1

Part One. Overview of Consumer Law

Assignment 1. What Is Consumer Law?

Consumer law has great economic and social importance in the United States. It has a long history in the common law and today occupies thousands of pages of statutes. Literally millions of transactions each day are covered by its rules. The duties of consumer law apply to nearly every business, and all individuals enjoy the legal protections of consumer law.

Despite its wide reach, consumer law occupies a vague, gray space in the legal world. It has poorly defined boundaries, both in law school curricula and in legal practice. In some ways, the porous nature of consumer law is an attribute. Lawyers who practice in this area often get to work on a wide variety of issues, and the umbrella of advocates who can be drawn into consumer issues is large.

For the student and teacher, however, the amorphous nature of consumer law presents challenges. To be coherent, and to be teachable in a single course, consumer law cannot merely be every law that contains the word "consumer" or that deals with an individual person. U.S. Senator Elizabeth Warren, a former consumer law scholar, explains this as the purple socks problem. Many laws govern purple socks—the safety of the dye, the wages paid to the laborers, the warranty given upon sale—but nobody teaches a course called Purple Socks Law. Consumer law exists as a legal field because it is defined by a common set of actors, transactions, and issues. As a one-sentence definition, consider this: Consumer laws provide rights to individuals and duties on businesses when these parties engage in a transaction for money or value. This definition is both under- and over-inclusive, and some would take an entirely different approach in defining consumer law.

Your first task in learning consumer law is to ask yourself what you think consumer law is, and to consider its history, current developments, and similar laws in working through your own answer to that question. With new consumer laws popping up as the marketplace and social norms evolve, identifying the shared features and purposes of consumer law is an essential foundation.

A. Origins of Consumer Law

The problems of consumer law are ancient. *See* William H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1136 (1931). Many of its legal protections directly reflect the limits of human cognition, including our emotional capacities for optimism and trust, and our later feelings of regret and anger. For thousands of years, when consumers were treated unfairly, they sought non-legal remedies (a club to the head of the wrongdoer?). Or consumers simply moved on—usually poorer and wiser for the unsatisfactory transaction.

Modern consumer law intervenes to prevent, or failing that, to remedy, the harms of some consumer transactions. The rise of consumer law is traceable to

2

the development of capitalism and to the growth of a robust market for goods and services. When a government or a feudal lord was responsible for providing food, shelter, and other necessities, the most pressing failures and injustices were problems related to citizenship and rights of personhood. These problems remain at the fore in developing countries. But countries with advanced market economies face an additional set of concerns related to how consumers and households get goods and services. Along with free markets came market failures. When those failures occur, consumer law intervenes to set parameters and provide remedies.

The legal system developed in tandem with economic markets. The ability to contract, the right to own property, and the rise of monetary and banking systems were all necessary legal precursors for the consumer marketplace. When people could make—and break—contracts, a system of law developed to help resolve such disputes. The common law of contracts is foundational to consumer law. At its heart, the question is whether an enforceable promise was made between a consumer and a business and whether the business should be held accountable when a consumer regrets the deal. Should consumers know that some products are too good to be true?

Carlill v. The Carbolic Smoke Ball Co.

Queen's Bench, 1892
2 Q.B. 484, aff'd, 2Q.B. 256 (Court of Appeals, 1983)

…The defendants, who are the proprietors and vendors of a medical preparation called "the Carbolic Smoke Ball," inserted in the *Pall Mall Gazette* of November 13, 1891, the following advertisement:

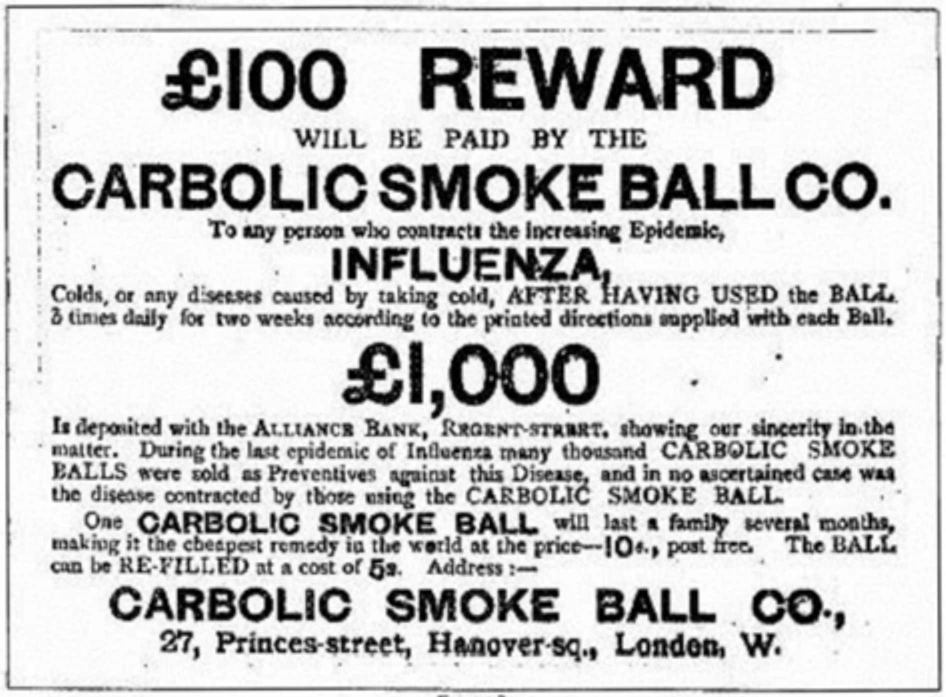


FIGURE 2

3

…The plaintiff, a lady, having read that advertisement, on the faith of it bought one of the defendants' carbolic smoke balls, and used it as directed three times a day, from November 20 till January 17, 1892, when she was attacked by influenza. She thereupon brought this action against the defendants to cover the £100 promised in their advertisement.

The defendants pleaded that there was no contract between the plaintiff and the defendants that the defendants should pay £100 in the event which happened; and that if there was such a contract it was void, either under eight & nine Vict. C. 109, as being a contract by way of wagering, or under 14 Geo. 3, c. 48, s. 2, as being a contract of insurance not made in accordance with the provisions of that section, or as being contrary to public policy. The action came on for trial before Hawkins, J., and a jury; but the facts not being in dispute, the learned judge reserved the case for further consideration on the points of law raised in the defence.…

Four questions require consideration in determining this case.

1st. Was there a contract of any kind between the parties to this action?

2nd. Was such contract, if any, wholly or partly in writing so as to require a stamp?

3rd. Was the contract a wagering contract?

4th. Was it a contract of insurance affected by statute, 14 Geo. 3, c. 48, s. 2.?

As regards the first question, I am of opinion that the offer or proposal in the advertisement, coupled with the performance by the plaintiff of the condition, created a contract on the part of the defendants to pay the £100 upon the happening of the event mentioned in the proposal. It seems to me that the contract may be thus described. In consideration that the plaintiff would use the carbolic smoke ball three times daily for two weeks according to printed directions supplied with the ball, the defendants would pay to her £100 if after having so used the ball she contracted the epidemic known as influenza.

The advertisement inserted in the *Pall Mall Gazette* in large type was undoubtedly so inserted in the hope that it would be read by all who read that journal, and the announcement that £1000 had been deposited with the Alliance Bank could only have been inserted with the object of leading those who read it to believe that the defendants were serious in their proposal, and would fulfill their promise in the event mentioned; their words, "*showing our sincerity* in the matter," state as much. It may be that, of the many readers of the advertisement, very few of the sensible ones would have entertained expectations that in the event of the smoke ball failing to act as a preventive against the disease, the defendants had any intention to fulfill their attractive and alluring promise; but it must be remembered that such advertisements do not appeal so much to the wise and thoughtful as to the credulous and weak portions of the community; and if the vendor of an article, whether it be medicine smoke or anything else, with a view to increase its sale or use, thinks fit publicly to promise to all who buy or use it that, to those who shall not find it as surely efficacious as it is represented by him to be he will pay a substantial sum of money, he must not be surprised if occasionally he is held to his promise....

The third question is whether the contract I have found to exist is a contract by way of gaming or wagering within the meaning of statute eight & nine Vict. C. 109,

4

s. 18, which renders such contracts null and void, and, therefore, not enforceable by action. I think it is not. It is not easy to define with precision what amounts to a wagering contract, nor the narrow line of demarcation which separates a wagering from an ordinary contract; but, according to my view, a wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and, therefore, remaining uncertain until that issue is known. If either of the parties may win but cannot lose, or may lose but cannot win, it is not a wagering contract....

In the present case an essential element of a wagering contract is absent. The event upon which the defendants promised to pay the £100 depended upon the plaintiff's contracting the epidemic influenza after using the ball; but, on the happening of that event, the plaintiff alone could derive benefit. On the other hand, if that event did not happen, the defendants could gain nothing, for there was no promise on the plaintiff's part to pay or do anything if the ball had the desired effect. When the contract first of all came into existence (i.e., when the plaintiff had performed the consideration for the defendants' promise), in no event could the plaintiff lose anything, nor could the defendants win anything. At the trial it was not even suggested that any evidence could be offered to alter the character of the contract or the facts as deposed to by the plaintiff. I am clearly of opinion that, if those facts established a contract, as I think they did, it was not of a wagering character....

In the pleadings I find a further defence that the contract was contrary to public policy; but the learned counsel for the defendants was unable to point out to me any grounds for such a contention other than those I have already discussed.

It follows from what I have said that, in my opinion, the plaintiff is entitled to recover the £100. I therefore direct a verdict to be entered for the plaintiff for £100, and judgment accordingly with costs.

Judgment for the plaintiff.

Carbolic Smoke Ball is a classic. It is frequently used in contract classes to illustrate doctrines of contract formation. Yet, it holds important lessons for consumer law too. It illustrates that consumers, if they manage to recover from illness and file a lawsuit, can hold businesses accountable for the statements in their advertisements. Note that defendants did not raise the efficacy of the smokeball as a defense, relying instead on doctrinal distinctions between a wagering or insurance contract and an ordinary contract. In today's world of technology and information, complete with services like Yelp and Google, consumers should be much better equipped to spotting scams like a cure for cold or flu.

5

Federal Trade Commission v. Airborne Health, Inc.

(CV08-05300 C.D.C.A.)

STIPULATED FINAL JUDGMENT AND ORDER FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission ("Commission" or "FTC"), filed a Complaint for Injunctive and Other Equitable Relief against Defendants Airborne Health, Inc.,...pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §53(b), alleging deceptive acts or practices and false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§45(a) and 52.

The Commission and Defendants…without Defendants admitting or denying liability for any of the conduct alleged in the Complaint, have stipulated to entry of the following agreement for permanent injunction and settlement of claims for monetary relief in settlement of the Commission's allegations against Defendants.

The Court, having been presented with this Stipulated Final Judgment and Order for Injunctive and other Equitable Relief ("Order"), finds as follows:

FINDINGS

1. This Court has jurisdiction over the subject matter of this case and jurisdiction over all parties. Venue in the Central District of California is proper.

2. The acts and practices of Defendants are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. §44.

3. The Complaint states a claim upon which relief can be granted under Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§45(a) and 52, and the Commission has the authority to seek the relief it has requested.

…

10. The commission's action against Defendants is an exercise of the Commission's police or regulatory power as a governmental unit.

11. The paragraphs of this Order shall be read as the necessary requirements for compliance and not as alternatives for compliance, and no paragraph served so modify another paragraph unless expressly so stated.

12. Each party shall bear its own costs and attorneys' fees.

13. Entry of this Order is in the public interest.

14. The Plaintiff and Defendants, by and through their counsel, have agreed that entry of this Order resolves all matters in dispute between them arising from the facts and circumstances alleged in the Complaint in this action, up to the date of entry of this Order.

…

I. Prohibited Representations Regarding Covered Products

IT IS HEREBY ORDERED that Defendants, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and their officers, agents, servants, employees, and all persons or entities in active concert or participation

6

with them who receive actual notice of this Order, by personal service or otherwise, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, in or affecting commerce, are hereby permanently restrained and enjoined from making, or assisting others in making, directly or by implication, including through the use of a product name, endorsement, depiction or illustration, any representation:

A. That such product:

1. Reduces the risk of or prevents colds, sickness, or infection;
2. Protects against or helps fight germs;
3. Reduces the severity or duration of colds; or
4. Protects against colds, sickness, or infection in crowded places such as airplanes, offices, or schools;

unless the representation is true, not misleading, and, at the time it is made, Defendants possess and rely upon competent and reliable scientific evidence that substantiates the representation.

B. About the efficacy or health-related benefits of any Covered Product, unless the representation is true, not misleading, and, at the time it is made, Defendants possess and rely upon competent and reliable scientific evidence that substantiates the representation.

Provided however, that Defendant Airborne Health may continue to deplete its existing inventory of Airborne Products plastic tube packaging. *Provided further,* that Airborne Health may continue to deplete its existing inventory of Airborne Products paper cartons and display trays specified in Attachments A1 and A2, for a period of 90 days after the entry of this Order, or until October 31, 2008, whichever is sooner. Airborne Health may not ship any existing inventory of Airborne Products packaging not specified in this Part after the date of entry of this Order.

II. Prohibited Representations Regarding Tests or Studies

IT IS FURTHER ORDERED that the Individual Defendants, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, and their officers, agents, servants, employees, and all persons or entities in active concert or participation with them who receive actual notice of this Order, by personal service or otherwise, in connection with manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, in or affecting commerce, are hereby permanently restrained and enjoined from misrepresenting, in any manner, expressly or by implication, including through the use of any product name or endorsement, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

...

IV. Monetary Judgment and Consumer Redress

JUDGMENT IS HEREBY ENTERED in favor of the Commission and against Defendants, jointly and severally, the amount of thirty million dollars ($30,000,000).

7

EXHIBIT A, *FTC v. AIRBORNE* COMPLAINT RADIO ADVERTISEMENT

(Sneezing.)

