



# CONSUMER LAW

## CASES AND MATERIALS

### Third Edition

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*To  
Pam, Kathy and Sharon,  
Monica,  
Ken, Keiko and Emmie,  
and  
Jeri, Melanie, Lindsay and Jesse*

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## Preface to the Third Edition

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Your authors have allowed sixteen years to pass since the publication of the second edition of this casebook in 1991. Many things have occurred on the consumer law scene, and yet the subject endures. It may be safe to say at this point, over thirty years since consumer protection case books first started to appear and separate courses on consumer law first started to be offered at major law schools across the country, that this is not a fad. There is some kernel of distinction that sets the law affecting consumer transactions apart from other types of commercial law, contracts, torts, etc.

Since the '91 edition, many consumer transactions and the laws governing them have changed dramatically. Concepts that did not get significant attention in the '91 edition—in many cases because they had not yet been conceived—but that now merit inclusion in the book include the internet, predatory lending, telemarketing, identity theft, the rise of mandatory pre-dispute arbitration clauses, spam, phishing, e-commerce, yo-yo sales, shrinkwrap, clickwrap, browsewrap and rolling contracts, credit repair organizations, the sale of consumer information, online privacy, privacy policies, yield-spread premiums, the Boston Fed Study, changes in terms of credit card agreements, PayPal, and payday loans.

The new developments have led to new statutes and regulations, and amendments to existing ones. Thus the Third Edition of the casebook includes such legislative/regulatory developments as CANSPAM, the Gramm-Leach-Bliley Act, FACTA and the 1996 amendments to the Fair Credit Reporting Act, HOEPA, the Telemarketing and Consumer Fraud and Abuse Prevention Act, the Telemarketing Sales Rule and the creation of the “Do Not Call” list,” the application of the Fair Debt Collection Practices Act to lawyers engaged in litigation, Check 21, FTC privacy interventions and state statutes governing predatory lending.

The need to include new materials generated significant issues for us in the new edition. Given the time constraints of the standard two or three credit hour law course, authors cannot add to a casebook indefinitely without cutting, so we cut the usury materials sharply because we think usury has become less important in light of federal preemption rules and the exportation doctrine. We also eliminated some of the less important materials on enforcement of consumer rights—though at the same time, we had to add new materials to the enforcement section about mandatory pre-dispute arbitration terms.

Two chapters in the Third Edition are almost completely new: Chapter Nine on predatory lending and Chapter Five on privacy. Some aspects of predatory lending appeared here and there in the '91 edition but given how predatory lending has surfaced as an important area with a new body

of law, we thought it best to combine the new rules with the older aspects of predatory lending into a single chapter. The chapter serves several purposes. First, it is a capstone chapter. If Truth in Lending and deceptive trade practices laws worked better, then predatory lending regulation would be less necessary. So the predatory lending chapter picks up where those laws fail. This chapter includes HOEPA (an amendment to TILA focused on predatory lending), the state predatory lending statutes and preemption of state legislation by federal regulators. That last provides a fascinating lesson on preemption, a theme that formerly received a separate chapter but now is integrated with substantive materials at various points in the book. And as you might expect, the predatory lending chapter also builds to some extent on the materials in the credit discrimination section. Thus, the chapter pulls a lot of material together in what is an evolving but fascinating area.

Privacy also gets its own chapter. Privacy is an example of something that consumer law courses formerly gave little or no attention to but that is now so significant in consumer transactions that it merits greater treatment. The chapter takes up three aspects of privacy: first, solicitations, including telemarketing and spam; second, the sale of consumer information, which focuses on the Gramm-Leach-Bliley privacy protections for consumer financial transactions; and finally, online privacy, which involves both solicitations and the sale of consumer information. By organizing it this way, it becomes easier to think about the broad policies which ought to motivate privacy regulation and to see how similar issues are answered differently in different areas: for example: we have a “Do Not Call” list for telemarketing but not a “Do Not Spam” list. Privacy issues surface elsewhere in the book, including, for example, in the materials on debt collection in Chapter Eight—where the book explores the invasion of privacy torts as applied to debt collection, as well as the Fair Debt Collection Practices Act. Privacy also comes up with the chapter on the Fair Credit Reporting Act—which covers, among other things, who can see your credit report and identity theft.

One new coauthor, Jeff Sovern, has joined the team for this Third Edition. Jeff has provided us with the expanded focus on consumer privacy issues, an area that he has written in extensively. He also spearheaded the effort to add a “capstone” type chapter on predatory lending.

Paul Razor, coauthor on the second edition, chose not to participate in this new edition as he has changed the direction of his career. We nonetheless owe him a debt of thanks for allowing us to build on what he had contributed to the second edition of the book.

