

AALS Conference on Commercial Law at the Crossroads
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Consumer Law as part of Commercial Law

By Jean Braucher
Roger Henderson Professor of Law
University of Arizona, James E. Rogers College of Law
Braucher@law.arizona.edu

The UCC As Too Narrow A Focus

The Uniform Commercial Code is not all of commercial law, and we should remember this in our teaching and in our scholarship. When it comes to the law applicable to consumers, the UCC is not the law of most significance in most situations. When I used to teach the course in Payments System, I liked Ronald Mann's teaching materials because they treated the UCC as the fringe part of the course and the federal statutory and regulatory materials as the centerpiece. *See* Ronald J. Mann, PAYMENT SYSTEMS AND OTHER FINANCIAL TRANSACTIONS: CASES, MATERIALS AND PROBLEMS (2d Ed. 2002).

Similarly, I would like to see commercial law teaching materials that include the law of consumer lending that is not in the UCC and that goes beyond secured consumer lending. Some treatment of interest rate deregulation, Truth in Lending, payday and title pawn lending, anti-deficiency statutes, and the legal structure of rent-to-own transactions would fit in a course that includes Article 9 (and also Article 2A). It would also be interesting to add materials on the Bankruptcy Reform Act treatment of nominally secured transactions as fully secured in certain instances and for certain purposes. Some examples of materials to use are posted on the conference web page, available from www.aals.org.

Is there time for coverage of non-UCC law, particularly consumer law, in a commercial law course, particularly one that also covers Article 9? Given how complex Article 9 has become, students are more likely to get a basic understanding of secured transactions if the focus is on the main concepts, rather than details. By steering clear of the thickets of specialized rules, one can make room for some treatment of contemporary consumer credit. Having some of this material in commercial law courses is not inconsistent with separate consumer law courses and may increase interest in such courses.

Including the Law in Action Perspective

Both in consumer law teaching and scholarship, a major theme is the limited effect of law on dispute resolution. Many casebooks use examples or problems involving small dollar amount transactions and ask for a legal analysis. Although not necessarily intended for this purpose, these sorts of problems can be used to raise questions about how consumers or businesses in such deals could afford to raise any legal issues. Often the answer is that they could not. Along the same lines, consumer cases that appear in casebooks can be used to ask the same sorts of questions: How did this consumer manage to get a lawyer? Was the lawyer hoping to get paid and, if so, how? Would most consumers be able to get a lawyer for this type of case?

An equally important, and related theme, is the importance of specificity in consumer law. See William C. Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 WIS. L. REV. 1018, and Arthur Allen Leff, *Unconscionability and The Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970). Businesses tend to comply with specific directions. Vague admonitory standards, for example against unconscionability and breaches of the peace, lead to infinitely distinguishable case law and are not effective in getting desired behavior.

Concepts of the Consumer

Article 9 defines a consumer transaction in terms of loans incurred and collateral acquired “primarily for personal, family, or household purposes.” Section 9-102(a)(26). For some purposes, this definition is either over- or under-inclusive.

Consumer as an Over-inclusive Category. For many sorts of consumer protection, we may want instead a concept of a vulnerable consumer—poor, lacking financial literacy skills, more likely to be the target of subprime marketing and collection. Law professors and even law students are not typical consumers. Very few have taken out a payday loan or bought at a rent to own store (although with changes in consumer culture, one might find an occasional student who has done so). A field trip to such an outlet could be instructive, something students could do on their own or in small groups to get an experience like that of regular customers.

Consumer as an Under-Inclusive Category. This is a bigger problem. For many purposes, the category of consumer should include large and small businesses that enter into small dollar amount transactions using non-negotiated standard forms. Because it would often be irrational to invest resources in even understanding the fine print in such a deal, the market will work at best weakly to police against much aggressive drafting. See William J. Woodward, *Neoformalism in a Real World of Forms*, 2001 WIS. L. REV. 971 (using the example of a choice of law clause selecting “the law of Ireland” as a term that it would probably be irrational for individuals or businesses to research in a transaction for a price of \$100 or even \$1000).