Female Announcer: Are these hideous sounds familiar to you, dear friend? Then why haven't you tried Airborne, the amazing new product created by a school teacher who was sick of catching colds in class. First came the wheel, then canned food and the Internet. Now, Airborne. Do you get a sore throat every time you turn around, catch colds at the office or on airplanes? Well, then your ship's come in, baby. Just listen to our fan mail. "Airborne got rid of my cold in one hour," writes David Mars. "A miracle cold buster," says Tommy Greico *(ph)*. So, next time you feel a cold coming on, take Airborne. Yeah!

Victoria Knight-McDowell: Hi, this is Victoria Knight-McDowell. I'm a second grade teacher and I developed the dietary supplement, Airborne, because I was sick of catching colds in class. When you feel that first cold symptom, won't you please give Airborne a try? Thank you.

More than one hundred years later, consumers have much more knowledge of the science of illness, as well as ready resources to investigate assertions in advertisements (e.g., Google). Yet, the common cold still is fodder for scams. The exploitation of trust for profit endures because consumers make mistakes and imperfect choices. Jean Braucher & Barak Orbach, *Scamming: The Misunderstood Confidence Man*, 27 YALE J.L. & HUMAN. 249 (2015).

What has evolved significantly is the approach of consumer law to address the problem. In the place of a common law action for contract, as seen in *Carbolic Smokeball*, are a variety of statutes that require disclosures, define how terms or statements can be used in advertisements, and impose warranties on the sales of goods. These developments can be seen as a response to the shortcomings of contract law. The common law ideas of a promise and of a meeting of the minds rest on an idealized transaction in which the party and counterparty have equal bargaining power and complete information.

Consumer law also has origins in tort law, in particular the common law actions of deceit or fraud. Such actions are difficult to prove, or even to plead, and the common law eventually embraced a set of less stringent actions such as negligent misrepresentation or fraud by omission. Proving the elements of tort can remain difficult for consumers because damages are often minimal or because there is no duty in a given circumstance from business to consumer. Statutes that ban unfair or deceptive acts or practices, which was the basis for the FTC's action against Airborne, are a partial response of modern consumer law to the limitations of tort.

The twin foundations of consumer law in contract and tort highlight that consumer law is fundamentally private law. The two key actors in a transaction governed by consumer law are private parties: a consumer and a business. Also, the typical injury is economic, another common feature of private law actions. The evolution in consumer law from common law to statutory law, however, has increased the role of government in the consumer law system. Legislatures make the bulk of consumer law in the public sphere, rather than courts in

8

response to private activity. Enforcement of consumer statutes is often by public officials, such as states' attorneys general, rather than private litigants.

The evolution from *Carbolic Smokeball* to *FTC v. Airborne* shows the developments in the theory of such a case and illustrates the reliance on public enforcement. These changes in lawmaking make it difficult to characterize consumer law as solely a matter of private concern. Today, consumer law bridges the public law and private law divide; it is as often shaped by public law such as administrative law and by private law such as tort suits.

B. Consumer Law in the Modern Marketplace

A central debate in consumer law is whether a particular market is sufficiently broken to justify legal intervention. Efficient marketplaces require that parties be able to acquire relevant information in a timely fashion, to communicate successfully with each other, and to have the power to enter into a deal or look elsewhere for a better one. Classic economics often assumes the existence of such features in the marketplace. A growing body of research and probably your own experiences suggest that such assumptions are often not met in the real world. Behavioral economics, psychology, marketing, and other disciplines study the ways in which consumers deviate from perfectly rational behavior, have cognitive barriers to decision-making, or are susceptible to having their actions shaped by businesses. Back in 1936, famed economist John Maynard Keynes acknowledged the role of emotions in influencing human behavior in the marketplace. He observed that "most, probably, of our decisions to do something positive, the full consequences of which will be drawn out over many days to come, can only be taken as the result of animal spirits—a spontaneous urge to action rather than inaction, and not as the outcome of a weighted average of quantitative benefits multiplied by quantitative probabilities." *See* THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 161-162 (1936). Consumer laws are written on this backdrop of human psychology. Depending on the situation, the law intervenes to protect people from their own behavior and decisions, or leaves them unfettered to act and enjoy or suffer the consequences.

A primary defensive tool of consumer law is the provision of information. Many consumer laws require the business to make disclosures, either before or at the time of a transaction. The idea is to compensate for a failure of consumers to seek out information or for the ability of businesses to shroud key information from consumers.

The theory goes that with better information, the marketplace is repaired so consumers can then be held to the bargains they made because they did so with full knowledge of the deal and its consequences.

Consumer law may fall short of these goals in its disclosure-based provisions. The problem is that both parties to the transaction may not give the disclosure the due intended by the law. Businesses may ignore requirements to provide disclosures or consumers may fail to read the disclosures. One study of clickwrap agreements, the online contracts in which a button is clicked to indicate assent, found that only one out of one thousand consumers reads such

9

agreements. *See* Yannis Bakos, Florencia Marotta-Wurgler, & David Trossen, *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* 43 J. LEGAL STUD. 1-35 (2014). Even if they are given the disclosures and are willing to spend the time to review them, consumers may be unable to understand mandatory disclosures. Credit card contracts, for example, are written at a reading level that exceeds the comprehension ability of 80 percent of Americans. *See* Connie Prater, U.S. Credit Card Agreements Unreadable to four out of five adults, http://www.creditcards.com/credit-card-news/credit-card-agreement-readability-1282.php. Another problem is language itself; about 20 percent of people living in the United States do not read in English. Disclosures also impose costs on businesses. The trade publication of nearly every industry contains laments about the costs of compliance related to disclosure.

Scholars have begun to identify harms of disclosure that go beyond the dollars and cents that businesses spend and the time that consumers use. Law professors Omri Ben-Shahar and Carl Schneider argue that it is often difficult to cabin the amount of information disclosed, such that useful information is crowded out, and that disclosure as a remedy can undermine other consumer laws. As an example of the latter problem, they note that the common law defense of unconscionability often rests on a consumer showing that a particular term was hidden and thus the deal was unfair. By burying extensive terms in mandated disclosures, businesses may shield themselves from unconscionability litigation for only a fraction of a penny per transaction in compliance costs. *See* Omri Ben-Shahar & Carl Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 704-706 (2011). Despite such concerns, disclosure remains a bulwark of consumer protection law, perhaps because it seems wrongheaded to argue against information. For free market advocates, information permits the freedom of choice. From the other side, information is a tool to deliver much needed protection from the market.

Consumer law also imposes substantive limits on transactions. These laws typically arise from an intuition that market failure is driven by unequal bargaining power rather than a lack of information. That is, consumers may know, or at least fear, that they are being ripped off but may lack the ability to negotiate for a better deal. Examples of this approach are rules that prohibit lenders from taking household goods such as baby cribs as collateral for certain loans and limits on mandatory arbitration clauses in some contracts. In the former case, the concern is that lenders are taking the collateral only for its hostage value and not because it is economically meaningfully protection for their interests. In the latter case, policymakers might worry that contracts of adhesion and a small number of market actors may effectively prohibit consumers from choosing a contract that allows them to litigate disputes. Substantive limits place a heavier check on people's and businesses' freedom than disclosure laws. Such remedies are often reserved for high-stakes transactions or when mandatory information disclosure has failed to eliminate the troubling transactions or conduct.

In addition to disclosure laws and substantive regulation, consumer laws may be motivated by a desire to enhance the remedies available to wronged consumers. For example, while a suitable cause of action under the common law may exist for a particular transaction, it may be extraordinarily difficult to

10

prove damages given the facts. Alternatively, the damages for that transaction may be easy to prove but be paltry in dollar amount. The outcome of either situation is to curb sharply the practical ability and interest of consumers (and their lawyers—who want to earn a living) in bringing such actions. Consumer statutes sometimes address these problems by permitting class actions or by providing for statutory or exemplary damages. These laws can be seen as addressing a different broken market: consumers seeking legal services. Enhanced remedies try to incentivize lawyers to represent consumers and thereby police the market. These are interventions in the market for legal services and in the court system, rather than duties or rights that change the substantive law of how consumers and businesses may transact.

Regardless of form, consumer laws are subject to a fundamental debate. Are such laws designed to enhance the marketplace or weaken it? The first stone thrown by most critics of consumer laws is paternalism. Why should government protect those who can and should protect themselves? To be valid, a contract must be agreed upon by a consumer. Is this mindset of protecting people from their own choices consistent with democracy and capitalism? The debate over this question goes to the heart of the kind of economy and society that a country wants. Proponents of consumer laws may accuse their adversaries of callousness to human suffering or of being willing to accept injustice as an irremediable consequence of markets, an assumption that they sharply challenge. More moderately, they may point to human biases that inhere to all consumers as errors that reduce the efficacy of a market-based system.

The concepts of "consumer rights" and "economic justice" illustrate the concerns behind such debates. These concepts are more prevalent in developing nations and Europe than in the United States. They draw on a human rights framework, which sees consumer law as a necessary tool for allowing people to realize their human capabilities and to accumulate adequate resources for health, safety, and political participation. The United Nations has promulgated Guidelines for Consumer Protection that give a good flavor of these ideas. In the United States, the relatively recent activism by labor unions and race membership groups on consumer credit issues seems motivated by similar concerns. In this view, consumers should be able to rely on government to keep them safe, including from the harms that can occur when buying goods or services or borrowing money. The battle for adequate wages produces little benefit to welfare if consumers are swindled out of their pay.

C. Consumer Law Compared to Consumer Protection

Consumer law is not a synonym for consumer protection—at least not in this book. Such a distinction is not merely semantic. It goes to the issue of whether consumer law is about intervention in a marketplace for the benefit of all, or protecting the vulnerable from wrongdoers. This book is titled “Consumer Law” to reflect its focus on the former. (Note that your course may be called “Consumer Protection,” which itself is worth pondering as the course

11

continues.) The core theory of this book is that markets require intervention on behalf of consumers, at least some of the time and in certain ways, to be robust and reliable. Better markets do not only benefit consumers but also improve the nature of competition as a whole. Corrections to markets can help competing businesses have a level playing field and make transactions more efficient. Both outcomes help keep the economy humming along at optimal levels. An illustration of this point is that the Federal Reserve has a Division of Consumer Affairs and Community Development. Even at the macro level of the central bank, consumer transactions matter.

Protection for the most vulnerable members of society, on the other hand, is sometimes characterized as being about helping the “few” instead of improving the lot of the “many.” Such ideas may be incorrect, but consumer protection as a term bears a mantle of social activism that the label of consumer law does not. In the 1970s when consumer law entered the law school curricula, classes nearly always focused on the perspective of the consumer. The attorney was the champion of the downtrodden, and the goal of consumer law was to empower the consumer. Concerns about discrimination and economic disparities, coming out of the civil rights movement, were twined with ideas about consumer protection. This was the early Ralph Nader era and harkened back to the progressive era battles between workers and capitalists.

In the last thirty years, however, consumer law has morphed. The role of law and economics in the legal academy and the deregulation movement in policymaking have pushed and pulled consumer law away from its consumer protection origins and toward market concerns. In *The Law and Economics of Consumer Finance*, Richard Hynes and Eric Posner give a flavor of today’s debate about credit, a major area of consumer law.

> Regulation of the market for consumer credit provides a number of benefits to consumers. It gives them information about the terms and consequences of the credit transaction, it provides them insurance against shocks, and it protects them from discrimination. But a proper defense of consumer credit regulation must explain why the market would not supply these benefits if

> consumers are willing to pay for them. The availability of credit insurance, the many ways in which typical credit transactions trade off between interest rate and risk, and the existence of information intermediaries all suggest that the market does respond to some degree to consumer demand for credit protections.
>
> Models that incorporate information asymmetry and market power have ambiguous implications for consumer credit regulation. Information problems do prevent markets from achieving the first best, and laws regulating the credit market can in theory increase social welfare. But it is difficult to determine whether the premises of the models are met in reality. Complicating the analysis, it is not clear how sensitive consumers and creditors are to the law, whether because of irrationality or "rational ignorance." And it is not clear how much the law would influence the behavior of even a rational, well-informed consumer, given the many loopholes, the limited penalty structures, and the many ways in which creditors can evade the law and creditors and debtors can contract around it.

Richard Hynes & Eric A. Posner, *The Law and Economics of Consumer Finance*, 4 AM. LAW ECON. REV. 197-198 (2002).

12

The cautious tone of this excerpt about the value of law is a far cry from the heyday of consumer protection. The authors frame the debate in terms of markets. The vulnerable consumer makes no appearance in the analysis, largely replaced by an idealized, rational consumer who can be inserted into economic models.

Today, consumer law may be trending back toward consumer protection. The global financial crisis that began in 2008 has sparked a new level of activism about the appropriate balance of power between businesses and consumers. Laws are rapidly changing, and the debate is moving at the margin. The market perspective will likely remain powerful in the United States, however, with undercurrents of consumer protection existing in an ocean of broadly-oriented consumer law.

D. Fields Related to Consumer Law

The preceding sections give an introduction to the key themes of consumer law. These themes help circumscribe the areas of study for a consumer law course. A consumer law is one that applies to consumer-to-business transactions for the purchase of goods, services, or property, and the financing of such purchases. Consumer law statutes are built on the common law foundations of tort, contract, and occasionally, property law. The statutory protections and remedies are typically cumulative of common law actions, a point often lost on litigants who struggle to fit their situation into the twists and turns of a statute but fail to plead a simple breach of contract or fraud action.

Contract law and tort law, in both their common law and statutory forms, are part of the body of consumer law. In particular, the Uniform Commercial Code (U.C.C.) is an important supplement to other consumer statutes. It provides the substantive law on sales, secured lending, and payment systems. Despite its name, the U.C.C. generally applies to consumer-to-business transactions. It also contains some specialized provisions that provide additional rules when one party is a consumer. Consumer law focuses on these rules, and asks why exceptions are made to the law that applies in business-to-business deals. The generally applicable rules of the Uniform Commercial Code are taught in one or more courses on commercial law, including secured transactions or payment systems.