We also wish to thank the Consumer Protection classes at the University of Wyoming and St. John’s University law schools, who used and commented on draft versions of this new edition. In addition, we wish to thank Mark D. Bauer, Assistant Professor of Law, Stetson University College of Law, and Amy Quester, Adjunct Professor of Law, Washington &

Lee University School of Law, both of whom tested the materials in their classes and made very helpful comments on them.

Ralph Rohner thanks all those colleagues and students whose response to this subject matter and these materials has been so stimulating over the years, especially to co-authors Andy, Dee, and Jeff who have brought to the third edition great patience, insight, energy, and imagination about our favorite area of the law.

Dee Pridgen wishes to thank her research assistants, administrative assistants, library staff and dean and colleagues at the University of Wyoming College of Law, for their support on this project, especially during her sabbatical leave in the fall of 2005. She owes a special thanks to the George Hopper Faculty Research Fund. She also wishes to thank her husband Ken Matsuno and daughters Keiko and Emmie Matsuno, who have endured her preoccupation with this manuscript as it has been brought to fruition.

Jeff Sovern thanks Dean Mary C. Daly, Associate Dean Andrew J. Simons, the librarians (especially Arundhati Satkalmi), his colleagues (particularly Professors John P. Hennigan, Gina M. Calabrese, Ann L. Goldweber, G. Ray Warner, and Linda M. Ryan), his research assistants Tracy Ruhling, Erica A. Coleman, Dana E. Grabiner, Richard Elem, and Elizabeth Daitz as well as Agnieszka Wilewicz at St. John's University School of Law. He is especially grateful for the support of his wife Jeri Gilbert and his children Melanie, Lindsay, and Jesse. Finally, he thanks the many consumer law students who have taught him the things he needed to learn to contribute to this volume.

## Preface to the Second Edition

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The answers may have changed,  
but the questions remain the same.

In the eleven years since the first edition of this casebook was published, almost every aspect of consumer law has been rewritten. The FTC has taken itself out of the “cutting edge” problems of deceit regulation. A litigation-prone Truth in Lending Act has been replaced by a nearly caseless Truth in Lending Simplification Act. Several approaches to consumer problems which seemed to be promising in 1979 have seemingly not had any great impact. Examples include class actions and the FTC Credit Practices Rule, and other Trade Regulation Rules. “Unconscionability,” with only one prominent exception, is used more by corporations than by consumers. Even the federal-state tension and balance which permeated the first edition has shifted—both ways. State usury laws have been “deregulated” and preempted. On the other hand, the use of state “Baby FTC Acts” has grown to fill the gaps left by federal FTC inaction.

—AND YET—

The basic fact patterns analyzed in the Problems of the first edition still exist, with their tension between protecting consumers and allowing creditors and sellers to do business. Thus, a surprising number of the Problems used in the first edition are still useful teaching tools, and have been kept in this second edition. Some of the old scams have disappeared, and some new ones have appeared, and related Problems have been added, amended or deleted as necessary.

It’s a different story with the cases and notes. Except for a few classics, or where historical development was needed, most of the cases have been replaced and notes rewritten.

The overall organization of the first edition has been maintained, with its four-Part division into: I. Regulation of Information, II. Regulation of Conduct, III. Regulation of Prices, and IV. Enforcement of all the above. Within those four Parts, there has been some rearrangement. The chapters in Part II relate to three different stages of the consumer transaction: pre-contractual relations (Chapters 3 and 4), obligations during performance (Chapters 5 and 6), and debt collection (Chapters 7, 8 and 9). Part III is broken into chapters on regulation of prices of goods and services (10), state regulation of interest rates (11), federal regulation of interest rates (12), an evaluation of these regulations (13), and the upside-down world of credit insurance (14).

Evaluations of the utility of regulation are attempted at the end of Chapters 2 (information), 4 (credit availability), 6 (cut-off of defenses), 9



(coercive collection) and in all of Chapter 13 (interest rate regulation). We believe that such evaluations are an integral part of any Consumer Law course.

Two new coauthors, Dee Pridgen and Paul Rasor, have joined the team for this second edition. One of the strengths of the first edition was its presentation of the tension between federal and state law in the consumer law area. Since the two original authors are now based in Washington, it seemed appropriate to bring in coauthors who were "outside the Beltway."

Each of the authors thanks all the other coauthors for their feedback, direction and support. Even though we are scattered around the country, overnight mail, the fax machine, the computer and the airplane allowed each of us to participate in the drafting (and redrafting) of all parts of the book. This book may be an example of Tofler's "Third Wave," where geographical boundaries no longer limit what we can do, as long as we can communicate.

