is the pet covenant a "defect?" Many people would find such a covenant attractive, even though Barret and Amanda found it abhorrent. It certainly was "material" to them, and Hillary had notice about this.

Should Hillary have inquired about the pet covenant? What if she had asked Bill and he missed it? Isn't the entire purpose of the title opinion to find out this kind of thing—which wouldn't normally be known to the seller's agent—and maybe not even to the seller (presumably Hubert has no pets).

If this all seems far-fetched (and you thought a dispute over 4,000 square feet of livable space in a Malibu mansion seemed down to earth), see *Bazal v. Rhines*, 600 N.W.2d 327 (Iowa Ct. App. 1999). The court ruled that a real estate broker who represented purchasers had breached her fiduciary duty and duty of good faith to sellers who had listed property for sale with her realty agency because the selling broker failed to disclose a restrictive covenant of one-dog-per parcel. In reaching this determination, the court relied on part that the broker had knowledge that the purchaser owned four dogs.

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As you pull on reading glasses (or wonder if you need) them, let me spare you: the deviations are extremely minor. For example, the words "YES" under "In Escrow" (mid-bottom right hand error) are justified in the actual Loan Estimate but not in the CFPB's model. Another complaint was that in the three main lines (Loan Amount, Interest Rate, and Monthly Principal & Interest), the spacing of the text is sometimes top justified and sometimes appears in the middle (vertically) of the line. Look at the word "NO" that appears and see how it is vertically centered for the Interest Rate line in the middle of the space, but up at the top, near the dividing line between items, for Monthly P&I. Concern was raised too about the empty spaces after the inserted numbers in the Estimated Closing Cost line (see empty space after "$5,234" and "in Loan Costs".) The CFPB's sample does not have such spaces. The CFPB, of course, was not mass generating forms using templates that needed to leave large blanks to accommodate potentially large numbers. The CFPB spent a great deal of time and money to create the maximally readable and understandable disclosure; perhaps these small errors undermine a lot of its work. The regulation is exacting. Disclosures "shall be made in the same order, and positioned relative to the master headings, headings, subheadings, labels, and similar designations in the same manner, as shown in form H–24" (set forth in an appendix to Regulation Z). 12 C.F.R. § 1026.37(o)(2)(ii). Does the Loan Estimate in Problem 13.3 meet that standard?

Although the students would not know this from the facts given in the problem, with this particular disclosure, there were also rounding errors at the pennies level. The sexy topic of rounding is described at length in 12 C.F.R. § 1026.37(o)(4). The Loan Estimate in Problem 13.3 simply dropped the pennies, rather than rounding up to the nearest dollar as required. The lender's software was programmed differently for generating the Closing Disclosure, and as required rounded up to the nearest dollar. The due diligence team for the secondary market purchaser caught the discrepancy (yes, in pennies) between the Loan Estimate and the Closing Disclosure and threw a fit.

The concern came not from the size of the error but from the potential scope of liability. Everybody agreed that the Loan Estimate errors did not meet the triggers for a required re-disclosure of the Loan Estimate during the pre-consummation period. 12 C.F.R. § 1026.19(3)(e) (e.g., the rounding error always worked in the consumer's favor so they were not charged more than the estimated disclosure). There is fear that the liability rules may not have such tolerance. Part of the difficulty is that the tolerance rules vary depending on what is being disclosed. There is zero tolerance for fees paid to the creditor or fees paid to an unaffiliated third party if the consumer could not shop for the service. 12 C.F.R. § 1026.19(e)(3)(ii). Further, all disclosures on the Loan Estimate must be made in "good faith," which seems reasonable at first glance. 12 C.F.R. § 1026.19(e)(3). An increase in what the consumer pays, however, from what is on the Loan Estimate vitiates good faith, regardless of whether the problem was technical or a miscalculation. *Id.*

And, of course, the fact that the Closing Disclosure was correct likely does not vitiate errors in the Loan Estimate. The result, as described to me by one lenders' counsel, is to bury consumers in re-disclosure. The Loan Estimate may be slimmed down to three pages but if you get 10 copies of it, you may not bother to read any of them or may review an incorrect version.

In this problem, the red flag is coming up after consummation, so the lender is just stuck with the paper on its books. That may not seem so bad, and it certainly isn't from this consumer's perspective. But these kinds of issues, aggregated and repeated, create major friction in the secondary housing market. A good discussion of the problem created by disclosure implementation is Kate Berry, *More TRID Problems: Wary Investors Kicking Back More Mortgages*, AMERICAN BANKER (Dec. 21, 2015) (describing lenders and investors grappling with issues such as "the proper use of hyphens, supplying figures with an ample number of decimal places, and the correct spelling of counterparty names.")

The liability can be steep. Putting aside the private right of action and assignee liability, the CFPB can impose large regulatory penalties on lenders. They would like a rule change to give them a right to cure for 30 days after consummation. This would let them correct things flagged by due diligence in selling the loan. It's difficult to see here, however, how there could be any meaningful correction. An incorrect Loan Estimate, later updated with a correct Closing Disclosure, is always there, having shaped (or not shaped) the client's behavior. Some might say that a better rule is to curb liability for Loan Estimates but if we have sloppy Loan Estimates, then we defeat some of the purpose of the disclosure.

When lenders complain about overregulation and its harms, this is the kind of situation that illustrates its point. The lenders also say that it is impossible to guarantee bug-free technology; the idea of perfection in disclosure just cannot be reconciled with modern software development. Indeed, “agile development,” a hot buzzword in software, really just means to let the mistakes roll as a way of ultimately ensuring an error-free product.

Assignment 13:

Home Purchases

These two Assignments on homeownership were a challenge, given the state of the law and market. In many respects the case law is truly nonexistent, and the market is nascent or even comatose. As this book went to print, here was the state of things:

- The new TILA/RESPA integrated disclosure ("TRID," in industry speak; "Know Before You Owe" in CFPB speak) became effective October 3, 2015, so there is very limited information on how they will work in operation.
- Fannie and Freddie remain in conservatorship with FHFA as their overseer. While there is widespread agreement that nothing will be done until Congress "does its job," there is no sense of when that might occur.
- Private label securitization remains dormant, but the legal framework is there for it to spring back to life. It seems unlikely, in the long term, that the government will provide all the liquidity that the housing market will seek.
- The qualified-mortgage and ability-to-repay (ATR) standards are relatively untested. While the rules took hold a while ago, the CFPB rule that any loan guaranteed by Fannie or Freddie is deemed a qualified mortgage means that until the private market heats up, there is only a small market of lenders having to apply the QM standard as written. The non-QM market is even smaller, leaving more uncertainty about ability-to-repay.
- The small numbers and recent origination of the non-QM/ATR loans means that the enforcement mechanisms, including defense to foreclosure, for these loans are untested.
- Foreclosures are on the decline. The loss mitigation rules from the National Mortgage Settlement of 2012, and the CFPB rules in 2014 and successive updates thereto, seem to have taken hold. However, the mac-daddy of loan modification programs, HAMP, expires December 2016. Nobody is certain whether its fundamental principles such as net present value will endure, and what options will be available.

Despite all that uncertainty, I tried to focus on the future. It is sorely tempting to let these assignments turn into a lecture on the financial crisis. While students can benefit from that background, and I open the assignment with a quote from the Financial Inquiry Commission Report, the reality is that many of them were in high school in 2008 when the crisis occurred. They never experienced a world of subprime loans as consumers. That said, many have "seen the movie" such as The Big Short are keenly interested in the topic. The "new" law of Dodd-Frank, with its qualified mortgage, CFPB, revised mortgage disclosure, etc., is the only law that they know. Forge ahead, and try to resist too much reminiscing about past illegal practices.

This is one area where we are all scrambling to keep up with events. One of the best sources is the CFPB's website itself. They do a nice job of creating summaries, charts, and compliance guides that are easier to parse than the regulation. Another great source is found in the ABA's annual Survey of Consumer Financial Services. The most recent is Jonathan W. Cannon et al., TILA-RESPA Integrated Disclosures, *Survey of Consumer Financial Services*, 71 BUS. LAW. 639 (2016). It contains an excellent summary of the Loan Estimate and Closing Cost disclosure regulation, replete with statutory citations, as well as a look at specific implementation challenges. As of October 2016, the CFPB is also proposing yet more changes to the disclosures. While these are in response to complaints from industry, and likely will be improvements, the pace of change is tough. I've tried very hard to create problems that will withstand such changes, and problem 13.3 is an explicit nod to the implementation difficulties.

Another challenge with these assignments was trying to divide the material. While debt collection and enforcement are saved for Part IV of the book so that students can compare remedies across laws, there was just too much in the way of specialized mortgage remedies to save it all for there. As a result, in the second assignment, there is a look at loan modifications in the context of servicing and looks at two special defenses to foreclosure: TILA rescission and violation of ability to repay.

Much of Assignment 13 is devoted to background knowledge and vocabulary. The focus is on legal issues such as home warranties that arise even in a cash purchase. The second homeownership assignment focuses on mortgage lending, particularly underwriting standards, and mortgage servicing.

Some may feel that the introductory section is too basic. I caution against that impulse. In my public role as mortgage monitor for the state of California, I did dozens of public outreach events. Most people, even those who had caught onto the idea of some legal theory like "show the note," were themselves fuzzy on exactly what the documents and actors are in a mortgage transaction. Without the basic vocabulary, the law becomes rules to be memorized, rather than a system of protection imbedded in a functioning market. As a final pitch for starting at the very beginning (what is a note? what does a realtor do?), remember that law students often are about to be first-time homebuyers. If we are counting on the educated few to police the market for the unknowing many, we need to do our part in creating the educated few.

Problem 13.1. This problem involves the timing of disclosures. The dates start running from the "application" for the loan, defined in 12 C.F.R. § 1026.2(a)(3). At that point, the originator must get the Loan Estimate to consumer no later than the third business day. 12

C.F.R. § 1026/19(e)(1)(iii)(A). It may be delivered or placed in mail, and is deemed to have been received three business days after delivered or placed in mail. 12 C.F.R. § 1026.19(e)(1)(iv).

