

PORTER

**MODERN
CONSUMER LAW**



Wolters Kluwer

ASPEN CASEBOOK SERIES

Modern Consumer Law

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Professor of Law

University of California, Irvine School of Law



Wolters Kluwer

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*To Betsy, Paul, and Luke,
who remind me that fairness is a matter of perspective.*
—K.P.

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Preface

Consumer law is incredibly complex, despite its applicability to millions of people engaged in everyday transactions. The complexity is reflected both in the law itself and in the challenges of trying to teach and learn consumer law. Consumer law has porous boundaries and comes from multiple sources rather than a single lawmaker or an integrated statutory code. Because consumer law is diffuse, many lawyers may practice in this area but not explicitly identify as “consumer lawyers.” Anyone who represents individual people in civil cases, however, will find many client problems that arise from consumer transactions, and the demand from consumers for legal help greatly overwhelms the supply of knowledgeable lawyers. From the other side, nearly any business that sells goods or services to individuals will face consumer law issues with compliance and litigation.

Consumer law is rapidly growing in importance. A 2013 poll of professors found that consumer law ranked first as the area of law deserving more attention in the legal academy, beating out hot topics such as immigration law, energy law, and alternative dispute resolution. See Brian Leiter’s Law School Reports blog, Apr. 18, 2013 at <http://tinyurl.com/k3d7p4a>. While law schools need to ramp up offerings in consumer law, the legal system and economy are more concerned with consumer issues now than at any time since the 1970s. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 contained sweeping law reforms and rearranged the very structure of consumer regulation. It created a Consumer Financial Protection Bureau to administer most federal consumer laws governing credit. This change reflects the unprecedented levels of household borrowing in the last twenty years and the importance of consumer spending to the overall economy. Because consumer law governs these purchases and loans, it has grown in size and complexity in tandem with its economic importance.

This book tackles the challenges of consumer law with a three-prong approach. First, it situates consumer law within the business law curriculum. At first this may seem counterintuitive, and of course, many who represent consumers do so in roles as government lawyers, legal services lawyers, or poverty lawyers. But consumer transactions, by definition, also involve businesses. Indeed, it is this consumer-to-business nature of the transaction that gives rise to the impetus for most consumer law. When businesses purchase property, goods, or services from each other (for example, a retailer that buys inventory from a wholesaler), consumer laws do not apply. Consumer law governs, however, when that retailer goes to sell the inventory in the form of goods on a shelf to a consumer. From this perspective, consumer law can be understood as the legal system’s effort to address the disparities in sophistication and power that typically exist between consumers and businesses.

This book is built around the fact that consumer law is big business — both for lawyers and for the economy in general. The book reflects this “consumer

law as business law” philosophy in its content and its pedagogy. It spends time explaining the economics and business structure of many consumer transactions. It seeks to explore and explain the relevant market: How are these deals structured? Who makes money? Is the market competitive or constrained? How does information flow in the market? In its pedagogical approach, the book refrains from assuming the student shares the normative perspective of a consumer. The problems often ask students to advise businesses on the compliance issues or litigation risks created by consumer law, as well as advocate for a beleaguered consumer. This tactic recognizes that the world of consumer practice offers opportunities for lawyers to represent consumers (as government lawyers, policy advocates, and plaintiffs’ attorneys) and to represent businesses (as in-house counsel, defense attorneys, and lobbyists).

Second, this book attempts to give consumer law a sharp theoretical framework by situating it at the intersection of contract and tort. Consumer law is more than a collection of laws with the word “consumer” in them. It is, as suggested above, the law’s response to the failures of traditional law to achieve satisfactory outcomes in consumer-business transactions. The book repeatedly returns to the doctrines of fraud (from tort law) and unconscionability (from contract law) to see how the common law in these areas has been reshaped by statutes and regulations. Newer consumer laws typically provide more protection for consumers and impose more duties on businesses than the common law did. Consumer law is an ideal place to expand on the first-year law school curriculum, adding skills in statutory analysis, administrative law, and policymaking to the student’s toolkit. The book also attempts to show the artificiality of a public law/private law divide. It highlights the way in which private transactions have public effects, and conversely how public goals find their way into laws that inhibit or limit private deals.

The third approach of the book is its commitment to a legal realist perspective on consumer law. In this regard, the book marshals empirical research on topics related to consumer law such as financial literacy, household finance, and the legal profession. It also points out where important knowledge is missing and asks how such data could be obtained. Law is neither practiced nor made in a vacuum; the book reflects the belief that well-equipped lawyers are comfortable with a broad range of social science including psychology, marketing, sociology, and economics. The legal realism approach repeatedly turns to the gap between the law as written and the law as experienced, asking questions about the value of a law that remains unused or underenforced and the ways in which lawyers and courts struggle to engage successfully with consumers who lack legal knowledge. Of course, such problems plague many other areas of law but are predominant in consumer law.