We also wish to thank multiple classes of students who read through mimeo versions of earlier drafts of this book, and who helped to improve it by their reactions and constructive comments. It is appropriate that their comments are reflected throughout the book, and their enthusiasm helped us complete it, for they are the ultimate consumers of our effort.

We could not have written this manuscript without the help from each of our schools of our secretarial staffs, librarians, colleagues and deans. To all of them, we give a heartfelt "Thank you." Dee Pridgen especially wishes to acknowledge the financial support she received from the George Hopper Faculty Research Fund.

November, 1990

JOHN A. SPANOGLE  
RALPH J. ROHNER  
DEE PRIDGEN  
PAUL B. RASOR

## Preface to the First Edition

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Too often, the materials for a consumer protection course start and end with theoretical problems, and have no substance in between. They seem to be based on an assumption that consumer protection laws are either only theoretically possible or some aberrant fluke of legislative madness which will not be repeated.

These materials proceed from a different set of assumptions: (1) Consumer protection statutes and caselaw doctrines are pervasive within the legal structure. (2) They are growing. (3) They are not likely to disappear, but are more likely to increase. (4) Even though they concern widely disparate subject-matter, there are likely to be common doctrinal and practical threads running through them, and it is our job to try to discover these threads.

Another problem with some consumer protection materials is that they rely on long quotations from law review articles, reports and other textual material to present information. There is now sufficient caselaw to provide a core of teaching materials. There are statutes also, in abundance. In many areas, the cases amply set forth both the present practices and the present legal doctrines. However, these cases should be read in the same manner as those for any other course—to evaluate and critique not only the holding of the case, but also its underlying assumptions, statute, and policies.

One pattern running throughout these materials is to compare judge-made law and legislation dealing with the same problem. Thus, where cases are presented, there will usually be discussions of statutory provisions dealing with the same problem.

The authors hope that these materials will enable students to do several things. One is to grasp a reasonable portion of the array of substantive law applicable in consumer transactions, with an appreciation both of its complexity and of its recurrent themes. Another is to appreciate the “hidden” workings of the consumer marketplace—the economic motives and consequences of transaction patterns. An equally important goal is to persuade students—most of whom instinctively applaud anything labeled “consumer protection”—that current statutory and caselaw approaches, and the policy choices underlying them, are not beyond criticism. If iconoclasm is perceived in these materials, it is intended.

For the purposes of this book, “consumer transactions” include those in which individuals enter into consensual arrangements for the purchase of property or services, or for the borrowing of money. These materials treat of the various legal rules designed to protect the consumer’s *economic* expectations in those transactions. We therefore do not address

such matters as products liability, or the regulation of product safety, or the rights of consumers in landlord-tenant or employment relationships, or other kinds of “transactions” in which consumers engage. Considerable attention is given to credit transactions since those present more, and more complex, legal issues than do cash transactions, and have generated more sweeping statutory controls.

These materials obviously build on concepts and rules treated in basic contracts courses, and in courses on sales, negotiable instruments and secured financing. This book is designed, however, to include ample prefatory and review material so that students need not have taken commercial law courses before taking Consumer Law. Neither of the authors treats those commercial courses as prerequisites, although one of us “recommends” that students take them first. In any event, students may profitably consult a basic commercial law hornbook, such as J. White & R. Summers, *Uniform Commercial Code* (1972), or R. Braucher & R. Riegert, *Introduction to Commercial Transactions* (1977).

Each of the authors first acknowledges that the other has contributed more than half the book. It is for this reason that the order of our names on the cover was chosen by coin flip.

To our students, past, present and future, we owe a debt beyond calculation. It is their interest and enthusiasm, their challenges, their critiques and their perceptions, that make this effort worthwhile.

We also acknowledge, with gratitude and affection, the support, encouragement and inspiration provided by two esteemed teachers of the law, Professors Homer Kripke and Fairfax Leary, Jr. In many ways, large and small, they are a part of this book and of the law it portrays.

There are many other people to whom we owe thanks for their help: Professor Jack Ayer, who was kind enough to share his unpublished materials with us, and whose materials furnished a springboard for many of our ideas. Our colleagues, who critiqued parts of the materials, especially Dick Bell, Grace Blumberg, Marjorie Girth, Nils Olsen, George Priest, Jack Schlegal, Paul Spiegelman, and Urban Lester. The mistakes and heresies in the final product, however, are ours, not theirs. And last but not least, our families, who did not tell us too often how absent we were.

April, 1979

JOHN A. SPANOGLE  
RALPH J. ROHNER

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