Laws that touch on concerns about information asymmetry, unequal bargaining power, economic empowerment, and the like as they relate to purchasing or borrowing are nearly always put under the umbrella of "consumer law." Other consumer-to-business interactions, such as employment relationships, may reflect similar concerns but are excluded from the body of consumer law. Examining why some subjects are typically outside the realm of consumer law helps reveal the common concerns of consumer law.

Because consumer law regulates the purchase of goods, the law of products liability is implicated in many transactions. Unlike products liability, consumer law rarely imposes strict liability. Consumer transactions are framed as contracts, with the legal twists often being the imposition of additional duties, such as mandatory disclosure of information, as part of the contract. An

13

example may help illustrate the point. The Magnuson-Moss Warranty Act is a staple of consumer law. It does not substantively create liability for defective goods, as does products liability law. Instead, the Magnuson-Moss Act regulates the language and meaning of warranty terms in consumer contracts. Magnuson-Moss does not impose warranty obligations but defines how such terms can be used. Products liability provides an important layer of protection for consumers harmed or shortchanged by defective goods, but its frame is different from the contractual approach of consumer law.

Banking law is a natural cousin of consumer law. Consumers must pay for the goods and services that they purchase, and this nearly always involves their use of payment systems such as cash, credit or debit cards, or checks. Financial institutions are the intermediaries in consumer-to-business transactions in processing these payments. Particularly in recent decades, many consumer purchases are financed by borrowing. This can occur through traditional loans, such as mortgages, or through products that blur the line between payment and borrowing such as credit cards. Banks and financial institutions bear the risks of such lending. The regulation of these entities can have a powerful effect on consumer purchasing and borrowing. This nexus between banking law and consumer law was hotly debated in 2010 by Congress when it created the Consumer Financial Protection Bureau in the aftermath of the global financial crisis. Part of the justification for a separate agency focused on consumers was that the traditional concerns of banking regulators on the safety and soundness of banks led such regulators, at best, to overlook consumer protection issues, or at worst, to permit practices that were deleterious to consumers. Practices that are highly profitable for financial institutions—and thus enhance the safety and soundness of the bank (in at least the short term)—may be so profitable precisely because consumers do not understand or benefit from such practices. This tension means that banking lawyers and consumer lawyers often see themselves as members of unrelated—if not warring—tribes. The key difference between banking law and consumer law may be one of perspective about whose economic health—families or financial institutions—is paramount.

Antitrust is another relative of consumer law. Like consumer law, it attempts to intervene in broken markets. The focus is on restraints to competition between businesses, however, rather than on the interaction of consumers and businesses. Antitrust seeks to protect the larger economy from anticompetitive practices, which helps businesses grow. Antitrust law does have some concern with consumers' well-being. Consumer injury, for example, is an aspect of claims under the Sherman Antitrust Act. The consequences of uncompetitive markets certainly reach down to the consumer level, in the form of limited product selection and higher prices, for example. Consumers do not usually rely on antitrust laws. The typical antitrust action is brought by a competitor or would-be competitor who alleges that remedying the anticompetitive activity would help consumers but who is usually motivated to file suit by a desire to increase its market share or profits.

Consumer transactions involve risk to the parties. The business often has continuing obligations on warranties or compliance with consumer law, and continuing concerns about whether a consumer will pay up for the good or service. Consumers have the inverse issues. Will this product or service be as promised? Can I repay the loan? Two areas of law address financial risk:

14

insurance law and bankruptcy law. Insurance is precautionary. It helps parties guard against financial loss from risks. Bankruptcy is reactionary. When risk management was insufficient or foresight impossible, bankruptcy provides a way to limit the harms of financial failure. Both areas of law exist as separate fields from consumer law. One main reason is that each system also has a complex set of rules for non-consumer transactions. Bankruptcy law deals with the problem of overwhelming consumer credit, but it also provides mechanisms for multinational corporations dealing with overwhelming debenture obligations. Insurance law has provisions to aid consumers in understanding their insurance contracts and ensuring that they are paid on claims, but it also regulates the solvency of insurers and other squarely commercial issues in the industry.

Because most of consumer law is statutory, consumer law also examines how lawmakers craft statutes and how courts interpret them. Consumer law is also administrative law. Consumer statutes frequently require government bodies to promulgate regulations, provide services to consumers, or regulate businesses in their dealing with consumers. Understanding the boundaries of government actors, and the overlapping roles of different levels of government, is an important aspect of consumer law.

Unlike many law school courses that largely focus on understanding whether a plaintiff or defendant is entitled to judgment on a set of facts, consumer law takes a keen interest in the ability of plaintiffs to bring an action in the first place and to receive meaningful relief. Conversely, consumer law also is about the tools available to defendants to defeat plaintiffs even when they have substantive law on their side. The study of consumer law is necessarily a study of civil procedure and remedies, including alternate dispute resolution.

Consumer law inevitably bleeds into other areas of law. The main feature of consumer law is a concern with the disparities between consumers and businesses in purchase and credit transactions. The primary goals of consumer law are to keep markets for goods and services functioning well and to protect consumers from harm when market mechanisms fall short.

Problem Set 1

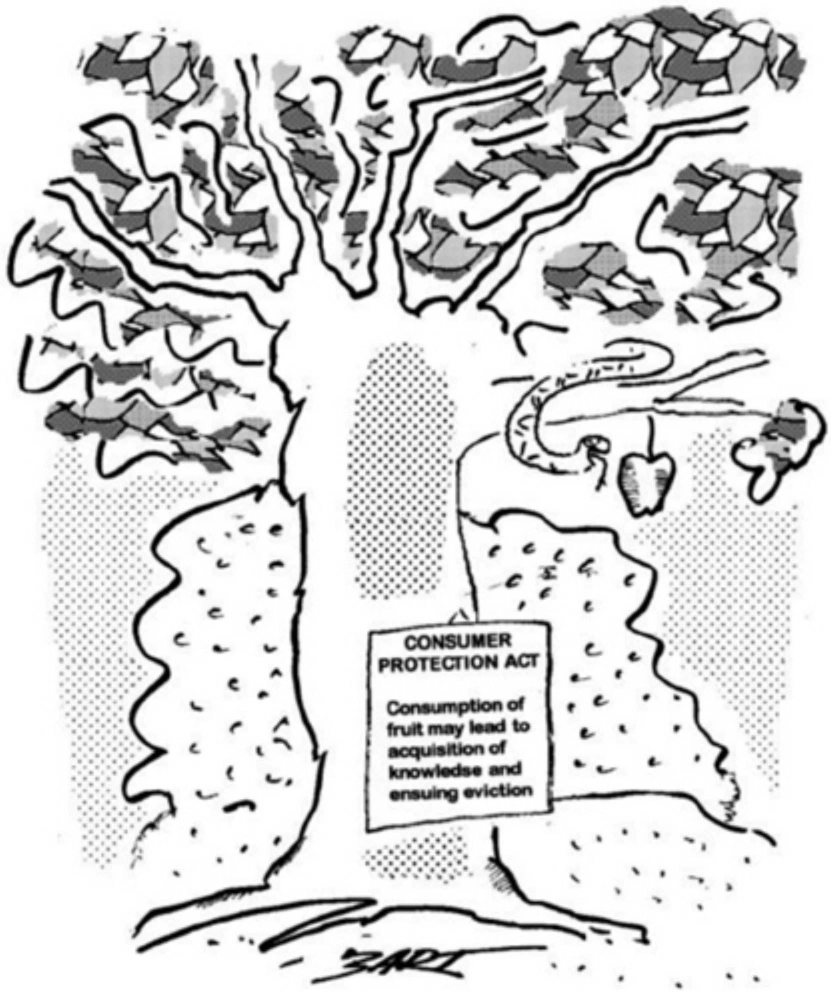
1.1. Make a list of five consumer laws that have affected your life in the last 24 hours. Don't do any research but simply think about your interactions with businesses. Do not worry about the names of the laws; just describe the transaction and what you think the law adds to your role as a consumer in the transaction. For each law, note whether you think it is aimed at correcting a broad marketplace gap or protecting a vulnerable consumer. Be prepared to share your list.

1.2. Your clients are frightened out of their wits—and their home. Upon retirement, the couple purchased a large Victorian home in the country. On moving day, their neighbors commended them for their bravery in being willing to occupy a house possessed by poltergeists, filling them in on the national publicity the house had received for its apparitions. The couple wants to rescind the sale. They've had to purchase another place to live, and two mortgages are straining their fixed income in retirement to the breaking point. What areas of law are implicated in this transaction and the litigation that

15

your clients want to pursue? Is this a problem for consumer law? (Or for the Ghostbusters?)

1.3. What is the perspective of the cartoonist on consumer law? From your experience, identify an actual disclosure that seems unnecessary. Be prepared to discuss your example, to explain why you think it was put into place, and to argue why such a disclosure should be eliminated.



1.4. In 2007, future U.S. Senator (then law professor) Elizabeth Warren made the case for a separate federal government agency to protect consumers when they engage in financial transactions. The article carried a byline of, "If it's good enough for microwaves, it's good enough for mortgages. Why we need a Financial Product Safety Commission." She wrote:

> It is impossible to buy a toaster that has a one-in-five chance of bursting into flames and burning down your house. But it is possible to refinance an existing home with a mortgage that has the same one-in-five chance of putting the family out on the street—and the mortgage won't even carry a disclosure of that fact to the homeowner. Similarly, it's impossible to change the price on a toaster once it has been purchased. But long after the papers have been signed, it is possible to triple the price of the credit used to finance the purchase of that appliance, even if the customer meets all the credit terms, in full and on time. Why are consumers safe when they purchase tangible consumer products with

> cash, but when they sign up for routine financial products like mortgages and credit cards they are left at the mercy of their creditors?…
>
> Consumers can enter the market to buy physical products confident that they won't be

> tricked into buying exploding toasters and other unreasonably dangerous products. They can concentrate their shopping efforts in other directions, helping to drive a competitive market that keeps costs low and encourages innovation in convenience, durability, and style. Consumers entering the market to buy financial products should enjoy the same protection. Just as the Consumer Product Safety Commission (CPSC) protects buyers of goods and supports a competitive market, we need the same for consumers of financial products–a new regulatory regime, and even a new regulatory body, to protect consumers who use credit cards, home mortgages, car loans, and a host of other products. The time has come to put scaremongering to rest and to recognize that regulation can often support and advance efficient and more dynamic markets.

Elizabeth Warren, *Unsafe at Any Rate*, 5 DEMOCRACY 8 (2007), at http://www.democracyjournal.org/5/6528.php.

Are you persuaded by the analogy? How are financial products, and consumer credit specifically, different from physical products? What are the advantages and disadvantages to her comparison to the Consumer Product Safety Commission, which regulates things like baby cribs and lawn mowers?

Assignment 2. Who Is a Consumer?

To say that consumer law is about consumers is painfully unsatisfying. First, there is the definitional problem. Everyone engages as a consumer at some moments, but we also take on a variety of other roles that are separately defined by the legal system—for example, as parents, as employees, as taxpayers. The law needs to define the types of people and transactions that come within the purview of consumer law. Often, the key task is distinguishing consumers from businesses. The law may further define consumer in its substantive content when it describes when a consumer is engaged in conduct that is covered by the particular law. Second, the law must consider whether to design consumer law around the "typical" consumer or a more narrow class of persons. This Assignment looks at a number of differing approaches to defining a consumer.

A. Definitions of Consumer

No less venerable an American than U.S. President John F. Kennedy grappled with explaining how to think about who was covered by consumer law. In a 1962 speech introducing a Consumer Bill of Rights (which was not enacted), he explained:

> Consumers, by definition, include us all. They are the largest economic group in the economy, affecting and affected by almost every public and private economic decision. Two-thirds of all spending in the economy is by consumers. But they are the only group in the economy who are not effectively organized, whose views are often not heard.

President Kennedy went for the big grab in his definition. In his conception, consumers become synonymous with citizens, which is a neat political trick. Businesses tend to resist such broad definitions, despite the clarity of including everyone and excluding no one.

Definitions of consumers appear in most, but not all, consumer law statutes. It is overwhelming and probably unnecessary to study all the definitions. This assignment focuses on a few of the most important definitions; they are important in part because they have often served as a model for later laws that adopt the same approach.

The Truth in Lending Act (TILA) is a federal statute that regulates the disclosure of the cost of consumer credit and related issues. Enacted in 1968, TILA remains a cornerstone of the federal consumer law regime. Its definition

of consumer, or slight variations of it, is typical of most statutes. It offers a good starting point for considering who is a consumer for purposes of the law.

On its face, TILA makes short work of the definitional task. It states that a "consumer" is a "natural person." 15 U.S.C. §1602(h); 12 C.F.R. §1026.2(a)(11). What, you might wonder, is an unnatural person—an alien? Crazy cousin Hubert? The language is designed to differ from other statutes that use the word "person" to indicate all entities. *Cf.* 11 U.S.C. §101(41) (Bankruptcy Code definition of person includes corporations, partnerships, etc.). Section 1603 of TILA specifically exempts from its purview credit granted to "organizations." Case law has affirmed that regardless of their purposes, corporations and organizations are not consumers under most provisions of TILA. *See e.g.*, *Prifti v. PNC Bank*, 2001 WL 1198653 (E.D. Pa. Oct. 9, 2011). An exception is that certain rules on credit cards, including those on unauthorized use, unsolicited issuance, and criminal misuse, do apply to organizations. This is accomplished by defining "cardholder" as a subcategory of the general consumer definition. *See* 12 C.F.R. §1026.2(a)(8).

