CONSUMER LAW

CONSUMER LAW
Cases, Problems and Materials

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Preface

Consumer Protection, as an aspect of our legal system, has existed for a long time, although perhaps it has played a more prominent role during some periods than during others.[1] For example, usury laws - state laws that regulate the amount of interest that may be contracted for with respect to a loan of money or the forbearance of debt - have existed in the United States since it became a nation, and even before in the colonies.[2] It is not relevant at this juncture that such laws might also protect persons whom we do not consider "consumers" today (nor, for that matter, that such laws might do more harm than good and thus not really be protective); they also "protect" persons whom we do consider "consumers." Nor is consumer protection exclusively the province of the states; since at least the late 1800's the federal government has been protecting the American consumer by legislation and regulation,[3] and we have not yet seen the end of the federal involvement.

Nonetheless, as late as 1972, most law schools did not offer a separate course dealing with this body of consumer protection rules in our legal system. Rather, indications that something else was out there came, if they came at all in law school, in courses in Contracts, Torts, Property, Commercial Law, Trade Regulation, and so on.

Certain developments have occurred to change that picture so that many law schools on the approved list of the American Bar Association offer separate courses or seminars under the general description "Consumer Law." One development certainly was the suddenly increased involvement of the federal government in the area through the Consumer Credit Protection Act, which started out only regulating consumer credit disclosure, garnishments and extortionate extensions of credit, but rapidly expanded to include: credit reporting; protections concerning credit cards; billing errors and related matters; consumer leasing; equal credit opportunity; fair debt collection; and electronic funds transfers. Further, in enactments like the consumer Product Safety Act in 1972 and the Magnuson-Moss Warranty Act in 1975, the federal government substantially in-

1. D. Rothchild & D. Carroll, Consumer Protection: Text and Materials 4-9 (1973) find that the common law, up until perhaps 1840, was charitable towards consumer concerns. However, during the period beginning then and extending into the 1920's, a strict rules-oriented approach, arguably protective of a developing industrialization, prevailed. But, commencing in the 1930's, a trend toward a more favorable legal balance for the consumer manifested itself, which has continued to the present time.

2. National Commission on Consumer Finance, Consumer Credit in the United States 5 (1972).

3. Forte, *The Department of Consumers*, and. L. Rev. 969 (1967).

creased consumer protection in the manufacture and distribution of products. In the Home Mortgage Disclosure Act and in the Community Reinvestment Act, it gingerly entered the "red-lining" controversy. Further under authority in the Federal Trade Commission Improvement Act, the Federal Trade Commission stepped up its consumer protection activities by, among other ways, issuing Trade Regulation Rules covering, among other subjects, door to door sales (and even beyond), holder in due course and credit practices. All of this, and more, made it difficult to continue conscientiously to teach courses in Contracts, Commercial Law and the like without some consideration of these matters, and then impossible to teach such courses within the time periods allotted to them because of the burgeoning subject matter.

However, not all the activity sprang from a federal source. Similar developments were also occurring on the state level, upsetting and expanding the established order. State statutes and cases restricting or abolishing the holder in due course doctrine in consumer transactions were common before the Federal Trade Commission promulgated its rule; hoary doctrines like "time-price" were being attacked and sometimes overturned; litigation and legislation to outlaw the "previous balance" method as a basis for finance charges proliferated; years-old exceptions to the usury laws in the loan area every so often evaporated; restrictions on security and deficiency judgments were becoming routine; age-old remedies like garnishment, attachment, replevin, and cognovit clauses were being modified to comport with new-found dictates of due process; and codifications of much that had been separate, and sometimes conflicting, were occurring, in acts like the Uniform Consumer Credit Code and the National Consumer Act. These events, and much more, further increased the pressure on traditional teaching in the areas affected.

The root cause of many of these developments itself also gradually demanded some separate recognition in the law school curriculum. That is to say, "consumerism" had come of age, was vocal, and law students were certainly among those affected. Since one result of these developments was a greater uniformity in the law than had existed before,[4] with a resultant simplification in relation to teaching "consumer law," it is not surprising that these circumstances soon began to culminate in separate law school courses in "Consumer Law."

These materials are designed for such a course. They contemplate a three-semester-hour time allocation. However, your editors confess they have never gotten through them in that period, even when they lectured much more than they would have liked. Accordingly, we surmise that if anyone wants (and can persuade his or her curriculum committee) to devote additional semester hours to the subject, the materials will be adequate for the task. By the same token, we suspect two semester hours is a bit short, albeit it may be what has to be accepted. Again if lectures and assignments for independent reading are used, with only various areas selected for greater class discussion, these materials can be adapted to a shorter course.

