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Kevin M. McDonald

Karl Hochkammer

Steven Wernikoff

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CONSUMER LAW IMMERSION

KEVIN M. MCDONALD | KARL HOCHKAMMER | STEVEN WERNIKOFF [1*]

I. INTRODUCTION

As part of Washington University School of Law's (WashULaw) Online Master of Legal Studies (MLS) program, students attend optional weekend immersion courses at the law school in St. Louis in both the spring and fall.[2] We recently taught a course on consumer law over the spring 2018 weekend session held on March 23-25, 2018. In attendance were twenty-two students, most of whom were enrolled in the MLS program. Several were foreign lawyers and one was an LL.M. student. This article summarizes our three-day experience and concludes with our key learnings that incorporate feedback we received from students both during and after the course.

II. DAY ONE

A. Introduction to Consumer Law

We began by introducing ourselves: Kevin McDonald came to the course with the perspective of an in-house general counsel and compliance officer who has worked for nearly twenty years for a global automotive company; Karl Hochkammer came to the course having served many international clients as a partner at a leading law firm in the Midwest; and Steve Wernikoff came having worked for nearly twenty years as an FTC

[1*] Kevin M. McDonald is Senior Vice President – Chief Compliance Officer, General Counsel & Secretary at VW Credit, Inc. Karl Hochkammer and Steve Wernikoff are partners at Honigman Miller Schwartz and Cohn LLP. The views and opinions expressed in this article reflects those only of the authors and should not be interpreted in any way to reflect those of their employer, firm or clients.

[2] For information on the Master of Legal Studies program, *see generally* http://law.wustl.edu/mls/index.aspx. For information on the Online Master of Legal Studies program, *see generally* https://onlinelaw.wustl.edu/mls/. For information on the on-campus weekend immersion experience, which is the channel through which we taught, *see* https://onlinelaw.wustl.edu/experience/immersion/.

enforcement attorney. These three perspectives allowed us to complement one another's approaches and perspectives.

Our goals for the course were ambitious, since we hoped to cover wide swaths of consumer law in just two and a half days, totaling about twelve hours of class time. We introduced the body of consumer law by briefly explaining the development of the common law of tort and contract in the nineteenth century. Over time, the common law was overtaken by case law, statutory law and regulatory law that developed into a complicated patchwork of laws and regulations enforced by courts and federal and state regulatory authorities. Students were introduced to several of the most prominent federal authorities throughout the course, including the Federal Trade Commission, the National Highway Traffic Safety Administration, and the Consumer Financial Protection Bureau. Time did not permit us to cover other agencies we might have otherwise covered, such as the Securities and Exchange Commission, the Consumer Product Safety Commission, the Food and Drug Administration, or the Environmental Protection Agency.

Our initial question to the class was straightforward: who is a consumer? Answer: all of us, including sometimes even small businesses (which surprised some students). Consumer law, as we identified it, is a body of law that has emerged as an outgrowth from the law of tort, contracts, statutes and regulations. Federal, state, and even local laws contribute to our understanding of "consumer law." These laws share a common purpose to protect individuals against harm from fraud and other unfair and deceptive trade practices that can occur in myriad situations, from taking medication to buying or leasing an automobile or financing a home purchase.

We then explained the origin of consumer law: common law contract law. Karl explained the doctrine of "caveat emptor," showing how this doctrine provided no remedy to consumers harmed by sellers who failed to fulfill their promises tied to goods (except in the cases of deceit or fraud). With the advent of manufactured goods, the law needed to evolve. In *Chandelor v. Lopus*,[3] the Exchequer Court in 1603 laid the foundation for what would become warranty law. After this case, contract law changed by focusing on sellers' breaches. Common law fraud still remained hard to prove and damages were often small. Asymmetrical information and industrializing economy often exacerbated these situations.