A slightly different approach to defining consumer is used in the Fair Credit Reporting Act (FCRA), which defines consumers only as "an individual." 15 U.S.C. §1681a(c). In its official commentary on the statute, the Federal Trade Commission has clarified that "individual" means "natural persons." Despite the different language in TILA and FCRA, the end result is the same. The Consumer Financial Protection Bureau also defines a consumer to be an "individual," but broadens this to include "an agent, trustee, or representative acting on behalf of an individual." Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §5481 (Dodd-Frank Act). The intent here was to sweep in situations when a consumer may be represented by a guardian or similar entity, perhaps because of mental incapacity or death. The case law interpreting TILA and FCRA also have been interpreted to cover such agents and the like.

This examination of definitions of consumer illustrates a structural point about statutes. Despite being enacted at one moment in time, they endure. In the case of FCRA, the implementing agency has explained the statute in such a way to make it match the definition in TILA, despite Congress' choice to use different words in FCRA than it had used in TILA. In the case of the Consumer Financial Protection Bureau, the Dodd-Frank Act was written decades later and reflects an effort to incorporate issues flushed out by case law into an improved (and more detailed) statute that gives more clarification than its predecessors. These evolutionary processes in statutes can be difficult to track. Unlike in case law, there is no quick look at appellate review. Often the legislative history provides little guidance of where its drafters looked for inspiration in wording.

Some statutes that are part of the canon of consumer law do not make any effort to limit their scopes and apply equally to consumers and businesses. For example, the Equal Credit Opportunity Act, 15 U.S.C. §1691 et seq. applies to business credit, albeit to a slightly lesser extent than to consumer credit. Another important instance of broad applicability is the federal unfair and deceptive acts or practices law, 15 U.S.C. §45, which states that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." There is no mention of consumers, despite this being a foundation of the consumer law framework. Every state has a similar statute banning unfair practices. Most of these are limited to consumers, however, picking up the TILA definition that transactions governed by the statute must involve a consumer as a person who uses the good or service at issue for personal, family, or household use. The Texas Deceptive Trade Practices Act uses a broader definition, as the below case illustrates.

Houston Livestock Show and Rodeo, Inc. v. Hamrick

125 S.W.3d 555 (Tex. App. 2003)

YEAKEL, Appellate Judge.

Appellant Houston Livestock Show and Rodeo, Inc. (Livestock Show) appeals from a judgment awarding appellees Leslie Hamrick and her parents, T.L. Hamrick and Connie Hamrick, Jimmy Barton and his parents, Craig Barton and Jacque Barton, and Kevin Copeland, damages.…Appellees sued the Livestock Show and the Texas Veterinary Medical Diagnostic Laboratory (Lab) alleging breach of contract, conversion, negligence, gross negligence, defamation, intentional or reckless infliction of emotional distress, and [for violations under] the Texas Deceptive Trade practices Act (DTPA), Tex. Bus. & Com. Code §§17.41-.63.

The jury returned a favorable verdict for appellees against the Livestock Show for the DTPA violations and defamation, as well as negligence and gross negligence against the Lab.…The Livestock Show brings this appeal…challenging the… consumer status of the parents.…We will reform the district-court judgment and, as reformed, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 1991 Leslie Hamrick, Jimmy Barton, and Kevin Copeland, all high-school students, entered farm animals they had raised in the Junior Livestock Show competition at the Livestock Show. They vied with other competitors in various animal classes for a chance at winning the contest and auction proceeds from the sale of their animals. As prescribed by Livestock Show rules, the Exhibitors were members of their schools' FFA or 4-H programs, operating under the guidance of the Texas Education Agency. Their FFA and 4-H programs, and to a certain extent their parents, supervised the Exhibitors' raising of their animals. Hamrick and Barton entered lambs, and Copeland entered a steer in the Junior Livestock Show. Each won their respective class, entitling them to participate in the Livestock Show's junior auction. The competition's rules required the animals to undergo drug testing for illegal substances, commonly used to improve an animal's appearance. The drug tests revealed illegal substances in all three animals, and the Livestock Show disqualified the Exhibitors. This action arises from the drug testing procedures and the Livestock Show's actions toward appellees.

Junior Livestock Show rule 16 states that "unethically fitted livestock" are prohibited, and exhibitors showing such animals would be disqualified and "barred from future competition" at the Livestock Show. The Livestock Show instituted animal drug testing to "teach and reward 4-H and FFA students for good animal husbandry," while "endeavor[ing] to protect the public from consuming tainted meat." Moreover, the rule warned exhibitors that the Livestock Show's drug test results were final and without recourse.

Livestock Show applications and entry fees submitted by Agricultural Science Teachers and County Extension Agents included the signature of both instructor and exhibitor. The reverse side of each application included a waiver of liability and a statement notifying the signatories that the Livestock Show had the right to test the animals for medication or drugs. Below this statement, the application contained lines on which the exhibitor and the exhibitor's parent or guardian signed. The exhibitors and their parents or guardians also signed and returned a notarized form stating that they would abide by the rules, and that no unauthorized substances had been given to the animals. In the event an animal required testing, the exhibitor and his or her parent or guardian would witness the collection of a urine specimen from the animal and sign another form acknowledging that they were present for the collection. Pending a successful drug test, the prizes and auction proceeds, less the Livestock Show's commission, would be disbursed.

Appellees paid the appropriate entry fees and submitted their applications. Each won ribbons in their respective class, entitling them to participate in the auction. At auction, Hamrick's lamb brought $12,020, Barton's lamb brought $1520, and Copeland's steer brought $5060. Pursuant to its drug testing rules, the Livestock Show obtained a urine sample from Barton's lamb on February 27. The next day, the Livestock Show collected urine samples from Hamrick's lamb and Copeland's steer. The Livestock Show split the samples into two parts, with the Lab [at Texas A&M University] testing one half, while the Livestock Show retained and froze the remainder. The Lab tested the specimens following the auction, and the Livestock Show retained the auction proceeds pending review of the results.

…[T]he Lab reported to the Livestock Show that Hamrick's lamb had tested positive. Nine days later, the Lab reported that Barton's lamb and Copeland's steer had both tested positive as well. Thereafter, the Livestock Show notified the Exhibitors and their schools that they had been disqualified because of the positive drug tests. Additionally, the Livestock Show informed appellees that they were barred from participating in Houston Livestock Shows for the remainder of their lives.…

The procedural history of the case spans more than ten years and the record is extensive. [But ultimately, a] jury found the following in favor of appellees: 1) $300,000 in mental anguish damages; 2) $115,000 in injury-to-reputation damages; 3) $12,020 for Leslie Hamrick's loss of prize money; 4) $190,000 in attorney's fees for trial and appeal; and 5) $630,000 in additional DTPA damages. [Defendants appealed]

THE PARENTS AS CONSUMERS UNDER THE DTPA

[T]he Livestock Show argues that the appellee parents are not consumers for purposes of the DTPA and that there is no evidence or factually insufficient evidence to support their status as consumers. The Livestock Show contends that "[t]he basis of

21

21

[appellee parents'] complaint is the drug testing performed by the Diagnostic Lab, [and] [t]hat is not a valid basis for a claim against the [Livestock Show] under the DTPA." The Livestock Show argues that the parents sought, acquired, or purchased nothing from the Livestock Show that could form the basis of the complaint and that they were not exhibitors in the show....

The DTPA mandates liberal construction to promote the underlying purpose of the act. Tex. Bus. & Com. Code §17.44 (2011). A "consumer" under the DTPA is defined as "an individual, partnership, corporation, this state, or a subdivision or agency of this state who seeks or acquires, by purchase or lease, any goods or services." Id. §17.45(4). To qualify as a consumer, the plaintiff must meet two requirements: (1) the person must seek or acquire goods or services by purchase or lease and (2) the goods or services purchased or leased must form the basis of the complaint. Sherman Simon Enters., Inc. v. Lorac Serv. Corp., 724 S.W.2d 13, 14 (Tex. 1987); see also Tex. Bus.& Com. Code §17.45(2) (2011) ("Services' means work, labor, or service purchased or leased for use...."). The word "purchase," in the context of the DTPA, has been defined as the actual transmission of services from one person to another by voluntary act or agreement, founded on valuable consideration. Hall v. Bean, 582 S.W.2d 263, 265 (Tex. Civ. App. 1979). A plaintiff's standing as a consumer is established by its relationship to the transaction, not by a contractual relationship with the defendant. Flenniken v. Longview Bank & Trust Co., 661 S.W.2d 705, 707 (Tex. 1983). Whether a plaintiff is a consumer under the DTPA is a question of law for the trial court).

The district court determined as a matter of law that the parents were consumers, and the evidence adduced at trial supports such holding. The parents were involved in the entire animal-showing process. The parents signed waivers of liability, which approved the Livestock Show's right to test the animals for unauthorized drugs. They also signed a notarized form stating that they would abide by the Livestock Show rules and that no illegal substances had been administered to the animals.

Additionally, when an Exhibitor's animal was subjected to drug testing, an Exhibitor's parent witnessed the taking of the sample, after which the parent signed another form acknowledging that the parents witnessed the event. The parents, as well as the Exhibitors, were subject to the threat of a lifetime banishment from future shows in the event of a disqualification resulting from illegal drug use. The myriad of services that the Livestock Show provided to the Exhibitors and their parents included the use of the facilities for their children, animal judging, drug testing, and the auction. Simply stated, the Exhibitors could not have entered the competition without their parents' express joinder and participation.

We hold that the district court was correct in concluding the parties were consumers because (1) the parents did seek or acquire the services of the Livestock Show, indicated by their authorization, participation, and potential exclusion from all future shows; and (2) the services provided by the Livestock Show form the basis of the complaint.

Showing livestock may seem far from the mainstream definition of being a consumer, but consumer protection laws are designed to be remedial and sweep broadly. Checking each law's definition of "consumer," or noting the absence of such a definition, is a critical first step in analyzing any consumer law problem.

22

B. Defining a Consumer Transaction

Beyond consumers meaning individuals and not entities, definitions typically contain limitations designed to separate out individuals acting as business people and individuals acting as consumers. These limitations come in a couple of different forms. Sometimes certain transactions are excluded from the applicable law, even if they are made by consumers acting as consumers. Usually this is because the size or nature of the transaction is much more common by business people than by consumers or because the transaction is of such a size or importance that the law expects consumers to be sufficiently engaged to protect their own interests. The other common limit is to examine the purpose of the transaction and ask whether its purpose was business in nature. This section considers these approaches in turn, but many statutes use both approaches in combination. The result is a patchwork of coverage for individuals that is less comprehensive than it may initially appear.

Laws that exempt certain transactions, even when made by individuals acting for their own benefit, can use different kinds of triggers for exclusion. TILA contains a major exemption from its scope based on a dollar threshold, exempting credit transactions of over $50,000 in amount. 15 U.S.C. §1603(3); 12 C.F.R. §1026.3(b). (As part of the Dodd-Frank Act, the $50,000 limit is adjusted for inflation. In 2015, it stood at $54,600.) This change was designed to sweep more ordinary consumer purchases, like cars, under the scope of TILA, which with its 1968 original $25,000 limit would have covered nearly all car purchases but failed to do so today. The intuition behind the dollar-figure exemption could be that when the stakes get high enough consumers will, or should, make specialized detailed inquiries about the deal, and therefore do not need mandatory disclosures. Alternatively, the dollar limit may reflect a belief that transactions of this size are rarely for personal, family, or household use and that to require TILA disclosure in such situations would overburden companies that primarily engage in business deals.

There is an important "exception to the exemption" (try saying that phrase five times quickly) of the dollar-limit threshold. Any extension of credit secured by real property, or secured by personal property used or expected to be used as the principal residence of a consumer, is covered by TILA. 15 U.S.C. §1603(3). Regardless of the value of the loan, when a house is the collateral, TILA applies to the transaction. The theory here is the inverse of the general dollar-limit idea: home mortgages have such high stakes, they always warrant disclosures.

TILA contains another type of exemption, which is the categorical exclusion of certain transactions from its scope. Student loans guaranteed by the United States or a state guaranty agency, such as Stafford loans, are exempt from TILA. 15 U.S.C. §1603(7). The Higher Education Act, 20 U.S.C. §1083 et seq., mandates alternate disclosures of credit cost for student loans and so presumably the TILA exemption prevents duplicative disclosures. TILA also exempts layaway plans, tax liens, borrowing against a pension account, letters of credit, and a few other items. *See* Official Staff Commentary, §226(a)(14)-1. These exemptions likely emanate from a varied set of justifications, including that the transaction is not an extension of credit.

23

Again, TILA provides the leading definition of a consumer transaction. A consumer credit transaction is one in which the "money, property, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. §1602(h); 12 C.F.R. §1026.2(a)(12). The limitation to personal, family, or household purposes is strengthened in TILA by an exemption from coverage for "transactions involving extensions of credit primarily for business, commercial, or agricultural purposes." 15 U.S.C. §1603. The personal, family, or household purpose" definition has been widely adopted in other consumer statutes. *See* 12 U.S.C. §5481 (defining "consumer financial product or service" subject to the Bureau as "any financial product or service that"…"is offered or provided for use by consumers primarily for personal, family, or household purposes.") and the Fair Credit Reporting Act, 15 U.S.C. §1691(a)(d)(1)(A) (defining a "consumer report" as one used or collected for "credit or insurance to be used primarily for personal, family, or household purposes.").

A large body of case law exists on whether a particular transaction is for personal, family, or household use. In some instances, the answer may differ depending on the exact statute at issue—even if its wording is identical to another statute—because courts look to the overarching purpose of the statute as part of their consideration. In deciding whether something meets the personal, family, or household use criteria, the key issue is the reason for the transaction. The identity of the creditor or the type of collateral does not shield something from being for personal, family, or household purposes.

The most challenging cases are those involving mixed uses, in which the good or service is used both for personal and for business use. In these cases, courts look to the "primary" purpose. Determining the primary purpose is a factual determination, requiring evidence about how often and how extensively the good is used. Most courts say that to be primary, a use does not have to be exclusive. *See* Palmer v. Statewide Group, U.S. App. Lexis 1497 (9th Cir. 1998) (interpreting TILA). If more than half of the use is for personal, family, or household purposes, this is usually sufficient evidence. Occasional consumer use is insufficient to defeat characterization as a business purpose. Once the primary purpose is identified, a court must decide the legal issue of whether that purpose is consumer or business in nature. The relevant timing for the determination is what occurred prior to and at the closing of the transaction, not later changes in use.