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4. Consumer protection laws, particularly on the state level, are still far from uniform and continue to derive from many sources scattered over the statute books and case reports. Nonetheless, certain problem areas are now commonly recognized, and blocks of law, fairly uniform in identifying the issues even if not in their method for resolving them, now exist.

The materials are intended to be used with the current edition of SELECTED COMMERCIAL STATUTES. Paperback is cheaper than hardbound and that, plus the high degree of change in the subject, dictates against reprinting such materials in this book. Moreover, if greater detail is sought, much material is available in free pamphlet form from federal agencies, or in standard reference works, such as Consumer Credit Guide published by Commerce Clearing House. Indeed, since no experienced practitioner in the area would stop with only the source materials in the book and in Selected Commercial Statutes, we believe students should become familiar with at least the existence of interpretations and guidelines issued by the staff of governmental regulatory agencies that are an important law source. This can be accomplished through appropriate assignments that make desirable some readings in Consumer Credit Guide published by Commerce Clearing House. This service is a highly desirable tool for any practitioner doing work in the subject, and thus it is something with which students need to become acquainted. However, too much reliance obviously cannot be placed upon this service since most law schools will have only one copy and thus availability for widespread student use would be too restricted.

Your editors teach at law schools which prepare a majority of their students for the private practice. Your editors also have had considerable practice experience. These factors have unquestionably affected our approach to and selection of the materials used in various respects.

1. The materials have a heavy orientation toward deceptive practices and consumer credit problems. Our experience indicates this is where a substantial amount of the difficulty lies.

2. There is some lack of emphasis on what "should be," in favor of concentration on "what is" or on trying to ascertain "what is." Thus, those who would primarily explore whether more rational schemes exist to resolve consumer problems, or whether present schemes comport with reality, should utilize other materials. Fundamentally, we only pursue such questions when they may serve to increase understanding, or to the extent that what is presently not in place has a high degree of potential realization.

3. We give some topics detailed treatment in these materials, some are only mentioned, and some are ignored, all in accordance with our experience as to what most practitioners are likely to encounter.

4. We have devoted more time to statutory enactments than to common law developments. Our experience is that the solution of consumer problems is increasingly accomplished by legislation and regulation. This has certainly been true on the federal level. Moreover, your editors are from a state where consumer protection legislation has been reasonably prolific. However, such state legislation is not uniform. Accordingly, to render this approach manageable, uniform acts like the Model Consumer Sales Practices Act and the Uniform Consumer Credit Code have been emphasized more than particular state enactments. Even though these uniform acts are not enacted in anywhere near all jurisdictions, we believe they are a suitable vehicle to identify the relevant issues, no matter what the solutions (or non-solutions) to these issues are in any particular jurisdiction.

5. Finally, your editors also teach commercial law courses and in connection with them spend considerable time on consumer rules which bear on the topics covered in those courses. As a result, the treatment of warranty, default,

holder in due course, and other topics in these materials is abbreviated and tends to emphasize only the consumer protection aspects rather than the full scope of coverage. More detailed learning concerning these matters is left for other courses. All citations to the Uniform Commercial Code (U.C.C.) are to the 1995 Official Text unless otherwise noted.

The final comment we wish to make concerns the organization of these materials. We have spent considerable time deciding upon an appropriate organization. We finally selected what might be termed a "transactional approach." That is to say, we have adopted an arrangement that considers first the significant problems that a consumer might encounter prior to entering into a consumer transaction and the types of solutions that have been promulgated for these problems. Then the problems that may be involved at the inception of the transaction or early in its life are dealt with, along with remedies. In conclusion, problems associated with the later life of the transaction, including default, are covered, again with a treatment of the available means of recourse. We believe these classifications are pedagogically sound, and also realistic as representing the way a practitioner would deal with an actual situation involving a client. However, it must be recognized that such classifications are hardly exclusive, and it is often necessary to raise future considerations at the same time, although leaving detailed examination until later. It also should be appreciated that this approach is more difficult for students. Instead of raising one or a few problems at a time under basically one case or statute, the approach often tends to interrelate a number of problems and bring to bear cases, statutes and regulations, both federal and state, all at the same time. In addition, it necessitates a contemporaneous consideration of available remedies for the situation. We have tried to smooth this as much as possible by readings and text. Of course, the students become more adept over time, but slow going should be expected at many points.

Most of the materials have been edited for the editors' organizational or pedagogical purposes. This includes, for example, the omission of parts of cases or other materials not relevant to the particular points sought to be raised, combining materials from various places within sources, and elimination of discussion or court opinion that in our viewpoint gives away too much to allow students to grapple with the issues being considered. For the most part, we have not highlighted such deletions or combinations, although additions or insertions have been generally indicated by brackets.

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August 1998

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