The lender also must deliver a Closing Cost disclosure. This is the five-page document (example shown in problem 12.4) that represents what used to be shown on the separate TIL/HUD-1 disclosures. The law requires that the Closing Disclosure must be given out at least three business days prior to "consummation." The latter term is also statutorily defined, but generally represents when the consumer becomes obligated under the loan.

The challenge here is how you count days, especially given the weekend days and holidays. Students who quickly concluded that the answer was just "three" are in for a ride. The Kirks submitted their application on Wednesday December 30th. In response, the loan officer, Alberto, mailed the Loan Estimate to the Kirks on January 4th. This is clearly more than three days in the ordinary sense, but the regulation defines "business day" for this context as day on which the creditor's offices are open to the public for carrying out substantially all of its business functions. 12 C.F.R. § 1026.2(a)(6). That definition, however, only applies for the Loan Estimate. There is a different—inconsistent—definition of business day for determining the last possible time to deliver the Closing Disclosure. Section 1026.2(a)(6) says that it does not apply for purposes of §§ 1026.19(f)(1)(ii) and (f)(1)(iii). In those situations, "business day" means all calendar days except Sundays and federal public holidays. Section 1026.19(f) is the Closing Disclosure, "disclosures in 1026.38 reflecting the actual terms of the transaction."

This means that the three-day count needs to be done separately for the Loan Estimate and the Closing Disclosure. For the Loan Estimate, the application was received on December 30th and placed in the mail to them on January 4th. Was the mortgage lender "open to the public for carrying on substantially all of its business functions" on the days of December 31? January 1? January 2? January 3? The problem specifies that January 4th, when the Loan Estimate was mailed, was a Monday, so if the lender is not normally open weekends and is closed federal holidays, only one day has elapsed December 31. But if the lender is open weekends, including even weekends near holidays, the three-day limit was exceeded (the 31st, 2nd, and 3rd—those are the three days in which the lender needed to act.

This opens up the Pandora's box of how one should count days, which the students may have seen in Civil Procedure. The rule for the good faith Loan Estimate says the creditor shall act "not later than the third business day after receipt of the application." I think that means the day of receipt does not count, but at the start of the fourth day after receipt, the creditor is late. Here, receipt on December 31; this date does not count. But if the lender is continually open for business, including weekends and holidays, then January 1, 2, and 3 is the three days and day 4 is too late.

With regard to the Closing Cost disclosure, it was mailed on Friday January 15^{th}. Here, the clock runs backward from when the consumer consummates the loan. This means if there is a procrastinating consumer or delay in the sale for any reason, the lender will need to double-check the count, and possibly resend the Closing Cost disclosures. There is one easy evidentiary issue for the lender here, which is that the Kirks replied back on Friday January 15^{th}. That email response of "Thanks!" can be offered as evidence of receipt. Comments to 12 C.F.R. §§1019(f)(1)(iii)-1 and -2. So the consumer received it on Friday the 15^{th}—if the lender is open the 16^{th}, 17^{th}, 18^{th}, such that those are all business days under the general definition of § 1026.2(a)(6), then the 19^{th} seems to run into the three-day window. But wait, the delivery of Closing Cost disclosures can be early—it just cannot be "*later* (emphasis added) than three business days before consummation." 12 C.F.R. § 1026.19(f)(1)(ii). So delivery on January 15^{th} for a loan closing January 19^{th} is just fine, assuming the lender was open 16^{th}, 17^{th}, 18^{th}, and 19^{th}.

One thing that is *not* an issue in this problem, but lenders have raised concerns about, is that there is also a waiting period between delivery of the Loan Estimate and when the loan may be consummated (formerly called "closed.") The period between January 4 and January 19^{th} is clearly longer than 7 days.

This problem is highly technical by design, and some will choose to skip it for that reason. The point of the problem, however, is to expose students to how exacting mortgage regulation is today. If the students think these rules are tricky, ask them to imagine that they are a junior compliance officer (a role typically held by early-career lawyers at a huge lender). How will they teach these rules to the kind of workforce that may process loans? How will they monitor if things are being done correctly? The problem's most artificial aspect is that a loan officer could ever get up the chain of command to a chief compliance officer for review work. A lot of actual compliance with these rules will rest on the quality of originator's technology.

Another important discussion to have with regard to this problem is to ask *why* there are time limits. What are consumers supposed to be doing with their three days? I think there are at least two good answers. The traditional one is that the consumer is supposed to take the Loan Estimate and shop against other lenders. I am dubious this will ever occur. The second one is for the consumer to have a chance to read, review, get help, ask questions, etc. as part of understanding the transaction. The rule that the Closing Disclosure must be delivered at least three days before consummation could be important in this regard. Prior to this regulation, people saw the Closing Disclosure right on the day of consummation; this is a tough time to walk away and most people are weary of reading and signing documents at that point. Consumers should also be comparing the Loan Estimate to the Closing Disclosure and being sure that nothing changed, or if so, the change was proper. The industry response is that having to give a three-day waiting period after providing a corrected Closing Disclosure—because the previously disclosed information became inaccurate—can lead to numerous delays in closing.

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Assignment 14:

Home Mortgages

NOTE: There are two mistakes in the references to the problems.

- In problem 14.1, the statutory reference to 15 U.S.C. § 1939c should be to § 1639c.
- In problem 14.4, the statutory reference to Cal. Civ. Code § 2924.28(d) should be to § 2923.6.

This Assignment is the second half of the consumer laws that apply to homeownership. At the outset, I should note that there is a strong case for covering landlord-tenant law in a consumer law book. Only about half of families own their homes, and landlord-tenant disputes are way more common than homeownership troubles. That conceded, my impression is that landlord-tenant gets some coverage in most property courses, whereas residential home mortgages are essentially ignored. (Please write me if you have thinking to the contrary). The origination discussion also ignores refinance transactions, which have their own set of ability-to-repay rules references "standard mortgages." 12 C.F.R. § 1026.43(d). I decided this was just too much pain, even for me, and that perhaps with rates having been so low in the years leading up to this book's publication, refinances will be rather unusual (self-justifying, I know).

The focus here is on the origination and repayment of mortgages. The first two problems cover the legally required underwriting standard and the consequence of violating it. The third problem examines transfers of a loan to a new servicer and the difficulty of crafting accurate but comprehensible communications to consumers. It also opens the door to a discussion on loss mitigation programs and process. The last problem considers one of the most vexing problems of mortgage servicing—the definition of a "complete application." Minimal coverage should include at least a couple of the subparts in Problem 14.1, and either 14.3 or 14.4, or something of your own design that looks at issues of payment histories, servicing, or loss mitigation.

It's hard to feel confident about the answers to these problems, although I think the problems themselves raise many of the most interesting, and likely enduring, issues. Servicing rules have already changed since the publication of the book in spring 2016. The CFPB issued new rules in August 2016, most of which take effect in August 2017, some February 2018. A summary is here: https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/08042016_cfpb_Mortgage_Servicing_Executive_Summary.pdf

The biggest change may be the elimination of the "one bite at the apple" rule. I thought this was so terrible that I never discussed it in textbook, in the hope it would change—and it has. Now so long as a homeowner becomes current, if they later again become delinquent, they are entitled to a new round of loss mitigation. The CFPB also went a long ways towards cleaning up the mess that was the rights for loan modification of successors in interest to a delinquent mortgage.

The origination market may change substantially if/when housing finance reform reshapes Fannie/Freddie. I suspect, however, that the new normal will be mostly qualified mortgages, even if the private label securitization market comes roaring back. Also, Dodd-Frank requires a five-year look back at the qualified mortgage definition. That is something to keep your eye on in future years, although given the pace of such studies, the book may be revised by then. Servicing rules are dense; nobody—not even the rule lawyers at the CFPB—seem eager to revisit those. They proscribe process, however, not programs. With the expiration of the government's HAMP program in December 2016, the substantive terms of loan modifications are highly uncertain.

I've put in several references to sources that I used in preparing the discussion below about each problem. As things evolve, they may become outdated. My top suggestions for references on mortgage issues are the National Consumer Law Center guide, FORECLOSURES AND MORTGAGE SERVICING (5th ed. 2014) ; the CFPB's own website that continues to provide useful guides for consumers, financial institutions, and the general public at http://www.consumerfinance.gov/mortgage/; and the Mortgage Bankers Association "Issues" page, https://www.mba.org/issues.

Problem 14.1. This problem can be expanded or contracted to fit your interest and time. One way to do so is to only assign a couple of the subparts. Another way is to give the answer, focusing on the doctrine, but avoid discussing the rationale for the answer (or alternative approaches that could have been used).

Each problem gives a number of details about the loan; I do not repeat them below. If you want to explore the problem in a general way before diving into the specifics, ask the class "What aspects of a mortgage transaction that are not listed below might be relevant?" The obvious answer is down payment. This was ruled out by the statute itself; see 15 U.S.C. § 1639c(a)(3) ("shall include consideration of . . . [listing factors] . . . "other than the consumer's equity in the dwelling or real property that secures repayment of the loan." Other suggestions might come up. At their worst, the answers for criteria border on credit discrimination (whether the homebuyer has kids or lives in a neighborhood with a high foreclosure rate). At their best, the students may have some interesting ideas about alternative approaches. A few to throw out if they come up empty-headed are: years on the job (likely to correlate with a propensity for income stability), whether the person has been a homebuyer before and the outcome of that experience, and the type of foreclosure laws in the state.

Another way to open up the problem is to look at the relevant statute, 15 U.S.C. § 1639c—NOT § 1639(c). Help the students see that the entirety of this enormous rule is shoved under 1639. Why? Because TILA § 1640 is the general liability rule across all financial products and to renumber it would have required a gigantic lift.