By 1844, William Story's *A Treatise on the Law of Contracts Not Under Seal* (1844) introduced the concept of implied warranties: good title; merchantability (the quality demanded and expected by the buyer where inspection is impracticable); fitness for a particular purpose (goods manufactured for a specific purpose made known to the manufacturer by the buyer); absence of latent defects (seller knows that buyer relies on seller's judgment, or seller is the manufacturer and can provide against defects); and conformity of bulk to sample. Tracing the development of warranty law over time, Karl showed that consumer laws now fall into these general categories: consumer protection statutes, consumer sales statutes, unfair trade practices acts, deceptive consumer sales acts, and consumer fraud acts.

Having discussed the genesis or modern consumer law and situating that body of law in its proper context generally, we next discussed the goals of consumer law: increasing consumer information, strengthening product safety, improving access to consumer credit and other financial services, and protecting consumers in e-commerce and social media. Consumer laws effectuate these goals primarily by providing disclosures to consumers

[3] *Chandelor v. Lopus*, 70 Eng. Rep. 3, 1603 WL 94 (Ex. 1603).

when buying goods or services, providing remedies (either individually or collectively such as via class actions), and enforcing these laws by court or administrative orders. We discussed how a government agency knows when to investigate or enforce a consumer law. Steve noted that the Federal Trade Commission (FTC) holds workshops to educate both consumers and businesses, reviews complaints, and consults and coordinates its activities with other government agencies. Information is really the key that drives the impetus for further government inquiries. Asymmetry of information often leads to harm.

That concluded our introduction to consumer law and our course. We then moved to the FTC and role of state attorneys general (AGs).

B. The Role of the FTC and State AGs

Steve took the class through the workings of the FTC and state AGs. He started by discussing the laws and rules administered by the FTC. Some of the more important consumer statutes the FTC enforces include the Federal Trade Commission Act (FTC Act),[4] the Children's Online Privacy Protection Act (COPPA),[5] the Fair Credit Reporting Act,[6] the Fair Debt Collections Practices Act,[7] the Fair Packaging and Labeling Act,[8] and portions of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).[9] Some of the more important regulatory rules that the FTC enforces include the Used Car Rule,[10] the Mail Order Rule,[11] Textile Rules,[12] CAN-SPAM Rule,[13] Telemarketing Sales Rule,[14] and the Children's Online Privacy Protection Rule.[15]

Turning to its structure, the FTC's operating bureaus are the Bureau of Competition (antitrust), Bureau of Consumer Protection, and the Bureau of Economics. The focus in our course is on the Bureau of Consumer Protection, with divisions that break down into advertising practices, marketing practices, enforcement, financial practices, privacy and data protection. We had a brief discussion of the 1984 FTC "Policy Statement on

[4] 15 U.S.C. §§ 41-58.

[5] 15 U.S.C. §§ 6501-6505.

[6] 15 U.S.C. § 1681 et. seq.

[7] 15 U.S.C. §§ 1692-1692p.

[8] 15 U.S.C. §§ 1451-1461.

[9] Dodd-Frank Wall Street Reform and Consumer Protection Act, Titles X and XIV, Pub. L. No. 111-203, 124 Stat. 1376.

[10] Used Motor Vehicle Trade Rule, 16 C.F.R. pt. 455 (1984).

[11] Mail, Internet, or Telephone Order Merchandise Rule, 16 C.F.R. pt. 435 (2014).

[12] Textile Fiber Rule, 16 C.F.R. pt. 303 (1959).

[13] CAN-SPAM Rule, 16 C.F.R. pt. 316 (2008).

[14] Telemarketing Sales Rule, 16 C.F.R. pt. 310 (2010).

[15] Children's Online Privacy Protection Rules, 16 C.F.R. pt. 312 (2013).

Deception."[16] Steve noted that in response to congressional demands for clarity in enforcement, the FTC defined the "unfairness" prong of the FTC's jurisdiction over enforcing Section 5 of the FTC Act's prohibition of "unfair or deceptive acts or practices" (UDAP)[17] by using three elements: a practice that (1) causes substantial injury that is (2) not reasonably avoided by consumers themselves and (3) not outweighed by benefits to consumers and competition.[18] A good example here is false charges or hidden fees charged to consumers.