Gallegos v. Stokes

593 F.2d 372 (10th Cir. 1979)

LOGAN, Circuit Judge.

This is an appeal from a trial court judgment in favor of plaintiff-appellee Inez Gallegos against Mel Stokes.

The issues on appeal only concern Truth-In-Lending Act (TIL) violations: whether the trial court properly entertained the defense by Stokes that the transaction with

24

Gallegos was commercial and not subject to the disclosure requirements of TIL; whether this is a consumer credit transaction covered by TIL, or an exempted commercial transaction; and whether Stokes can avoid liability because the disclosure errors were made unintentionally and in good faith. For the reasons stated below, we affirm the judgment of the trial court.

On August 15, 1975, Gallegos purchased a 1969 Dodge pickup truck from Stokes, who was manager of Hopper Auto Sales in Albuquerque. (It is stipulated that Stokes, who later purchased the business, is the proper defendant.) The total cash price was $1,395. Gallegos traded in her 1965 Chevrolet station wagon and some jewelry, valued at $150 and $200 respectively, reducing the total due to $1,045. A $45 fee for license, certificate of title and registration was not included in the cash price.

Stokes prepared a security agreement and the other papers necessary to complete the transaction. The agreement provided for 24 monthly installments of $59.46 each, to begin on September 5, 1975. The annual percentage interest rate was stated as 27.40% and the total finance charge as $321.56. Gallegos failed to make the first payment and Hopper Motors repossessed the truck. None of her down payment was returned, and no deficiency judgment was sought by Hopper Motors.

We accept the findings of the trial court that the total finance charge should have been stated as $292.60, based on N.M. Stat. Ann. §50-15-8 which permits a 14% annual percentage rate calculated without regard to whether the sale provides for installment payments. The monthly payments would have been $55.73 and the annual percentage rate as 24.93%. The disclosure provisions were violated by overstating the finance charge, §1605 and 12 C.F.R. §226.4, the annual percentage rate, §1606 and 12 C.F.R. §226.5(b), and the monthly payment, §1638(a)(8) and 12 C.F.R. §226.8(b)(3). In addition, Stokes violated 12 C.F.R. §226.4(b)(4) because he neither included the finance charge nor itemized and separately disclosed the license, certificate of title, and registration fees.…

II

We turn next to whether the trial court was clearly erroneous in deciding that Gallegos' purchase was not within the commercial use exception to TIL. This is a factual issue to be resolved by the trier of fact. Redhouse v. Quality Ford Sales, Inc., 511 F.2d 230 (10th Cir.), op. on rehearing en banc, 523 F.2d 1 (10th Cir. 1975). We find sufficient evidence in the record to support the trial judge's finding that the truck was primarily for personal use. Mrs. Gallegos traded in her only automobile, and the truck became her sole means of transportation. Stokes accepted her jewelry as part of the down payment. Her testimony at trial indicated she bought a truck because she moved often, and it would help transport her family and possessions. The defense also elicited testimony that she intended to use the truck to sell fresh produce, obtained from the Estancia Valley, as a means of making money. But Stokes made an attempt to comply with the TIL disclosures requirements, evidently assuming this was a consumer credit transaction. Had he believed then that the sale was not "primarily for personal, family, household, or agricultural purposes" he would not have attempted to comply.

25

Cases considering whether a transaction is primarily consumer or commercial in nature look to the transaction as a whole and the purpose for which credit was extended. Many involve mortgaging real property or property purchased for rental use. Gerasta v. Hibernia Nat'l Bank, 411 F. Supp. 176, 185 (E.D. La. 1975) (second mortgage on future residence is consumer transaction); Adema v. Great N. Dev. Co., 374 F. Supp. 318, 319 (N.D. Ga.1973) (lots purchased for investment reasons do not make buyer a consumer); Puckett v. Georgia Homes, Inc., 369 F. Supp. 614, 619 (D.S.C. 1974) (purchase of mobile home to be used as rental unit is not a consumer credit transaction); Sapenter v. Dreyco, Inc., 326 F. Supp. 871, 873 (E.D. La.) (cash from second mortgage on residence to meet payments on investment property is not consumer transaction).

In a case where a truck was purchased for personal as well as business use, the TIL disclosures were required to be made. Allen v. City Dodge, Inc., 5 Cons. Cred. Guide (CCH) ¶98,428 (N.D. Ga. Sept. 8, 1975). The situation here presents an even stronger case for requiring disclosure, since it is more likely she would use it primarily for personal, family and household purposes.

The purpose of TIL is to provide consumers with meaningful disclosures of credit terms and conditions, and encourage the informed use of credit. 15 U.S.C. §1601(a). Theoretically TIL permits a consumer to "shop for credit" and thus compensate for a weaker bargaining position compared with business and commercial borrowers. Mrs. Gallegos did not have an ongoing business when she purchased the truck, nor the prospect of establishing one. She was a widow with a fifth grade education, who traded her only car and personal jewelry in on this purchase. Even if we take her testimony in the light most favorable to Stokes, she was a person engaged in a consumer credit transaction of the type intended to be protected by the required TIL disclosures.

We therefore affirm the trial court award of damages, costs and attorney's fees. Mrs. Gallegos is also entitled to attorney's fees for the successful defense of this appeal. See Thomas v. Myers-Dickson Furniture Co., 479 F.2d 740 (5th Cir. 1973). We grant an additional $300 for attorney's fees for the appeal.

The line between personal, household, and family versus business use may be blurred more frequently in today's economy. As more people work from home or are employed as freelance consultants, there may be more overlap in their activities as consumers and businesses. Michael Troncoso, *The Sharing Economy's Next Phase: The Active Venue Firm*, (June 30, 2015), http://www.law360.com/articles/673249/the-sharing-economy-s-next-phase-the-active-venue-firm.

The increasing number of independent contractors and sole proprietorships also raises questions about whether consumer law's assumption that consumers need protection but businesses can protect themselves is useful. Do people really become more sophisticated or rational, or turn into better negotiators, when they lose their jobs and start performing the same work for a fee rather than for wages? If small business is the key to the American economy, shouldn't they enjoy the same protections from larger businesses as consumers?

26

The European Union has struggled with this issue. While its law does not apply to legal persons, even if they have a non-business character, such as a non-profit association, many of the E.U. member states have a broader reach. *See* Ewoud Hondius, *The Notion of Consumer: European Union versus Member States*, 28 SYDNEY L. REV. 89 (2006). The justification is that some types of legal entities are just fictions for an individual person making a decision, such as with sole proprietorships.

C. Who Is Consumer Law Trying to Protect?

Even if it distinguishes between people acting as consumers and people acting as business people, consumer law must grapple with another issue of identity. Who is "the consumer" that the law is trying to protect? The legal solution to a perceived problem will depend on who is being harmed. In consumer law, this issue often squarely raises a debate about the degree to which the law should expect consumers to protect themselves. This abstract problem in conceptualizing the consumer has crucial implications for policy. It also can powerfully affect the enforcement of consumer laws because regardless of the written law, the resources might only be expended for a lawsuit if it is perceived that consumers are being taken advantage of.

People, even narrowed to those living in America, have a wide variety of characteristics that bear on how they engage in consumer transactions. Demographic qualities such as educational attainment, age, and race may shape how consumers make purchases or choose financial products. Other factors related to a consumer's life experience, including fluency in English, or whether the consumer has a special status under the law, such as being a veteran or receiving government benefits, may also suggest that a different set of protections is appropriate. The challenge for policymakers is identifying the qualities that might be relevant to the appropriate scope of the law and to balance the need to protect some consumers with the law against the desire to give freedom to other consumers from the law.

Consumer law takes its cue on constructing the consumer from the common law of tort and contract. At the simplest level, the issue is similar to that of the infamous "eggshell plaintiff" and the tort doctrine that you take your defendant as you find him. *See* MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, TORT LAW AND ALTERNATIVES CASES AND MATERIALS 394 (9th ed. 2011). Some consumers have the equivalent of eggshell skulls when it comes to their financial transactions. They may have little education or experience, or merely may be particularly gullible or susceptible to sales pressure. What level of sophistication should a business be able to assume of its consumers? Are businesses required to assess a consumer's understanding of a deal or risk being unable to enforce it later?

In contracts, this discussion usually centers on unconscionability, a justification for a court's refusal to enforce a bargain. Nearly every contracts law book presents *Williams v. Walker-Thomas Furniture Co.* to illustrate the doctrine. 350 F.2d 445 (D.C. Cir. 1965). Its key elements are an absence of meaningful

27

choice, often created by gross inequality of bargaining power, and contract terms that are unreasonably favorable to the other party. Inequality of bargaining power often corresponds to demographic and economic characteristics, most obviously low incomes. Recall that Ms. Williams was a welfare recipient when she engaged in the purchases at issue in that case. The implication of the case is that those in poverty or who suffer other disadvantages that create bargaining inequities should be given special protection by the law. They are one type of "eggshell" consumer and perhaps consumer laws should be designed to protect the most vulnerable, rather than the typical or average consumer. The consequence is restricted freedom of contract for the most sophisticated. This debate is being played out in the wake of the mortgage crisis over the desirability of products like complex adjustable-rate mortgages. These products may be appropriate for a small subset of consumers with particular financial circumstances and the acumen to understand their risks and consequence. The typical American may be better suited to a traditional long-term fixed-rate mortgage. The debate continues on whether regulations to ban the complex products are appropriate on the basis that a majority (or even vast majority) of consumers would be better served by simpler products.

This discussion about the ideal consumer implicates racial discrimination and other forms of economic oppression. The stereotypical consumer in the minds of lawmakers may have an income, education, and credit market access that are more common among white Americans. For example, the laws protecting certain assets of debtors may mirror the typical wealth accumulation of white families, who are more likely to be homeowners than non-white families of similar means, and thus to benefit from homestead protections. *See* A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725 (2004). Similar issues arise in assessing the value of mandating disclosures in a consumer's primary language. If one thinks non-English speakers are a small fraction of the population, the costs of such disclosures may seem unduly onerous to business. The cost-benefit analysis is different if one knows that the fraction of non-English speakers is sizeable. In the U.S. Census, 2011 American Community Survey, 20.8 percent—about 60.6 million people—do not speak English. About two-thirds of these people speak Spanish.

These discussions about race, gender, class, and other issues are often difficult. One's instinct, regardless of one's substantive views, may be to allow the issue to be latent, an undercurrent to discussions about consumer "sophistication" that remains unspoken. The subject has now been raised by your casebook, hopefully encouraging you and your classmates to explore these issues as they present themselves in the remainder of the course. Later in this book, the separate laws that prohibit discrimination toward racial minorities, women, immigrants, and others in purchasing goods and obtaining credit are studied in detail.

D. Special Categories of Consumers

Contract law restricts the enforceability of contracts entered into by minors. It also refuses to enforce contracts when one party lacks mental capacity.

28

The focus of both restrictions is to limit contracting activity to people who are able to understand the deal and appreciate its effects. These rules continue to apply in contracts for consumer goods and services and are supplemented by special rules for particular groups of consumers. One example is the restriction on the issuance of a credit card to any person under the age of 21, unless they have an adult co-signer or can establish proof that they have the means to repay their likely debts. 15 U.S.C. §1637(c)(8). This rule may reflect the perceptions about the complexity of credit cards; they are just too complicated in their terms for people between the age of 18 (the typical age of majority for contract) and 21. Some parents supported the rule on different grounds. They noted that if their children became overindebted, the parents as a practical matter would pay off such debts. It made sense, the argument went, to require a co-signer and avoid parental surprise. Interestingly, there is no similar limitation on higher dollar amounts of credit, such as car loans and mortgages, which are legally available to those 18 years and older.

At the other end of the age spectrum from students are older Americans. This group of consumers also raises concerns about financial sophistication and mental capacity. One in five people aged 80 years or more has dementia but the condition is often undiagnosed or does not result in a loss of legal capacity to contract (although it may latter be raised as a defense to the contract). Older Americans may also have fewer contacts with government, workplaces, and social centers where they may learn about new financial products or may be less likely to use the power of the Internet to identify scams. They may also have different attitudes about being able to trust financial institutions or intermediaries. *See generally* Deborah Thorne, *The (Interconnected) Reasons that Elder Americans File Consumer Bankruptcy*, 22 J. AGING & SOC. POL'Y 188 (2010); Priscilla Vargas Wrosch, *What More Can Congress Do About the Elder Abuse Epidemic? A Proposal for National Movement*, 23 TEMP. POL. & CIV. RTS. L. REV. 1 (2013). As a result of these and similar issues, many elder law practitioners spend a significant amount of their client representation working on consumer law problems.

Reverse mortgages are a financial product designed for older Americans, who have often built up substantial equity in their homes. The loans can provide funds either in a fixed amount or as a line of credit (or a combination of both) and do not require repayment until the house is sold (likely to be when the person dies or moves to housing for seniors). The government requires an information session from a specially-trained reverse-mortgage counselor as a condition of its reverse mortgage program. While some of this is due to the complexity of the product, similar counseling was never required for other "exotic" mortgages such as 2-28 teaser ARMs (see, even the name is mystifying!). The counseling probably reflects normative desires to protect older Americans from disastrous financial mistakes and a belief that as an empirical matter older Americans are less able to protect themselves in financial transactions than their younger counterparts. Another example of additional protection for older American is a North Dakota statute that generally gives consumers three days to change their minds and cancel a door-to-door sale, but extends that period to fifteen days for consumers over 65 years of age. N.D. Cent. Code §51-18-02.