The ability to repay rule has a clear theme of "reasonableness." Creditors should act in a "reasonable" way in making their good faith determination of underwriting (a process point) and should also reach a "reasonable" conclusion about ability to repay (a substance point). The statute gives a lot of room for regulations to pin down the specifics, and contemplates regulations in its prefatory language. Congress specified certain points, however, including that taxes and insurance should be taken into consideration in underwriting § 1639c(a)(1) and that an assessment of income must mean more than asking a consumer to state income on an application and should involve third-party verification § 1639c(a)(4).

The purpose of the statute in § 1639b is also worth a quick study. It seems to embody twin goals: 1) consumer understanding (and therefore not deceived or abused), and 2) reduced risk of default (through an assessment of ability to repay). These goals can point in different directions. One can imagine an extremely simple product that would also be at high risk of default.

The CFPB chart reproduced below is a useful "cheat sheet" to distribute to your students. Note that I have eliminated the "small creditor QM" and "small creditor balloon QM" columns from the original. If you want those, the original version is here: http://files.consumerfinance.gov/f/201404_cfpb_atr-and-qm-comparison-chart.pdf

a. No. This is the easiest problem. The described loan is too long to be a qualified mortgage, which must be limited to a 30-year term. 15 U.S.C. § 1639c(b)(2)(A)(viii). The computer program got it wrong here. One can talk about the history of the 30-year mortgage here. Tara Twomey and I have a brief discussion on the topic in our chapter *Risk Allocation in Homeownership: Revisiting the Role of Mortgage Contract Terms*. SHARED RESPONSIBILITY, SHARED RISK (Jacob Hacker & Ann O'Leary eds., 2012).

You might also ask about the 42.7% Debt-to-Income ratio. It satisfies the qualified mortgage framework because the DTI may be up to or equal 43%. There is no rounding here, and even if there were, it would still be inside the rule. This kind of bright line rule may invite manipulation to get just under the threshold, say by having one person take on a second job short-term near the time of the mortgage application. Presumably the rule writers took that into account and are comfortable with some variation. Fannie's and Freddie's product to expand credit access, Home Ready, permits a DTI up to 50%.

The fact that the computer program got it wrong, even on such a simple issue, goes to the difficulty of building a compliance program. This kind of result was surely not the result of misunderstanding or trying to evade the rule that limits qualified mortgages to 30 years. Instead, it almost certainly is a coding error that could result from a simple typo in the programming to a more complex logic error. While the "computer made us do it" excuse from lenders is about as effective these days as the "dog ate my homework" is on elementary school teachers, the role of technology in producing legal compliance is exploding. That phenomenon correspondingly is changing the ways in which lawyers do their jobs. Will "Intro to Computer Programming" or at least "Technology Skills for Lawyers" be additions to the law school curriculum in the future?

b. Yes. This is a good place to discuss the down payment issue, if you haven't done it before. The borrower here is making a gigantic downpayment—50%. You can explain the concept of LTV (loan-to-value) and how being underwater was a major risk factor for default during the foreclosure crisis. Some people may believe that QM equates to 30-year fixed-rate "vanilla" mortgage, but that is not correct. The adjustable rate is perfectly fine, and there is absolutely no limit on interest rate in the rule. The trick, and it's buried in there, is that the underwriting was done at the maximum rate at the 10-year mark. This should be fine because the rule requires underwriting to the max rate in the first five years. 15 U.S.C. § 1639c(b)(2)(A)(v). The lender can go further than that in its process; that is, the qualified mortgage standard is clearly met with a more aggressive underwriting standard. (If students question that, you can observe that most of the rules are limits (such as 30 years and so the 15-year note here is fine, and this is a reasonable interpretation). More to the point of fact, the loan described is a one-way ratchet so that the interest rate only goes up. By definition, if the consumer can repay the 10-year higher rate, they could repay the 5-year rate. The consumer's monthly payment here doesn't so much "vary" as it "increases." (But "increasing rate loan" lacks the ring of "variable rate.")) The same was true of the variable rate loans made in the years preceding the foreclosure crisis. The "teaser" introductory rate was often set to the same as the contractual "floor" rate of the loan.

c. Yes. But maybe not for the reason one might guess. The program spit out "Ability to Repay" rather than qualified mortgage. This is clearly the better of the two categories because the loan negatively amortizes, which takes it out of the Qualified Mortgage category. 15 U.S.C. § 1639c(b)(2)(A)(i) and (ii). Negative amortization loans must be accompanied by specialized disclosures. 15 U.S.C. § 1639c(f).

Some students may assert that this loan does not even meet ability to repay. The argument is that the lender must consider "credit history," see 15 U.S.C. § 1639c(a)(3) ("A determination under this subsection of a consumer's ability to repay a residential mortgage loan shall include consideration of the consumer's credit history. . . ."). The problem states that the borrower has no "credit score." That does not mean that there could not be a credit history established painstakingly through paperwork and documentation and submitted to the lender. The rule does not require the use of a specific credit report or a minimum credit score. Comment 43(c)(2)(viii)-1 to 12 C.F.R. § 1026.43(c)(2)(viii). Borrowers must simply document what they did review and how it played into their consideration of ability to repay. If the lender simply ignored credit history or imputed an average score or overrode that factor, the loan is flatly illegal (". . . no creditor may make a residential mortgage loan unless . . . the consumer has a reasonable ability to repay the loan . . ."). 15 U.S.C. § 1639c(a)(1).

d. Yes. This mortgage is a qualified mortgage. Except for the amount of principal (which would be high for most states), probably a pretty good estimate of a "normal" loan in the 2016 vintage. This problem is where to discuss what it means to be "qualified mortgage." The key is that meeting the criteria for a qualified mortgage limits the creditor's liability. The rule is bifurcated. For garden variety QMs, the loans enjoy a safe harbor from challenge for violating ability to repay. 15 U.S.C. § 1639c(b)(1). This is extremely attractive to lenders (and assignees) who want to limit liability. If the loan is a qualified mortgage that falls into the category of a "higher-priced" loan ("covered transaction"), then the presumption may be rebutted. The definition of a HPCT QM (gotta love the acronyms) is in 12 C.F.R. § 1026.43(b)(4) and essentially turns on the APR being measurable above the average rate offered on prime loans at the time of the origination. Borrowers who want to challenge a violation of the ability to repay rule, despite their higher-priced loan having been originated under the qualified mortgage standard, would rebut the presumption by showing that there was insufficient income after paying the mortgage to meet living expenses at the time of origination. 12 C.F.R. § 1026.43(e)(1).

At least before January 10, 2021, or until the GSEs are out of FHFA conservatorship, you can also discuss the "GSE-eligible" category of QMs. These loans still have to meet the first product feature characteristics (loan length, no negative amortization, etc.). But the borrower's debt-to-income can exceed 43% and if a GSE, FHA, VA, or USDA will purchase, guarantee, or insure the loan, it is deemed to be a "qualified mortgage." This discussion can take some too far into housing finance, but others will want to cover what is likely the dominant mortgage in the market—those that the GSEs will accept. A CoreLogic study released before the qualified mortgage rules became effective on January 10, 2014 found that an "astounding 60% of mortgages would not meet QM standards." Clifford Rossi, *How to Make Non-'Qualified' Mortgages Bulletproof*, AMER. BANKER (Jan. 10, 2014). It isn't clear what vintage loans this studied but the article did reveal that about one-quarter of the non-QM loans would run into the DTI rule as the issue.

General Comparison of Ability-to-Repay Requirements with Qualified Mortgages[1]

	ATR Standard	General QM Definition	Agency/GSE QM (Temporary)
Loan feature limitations	No limitations	No negative amortization, interest-only, or balloon payments	No negative amortization, interest-only, or balloon payments
Loan term limit	No limitations	30 years	30 years
Points & fees limit	No limitations	3% or higher[3]	3% or higher[3]
Payment Underwriting	Greater of fully indexed or introductory rate	Max rate in first 5 years	As applicable, per GSE or agency requirements
Mortgage-related obligations	Consider and verify	Included in underwriting monthly payment[4] and DTI[5]	As applicable, per GSE or agency requirements
Income or assets	Consider and verify	Consider and verify	As applicable, per GSE or agency requirements
Employment status	Consider and verify	No specific requirement, but Included in underwriting income and DTI[6]	As applicable, per GSE or agency requirements
Simultaneous loans	Consider and verify	Included in underwriting DTI	As applicable, per GSE or agency requirements
Debt, alimony, child support	Consider and verify	Consider and verify	As applicable, per GSE or agency requirements
DTI or Residual Income	Consider and verify	DTI ≤ 43 percent	As applicable, per GSE or agency requirements
Credit History	Consider and verify	No specific requirement, but may be included in underwriting debt and DTI[7]	As applicable, per GSE or agency requirements

Requirements for Small Creditor Qualified Mortgages are omitted.

cfpb Consumer Financial Protection Bureau

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Problem 14.2. The doctrinal point is to illustrate the liability that can stem from a violation of the ability-to-repay standard. Before diving into the ambiguities of those rules, I offer two other ideas for discussion.

The problem also can be used to flag the challenges facing in-house lawyers. Tension frequently arises between in-house counsel and the business lines. Lawyers face pressure from executives—who often have bottom line profit-loss responsibility—to green light projects. But if the liability is overwhelming, the lawyer will be blamed. The resolution invoked here was to call outside counsel for another opinion.

The problem specifies that Felipe is a registered lobbyist; you can open the discussion to arguments to change the rules and who might be persuaded to reduce liability. Mortgage lenders, and anti-regulation folks, are the obvious answers, but this can be a good place to discuss the strange bedfellows that sometimes arise around "expanding the box" of mortgage credit. Civil rights groups and asset building policymakers point to the historic fact that a home is the best savings vehicle for low-income people; it's a toehold on transitioning to a more solid position in the middle class. These groups expressed concerns about the qualified mortgage definition and ability-to-repay standards—and largely were heard. Their voices were dimmer on the issues of liability, probably because few of us (other than bankruptcy lawyers like me) enjoy thinking about the fall out of transactions gone awry.

Section 1640 of TILA, which used to be a slim, if substantively unsatisfying, statute has ballooned. It is difficult to identify the applicability liability rule and to fit the pieces together. Remind the students that there will be another pass at these materials in the Part IV of the book, Enforcement.