A description of case progression included an overview of how the FTC finds cases by coordinating with law enforcement and state attorneys general; the issuance of civil investigative demands (based on signature of one of the five FTC commissioners); or access letters. The FTC has many remedies at its disposal. In federal court the FTC can obtain an injunction, immediate discovery, asset freezes, receiverships, consumer redress, contempt (jail, fines, etc.), and monetary penalties.

III. DAY TWO

A. Motor Vehicle Safety

Day two began with an hour devoted to consumers of automobiles, i.e., motor vehicle safety. Kevin divided the hour into two segments, spending the first half hour on the common law of products liability in the automotive context, focusing on three leading cases: *MacPherson v. Buick Motor Co.*,[19] *Evans v. General Motors Corp.*,[20] and *Larsen v. General Motors Corp*.[21] These cases exemplify the common law's movement toward protecting consumers from harm by removing privity as a requirement for negligence (*MacPherson*) and adding a duty of reasonable care in the design of products against unreasonable risk of injury to the consumer of a product (*Larsen*). We spent time discussing the analogical reasoning used by Justice Cardozo in *MacPherson* because this technique is a common device used by judges often, not just in contract or negligence.

The final half hour was spent discussing the National Highway Traffic Safety Administration (NHTSA),[22] which kicked off by tracing the agency's origins to Ralph

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[16] FTC, FTC Policy Statement on Deception, 103 F.T.C. 174, 175 (October 14, 1983) (appended to *Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)), FTC Policy Statement on Deception, *available at* https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

[17] 15 U.S.C. § 45.

[18] *See* FTC, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (August 13, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

[19] *MacPherson v. Buick Motor Co*., 111 N.E. 1050, 217 N.Y. 382 (1916).

[20] *Evans v. Gen. Motors Corp.*, 359 F.2d 822 (7th Cir. 1966), *cert. denied* 385 U.S. 836, 87 S. Ct. 83, (1966).

[21] *Larsen v. Gen. Motors Corp.*, 391 F.2d 495 (8th Cir. 1968).

[22] NHTSA, *see generally* www.nhtsa.gov; *see also* KEVIN M. MCDONALD, SHIFTING OUT OF PARK: MOVING AUTO SAFETY FROM RECALLS TO REASON (2006).

Nader's *Unsafe at Any Speed*.[23] An overview of NHTSA's main responsibilities included a discussion of the Federal Motor Vehicle Safety Standards and NHTSA's authority to investigate safety-related defects and issue recall orders. NHTSA protects consumers by issuing prescriptive standards for motor vehicles and items of motor vehicle equipment and is given wide latitude in its decisions.[24] An important issue here is how much latitude a jury should give a manufacturer who has complied with a safety standard. In other words, although the law says that safety standards set by NHTSA are only "floors," should any kind of deference be afforded manufacturers who comply? If not, are we comfortable allowing juries to "second guess" the engineering judgments of NHTSA regulators? The class did not arrive at any definitive conclusion.

B. Consumer Marketing Law

We next shifted gears to discuss consumer marketing law. Steve showed how the FTC Act's main prohibition against "unfair or deceptive acts or practices" under Section 5 of the FTC Act also applies to advertisements. Ads must be truthful and non-deceptive. Omission of information may also trigger liability. The concept of substantiation requires advertisers to have a reasonable basis for claims they make. Sellers are liable for claims made by agents: advertising agencies are also potentially liable, depending on the level of participation and knowledge of false claims. Disclosures and disclaimers must be clear and conspicuous, including in the online, mobile, and social media worlds. To this end, we looked at the FTC's "dot com disclosure" guidance,[25] which offers guidance on how to make effective disclosures in digital advertising.

Our discussion moved to online advertising. As consumers continue to block ads online, native advertising has come into play so consumers now can become marketers. Native advertising refers to using a format that makes advertising or promotional messages look like objective content. Companies reach consumers with third-party ad networks sitting in the middle between the consumer and the company's website. When clicking on banner ads, users might be sent to a site set up by the hired advertising company. This is potentially deceptive because users might be directed to a fake news page or fake merchant page.