Another group of people subject to special consumer rules are members of the armed forces. The "Talent Amendment" to the defense appropriations bill

29

of 2007 imposed limitations on and requirements for certain kinds of consumer credit extended to active duty military and their spouses and dependents. Pub. L. 109-364, §670 (codified at 10 U.S.C. §987). Its most controversial provision is the creation of a price restriction on consumer credit; the "military annual percentage rate" cannot exceed 36 percent. Depending on interest rates at the time, this figure may not seem unduly restrictive. One might observe that most credit cards, car loans, and other transactions carry lower rates. The Talent Amendment, however, regulates high-cost, short-term credit: payday loans, motor vehicle title loans, and tax refund anticipation loans. These transactions often carry annual percentage rates above 100 percent and sometime as high as 500 percent. Given the hostility of modern consumer law to price regulation, the Talent Amendment is an important enactment.

The justifications for intervention in the credit markets available to service members illustrate some concerns beyond the typical fears about vulnerable citizens. After all, if you are brave enough to serve on active duty, surely you can protect yourself from a piece of paper and a pushy loan officer? The evidence suggested the fallacy of this assumption. A study by Steven Graves and Christopher Peterson on the geography of payday loans showed that military counties and zip codes have very high densities of payday lenders compared to non-military areas. Stephen M. Graves & Christopher Peterson, *Predatory Lending and the Military: The Law and Geography of "Payday" Loans*, 66 OHIO ST. L.J. 653 (2005). Their findings suggest that payday lenders target service members because they are a highly profitable demographic. Numerous military leaders testified about the effects of unmanageable debts on troop morale and on the quality of life for service members. Bad credit could undermine military readiness, either because troops were distracted by debt problems facing their household or because debt problems were grounds for losing security clearance. Another point was that high-cost credit strained the ability of military families to make ends meet. Salaries come out of the tax coffers, and so perhaps the government should have a greater say in the degree to which service members commit themselves to paying off hundreds of dollars of interest each month.

One interesting debate was over the assertion that service members needed protection because of their financial naivety. Service members frequently are young and they may have limited experience with financial transactions. Countering this argument was the military's required program of financial literacy. Unlike typical Americans, most of whom are never required to take a financial education class, service members attend mandatory sessions where the basics of credit math are taught. The Talent Amendment may reflect a conclusion that such education cannot fully substitute for substantive regulation, a point considered more fully in Assignment 26.

Problem Set 2

2.1. After trying the practice of law for a year, Janis Wallace decided she was better suited to life as a law professor. She is on the tenure track at Hogg University in Iowa and under pressure to produce a fascinating article on her area of specialty, consumer law, before the end of the academic year. Her personal

30

charm and notoriously short reading assignments have made her a very popular teacher, however, and when she is in her office, she struggles to write her article because of student interruptions. She has taken to working each morning at her local branch of a national coffee shop. She has learned to sip a $1.65 cup of tea for four hours, while enjoying a clean table, comfy chair, and complimentary Wi-Fi for research.

Yesterday, while doing some research on Wikipedia, a virus attacked Professor Wallace's computer, decimating all of its memory and all of her work on her tenure article. The virus attack occurred when the store Wi-Fi was hijacked and involuntarily redirected her to a hacker site that infected the computer. After the attack, Professor Wallace burst into tears for a good hour, like a fragile academic, and then reverted to her lawyer roots by threatening to sue the coffee shop for its defective Wi-Fi. The manager admitted that the store provided no firewall or made any other effort to secure its Wi-Fi against intruders, but refused to provide her with any compensation (not even a free tea!), announcing that "you get what you pay for."

Professor Wallace has realized that she will not get tenure and instead has thrown herself into her lawsuit against the coffee shop. You are its in-house counsel, and the complaint is on your desk. What are your best arguments and tactics to defeat Professor Wallace's action under the unfair or deceptive acts and practices law? Iowa Code §714.16(1) and (2).

2.2. Your law school classmate, Ricardo Levin, chose the big firm route, spending the last six years working on discovery in a single case; you established a solo practice doing a bit of everything. Ricardo posted to Facebook yesterday that he needed a "real" lawyer to represent him. Intrigued, you called Ricardo and learned that his big firm went big-time bankrupt. Ricardo has been receiving letters from Barristers Bank, relating to a credit card that his firm gave him to use for entertaining clients, his extensive travel to client locations, and other purposes. When his firm was short on cash and changed its reimbursement policy, Ricardo continued to use the card to pay for meals and taxis when he worked late out of habit.

In the firm's bankruptcy, Barristers Bank was paid only ten cents for each dollar it was owed. It is now threatening to sue Ricardo for the rest of the debt. Ricardo has looked at the credit card agreement he was given. It clearly states that he is personally obligated on the debt if his firm fails to pay. Ricardo wonders if perhaps he can settle this matter, or even make it go away, by finding Barristers Bank liable for some mistake in the credit card transaction.

You ask Ricardo to send you all the paperwork he was given when the card was issued and note that no Truth-in-Lending disclosure was provided. What do you need to know to figure out whether a TILA disclosure should have been given? How will you get such information? 15 U.S.C. §§1602(i) and 1603; 12 C.F.R. §1026, Supplement I—Official Staff Interpretation 1026.3(a).

2.3. You are the senior aide to the Chair of the House Committee on Government Oversight. A constituent has recently expressed concern that the Consumer Financial Protection Bureau (CFPB) may target her business of making loans to students in the weeks before school starts when they are waiting for their financial aid checks to arrive. You remind the constituent that section 1013 of the Dodd-Frank Act requires the CFPB to have two units focused on

31

certain kinds of consumers and point out that students are not mentioned. The constituent suggests that you "review the organizational chart on CFPB's website (www.consumerfinance.gov/the-bureau) and get back to her when you've figured out how to reign in this overreaching government." What does your investigation reveal? What should the Committee do in response, if anything, about this situation? The committee members will want to know their legal options as well as the policy and political concerns.

Assignment 3. Who Makes Consumer Law?

Consumer law comes from a number of sources. First, there are the kinds of law (e.g., the source of that doctrine is statutory). Statutes and regulations are the most voluminous, and therefore probably onerous source of consumer law. The common law of contract and tort continue to be important, however, and increasingly consumer law is even popping up in other places such as trade treaties. All of these laws are interpreted and applied by courts or take on practical meaning from consensual settlements. Second, there are the kinds of lawmakers (e.g., the source of that doctrine is federal). Consumer laws exist at the international, federal, state, and local levels. Preemption is a major issue in consumer law, as actors battle for the right to make law. This Assignment provides a directory of the players in making consumer law and describes cooperation or conflict that characterizes their interactions.

A. Types of Law

1. Statutes

Most consumer law is statutory. It is difficult to conclude whether federal or state statutes are more important. For some issues, one lawmaker is dominant, while for others there is a balance of power. Federal legislation obviously is more sweeping in scope, while the impact of state legislation is more modest. That is primarily a function of the number of consumers in any given state's population, although some states have an outsized effect because many institutions are chartered there. The prevalence of credit card companies in South Dakota is a good example. On the other hand, the states are often more aggressive in their lawmaking, acting before there is awareness or consensus at the federal level that a law is needed. The National Mortgage Settlement between the five largest mortgage servicers and 49 states' attorneys general illustrates this dynamic. The deal was reached in February 2012, and its standards were nearly entirely swept into the CFPB's mortgage servicing regulations, but were not effective until January 2014.

When a bill is passed by both parts of Congress and signed by the President, it becomes a public law. It receives a public law number to uniquely identify it that begins with the session of Congress in which the bill was passed. It also has a common name, as specified in the bill text. For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act is Public Law 111-203. These laws are published quickly in the Statutes-At-Large by the government printing office. The Dodd-Frank Act begins at 124 Stat. 1376.

Most consumer law, because it is permanent and substantive (as opposed to something like an appropriation budget that is specific to one year), is then "codified." This means that it inserted into the United States Code at a particular location. The U.S. Code is broken down into titles, each of which cover large areas of substantive law. For instance, Title 12 is called "Banks and Banking." This book uses the U.S. Code to identify statutes whenever possible for consistency purposes and for ease of research. Be warned though that some of the most important consumer laws are still commonly referenced in the practice world by the section numbers contained in their public laws. A good example of this is the 1994 Home Ownership and Equity Protection Act (HOEPA), which is codified in TILA, of the Consumer Credit Protection Act, at 15 U.S.C. §1639. Nonetheless, people talk about "HOEPA loans" rather than referring to these generally under TILA.

The most complete codification of federal consumer law is in the Consumer Credit Protection Act. The seven subchapters studied in this course, along with their common names and acronyms, are:

I.	Consumer Credit Cost Disclosure (Truth in Lending Act, TILA or TIL)	15 U.S.C. §§1601-1677
III.	Restrictions on Garnishment	15 U.S.C. §§1671-1677
IV.	Credit Repair Organizations Act (CROA)	15 U.S.C. §§1679-1679j
VI.	Fair Credit Reporting Act (Fair Credit Reporting Act, FCRA)	15 U.S.C. §§1681-1681x
VII.	Equal Credit Opportunity Act (ECOA)	15 U.S.C. §§1691-1691f
VIII.	Fair Debt Collection Practices Act (FDCPA)	15 U.S.C. §§1692-1692p
IX.	Electronic Fund Transfer Act (EFT)	15 U.S.C. §§1693-1693r

These laws were not all passed at the same time, but rather were brought together in the codification process. Some have been aggressively amended since enactment, such as TILA, while others remain largely in their original form, such as the FDCPA. In practice you are particularly likely to see the credit reporting, equal credit, and fair debt laws referenced by the section numbers from the public law, rather than the U.S. Code. This is partially because when these laws were put into the U.S. Code, numbers were in short supply. To avoid ticking up to §1700, entire acts were stuffed into one section number. The result, for the Fair Credit Reporting Act, is a numbering scheme of §1681, §1681a, §1681b, etc. Inside each of these sections are the usual subparts. Take a look at §1681c-1(a)(1)(A) for an example of how *not* to make an easy-to-reference law.

If this alphabet soup has your head swimming, take an aspirin before you continue reading. It gets worse (or more fun, for the few of you who love this kind of detail). The other federal consumer laws are scattered in the U.S. Code. The most important of these is the Federal Trade Commission Act, 15 U.S.C. §41 et seq., which makes unfair and deceptive practices unlawful. This law was the basis of the *Airborne* settlement featured in Assignment 1. Beyond this, people might differ on what federal consumer laws are most worthy of study. This book will examine several, including the Real Estate Settlement Procedures Act (RESPA), the Telemarketing and Consumer Fraud and Abuse Prevention Act, the Gramm-Leach-Bliley Act, the Magnuson-Moss Warranty Act, and the

34

Federal Arbitration Act. These are codified in different titles in the U.S. Code—in part, a reflection of the difficulty of conceptualizing consumer law.

Most statutes delegate additional authority to specific government agencies. In consumer law, the main activities are rulemaking and enforcement. The decisions of these agencies are constrained by administrative law. Its doctrines legitimate and limit the actions of agencies. Questions often arise about whether the agency's action is within its powers or within the boundaries of the statute. As a substantive matter, the primary constraint is the statute itself pursuant to which the agency is taking action. The Administrative Procedure Act, 5 U.S.C. §551 et seq., sets out the procedural requirements for federal agency activities. This includes notification and timing processes for making rules to implement statutes. Because consumer law is complex, regulations are many. The result is that administrative law serves as an important backdrop to all federal consumer law statutes. Agencies are also restricted in part by their structure, funding, and political pressures. Many lawyers earn a living helping clients influence rulemakings and comply with enacted rules.

States also are an important source of common law. In the interests of brevity, and perhaps a hope that you can retain some of this Assignment, these are not listed. Generally, these are covered in each assignment simultaneous to any applicable federal law. For example, Assignment 14 covers both federal law on mortgages as well as state laws that provide additional rules.

A general distinction in state statutes is between uniform state laws and non-uniform state laws. The best example here is the Uniform Commercial Code, which is identical or nearly identical in each state, as you might gather from its name. It is promulgated by non-government bodies, in this case the American Law Institute and the Uniform Law Commission, a project of the National Conference of Commissioners on Uniform State Laws (NCCUSL, pronounced "na-CUE-zal", similar to recusal). The uniform act is then enacted by all or many state legislatures, essentially unchanged. Because the law is then the same in all 50 states, these laws have broad applicability.

By contrast, other state laws may be one-of-a-kind or may sharply differ from state to state. A good illustration here is usury laws, which restrict the amount of interest that may be charged. Some states have no restrictions at all; other states have usury caps but these vary a great deal in the rate restriction and the transactions to which they apply. Another example is state laws that ban unfair and deceptive practices. These are not strictly uniform, but they do tend to follow certain patterns, as some states were influenced by their predecessors in drafting their own laws. These disparate state laws apply more narrowly than federal law or uniform state law; it is impossible to study them all. Instead, this book selects certain state laws to provide examples of representative state approaches. Problem 2.1 illustrated this approach by asking you to apply Iowa's unfair and deceptive acts and practices statute.

2. Regulations

Most federal consumer statutes empower one or more federal agencies to pass substantive rules (sometimes called legislative rules). These have the force and effect of law and must be rooted in the grant of power from Congress in the

35

statute under which the rule is made. These rules effectively expand the statute by filling in details. Rules may provide factors to be considered in determining a violation of a law or define frequently used terms.

Most consumer law rules are made by informal or "notice and comment" rulemaking. This process has three major steps. First, the agency will give notice, usually by publication in the Federal Register. The notice should include either the terms or substance of the proposed rules and a description of the rules (called a "preamble"). Sometimes the agency will give an earlier form of notice, called an Advance Notice of Proposed Rulemaking, which provides less detail and invites participation at a more generic level. Second, time must elapse after notice to allow all interested persons the opportunity to submit comments on the proposed rules. The agency has a duty to consider the public comments. When it promulgates its final rule, it will normally address the nature of the received comments and the agency's reaction to those comments. Third, final rules are published in the Federal Register and codified in the Code of Federal Regulations (CFR). For the Consumer Credit Protection Act, these regulations have letters that identify the statute to which they correspond (Reg. Z, for example, accompanies TILA). This book will cite to the CFR, in parallel to its citation to the U.S. Code for statutes. Note that in similar fashion to statutes, the common text names such as Reg. Z or Reg. B are widely used rather than the CFR. Below is a quick guide to some of the key regulations.