The opening clause, (a), which the students may have skipped as the book sends them to (a)(4), says that "[e]xcept as provided in this section" liability shall be "in an amount equal to the sum of" subsections 1, 2, 3, and 4. While the "except" clause may suggest that only (a)(4) is applicable to determine damages, the language about a "sum" and the "and" joining subsections 3 and 4 cut the other way.

Actual damages, subsection (a)(1), seem to be the table for any violation. This should not deter mortgage lenders, however, because most people who lose a house to foreclosure have no equity at that point—they are not losing an asset. Subsection (a)(2) is the statutory damages. The four parts (i)-(iv) are joined by an "or" so liability is in the alternative. In the case of a closed-ended loan secured by real property, damages are limited to "not less than $400 or greater than $4,000." 15 U.S.C. § 1640(2)(A)(iv). The consumer does not get the "twice the amount of any finance charge" in (2)(A)(i), although that amount is likely much higher than $4,000. To summarize, a violation of either the ability-to-repay or QM rule creates liability for actual damages and statutory damages of $400-$4,000.

If the lender violates ability-to-repay, § 1639c(a), then "enhanced" damages also kick in and add to the liability. 15 U.S.C. § 1640(a)(4). The penalty is steep: "an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material." The qualified mortgage rules are in § 1639c(b) and so the enhanced damages in § 1640(a)(4) do not apply (it only references violations of § 1639c(a).) For QM loans, liability seems limited to actual and "normal" statutory damages of not greater than $4,000.

Joyce is absolutely correct in her analysis in the problem. Even if the loan never goes into default and the borrower is not facing foreclosure, the lender could face liability for violating ability-to-repay. That is, the fact that a consumer is—in fact, able to pay—does not insulate the lender from having violated the ability to repay. The penalty means that the borrower gets a "free" loan, as damages will equal all the interest and fees.

For both ability-to-repay and QM loans, the statute of limitations is extended from the normal one-year rule in TILA. For an affirmative suit by the borrower, the statute of limitations is three years from the occurrence of the violation. 15 U.S.C. § 1640(e). After that three-year time period, however, the borrower can still assert monetary damages in a recoupment or counterclaim. 15 U.S.C. § 1640(k)(2)(B). In such suits, liability is limited to an amount not exceeding three years' worth of finance charges and fees even though the suit may be brought outside the three-year window from the occurrence of the violation. *Id.* Costs and a reasonable attorneys' fee are also recoverable by the borrower. 15 U.S.C. § 1640(a)(3).

If an ability-to-repay loan goes to foreclosure, and the borrower is asserting the violation as a recoupment or setoff—the creditor faces much more risk. There is no time limit at all on a borrower asserting that the creditor violated the ability-to-repay requirements in a judicial or non-judicial foreclosure or other action to collect the mortgage debt. 15 U.S.C. § 1640(k)(1). In other words, the tail of liability for ability-to-repay extends for the entire term of the loan (e.g. 30 years, or until it is paid off in a refinance transaction). This is a big contrast to qualified mortgages, which are not mentioned in § 1640(k)—again only § 1639c(a) is referenced. For qualified mortgages, liability seems to terminate three years from origination—even if the loan is in foreclosure. And remember that for regular QM loans (not higher-cost QMs), being a qualified mortgage is an absolute, non-rebuttable safe harbor from liability for violating ability to repay. This more extensive liability for ability to repay is exactly why Joyce is counseling the bank against making anything other than QM loans.

The statutory reference to "defense to foreclosure" is difficult to apply. Does that mean that the borrower can effectively never pay again if the borrower proves a violation of ability-to-repay? The lender's screw-up could always be asserted to let the borrower win a foreclosure.

Assignee liability is covered in more detail in Assignment 21, and you may want to save coverage until then. The short answer, if someone raises it, is that liability is joint and several under TILA and assignees are liable, not just the originating mortgage company. 15 U.S.C. § 1641(d)(1).

This stuff is hard, and you may want more resources (or another crack at a lucid explanation that might best my effort here). One piece is Adam Levitin, *How Risky Is It to Make a None-QM Mortgage? And Is QM Going to Hold Back Access to Credit?*, CREDIT SLIPS (Dec. 17, 2013), http://www.creditslips.org/creditslips/2013/12/how-risky-is-it-to-make-a-non-qm-mortgage-and-is-qm-going-to-hold-back-access-to-credit-.html. Several law firms that represent the industry also have nice summaries; this American Bar resource is mercifully concise. Sanford Shatz, *An Overview of the Consumer Financial Protection Bureau's Abilty-to-Repay and Qualified Mortgage Rule*, BUSINESS LAW TODAY, http://www.americanbar.org/publications/blt/2013/04/02_shatz.html (last visited Dec. 5, 2016).

Problem 14.3. Transfers remain the bugaboo of servicing, despite the CFPB's continued assertion that they should be "seamless" and that consumers not get the "runaround". See Steve Antonakes, *Deputy Director Steven Antonakes Remarks at the Mortgage Bankers*

Association, CONSUMER FIN. PROT. BUREAU (Feb. 19, 2014), http://www.consumerfinance.gov/about-us/newsroom/deputy-director-steven-antonakes-remarks-at-the-mortgage-bankers-association/ and *CFPB Issues Bulletin to Prevent Runarounds in Mortgage Servicing Transfers,* CONSUMER FIN. PROT. BUREAU (Aug. 19, 2014), http://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-bulletin-to-prevent-runarounds-in-mortgage-servicing-transfers/. The Middle State AG's office is complaining here that Starbright cannot ignore loan modification processes that began with the transferor servicer. Under the new CFPB rules, Middle State AG is correct.

In its 2016 rules, effective in 2017, the CFPB clarifies that a transferee servicer must comply with the loss mitigation rules (§ 1024.41) on the same timeframes. 12 C.F.R. § 1024.41(k). No delay or reset is permitted because of the transfer, with a few exceptions. One that is relevant here is that new servicer gets 30 days *from the transfer date* to decision a pending loan modification application, rather than 30 days from when the consumer submitted the application to the transferor servicer. This gives Starbright additional time to finish evaluating the modifications that are pending compared to the prior rule that arguably did not provide for any reset of the 30-day decision period.

Starbright, however, does not want to decision the pre-existing loan modification. It wants to have the consumer start over with its StarSaver program. This is not permissible—at least for consumers who have a pending complete application (query: "facially complete", see problem 14.4) at the date of transfer.

For customers who have been solicited for loan modifications (or should be based on their delinquency status), but have not yet finished document collection, Starbright can "transfer" them to the loan modification options that it offers. That is, the consumer will be put through the proprietary StarSaver document collection and evaluation process rather than whatever options the transferor servicer has. Note the substantive point—servicers can decide what options to offer, and even whether to have loss mitigation programs. The servicing rules are virtually all process oriented; they provide no right to interest rate reduction or even the use of a Net Present Value (NPV) test in determining whether to modify the loan or proceed with foreclosure.

The variety of proprietary options was much less of a problem when HAMP was a uniform option across nearly all servicers. Upon its expiration, the industry is struggling to decide whether to adopt voluntarily agree to a consistent program or to go their own directions. The Mortgage Bankers Association, led by Quicken, has pushed something called "OneMod". Rob Van Raaphorst, *MBA Task Force Proposes Loan Modification Program to Provide At-Risk Homeowners Payment Relief,* MORTG. BANKERS ASSOCIATION (Sept. 23, 2016), https://www.mba.org/2016-press-releases/september/mba-task-force-proposes-loan-modification-program-to-provide-at-risk-homeowners-payment-relief. At this time (fall

2016), it is not clear how servicers' modifications will vary in terms of things such as principal reductions, capitalization of arrearages, set-up of interest rates, etc.

Starbright uses the CFPB model Notice of Servicing Transfer letter. 12 C.F.R. § 1024.33; Appendix MS-2. That would seem to shield it from legal liability—certainly from action by the CFPB. But the Middle State AG's office has complained that the letter is deceptive because it stated, "nothing else about your mortgage loan will change" upon transfer. For a delinquent loan, a transfer of servicing can change the loss mitigation options, sometimes dramatically. While the loss mitigation options are not part of the "loan" so the letter may be strictly correct, I think consumers could be deceived into believing that the new servicer had to give them the same loss mitigation options as the prior servicer. A Report that I wrote when I served as the California Monitor to the National Mortgage Settlement complained about this point. CALIFORNIA MONITOR, RECLAIMING THE RULES: SOLUTIONS FOR MORTGAGE SERVICING (Sept. 30, 2014), at 8. The standard hello/goodbye letters fail to indicate that the new servicer may not offer the same foreclosure relief that was offered by the previous servicer or that it may require new or different documents.

While I am a big fan of simplicity in law (anyone trying to read the 900-page 2016 "improvements" to the mortgage servicing rules will surely feel that way), servicing transfers seem like an area where treatment should be bifurcated for current and delinquent customers.

Nationstar has used this approach, and Dana Dillard, EVP and Chief Customer Officer, has some compelling data on how it improves customer service and reduces complaints. For delinquent customers, the outreach is more intense and personalized, and less focused on that next payment (the focus of the hello/goodbye letter). After all, delinquent customers who didn't pay their prior servicer usually do not suddenly start. The message to delinquent customers should be that the transfer may delay the decision (which the CFPB rules now explicitly allow (30 days from transfer date)) and that the homeowner should start working as quickly as possible with the new servicer to avoid the aging of documents, such as pay stubs.

Another reform to consider is to require a total freeze on foreclosure activity for 60 days after the effective date of transfer. Particularly given the rarity of complete but not decision applications (see the next problem), this kind of protection could be very useful in allowing the homeowner time to learn about the new servicer's loss mitigation offerings and process.

Problem 14.4. NOTE: The statutory citation reference following the problem contains a typo. It should read Cal. Civ. Code § 2923.6(d), not 2924.28(d). In future editions, the reference will be to § 2923.6 generally, and that entire section is included in the statutory supplement.