These three characteristics of this book lead to a “casebook” that is quite far from the traditional law text. In fact, the book contains relatively few cases as compared to the amount of expository text. The goal is to focus students on the statutes and regulations that are the heart of modern consumer law. It also mirrors the reality that case law often does not exist on a particular point or is of little importance to a business lawyer or consumer lawyer trying to design a

litigation strategy sharply constrained by reputational risks (business) or financial limits on affording counsel (consumer). The book's cases illustrate the factual context of the transactions as much as they teach the dispositive law. The book also uses rules, legislative history, research studies, websites, videos, and even things like cartoons and newspaper stories to teach consumer law. Part of the justification for this is that consumers themselves are likely to learn about their rights from these sources, rather than from published case law. The text tries to be explanatory in tone. As stated in this preface's first sentence, consumer law is hard. This book outlines the basic law and provides opportunities for using the core legal competencies of reading and analyzing law to see how the law applies in context.

The book is designed to be taught using a strong form of the problem-method. Unlike the questions following cases in a traditional text, the problems are not to be skimmed and treated as rhetorical. The problems are to be read, analyzed, worked, and "solved" to the best of students' abilities before class. The problems take several typical forms. These include: 1) statute readers that highlight key points or ambiguities in the law itself; 2) transactional problems that pose questions of compliance, planning, and client counseling; 3) theoretical puzzlers that push on the persistent difficulties of consumer law as a legal subject; and 4) policy problems that require identifying the social, economic, and political issues at play in consumer lawmaking. The problems are fact-specific and contextual. This means that as in real life, some problems have clear answers and others are ambiguous. Some problems intentionally omit key facts because limited information is a real problem in lawyering. Other problems reflect that a half-victory or partial solution is often the only outcome, asking students to identify the barriers to a more comprehensive resolution.

This book's coverage is selective. It is organized around several major aspects of transactions: getting into a transaction, the substantive terms of the transactions, and enforcement if the transaction goes awry. It does not cover all the goods, services, or property that consumers buy or all the types of financial products used in these transactions. Instead it selects certain products as emblematic of different approaches to consumer law. The intuition is that consumers and businesses face similar information and power disparities across transactions. Once students see how consumer law grapples with these issues in a particular context, they can identify similar problems and solutions in other areas. This approach has particular merit in consumer law, where the scams and frauds of today are regulated or litigated out of existence tomorrow only to be replaced with new scams and frauds. Underneath activities ranging from advertising cold remedies to creating digital currency, the fundamental problems of consumer law remain. What is the appropriate amount of intervention in the market? How much should the law expect consumers to protect themselves? When is the burden on business so great that it creates economic hardships that outweigh the social benefits of regulations?

This book is organized into five major parts. It opens by asking some basic questions about the nature of consumer law. This part provides an opportunity to tackle the boundary problem of consumer law and to introduce students to the multiple origins of consumer law. The book gives heavy weight to federal consumer law but covers state law as applicable, doing so by focusing

on a particular jurisdiction to illustrate a typical approach. Part 2 focuses on the initial contact between the consumer and business; it addresses issues related to advertising, marketing, and access to credit. Part 3 considers the terms of a consumer-business transaction in two ways. It begins with a study of substantive limits on the sale of products and the extension of credit, looking at issues like warranties, disclosure, and credit cost. Then, it offers one or more in-depth assignments on each of several major consumer products: homes, automobiles, credit cards, student loans, etc. Part 4 of the book studies the rights and remedies of consumers and businesses if the transaction does not go as planned. It considers how the law balances enforcement of the contracted-for bargain against protection of consumers. It also distinguishes between the enforcement mechanisms used in consumer law: private litigation, public action, and alternate dispute methods. The final section, Part 5, addresses consumer law policymaking by studying emerging topics for consumer law.

Consumer law is sometimes derided as the law of small problems. In my view, this characterization is inaccurate. Consumers may be “small” in their individual contexts, but their force in the economy and in society is formidable. Being a consumer is one of the key ways that people engage in the world. The laws that allow or curb how consumers and business transact with each other reflect core values about capitalism and democracy. Consumer law is a fertile ground for examining normative principles about our economy and our society. I have found studying and shaping consumer law to have many rewards and challenges. I hope this book inspires you to identify and engage as a lawyer, and as a citizen, with consumer law issues. Consumers and businesses will benefit from a new generation of people passionate about consumer law.

February 2016
Irvine, California

KATHERINE PORTER

Acknowledgments

This section brings happy memories of bright and passionate people who share my interest in consumer law. From the students who endured not-quite-done book versions to the colleagues who patiently explained points of law or practice, I am grateful for the help. All errors are my own; the book has significantly fewer mistakes or misstatements because of the help of my students and the consumer law professors and lawyers that I know.

I owe particular debts to Cathy Lesser Mansfield and Tara Twomey. They introduced me to consumer law as a distinct area of law, and their deep knowledge continues to inspire me. Elizabeth Warren's pioneering textbooks that use the problem method to teach statutory areas of law are obviously a model for this book. She is an inspiring public servant, but for me, she will always be the best-ever professor.

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Special Notice

The problems in this book are filled with consumers, lawyers, businesses, and others who are the product of my imagination. Any resemblance to any real person is purely coincidental and uninspired.

I have edited cases for smoother reading. Citations and footnotes have been deleted without indication. Footnotes that were not eliminated retain their original numbers.

Citations of federal statutes are to the United States Code, despite popular usage of public law section numbers for some laws. Citations to federal regulations are to the Federal Register; if more than one agency jointly has the authority to issue regulations, the citation is to the Consumer Financial Protection Bureau's regulations.

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