Regulation Z	12 C.F.R. §1026: Truth in Lending
Regulation M	12 C.F.R. §1013: Consumer Leasing
Regulation B	12 C.F.R. §1002: Equal Credit Opportunity
Regulation E	12 C.F.R. §1005: Electronic Fund Transfers
Regulation V	12 C.F.R. §1022: FCRA Regulations
Military Lending Act	32 C.F.R. §232: Limitations on Terms of Consumer Credit Extended to Service Members and Dependents

3. Guidance/Commentary

In addition to rulemaking, agencies sometimes issue guidance documents. These lack the binding force of law and need only be published in the Federal Register for the agency to be able to rely upon them in taking action. The purpose of such guidance is to inform the public of the agency's interpretations and to promote consistency among agency personnel on how to apply ambiguous laws or to address new situations. Depending on the agency, these can take different forms, including bulletins, manuals, interpretive guidelines, official staff commentary, etc. This less formal lawmaking is widely used by some agencies but eschewed by others.

4. Case Law

The prominence of statutes in consumer law does not make cases irrelevant. Courts interpret ambiguous statutes, apply them to unique factual situations,

36

and sometimes overturn either statutes or rules. The prevalence of case law depends a great deal on the statute and the level of litigation it generates. There are hundreds of cases on certain issues and virtually no cases on other issues. The number of cases does not reflect the frequency with which the issue arises or its social importance. Rather, litigation—and published opinions in particular—mirror the ability of consumers to file complaints and litigate through the courts. If damages are small or an area of law is complex, fewer consumers may file suit.

B. Federal Government

The two main federal agencies in today's consumer law landscape are the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB). They have different responsibilities, structures, funding, and oversight. The balance of power between the CFPB and the FTC is evolving as the CFPB was created in July 2010 and had its effective "transfer date" of authority from the FTC and other agencies in July 2011.

1. Federal Trade Commission

The Federal Trade Commission has authority to regulate unfair practices "in or affecting interstate commerce." 15 U.S.C. §45 et seq. In the decades since that law was enacted in 1938, the FTC has promulgated regulations on hundreds of industries, ranging from fur products to funeral homes. The FTC regulations are codified in title 16 of the Code of Federal Regulations. These have the force of law. The FTC also has issued guidance documents on several statutes, including the Magnuson-Moss Warranty Act. These are not regulations but provide insight about how the FTC might react to a particular practice in deciding whether to bring an action.

The FTC has a narrower swath of responsibility in the financial services area than before the creation of the CFPB, but it is still a significant player. It shares authority with the CFPB on some issues. For non-financial industries or laws other than "federal consumer law" as defined in Dodd-Frank (see Assignment 2), the FTC is the primary consumer regulator. The FTC also retains exclusive federal authority over dealers of automobiles, boats, motor homes, and the like, even when these dealers engage in consumer lending that would otherwise subject them to CFPB oversight. 12 U.S.C. §5519.

The FTC is a five-member commission. Its key powers, in addition to rulemaking, are an ability to obtain information and the ability to litigate. Section 6(b) of the FTC Act empowers the commission to require the filing of "annual or special…reports or answers in writing to specific questions" for the purpose of obtaining information about "the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals" of the entities to whom the inquiry is addressed. This enables it to conduct wide-ranging economic studies that do not have a specific law

37

enforcement purpose. For example, the FTC has studied debt collection. *See* Repairing a Broken System: Protecting Consumers in Debt Collection Litigation (July 2010), http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf), and children using the Internet. *See* Virtual Worlds and Kids: Mapping the Risks: A Federal Trade Commission Report to Congress (December 2009), http://www.ftc.gov/os/2009/12/oecd-vwrpt.pdf. The commission can also investigate possible unfair or deceptive acts or practices by making a "civil investigative demand." 15 U.S.C. §57b-1. An amendment in 1980 eliminated the ability of the FTC to use traditional subpoenas for its consumer protection work, although that power remains for its antitrust activities. The civil investigative demand lets the FTC obtain existing documents and oral testimony, require the filing of written reports or answers to questions, and require the production of tangible things. Businesses that fail to comply with a civil investigative demand could face suit in federal court and penalties for noncompliance.

The FTC enforces consumer protection law through both judicial and administrative processes. The FTC can seek preliminary and permanent injunctions to remedy "any provision of law enforced by the Federal Trade Commission." 15 U.S.C. §53(b). Courts have held that the statutory reference to "permanent injunction" entitles the FTC to obtain an order not only permanently barring deceptive practices, but also imposing various kinds of monetary equitable relief (*i.e.*, restitution and rescission of contracts) to remedy past violations. *See FTC v. Ross*, 743 F.3d 866, 891 (2013). The FTC also has successfully argued that to preserve the possibility of ultimate monetary equitable relief, it can obtain a freeze of assets and imposition of temporary receivers in appropriate cases.

In the administrative process, the FTC makes the initial determination that a practice violates the law in either an adjudicative or rulemaking proceeding. To issue a complaint, the FTC must have reason to believe that a law violation has occurred. If the party elects to settle the charges, it may sign a consent agreement (without admitting liability), consent to entry of a final order, and waive all right to judicial review. These agreements are placed in the public record for comment before the FTC decides to make the orders final. If a party elects to contest the charges, the complaint is adjudicated before an administrative law judge in a trial-type proceeding. If the administrative law judge determines a practice is unfair or deceptive, the FTC must still seek the aid of a court to obtain civil penalties or consumer redress for violations of its orders to cease and desist or trade regulation rules. For this reason, a judicial suit is preferable to the adjudicatory process. Nearly all consumer protection enforcement by the FTC occurs outside the administrative adjudication process.

2. Consumer Financial Protection Bureau

In July 2010, Congress created a Consumer Financial Protection Bureau as part of its sweeping financial overhaul in the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §5481. Its enumerated purpose is to "seek to implement and, where applicable, enforce Federal consumer financial law

38

consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. §5511. The statute set forth six specific functions of the CFPB:

> (1) conducting financial education programs;
>
> (2) collecting, investigating, and responding to consumer complaints;
>
> (3) collecting, researching, monitoring, and publishing information relevant to the functioning of markets for consumer financial products and services to identify risks to consumers and the proper functioning of such markets;
>
> (4) supervising covered persons for compliance with Federal consumer financial law, and taking appropriate enforcement action to address violations of Federal consumer financial law;
>
> (5) issuing rules, orders, and guidance implementing Federal consumer financial law; and
>
> (6) performing such support activities as may be necessary or useful to facilitate the other functions of the Bureau.

12 U.S.C. §5511. The federal consumer law that is the CFPB's province is defined to include 17 federal statutes. The CFPB consolidated regulatory authority over banks and non-banks in one location. Previously, depending on the charter, a financial institution could face different rules and enforcement activity. National banks were regulated by the Office of Comptroller of the Currency (OCC), while other state-chartered banks had the Federal Deposit Insurance Corporation (FDIC) and the Federal Reserve Board as regulators. The model of the CFPB is regulation by product type, rather than by provider type. Now, all entities that issue credit cards will be governed by the CFPB and its single set of rules. In its rulemaking activities, the CFPB is subject to the normal strictures of the Administrative Procedures Act.

The CFPB is structurally part of the Federal Reserve Board but has several measures of independence. 12 U.S.C. §5491. Its Director is appointed by the President and confirmed by the Senate, with a five-year term that can be terminated only for cause. The statute prohibits the Federal Reserve from intervening in any matter or delaying or preventing the issuance of any CFPB rule or order. Congress has directed the CFPB to coordinate with other banking regulators and the FTC to "promote consistent regulatory treatment of consumer financial and investment products and services." 12 U.S.C. §5495. The budget for the CFPB is not subject to typical appropriations but rather is to be "an amount determined by the Director to be reasonably necessary" up to a maximum of 12 percent of the Federal Reserve's operating budget. 12 U.S.C. §5497.

In addition to being charged with "carry[ing] out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof," 12 U.S.C. §5511, the CFPB has also a separate generic charge that is reminiscent of the FTC Act. Its powers include the ability to "take any action…to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." 12 U.S.C. §5531. The financial services industry has latched on to the word "abusive" as a major

39

addition to the FTC Act's reference to "unfair or deceptive"; the term seems to have produced sleepless nights among bank attorneys and their outside counsel. Perhaps in response to this industry anxiety, the CFPB waited years after its creation —until 2014—to assert that a practice was abusive. The substantive definitions of unfair, deceptive, and abusive are the subject of Part II of this book.

In enforcing federal consumer law or preventing unfair, deceptive, or abusive practices, the CFPB has an array of enforcement powers. These tools include the power to issue subpoenas, conduct hearings, issue cease and desist orders, and file actions in federal district court or state court for "all appropriate legal and equitable relief including a permanent or temporary injunction as permitted by law." 12 U.S.C. §5563. The CFPB can also file suit to result in the rescission of contracts, refunds of money, disgorgement for unjust enrichment, damages, and civil penalties. 12 U.S.C. §5565.

3. Other Regulators

Before 2011, the list of other federal regulators of consumer law would have been lengthy and included the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of Thrift Supervision (now defunct), among others. For consumer financial services, enforcement now resides with the CFPB. Some agencies still have enforcement powers on some types of consumer statutes—if that term is broadly defined—but had a significant amount of their powers transferred to the CFPB. The Department of Housing and Urban Development (HUD) retains full authority over the Fair Housing Act, for example, but its powers related to the Real Estate Settlement Procedures Act were transferred to the CFPB. Most of these regulations still exist but focus on the safety and soundness of the financial institutions, not compliance with consumer law.

C. State and Local Government as Lawmakers

1. Attorneys General

Attorneys general are the chief law enforcement officer for the states. They have myriad responsibilities, including defending the state in lawsuits. Some attorneys general place relatively more emphasis on consumer protection than others, and this often changes with the elected person's priorities. In recent years, attorneys general are working more frequently together on "multistate" actions; their combined power is formidable as the tobacco settlement revealed.

Attorneys general are able to enforce their state's unfair and deceptive practices act. The attorneys general may also have responsibility under other state

40

laws that are on limited substantive topics. Attorneys general receive and try to resolve consumer complaints, produce consumer education materials, publicize frauds or scams, and conduct investigations into companies' business practices. The attorneys general also file lawsuits when they believe a business is violating a consumer protection law. Usually, such action is reserved for situations in which there have been a large number of complaints, a pattern or practice of fraud, or an important question of law is at issue. When litigating, the attorney general represents the public good and not individual complainants. Depending on the relief obtained, however, consumers may receive restitution as a result of litigation.

2. State Banking Regulators

Each state has a person in charge of state-chartered banks (as opposed to banks that have a federal charter) issued by an organization such as the Office of the Comptroller of the Currency or the National Credit Union Administration. Nearly all very large banks have federal charters. These "Banking Commissioners," or "Superintendents of Banking," regulate the financial institutions through examinations. Some state banking authorities are very active in consumer protection, such as Colorado's Department of Banking declaring that it "embraces [its] mission of consumer protection and works to protect public interest and preserve public trust in the Colorado banking industry." Others do very little consumer protection enforcement. Because banks have a choice between a state or a federal charter, concern arose about a "race to the bottom" among regulators to attract financial institutions seeking reduced consumer protection burdens. The consolidation of federal authority in the CFPB addressed competition between federal regulators but not between state agencies and federal agencies.

3. City Government

During the last decade, a few city governments have taken an active interest in consumer law. New York City has mandated calorie and nutritional labeling on menus for most restaurants, and San Francisco launched a major investigation of the practices of a credit card issuer. Cities' recent activism largely has been motivated by the harms of the foreclosure crisis that began in 2007. Vacant properties after foreclosure can lead to delinquent tax bills, higher crime, and public nuisance problems, such as abandoned swimming pools or overgrown yards. The city of Baltimore filed three separate lawsuits, beginning in 2008, against Wells Fargo Bank, alleging that it violated the Fair Housing Act by targeting minority neighborhoods with unaffordable loans. The city claimed tens of millions in damages, and the U.S. Department of Justice got involved. After a brief but vigorous defense, Wells Fargo settled with the federal government for $175 million, about $10 million of which went to Baltimore and its residents.

41

D. Preemption

While consumer law was traditionally the province of the States, in the post-New Deal era, Congress promulgated more federal consumer law. As a result, federal regulators grew in size and power. The result was an increasing number of conflicts about whether a given federal law preempted a state law. In the banking context, the Supreme Court issued a number of decisions favorable to federal regulators, beginning with *Marquette National Bank of Minneapolis v. First of Omaha Service Corp.* 439 U.S. 299 (1978).

The Dodd-Frank Act reshaped the preemption landscape, tilting back toward more equal authority between state and federal actors. First, Congress made clear that Dodd-Frank itself was not designed to enlarge federal power at the expense of the states. If a state's statute, regulation, order, or interpretation provides greater protection than Dodd-Frank, it is not "inconsistent" with the provisions of 12 U.S.C. §5551. Second, Dodd-Frank reversed *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); bank operating subsidiaries are now subject to state law. Third, the standard for preemption for consumer financial laws was changed.

> State consumer financial laws are preempted, only if [1] "application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State, and [2] in accordance with the legal standard for preemption in [*Barnett Bank v. Nelson*], the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; or by regulation or order of the Comptroller of the Currency on a case-by-case basis, in accordance with applicable law.

12 U.S.C. §25. The effect of this statutory language is unclear. The first step in untangling the morass is to study the *Barnett* decision.

Barnett Bank of Marion County, N.A. v. Bill Nelson, Florida Insurance Commissioner, et al.

517 U.S. 25 (1996)

BREYER, Justice.