The underlying issue is that many of the key homeowner protections for loss mitigation are triggered only upon the submission of a “complete” application. The CFPB’s servicing rules allow the foreclosure to continue until the application is complete. The California Homeowner Bill of Rights mimics this rule. It is discussed in *Valbuena v. Ocwen Loan Servicing* in the text. Cal. Civ. Code § 2923.6(c) provides that “if a borrower submits a complete application . . . the borrower’s mortgage servicer [and other agents and parties] shall not record a notice of default notice of sale, or conduct a trustee’s sale until the borrower has been provided with a written determination by the mortgage servicer regarding that borrower's eligibility for the requested loan modification.” It’s important to flag the limitations of dual tracking “prohibitions”—they forbid big steps: the initiation of foreclosure or sale. The servicer can continue to push the foreclosure along in lesser ways, such as by sending required notices in a non-judicial foreclosure and litigating in a judicial foreclosure up to the point of sale. See 12 C.F.R. § 1024.41(f) & (g) (describing how nature of dual tracking protection varies depending on whether complete application is submitted before or after servicer initiated foreclosure and how many days before scheduled foreclosure sale).

The existing framework allows servicers to do two things: 1) define “complete” as a legal matter, and 2) decide when an application is “complete” as a factual matter in any particular case. Homeowners lack the information to know what they must do to create this magical status of “complete application” and even if they achieve it, they are not notified. I see this as a major problem, both because it provokes continued stress on the homeowner and because it makes it very difficult, if not impossible, to litigate alleged violations of the dual tracking protection. When I worked as the California Monitor for the National Mortgage Settlement, I wrote a report on the issue and possible solutions. CALIFORNIA MONITOR, THE “COMPLETE” APPLICATION PROBLEM: A SOLUTION TO HELP HOMEOWNERS AND BANKS WORK TOGETHER (June 19, 2013).

Under California law and the initial mortgage servicing rules, servicers are not required to confirm completion. This is partly because of the process used; “completion” is determined by the underwriter at the time he or she decisions the loan modification. At that point, the consumer gets a loan modification or a denial letter. Sending a complete application letter at the same time would seem to be confusing and unnecessary. However, the CFPB’s updated mortgage servicing rules, issued August 4, 2016 and effective one year from that date, will require a written letter to the borrower within five business days of the receipt of a complete loss mitigation application. 12 C.F.R. § 1024.41(c)(3).

The problem remains, that the CFPB allows the servicer control of what constitutes a complete application. “A complete loss mitigation application means . . . a servicer has received *all the information that the servicer requires* from a borrower in evaluating applications for the loss mitigation options available to the borrower*."* 12 C.F.R. § 1024.41 (b)(1) (emphasis added); *see also* CONSUMER FIN. PROT. BUREAU, *Help for Struggling Borrowers* 31(Dec. 18, 2013), http://files.consumerfinance.gov/f/201312_cfpb_mortgages_help-for-struggling-borrowers.pdf ("The servicer can establish its own COMPLETE application requirements.").

The California law says an "application shall be deemed complete." Cal. Civ. Code § 2923.6(h). This suggests to me that this is an issue of fact on which a court could disagree with a servicer's assertion that an application was not completed. But the definition also puts the onus on the borrower to supply the servicers "with all documents required by the mortgage servicer." *Id.* How does a homeowner know what these documents are? While the basic documents have been an application form, a hardship affidavit, and an authorization for a release of tax forms, this could change at any time, particularly with the expiration of the federal government's HAMP program. More importantly, the basic documents are *not* enough. Servicers can require more documentation than the basics, and typically do for borrowers who are self-employed or rely on non-wage income. My conversations with one servicer suggest that more than 20% of applicants fit into these categories.

Because the CFPB's new rule requires a written completion letter to consumers, this is an obvious solution that you'll want to raise in class. In the Complete Application report from the California Monitor, we rejected that as a solution because of the underwriting process discussed above. I am uncertain if that process has changed significantly or the CFPB is simply requiring more letters; there is certainly no shortage of paper mail coming to struggling homeowners. The letter certainly has *ex post* benefits. If the bank sells the property *after* the letter goes in mail, the consumer has a nice piece of proof to show a dual-tracking violation. While the plaintiff was successful in *Valbuena* in avoiding dismissal because the allegations contained a triable issue of fact, that does not mean that plaintiffs necessarily will prevail. Because the servicer controls the definition of complete, it can always allege that something else was missing.

The federal rules address this by creating something called a "facially complete application." 12 C.F.R. § 1024.41(c)(2)(iv). This arises when a borrower responds to the "missing item" letter sent in response to the initial application by submitting all requested documents. The servicer can require more, but must treat the application as complete at that point for purposes of the dual-tracking protection. It does not need to decision the application, however, until everything it wants is received.

The solution that the California Monitor recommended was to explicitly define "complete" as a relatively skeletal set of generally applicable documents. The consumer would have clarity about what exactly needed to be submitted to halt the foreclosure, even if additional documents were necessary later to evaluate and receive a loan modification. The goal was to simplify and standardize the definition of completion across all borrowers, even those whose situations require more documents. Our experience counseling thousands of Californians also convinced us that only this kind of rule would provide peace of mind to people who feared foreclosure. We saw that continuing to submit documents, in what could feel like a never-ending quest to create a "complete" application, along with the stress of continued foreclosure, ultimately led people to give up on a loan modification. Another proposal, offered by the Massachusetts Attorney General's Office, was that if a servicer failed to send a written notice requesting additional documents necessary for completion within five days of receiving an application, as required by federal law, the application would be "complete" for purposes of triggering dual tracking protection.

The issues around complete application abated as servicers became more skilled at executing HAMP modifications and developed full-blown in-house modification teams. The expiration of HAMP and the reduced priority put on loan modifications as the foreclosure crisis fades could mean that confusion about servicing increases.

Assignment 15

Credit Cards

Credit cards are a nice follow-on from the assignment on credit disclosure, as the students have looked at the difficulty of explaining cards (Problem 12.3). The law in this area has been relatively stable in the wake of the CARD Act of 2009, however, the CFPB has been active with enforcement. A recent example is the $32 million penalty that First National Bank of Omaha agreed to pay in settling allegations of illegal credit card practices. The most creative/egregious act was forcing consumers to listen to debt cancellation product sales pitches merely to activate their cards, and then "distracting" consumers into making a purchase of debt cancellation by asking them to confirm their place of birth, rather than an affirmative "press 1 if you want the product" type approach. http://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-first-national-bank-omaha-pay-3225-million-illegal-credit-card-practices/.

The best monograph treatment is Ronald Mann, *Charging Ahead* (2006), although it is now dated. In class, it can be fun to show an excerpt of the Frontline documentary, *The Secret History of the Credit Card* (2004). I'm partial to the part where Andrew Kahr talks about his invention of the introductory teaser rate, but the entire thing is excellent if you have the time.

Problems 15.1 and 15.2 look at limits on fees and card pricing. These problems are pretty tough, particularly 15.2 on rate changes. The connections back to Assignment 11 are obvious. While there is no price cap on interest rates, isn't this just usury by another name? Problems 15.3 and 15.4 are about the Fair Credit Billing Act and issuer liability. It's tough to fit all four problems into 60 minutes so dropping one problem makes sense. Because 15.3 and 15.4 cover the same issues, I usually alternate between assigning them. Problem 15.2 is the hardest and therefore longest. If you do drop it, just lecture a bit on rate changes and repricing. The key rules, besides those discussed in the answer to Problem 15.2, are that the 45-day advance notice does not apply if the consumer had an introductory rate that expired to the previously disclosed "go to" rate or if the consumer has failed to make payments.

Problem 15.1. This problem explores several issues discussed in the text, but more importantly, looks at the tension between statutes and regulations. This is a repeat theme from Problem 12.4 (looking at whether the regulation eliminating the requirement of "more conspicuously" for APR and finance charge is a permissible interpretation of TILA.) You can also return to Problem 3.1 about the difference between regulations and statutes.

The question is whether this card violates the "fee harvester" provisions of TILA. These were added by the CARD Act in response to subprime cards that were prevalent before that legislation. Fee harvester cards were criticized because by the time the fees were paid, consumers had as little as $50 or $100 of credit. Section 1637(n) applies when the non-triggered fees (examples of triggered fees are late fees, overlimit fees, etc.) are more than 25% of the total amount of credit authorized. The $150 upfront fee is high enough to make section 1637(n)'s substantive limit apply to a card with a $500 credit limit. "Fine," says our legally trained consultant, "but this product isn't going to charge the consumer any fees (other than the statutorily excluded trigger-type fees)." From the facts, it appears that the plan is to have the $150 fee be paid "upfront." It will not reduce the available credit. If this is the product structure, the card seems to comply with TILA because it does not require the payment of fees from "the credit made available under the terms of the account." 15 U.S.C. § 1637(n).

The fact that this card is legal will shock some students. You can amplify the shock by pointing out that there is no limit on the amount of the upfront fee; it could be $300 for $500 of credit or more, as long as no fees reduce the $500 credit limit.

"But wait!!!" the diligent students will cry. This isn't what 12 C.F.R. § 1026.52(a)(1) says. The regulation seems to prohibit a card that has a total amount of fees in the first year of the account that equals or exceeds 25% of the credit limit when the account is opened. $150 is more than 25% of $500, so this card appears to violate Regulation Z. I think the regulation flat out prevents requiring payment of fees that are more than 25% of the credit limit—even if the fees do not diminish the credit limit. This is consistent with the CFPB's Official Interpretation to 12 C.F.R. § 1026.52(a)(1) "General Rule" (July 18, 2005).

By contrast, I think the statute says that, if the first-year/account-opening fees exceed 25%, then any additional fees cannot diminish the amount of credit available. How to reconcile the statute and the regulation is an absolute mystery to me, except to fall back on the rule that the statute trumps an inconsistent regulation. In my defense (and that of you and your students), the court that faced this issue had a hard time too. *See First Premier Bank v. CFPB*, 819 F. Supp. 2d 906 (D.S.D. Sept. 23, 2011) (granting the bank a preliminary injunction to avoid enforcement of the regulation because the plain meaning of § 1637(n) reveals that it only regulates fees that reduce the credit line and that the regulation would cover something "far beyond the express direction" of Congress.) That said, the regulation remains unamended from when the *Premier* decision was issued and on the books as it reads. Coincidentally, I believe this was the first litigation to which the CFPB was ever a party.