The Uniform Computer Information Transactions Act made use of the concept of a mass-market transaction. 2002 Official Text, Section 102(a)(45). However, it heaped limitations on the concept and also deployed it mainly to provide truly substandard treatment to non-mass-market transactions. See Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and Its Lessons for Policing of Standard Form Contracts*, 7 LEWIS & CLARK J. OF SMALL & EMERGING BUS. L. 393 (2003). There is a need for specific and targeted legislation to deal with mass-market software transactions, with a more natural definition of “mass market.” Mass-market deals involve distribution of products to a substantial public of customers under substantially the same terms, with no negotiation except perhaps as to price, quantity, method of payment, selection among standard options, or time or method of delivery. Focusing only on this type of deal, it would be possible to draft a much simpler statute than UCITA to deal with the major issues in mass-market software transactions. See Jean Braucher, *New Basics: 12 Principles for Fair Commerce in Mass-Market Software and Other Digital Products* [paper available at www.fairterms.org].

Commercial Law, Consumer Law and Interest Group Politics

A great deal has been written about the flaws of the uniform laws process, particularly when the aim is to produce legislation enactable in 50 states. Absent some major efficiency gain (for example, the streamlining of the filing system in the revision of Article 9), the process tends to produce vague language punting on controversial issues. Some good examples in Amended Article 2 are the exclusion of undefined “information” from the definition of goods, Section 2-103(1)(k), and the refusal to take a clear position on *Hill v. Gateway*. See Section 2-207 and comment 5. See Jean Braucher, *Amended Article 2 and the Decision to Trust the Courts: The Case Against Enforcing Delayed Mass-Market Terms, Especially for Software*, 2004 WIS. L. REV. 753.

We probably do not need more scholarship on the UCC process, but it is worth presenting the context of interest group politics to students. It is a way to show that law reform does not come from Delphi. A good vehicle for bringing the excitement of interest group politics into the classroom is by providing students with real examples of submissions on behalf of various groups to the UCC process. Some favorite examples are posted on the conference web page [available from www.aals.org]. These submissions show policy argument in action and thus can interest students in engaging in it.

A late breaking interest-group coalition is a particularly interesting example of a strategy that consumer groups should seek to replicate. Americans for Fair Electronic Commerce Transactions (AFFECT) is a coalition that includes consumer advocates, library organizations, insurance companies and insurance industry trade associations, and an array of business customers of mass-market software. This coalition formed in opposition to UCITA, and since the two enactments in 2000 has been successful in defeating it everywhere. It has recently moved toward developing alternatives, beginning with a principles project. Consumer organizations could not have stopped UCITA on their own. It may be that it took a law as one-sided as UCITA to bring together diffuse

interests (and strange bedfellows), but consumer advocates should be looking for other opportunities to do something similar. For more information on AFFECT and on its principles project, see www.ucita.com and www.fairterms.org.

Consumer Transactions and Interdisciplinary Approaches

An entire panel of this conference has been devoted to cognitive psychology, and consumer contracts are the most obvious deals to which to apply this perspective. Another promising perspective is that of social psychology, stressing that humans often act in response to situational pressures rather than pre-existing preferences. See John Hanson and David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003). A great deal of scholarly work could usefully explore the implications of this work for consumer law. Consumer marketing frames situations to get consumers to act in desired ways, and consumers may not even realize what aspects of a given situation influence them. Furthermore, businesses must compete in framing strategies or lose out to those who become masters of marketing arts and sciences.

Marketing is an applied version of social psychology. It is a discipline with which we should become better acquainted. Whole departments of business schools are devoted to marketing, yet commercial law scholars too often operate on very impoverished assumptions about why consumers act the way they do. See e.g. Pamela N. Danziger, *WHY PEOPLE BUY THINGS THEY DON'T NEED* (2004).