In 1916 Congress enacted a federal statute that says that certain national banks "may" sell insurance in small towns. It provides in relevant part:

> "In addition to the powers now vested by law in national [banks] organized under the laws of the United States *any such [bank]* located and doing business in any place [with a population]…[of not more than] five thousand…*may*, under such rules and regulations as may be prescribed by the Comptroller of the Currency, *act as the agent for any fire, life, or other insurance company* authorized by the authorities of the

> State…to do business [there],…by soliciting and selling insurance…Provided, however, That no such bank shall…guarantee the payment of any premium…And provided further, That the bank shall not guarantee the truth of any statement made by an assured [when applying]…for insurance." Act of Sept. 7, 1916 (Federal Statute), 39 Stat. 753, 12 U.S.C. §92 (emphases changed).

In 1974 Florida enacted a statute that prohibits certain banks from selling most kinds of insurance. It says:

> "No [Florida licensed] insurance agent…who is associated with,…owned or controlled by…a financial institution shall engage in insurance agency activities.…" Fla. Stat. Ann. §626.988(2) (Supp. 1996) (State Statute).

The term "financial institution" includes

> "any bank…[except for a] bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000.…" §626.988(1)(a).

Thus, the State Statute says, in essence, that banks cannot sell insurance in Florida—except that an *unaffiliated* small town bank (*i.e.*, a bank that is not affiliated with a bank holding company) may sell insurance in a small town. Ibid.

In October 1993 petitioner Barnett Bank, an "affiliate[d]" national bank which does business through a branch in a small Florida town, bought a Florida licensed insurance agency. The Florida State Insurance Commissioner, pointing to the State Statute, (and noting that the unaffiliated small town bank exception did not apply), ordered Barnett's insurance agency to stop selling the prohibited forms of insurance. Barnett, claiming that the Federal Statute pre-empted the State Statute, then filed this action for declaratory and injunctive relief in federal court.…

We granted certiorari due to uncertainty among lower courts about the pre-emptive effect of this Federal Statute. We now reverse the Eleventh Circuit.

We shall…begin by asking whether, in the absence of that rule, we should construe the Federal Statute to pre-empt the State Statute. This question is basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State? If so, the Supremacy Clause requires courts to follow federal, not state, law. U.S. Const., Art. VI, cl. 2.

Sometimes courts, when facing the pre-emption question, find language in the federal statute that reveals an explicit congressional intent to pre-empt state law. More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's "structure and purpose," or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent. A federal statute, for example, may create a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Alternatively, federal law may be in "irreconcilable conflict" with state law. Rice

v. Norman Williams Co., 458 U.S. 654, 659 (1982). Compliance with both statutes, for example, may be a "physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143

43

(1963); or, the state law may "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

In this case we must ask whether or not the Federal and State Statutes are in "irreconcilable conflict." The two statutes do not impose directly conflicting duties on national banks—as they would, for example, if the federal law said, "you must sell insurance," while the state law said, "you may not." Nonetheless, the Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids. Thus, the State's prohibition of those activities would seem to "stan[d] as an obstacle to the accomplishment" of one of the Federal Statute's purposes—unless, of course, that federal purpose is to grant the bank only a very *limited* permission, that is, permission to sell insurance *to the extent that state law also grants permission to do so.*

That is what the State of Florida and its supporting *amici* argue. They say that the Federal Statute grants national banks a permission that is limited to circumstances where state law is not to the contrary. In their view, the Federal Statute removes only federal legal obstacles, not state legal obstacles, to the sale of insurance by national banks. But we do not find this, or the State's related, ordinary pre-emption arguments convincing.

For one thing, the Federal Statute's language suggests a broad, not a limited, permission. That language says, without relevant qualification, that national banks "may…act as the agent" for insurance sales. 12 U.S.C. §92. It specifically refers to "rules and regulations" that will govern such sales, while citing as their source not state law, but the federal Comptroller of the Currency. Ibid. It also specifically refers to state regulation, while limiting that reference to licensing—not of banks or insurance agents, but of the insurance companies whose policies the bank, as insurance agent, will sell. Ibid.

For another thing, the Federal Statute says that its grant of authority to sell insurance is an "addition to the *powers* now vested by law in national [banks]." Ibid. (emphasis added). In using the word "powers," the statute chooses a legal concept that, in the context of national bank legislation, has a history. That history is one of interpreting grants of both enumerated and incidental "powers" to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law. Thus, this Court, in a case quite similar to this one, held that a federal statute permitting, but not requiring, national banks to receive savings deposits, pre-empts a state statute prohibiting certain state and national banks from using the word "savings" in their advertising. Franklin Nat. Bank v. New York, 347 U.S. 373, 375-379 (1954) (Federal Reserve Act provision that national banks "may continue…to receive…savings deposits" read as "declaratory of the right of a national bank to enter into or remain in that type of business").

In defining the pre-emptive scope of statutes and regulations granting a power to national banks, these cases take the view that normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted. To say this is not to deprive States of the power to regulate national banks, where (unlike here) doing so does not prevent or significantly interfere with the national bank's exercise of its powers. See, e.g., Anderson Nat. Bank v. Luckett, 321 U.S. 233, 247-252 (1944) (state statute administering abandoned deposit accounts did not "unlawful[ly] encroac[h] on the rights and privileges of national banks"); McClellan v. Chipman, 164 U.S. 347, 358 (1896) (application to

44

national banks of state statute forbidding certain real estate transfers by insolvent transferees would not "destro[y] or hampe[r]" national banks' functions); National Bank v. Commonwealth, 9 Wall. 353, 362 (1870) (national banks subject to state law that does not "interfere with, or impair [national banks'] efficiency in performing the functions by which they are designed to serve [the Federal] Government")....

The Federal Statute before us, as in *Franklin Nat. Bank*, explicitly grants a national bank an authorization, permission, or power. And, as in *Franklin Nat. Bank*, it contains no "indication" that Congress intended to subject that power to local restriction. Thus, the Court's discussion in *Franklin Nat. Bank*, the holding of that case, and the other precedent we have cited above, strongly argue for a similar interpretation here—a broad interpretation of the word "may" that does not condition federal permission upon that of the State....

In light of these considerations, we conclude that the Federal Statute means to grant small town national banks authority to sell insurance, whether or not a State grants its own state banks or national banks similar approval. Were we to apply ordinary legal principles of pre-emption, the federal law would pre-empt that of the State.

The Court reversed the judgment of the Court of Appeals. The result was to invalidate a state law that prohibited a national bank from engaging in an activity that federal law authorized. The question is how to apply this standard in narrower situations of preemption. Most advocates read the Dodd-Frank Act to weaken the federal government's ability to assert preemption. One regulator, the Office of Comptroller of the Currency (OCC), claimed that its broad preemption regulations were consistent with the *Barnett* standard. On July 21, 2011, the OCC issued a final rule that "clarified" its preemption standards.

> [T]he OCC concludes that the Dodd-Frank Act does not create a new, stand-alone "prevents or significantly interferes" preemption standard, but rather, incorporates the conflict preemption legal standard and the reasoning that supports it in the Supreme Court's *Barnett* decision....The

"legal standard for preemption" employed in the Court's decision is conflict preemption, applied in the context of powers granted national banks under Federal law. "Prevent or significantly interfere" is not "the legal standard for preemption in the decision"; it is part of the Court's discussion of its reasoning; an observation made describing other Supreme Court precedent that is cited in the Court's decision....Accordingly, because we conclude that the Dodd-Frank Act preserves the *Barnett* conflict preemption standard, precedents consistent with that analysis—which may include regulations adopted consistent with such a conflict preemption justification—are also preserved....

Some commenters asserted that the "obstruct, impair, or condition" phrasing in the 2004 preemption rules was not only inconsistent with *Barnett* but also inconsistent with the new, narrower "prevents or significantly interferes" standard that they assert is imposed by the Dodd-Frank Act. As discussed above, we conclude that the Dodd-Frank Act *Barnett* standard is the conflict preemption standard employed in the Court's decision, not a new test. The

45

question remains, however, of the relationship between that standard and the "obstruct, impair or condition" formulation....[T]he words "obstruct, impair or condition" as used in the 2004 preemption rules were intended to reflect the precedents cited in *Barnett*, not to create a new preemption standard. Nevertheless, we acknowledge that the phrase created confusion and misunderstanding well before enactment of the Dodd-Frank Act. We also recognize that inclusion of the "prevents or significantly interfere" conflict preemption formulation in the *Barnett* standard preemption provision may have been intended to change the OCC's approach by shifting the basis of preemption back to the decision itself, rather than placing reliance on the OCC's effort to distill the *Barnett* principles in this manner....For these reasons, the OCC is deleting the phrase in the final rule.

OCC Final Rule, pertaining to 12 CFR Parts 4, 5, 7, 8, 28, and 34 (July 21, 2011), http://www.occ.gov/news-issuances/news-releases/2011/nr-occ-2011-95a.pdf.

The OCC's rule modifies the language of its preemption regulation but that, in its view, does not change any positions that the OCC has taken to date on preemption. This is certainly different than reverting to the preemption doctrine as existed at the time that *Barnett* was decided. These issues will almost certainly be raised in court challenges. An early decision, *Baptista v. JPMorgan Chase Bank, N.A.*, 640 F.3d 1194, 1197 (11th Cir. 2011), seems to side with the OCC, stating that "the proper preemption test asks whether there is a significant conflict between the state and federal statutes—that is, the test for conflict preemption." The standard for judicial review for OCC preemption regulations was clarified under Dodd-Frank. Rather than the deferential *Chevron* standard, the OCC's preemption regulations will require satisfying a court that substantial evidence supported the OCC's determination. Dodd-Frank also says that the OCC should make preemption decisions on a case-by-case basis and shall first consult with the CFPB, taking its views into account. 12 U.S.C. §25b. These additional requirements, plus the murky issues of interpretation around *Barnett*, suggest that preemption will remain an important battleground between businesses and consumers in the upcoming years.

Problem Set 3

3.1. You are a mid-level associate at a law firm, excited to have the help of a summer associate for the first time in your career. You recently were given a new project concerning a client whose credit card bill seems to be completely wrong. You asked the summer associate, Gloria Ho, to get you the "law" on this and warned her that "there is undoubtedly a statute or something; I don't want to see a bill for ten hours of searching in the case law database for this." Gloria just emailed you the files below with a note that said "Off to the firm hula hoop party (you should see my awesome costume!) but wanted to send your way the law on credit billing. See ya!" Professionalism concerns aside, what do you make of the files below? Which is the "law?" Why did she send them both to you?

46

15 U.S.C. §1666. Correction of Billing Errors

(b) Billing error

For the purpose of this section, a "billing error" consists of any of the following:

(1) A reflection on a statement of an extension of credit which was not in the amount reflected on such statement.

(2) A reflection on a statement of an extension of credit for which the obligor requests additional clarification including documentary evidence thereof.

(3) A reflection on a statement of goods or services not accepted.

(4) The creditor's failure to reflect properly on a statement a payment made by the obligor or a credit issued to the obligor.

(5) A computation error or similar error of an accounting nature of the creditor on a statement.

(6) Failure to transmit the statement required under section 1637(b) of this title to the last address of the obligor which has been disclosed to the creditor, unless that address was furnished less than twenty days before the end of the billing cycle for which the statement is required.

(7) Any other error described in regulations of the Board.

12 C.F.R. §1026.13. Billing Error Resolution

(a) Definition of a billing error. For purposes of this section, the term billing error means:

(1) A reflection on or with a periodic statement of an extension of credit that is not made to the consumer or to a person who has actual, implied, or apparent authority to use the consumer's credit card or open-end credit plan.

(2) A reflection on or with a periodic statement of an extension of credit that is not identified in accordance with the requirements of §§1026.7(b) and 1026.8.

(3) A reflection on or with a periodic statement of an extension of credit for property or services not accepted by the consumer or the consumer's designee, or not delivered to the consumer or the consumer's designee as agreed.

(4) A reflection on a periodic statement of the creditor's failure to credit properly a payment or other credit issued to the consumer's account.

(5) A reflection on a periodic statement of a computational or similar error of an accounting nature that is made by the creditor.

(6) A reflection on a periodic statement of an extension of credit for which the consumer requests additional clarification, including documentary evidence.

(7) The creditor's failure to mail or deliver a periodic statement to the consumer's last known address if that address was received by the creditor, in writing, at least 20 days before the end of the billing cycle for which the statement was required.

3.2. You represent a federally-chartered bank that primarily serves immigrant communities, offering them access to banking products at a pricing scheme that is pitched to the bank's shareholders as "aggressive" in its potential for profits. While you regularly get complaints sent over from the Attorney General's Office in your state, so far your response system of adding

47

those to a file folder seems adequate. Yesterday, however, you learned that the CFPB has issued a rule declaring the practice of failing to give disclosures in a native language to a person "that the financial institution knows, or reasonably should know does not speak English" is an unfair and abusive practice. As outside counsel, you try to limit just how much you know about what really happens in the bank's branches, but you have a bad feeling about this new rule. The compliance or liability costs could cripple the bank's profits and send it straight out of business. What responses are available to your client? Can you intervene to alter the CFPB's position? If not, who might take enforcement action against the bank? *See* 12 U.S.C. §§25b, 513, 5552, 5563, 5565.

3.3. Senator Stamm is looking to make a splash in the Senate before his first reelection campaign. He is a moderate but thinks that that the zeitgeist of the day in America is anti-government. He has asked for advice on a bill that passed the House, H.R. 1315, "The Consumer Financial Protection Safety and Soundness Act." He wonders if he should lead the charge in the Senate to pass this bill. He would like you, his legislative director, to advise him on whether the CFPB should be run by a Commission, as described in section 104 of the bill, rather than by a Director. What are the benefits of such a change? What are the best counter-arguments to the bill to expect from the CFPB's defenders? As he told you, "I want to make a splash; I don't want to drown out there."

48

49