Even if the card company wants to rely on the statute and challenge Regulation Z as an unreasonable expansion of Congress' intent, there are other legal issues to consider. The problem sends students to the ability to repay rule, a concept that they have just seen in the mortgage context in the prior Assignment. Section 1026.51 requires the card issuer to consider “the consumer’s ability to make the required minimum periodic payments under the terms of the account based on the consumer’s income or assets and the consumer’s current obligations.” This means that the company needs to have some meaningful underwriting in place (or at least “reasonable policies and procedures” to do underwriting in general) and cannot simply give issue the card to all applicants without an application that collects income or asset information. The substantive underwriting standard, however, is pretty weak. It is not that the consumer can pay off the debt, it is that the consumer can make the required minimum payment each month. What is the minimum payment? How low can you go? The rules in § 1026.51(a)(2) are hard to parse, but they do not seem to set a required minimum payment. Instead, the focus is on making sure the card issuer cannot pull a fast one in calculating the minimum payment.

A related ability to repay issue may arise from the proposed card’s target customer base. The problem references unemployed or people who have lost a home to foreclosure. The last sentence of § 1026.51(a)(1)(ii) says that a credit card should not be issued to a consumer “who does not have any income or assets.” Unemployed people may be getting government benefits, and you can perhaps argue that it would be credit discrimination to refuse to lend to benefit recipients. (As Assignment 7 explained, ECOA prevents discriminating in credit transactions “because all or part of the applicant’s income derives from any public assistance program.” 15 U.S.C. § 1691(a)(2).) This kind of review is great, not only for reinforcing learning but because in real practice, when one pulls on a thread, it can lead to a snarl of laws.) Unemployment benefits are temporary, which may be a reason to not give credit cards to unemployed people, but here the company is perfectly willing—at this price—to give out the cards. If challenged for failing to assess ability to repay, it could argue that discounting unemployment benefit as income would expose the bank to risk for credit discrimination. This hypothetical is just the kind of “no matter what we do, we get sued” lament that industry lawyers love to proffer.

The potential customer base has also frequently suffered foreclosure, which is clearly a reduction in assets. But as with the minimum payment rule, the standard is quite weak. It seems to only prohibit giving cards to people without any income or assets. If the consumer has some other non-home asset, such as a checking account, the card issuer seems protected from ability to repay challenge. Some students will be troubled that one will give a $500 credit card to someone with only $300 in the bank, but that is exactly what credit is—it’s a loan to borrow money that you do not have. I think the $300 would definitely be enough to show an ability to make required minimum payments on a $500 card. The ability to repay, which sounds tough, is actually pretty weak in the context of credit cards, and certainly compared to the rules for mortgages.

The problem says the late fee will be $50. Some students may suggest that amount is impermissible because it exceeds the figure set forth in Regulation Z, 12 C.F.R. §

1026.52(b). As of 2015, that amount was $27 (it adjusts annually though, so check a current version of the regulation online at the CFPB e-reg site). But that number is just a safe harbor. Issuers can charge more, if a higher fee is "reasonable and proportional to the omission or violation to which the fee or charge relates." 15 U.S.C. § 1666d(a). The users of this card are risky customers who are likely to be delinquent. The problem describes an array of strategies that the issuer plans to use to monitor the customers; setting up and deploying that kind of monitoring and communication will be expensive. The late fee—even at about double the safe harbor—may be justifiable. It's a factual question, and you can ask students to think about what kind of information, as counsel, they would request from the business lines to create a sound legal basis for the fee.

As a final note, the texting or calling a cell phone could be difficult in light of the tougher amendments to the Telephone Consumer Protection Act, which were covered in Assignment 4. I wouldn't wade back there but you have a heads up if the students mention it. At a minimum, the card issuer will need to be careful to get—and try to maintain—consent to use auto dialers in reminding consumers about late payments.

The overlimit fee also is subject to the reasonable and proportional rule. The extra rule for overlimit fees, discussed in the text, is that consumers must affirmatively consent (opt-in) to overlimit transactions and fees. If not, an issuer can honor an overlimit transaction as a courtesy but cannot impose a charge. The consent must be in writing or electronically. 12 C.F.R. § 1026.56. The proposal here to obtain consent in real time via the telephone does not satisfy Regulation Z. You can end with a discussion of whether that is sensible policy. Why wouldn't contemporaneous disclosure ("in time/in context" as recommended for privacy disclosures, Assignment 6) be more desirable than relying on written disclosure obtained years earlier? Perhaps the answer is that consumers may be pressured to accept the overlimit fee because of embarrassment at the point of sale. Another answer is that the "just in time" notification technology was not widely available in 2009.

Problem 15.2. This problem looks at the repricing restrictions on credit cards. In 2004, Elizabeth Warren said that credit cards were the only product she knew where the price could increase after the purchase. The analogy to open-end credit as a tangible product may not hold up (although the "exploding toasters" are like "exploding adjustable-rate-mortgages analogy did work to sell the CFPB). Congress did limit rate increases in the CARD Act in a couple of important ways.

Section 1026.55(a)(2) permits an increase to an APR according to an index that is not under the card issuer's control and is available to the general public. The Treasury index certainly meets those rules. It is highly unlikely that the prime rate jumped 10% but the students may not know that. Any increase in the consumer's APR made under the "no notice" rules appears to be limited to the amount of increase in the index.

Additional amounts of increase would be subject to the 45-day advance notice requirement. 15 US.C. § 1637(i)(1). This time period is designed to give the consumer more than one billing cycle to adjust to the changed price. There is an exception to the 45-day advance notice, if the card has a variable rate tied to an index *and* the index has gone up, 12 C.F.R. § 1026.9(c)(2)(v)(C), that More for Me can use, but that does not mean that the rate can be "effective immediately" in the sense of being applied to prior balances. 12 C.F.R. § 1026.55(b)(3). It can charge the higher rate going forward on new charges. The prior balance is "protected." 12 C.F.R. § 1026.55(c).

If notice is required, the letter needs to provide a reason for the change because an APR index is a "significant change" under § 1026.9(c)(2)(ii) (because APR is required to be disclosed under § 1026.6(b)(4)). The disclosure rules in § 1026.9(c)(2)(iv) limit the creditor to "no more than four principal reasons for the rate increase" but require at least one.

After what is literally a regulatory hell created by the complications of APR changes, the students (and you) will be relieved to know that TILA has nothing to say about rewards. Zilch. Despite the fact that this is the motivating force for many consumers in choosing their card—and spending frequently on it—the only recourse for reward changes appear to be breach of the card agreement. Undoubtedly, More for Me reserved the right to alter the rewards in the fine print of the card agreement. If Pamela wants airline miles, she'll need to get a new card (and presumably pay off the balance to close her More for Me card.)

Problem 15.3. When the charge appears on the statement for goods not delivered to the obligor in accordance with the purchase transaction, a "billing error" occurs. 15 U.S.C. § 1666(b)(3). Harold's call to the credit card company is inadequate to assert the billing error. The law requires written notice (and in a manner other than a note on the payment insert). 15 U.S.C. § 1666(a). Until the creditor gets a proper notice, Harold is on the hook for the $89 to the card company. It was correct in telling Harold that it was not obliged to remove the charges under the law, but that was only a half answer.

The rest of the story is that Harold still has the opportunity to assert a billing error. The law gives 60 days from when the creditor transmitted the statement to the obligor (Harold). 15 U.S.C. § 1666(a). Once Harold does assert a billing error, the timeline for resolution and procedures in § 1026.13(c) and (d) apply. Harold can withhold payment, and the bank must undertake procedures to determine if the billing error occurred as asserted. 12 C.F.R. § 1026.13(e). While the card company cannot misstate the law, it would seem a stretch to me to require it to affirmatively tutor Harold on his rights. That said, I wouldn't want to be the person responsible for reviewing these call tapes and making sure that customer service did not deceive someone about their legal rights. From a business standpoint, the better path is probably to educate Harold and send him a form to complete to report a billing error.

There is an alternate route, however, which is to treat this issue as one of "pass-thru" liability under the special credit card provisions. TILA allows Harold to assert against the card issuer all his claims that relate to the failure of Honey Heaven (person who honors a credit card) to resolve the dispute satisfactorily. 12 C.F.R. § 1026.12(c). Harold can withhold payment of the amount of credit that gave rise to the dispute, and the issuer cannot report him as delinquent until the dispute is settled. Be sure your students see that this is not a "billing error" strategy attacking the card company; rather it is using a liability-shifting provision in the law that makes the card companies the keepers of their merchants.

While your students' Texas geography may be weak, El Paso is nowhere near Austin. But the mileage is irrelevant because the "disputed transaction occurred in the same state as the cardholder's address." 12 C.F.R. § 1026.12(c)(3). There is no limitation here to the ability to assert a claim. This is a red herring.

The effect of liability provision for credit cards is stunning when one thinks about its effect: the issuer is basically obligated to take on the loss for bad merchants. The students often think this is entirely fair as it is the only set of rules they have ever known for purchases. You can tease out the policy justifications for this rule, but they include the fact that the card issuer is a repeat player with regard to the merchant and can much more easily than the consumer detect and punish a bad seller. *See* Ronald Mann, CHARGING AHEAD 167-171 (2006) for a discussion of rewards programs.

Problem 15.4. This problem presents the opposite angle of the prior one. Lydia has followed all the procedures to assert a billing error, 12 C.F.R. § 1026(b), but the facts do not meet the legal definition of a billing error. Indeed, the problem does not even say that Lydia has received her periodic statement from Wish yet. But even when it comes and shows a $3,700 charge, there is no billing error.

Instead, Lydia is trying to assert a claim against the issuer that she has against the merchant, Slim. While the special credit card rules of § 1026.12(c) permit this, there are limits. First, it isn't clear that Lydia calling up Slim and shouting that she wants a refund and refusing to have a conversation will satisfy the requirement that the "cardholder has made a good faith attempt to resolve the dispute with the person honoring the credit card." 12 C.F.R. § 1026.13(c)(3). Second, Lydia cannot assert any tort claims. This prevents her from recovering her expenses for her doctor's bills, but here she also seems to be claiming the scooter is defective. Perhaps that is products liability, and therefore a tort, and excluded. On the other hand, Slim did not disclaim the implied warranty of merchantability and the scooter is "good" under the UCC. (ah . . . more review; see Assignment 10). This suggests a contract analysis is appropriate, rather than tort.

If Lydia can go after the issuer, Wish, for liability for the defective scooter, then Wish cannot make an adverse credit report until the dispute is resolved. Lydia can withhold payment of the $3,700 and any finance or other charges that accumulate. Wish is likely going to have to credit the $3,700 to Lydia's account. What is its remedy? It can then pass along that liability via Mastercard back to Slim, arguing it should bear the cost of the defective scooter. While Slim is ultimately liable, allowing the consumer to put the problem squarely at the foot of the card issuer and leaving it to the networks to police retailers is a major benefit of America's legal regime for credit cards.

Assignment 16

Automobile Transactions

Cars are one of those topics that sometimes gets short shrift. Compared to mortgages and credit cards, cars are simpler transactions, and there is not the behemoth of RESPA-TILA providing endless statutory snarls. Car loans are big business, however, with the outstanding volume tripping the $1 trillion mark in 2015. Josh Zumbrun, *Car Loans Top $1 Trillion for First Time*, WALL ST. J., (Aug. 14, 2015). While auto delinquencies remain at the lowest levels in years, the increase in subprime auto loans is sparking concern about a credit bubble.

Cars are vitally important to consumers too, and this market has long been troubled by a lack of transparency and shady dealings. Some problems are abating with technology. For example, smart phones allow consumers to check prices in the Kelley Blue Blue from the dealership lot; this helps people negotiate a sales or trade-in price with better information. Similarly, advanced technology has made odometer fraud more complicated to execute. Other problems continue, however, and may even be worsening because of technology. An emerging and troubling trend is the use of GPS tracking and remote shut-off devices in cars. The estimate I heard is that over 3 million cars are on the road today with such equipment, often without the consumer's knowledge and/or consent. Sarah Jeong, *How Technology Helps Creditors Control Debtors*, THE ATLANTIC (Apr. 15, 2016), at http://www.theatlantic.com/technology/archive/2016/04/rental-company-control/478365/.

Overall, I think car lending is probably the least regulated major consumer credit product but that may be changing. In 2015, the CFPB expanded its supervision powers to nonbank autofinance companies in 2015 (it already had authority over banks and credit unions). It has taken prominent enforcement actions aimed at discrimination in auto loans, such as a joint action with the Department of Justice against Toyota Motor Credit Corporation that could require payment of up to $21.9 million in restitution. CFPB Press Release, Feb. 2, 2016. http://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-reach-resolution-with-toyota-motor-credit-to-address-loan-pricing-policies-with-discriminatory-effects/

The market for used cars continues to present a wide variety of issues related to sales practices, financing, and product quality. Even new cars are the subject of multiple recent scandals that impose consumer harm. From the Toyota manufacturing defects to Volkswagen's deception on gas mileage, even a consumer buying a high-end new car and paying with cash faces considerable risks.

The reading is fairly long and looks at a wide range of laws. The assignment mirrors how consumer lawyers work. A client will seek out a lawyer because she has a "car problem." The lawyer must look at all the laws that could improve the situation. Similarly, those who represent auto dealers or manufacturers, either as outside or in-house counsel, will often be tasked with working on many substantive areas that touch the client's business.

The first problem studies lemon "laundering" and looks at the risks to subsequent purchasers. The second problem looks at yo-yo sales, a sales tactic in which the dealer creates leverage to up its profit at a consumer's expense. The third problem highlights the risks to consumers created by the fact that regulated at the state level, yet easily moveable across state lines. The fourth problem is an examination of auto title lending. This leads nicely into the next assignment on payday lending, as the students can think generally about high-yield lending. As of fall 2016, the CFPB had proposed regulations that would require assessment of ability-to-repay for vehicle title (and payday loans). Be sure to check the law before teaching problem 16.4, although the CFPB regulations are a floor that states can exceed.

Problem 16.1. This problem exposes the limited applicability of lemon laws and the practice of lemon laundering.

Jack is correct that the car—as to him—was a lemon under the Texas statute. The problems interfered with the car's functioning, required four or more repair trips, and occurred in the applicable time period. You can note here too that Jack almost certainly would have been better off knowing his legal rights. If he had insisted on the Opal being classified as a lemon, the dealer would have been required to repurchase the car for the full purchase price less a reasonable allowance for Jack's use. Tex. Occ. Code § 2301.604.

Ask the students if the car is a lemon as to Amber. By this point in the semester, most will look at the statute and note that Texas extends its lemon law to used vehicles, as long as they are covered by a manufacturer's warranty, Tex. Occ. Code Ann. § 2301.601(2) (defining "owner"). The problem does not say whether Amber purchased the car with a warranty. And more to the point—the car is driving fine! Amber has not experienced any problems at all, much less ones that would meet the definition of a lemon—a "serious safety hazard" or a substantial impairment of the car's use or market value. Tex. Occ. Code. § 2301.604(a).

What is Amber's harm here, other than her feeling humiliated by Jack? The car works fine now, and after all, the dealership did some repairs before re-selling it. Some students will say there is none, unless the problem reoccurs. Others will note that they would not pay as much for a car that had prior problems—even if those problems were fixed. They may fear other problems, such as the replacement technology going bad. Also, if the lemon problem was created by defective design or manufacturing that appears in many vehicles, the Opal may get a bad reputation that will reduce resale.

Amber was a victim of a practice known as lemon laundering. It occurs when a purchaser is sold a known "lemon" without knowledge of the car's designation as such. The issue here is whether BCC and Bluebell were required to tell her. Jack did not use the full provisions of the lemon law, which in Texas require written notice by the consumer to the manufacturer. The statute seems to contemplate that the Texas Motor Vehicle board will order a refund of replacement. Tex. Occ. Code § 2301.606. That did not happen because when Jack made noise to Bluebell, it voluntarily repurchased the car. This arguably takes the car outside the lemon law, which would require a written disclosure of the car's "lemon" nature to a subsequent buyer. As support for the fact that this lemon laundering rule does not apply here, note that the disclosure must include the toll-free number for the Texas Motor Vehicle Board so that the buyer/potential buyer of the lemon can get information on the defect from a neutral party. Tex. Occ. Code § 2301.610. If Amber were to call the Board, it would have no record of Jack's Opal.

This is a major loophole in the lemon car scheme, and one that Bluebell undoubtedly knowingly took advantage of by offering a buyback with a bonus trade-in value, rather than letting Jack pursue his legal remedies. Even if Texas had a rebranding statute that required a notation on title of the manufacturer repurchase of the lemon vehicle, it arguably would not apply to this situation. Why? Because the manufacturer does not seem to have purchased the car, the dealer did. The problem does not give any insight into the relationship between BDD and Bluebell, such as whether Bluebell was paid or rewarded in some way by BDD for diffusing its lemon liability as a manufacturer. One could hypothesize that BDD "suggests" to dealers that they keep complaining customers happy with buyer incentives upon trade-in and makes it financially palatable for dealers to do so. Wisconsin has tackled this problem by broadening its lemon laundering statute to cover any repurchase by an authorized distributor or dealer with compensation from the manufacturer. Wis. Stat. § 340.01(28e).

The call of the problem asks whether Bluebell broke the law. While its conduct may not fall under the lemon laws and anti-laundering rules, it could have engaged in a deceptive act with its failure to disclose the car's history to Amber. The students saw the Texas Deceptive Trade Practices Act in Assignment 2 in the case on whether participants in a livestock show were consumers. It provides a likely avenue for a remedy. At least one case has found liability for concealing a lemon on similar facts of a "goodwill" or "voluntary" buyback. *See Johnson v. Ford Motor Co.*, 2003 WL 22794432 (Cal. Ct. App. Nov. 25, 2003) (While the initial award of $10 million in punitive damages was reversed and remanded, the liability was upheld. Ultimately the punitive damages were affixed at $175,000). The facts in *Johnson* were stronger, however, because the original owners had in fact requested a repurchase from the manufacturer and because the new purchaser was shown a computer printout showing no significant repairs for the vehicle. Additionally, Amber should make a complaint to the relevant regulators, which include the FTC for an unfair sales practice, the Texas Attorney General for a state UDAP violation, and the Texas Motor Vehicle Board, which in addition to enforcing the lemon laws also licenses dealerships.

Problem 16.2. This problem illustrates a yo-yo financing scheme. These scams have many colorful names. My favorite is "MacArthur" transactions, named for the general's famous "I shall return" quote. (This likely will be absolutely lost on your students, however.) See National Consumer Law Center, *Automobile Fraud* 95 (2015) (listing names for these types of sales-financing practices).

These transactions take a variety of forms but the basic premise is the same: use the fact that the consumer has the car and signed a purchase agreement as leverage to change terms in the dealer's favor. The dealer gets the benefit of "locking in" the sale. The consumer does not comparison shop because it thinks the transaction is a done deal and believes she cannot change her mind. Some of the practices with regard to yo-yo financing are pretty shocking, but the regulation—as this problem illustrates—has a pretty light touch. The National Consumer Law Center collects the applicable statutes in Appendix 4; about one-third of states have "some kind of official pronouncement about yo-yo sales." *Id.* at 97.

The Nevada statute delineates certain actions as a "deceptive trade practice" but does not ban options to cancel in vehicle sale contracts. Wonder Wheels will argue that the retail sale agreement contained a valid contingency clause. It is arguable that this sale contract did not contain sufficient language to permit a right to cancel. You can study together the language about "consummate" the transaction and ask what Cathy's understanding of what the contract was, or what it should have been. Did she read the contract? Was this language clear and conspicuous? Is that a requirement? (No specific statute seems to require that). A common method is the dealer has the consumer signed the sales contract but leaves its signature off. That is a classic tactic to attempt to create a right to cancel, but it may not work. The dealership's name often appears preprinted just below the signature line, and some courts have said that is sufficient, even absent the wet signature of an employee of the dealer. Further, one can construe the dealer's proffering the sales contract as an offer, that the consumer accepted by signing, thus creating a final deal.

Wonder Wheels may also defend its conduct by noting that it did really try to obtain financing. The facts are unclear, but presumably WonderWheels does not make loans. Alternatively, maybe it does make loans, but only if—and when—it can find an immediate buyer for the note. (You may need to explain sale and assignment of notes briefly; tread lightly). Is it right that they cannot find a buyer of the "paper" or is it that it cannot find a buyer that would generate profits? The note has some value; it is a promise to repay a substantial sum (I usually proffer that the car purchase price was $6,000). Wonder Wheels' problem is that, due to Cathy's high risk of default, buyers do not want to pay the note's face value, believing that a 17% APR would not compensate adequately for the risk of Cathy's default. Such a note may only be worth $5,500, for example.

Regardless of the uncertainty about whether the dealer can cancel the contract, look at its leverage over Cathy. If she fits it, the dealership can repo the car and leave her stranded to get to her job. Of course, that might be wrongful but Cathy will need to find a lawyer to challenge all that behavior. Query your students on whether any of them would like to take this case on a contingency, given that Cathy has no cash (and legal aid likely has weeks of wait time to get help.)

Assuming that Wonder Wheels has a valid right to cancel, the Nevada regulation provides limited protection. It cannot refuse to give Cathy her $500 back, so she has that option. But that is about it—and she'll need to know about this law to be able to assert that right. In all likelihood, Cathy is going to sign for the 24%. Or she'll have to chew up time shopping for another car, and could just end up with a 24% APR anyway. Wonder Wheels appears to be truthful that this is the "going rate" and that Hubert did a poor job underwriting the loan. The problem with yo-yo financing is that it gives the dealership a wide berth to shop the loan and change its mind, while putting Cathy in a difficult situation.

Problem 16.3. This problem looks at the dealer's dilemma with regard to representations about used cars. It puts the student in the counseling role of a business attorney and asks them to translate legal advice into practical steps. It is also an opportunity to study the uneven consumer protections created by relying on state laws.

The dealer gets its cars from two sources, an important fact under the Alaska statute. If the seller is a consumer, the dealer must make a "reasonable inquiry" about the "condition of the vehicle, including the accident and repair history of the vehicle." You can play the client, and ask "what is a reasonable inquiry?" The student-attorney then begins to struggle. Clients do not need the bare legal standard; they need to know how to apply it, especially here in a compliance situation. What concretely should the dealer do to make a reasonable inquiry? Should the salesman ask questions of the seller? Should the seller be given a paper in a large stack of others that asks them to list any problems? A student may suggest that the dealership just use CarFax, but that reveals a failure to read the statute carefully. The reasonable inquiry must be "of the seller." CarFax may be useful in prompting sellers to "remember" accidents or vehicle problems but it is not sufficient. The statute does require that information from the seller "be recorded in writing and verified by the seller," suggesting at some point the seller is going to have to sign. Designing these kinds of forms is the work of real lawyers, despite rarely being a task in law school.

The dealerships get the rest of their cars from a wholesaler out of Hawaii. For these cars, the Alaska statute requires only that the dealer disclose that it was purchased from a wholesaler. How could the dealership comply with this? Presumably, just add a line that says "This vehicle was purchased from a wholesaler." I ask the students what this means to them; would they perceive it as a negative? Would they make further inquiries at that point, usually as the car sale is about to be finalized?

The Hawaii statute does not apply to car sales in Alaska. It's a bit of a red herring to point students there, but is useful for two purposes. First, its presence highlights that car sales are regulated at the state level but they are easily transferred across state lines—literally shipped off in search of more industry-friendly laws. The mobility of vehicles along with variations in state law create lots of opportunities to harm consumers. Second, the Hawaii statute provides a point of comparison to Alaska's scheme. Where would the student prefer to buy a car? The answer is clearly Alaska, where the dealer has a duty to make an inquiry and pass that information along to a "prospective purchaser." In Hawaii, the dealer should do its best to avoid learning anything about the car's condition. Only when that information becomes "known" does the dealer have to disclose. From a policy perspective, the Hawaii statute discourages the dealership from getting the information that consumers need, so its requirement that the dealer share any such information is of little use.

While the problem does not explicitly raise the issue of salvage, it is an important and distinct concept from the lesser damage contemplated here. The definition of salvage varies greatly at state law. Salvage is typically addressed by requiring the insurance carrier or salvage yard to obtain a specialized title or notation on the title that advises all future buyers of the car's salvage designation. That solution can be overcome by engaging in title fraud, which has been made easier by sophisticated technology to mimic legitimate titles. And a great first step in title fraud is moving the car to a different state. A major counter to these problems is the National Motor Vehicle Title and Information System, a federal database of salvage vehicles maintained by the Department of Justice. Some states, such as New Hampshire, are beginning to require reporting into the database. If this catches on, it could greatly help with the sale of salvaged vehicles. The practice is shockingly common, with hundreds of thousands of "total-loss" cars being sold to consumers each year. After Hurricane Katrina, at least half a million cars were ruined, but a report found that about half of all cars with salvage-branded titles lost that designation after being sold in another state. Press Release, CarMax, *Car Max and Experian Automotive Warn Consumers About Flood-Damaged Vehicles* (Dec. 11, 2006). While huge hurricanes hopefully are not routine occurrences, the sale of salvage cars to unknowing consumers is shockingly routine.

Problem 16.4. This problem presents a variant of New Hampshire's auto title legislative saga. The state had capped loans at 36% *per year* in 2008, and then in 2011 came back with the 25% *per month*. It's hard to believe such a change is based on any reasoned assessment of an appropriate rate but rather purely on industry pressure. The 36% likely choked off the industry, and the legislature was persuaded to bring it back. But one wonders what the minimum rate is that would allow the industry to make loans and whether something under an eye-popping APR would do the trick?

This is a policy problem but walking through the statute is a first step. The right to rescind in part II should be familiar to them. It is a classic "cooling off" period like they saw with door-to-door sales. You can ask what the justification is here, as consumers drive to auto title lenders and should not be subject to undue sales pressure. Perhaps the high cost of the loan means we think consumers will change their minds, but I doubt that, as I can't see what would prompt second-guessing. If these really are for emergency loans, maybe the consumer will have used the money.

The statute does have rate restrictions. The loan could not have a teaser rate, and having just studied mortgages, the students should see the analogy to concern over teaser rate mortgages, such as the 2/28 ARM loans. One significant difference with title loans from mortgage loans is that home prices generally appreciate (putting aside the last several years), whereas cars nearly always depreciate. Thus refinancing options for an auto loan will likely be limited to another loan. Another thing that struck me about the New Hampshire statute is that perhaps by preventing a low initial rate, the effect is to drive up the overall rate for all borrowers—including those who will take out only one loan and will pay it off in full. Because a lender cannot be certain about that, the restriction may push a lender to a higher rate for the first loan. That, in turn, could drive away consumers who truly want one-time credit because it will make the auto title loan relatively expensive compared to other options. The rate of 25% interest per month is a chance to resist the idea of APR. When asked, "What is the APR?" the clever student will say "I don't know." Normally a weak answer, it is correct here because the finance charge and the repayment term are unknown. Making the unrealistic assumption that there are no finance charges, the annualized rate of 25% per month for a one-month loan is 300% (25% x 12 months). If the loan was renewed and rolled over for a year (with no payments other than renewal fees), the APR is 1355% for a one-year loan. Quite a change from 36% APR in the prior legislation.

Another point to discuss is repossession. The data are hotly disputed but the risk of property loss with title loans is definitely non-trivial. The text gives 17% and 10% as estimates but there are studies going farther afield in both directions. The students should be pushed on what the credit needs of a labor union's membership of service employees are likely to be. Do low-to-moderate income borrowers need this kind of short-term credit?

If the union helps protect against layoffs and income interruption and pushes for a fair wage, do these households have a need for short-term expensive credit? On the other hand, these are not high-paying jobs. This can lead to a debate about what consumers do with their auto loans. The recent paper by Fritzdixon, Hawkins, and Skiba, cited in the text, reports that 20% of borrowers use the money to pay rent; 17% borrow for utilities. The paper also has survey data on the demographics of car title borrowers. While it certainly varies locally, and the data are from a handful of states, the paper provides some nice data points (such as that 15% of car title borrowers are unemployed and that only 16% have used a payday loan in the last year). Another paper on the topic is Nathalie Martin & Ernesto Longo, *High-Interest Loans and Class: Do Payday and Title Loans Really Serve the Middle Class?* 24 LOY. CONSUMER L. REV. 524 (2012).

The statute has a limit on roll-overs, but it is very weak. It requires that the borrower take an oath certifying there is no other outstanding loan and has not been one for 60 days. Interestingly, the oath applies to title loans as well as payday. The Fritzdixon, Hawkins, and Skiba study finds that in Texas about 36% of borrowers spend more than six months paying off their loans. On the one hand, if consumers can continually make the payments, how is being mired in a title loan really that much different than being mired in a high-rate mortgage or credit card debt? Advocates assert that repossession of a car has more serious consequences than unsecured defaults and that repossession is more likely to actually occur than with other forms of secured high-yield lending such as rent-to-own.

If you want to brief the students on your state's auto-title lending laws, the Consumer Federation has a chart. Be sure to check whether the law has been changed, however, as this remains an active area for legislation.
http://www.consumerfed.org/pdfs/Resources.CTL.StateLawTermChart12.2.12.pdf.