Misrepresentations can include websites that pose as objective news reports, fabricated comments from "consumers," etc. Inadequate disclosures can come from affiliates failing to disclose adequately their connection to merchants. Responsible parties can include affiliates, merchants, and affiliate networks. Issues arising with e-commerce include affiliate marketing abuses and native advertising transparency.

The governing principle is straightforward: consumers have a right to know if an opinion or supposed "proof" is actually a marketing pitch. Examples presented included *In*

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[23] *See* RALPH NADER, UNSAFE AT ANY SPEED (1965).

[24] See *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330 (D.C. Cir. 1968).

[25] FTC, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* (March 2013), *available at* https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com- disclosures-information-about-online-advertising.pdf.

the Matter of Machinima, Inc.,[26] in which Machinima ran an ad campaign on behalf of Microsoft and an ad agency to promote Xbox One gaming system and several games. Machinima paid and solicited video bloggers to post Xbox game play videos that appeared to be objective opinions of the video bloggers. The videos didn't disclose adequately (or at all) that the video bloggers were compensated--the FTC found that deceptive. Another case discussed was *In the Matter of Sony Computer Entertainment America, LLC*,[27] in which the FTC charged a Los Angeles-based ad agency with promoting consoles through deceptive Twitter endorsement. We also discussed *In the Matter of Lord & Taylor, LLC*,[28] in which the FTC charged the retailer with deceiving consumers through paid articles in an online fashion magazine and paid Instagram posts by fifty "Fashion Influencers." Lord & Taylor paid for native ads without disclosing that the posts were paid advertisements, running afoul of the FTC.

With time running out, we had only a few minutes to touch on the CAN-SPAM Act.[29] This law applies to "initiators" ("transmit" or "procure") and prohibits false header information (such as a false reply line) and deceptive subject lines. Companies can be liable also for those who send on their behalf. The law here requires opting out, which gives companies one free pass so long as consumers can opt out from receiving future messages. We overviewed both "snowshoe" spam (using multiple servers, "from" addresses, and mailbox physical addresses) and illegal spam (using a vulnerable computer on the Internet through which to send spam).

We closed this segment by touching briefly on the Telemarketing Sales Rule,[30] which applies to commercial call (except politicians), non-profit charities, and most business-to-business calls. Calls must disclose material information and not contain misrepresentations. It is illegal to assist and facilitate Telemarketing Sales Rule violations. Robocalls are almost all illegal absent prior express consent. Consumers can register their cell phone numbers with the FTC's National Do-Not-Call Registry.[31]

C. Consumer Financial Protection

Kevin led the next segment on consumer financial protection. We focused on access to credit and how the common law approached the topic of dealer participation in automobile lending. Dealer participation is that portion of a finance charge retained by the dealer when selling a vehicle through an installment sales contract. The ability of the dealer to exercise discretion in setting dealer participation has led over the years to accusations of

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[26] FTC File No. 142-3090, *available at* https://www.ftc.gov/enforcement/cases-proceedings/ 142-3090/machinima-inc-matter.

[27] FTC File No. 122-3252, available at https://www.ftc.gov/enforcement/cases-proceedings/ 122-3252/sony-computer-entertainment-america-llc-matter.

[28] FTC File No. 152-3181, *available at* https://www.ftc.gov/enforcement/cases-proceedings/ 152-3181/lord-taylor-llc-matter.

[29] 15 U.S.C. §§ 7701-7713.

[30] Telemarketing Sales Rule, 16 CFR 310 (2010).

[31] *See* FTC, National Do Not Call Registry, https://www.donotcall.gov/ (last visited June 10, 2018).

violations of fair lending law, specifically the Equal Credit Opportunity Act (ECOA)[32] and Regulation B.[33] The theory used to assert violations of the ECOA and Regulation B is disparate impact.[34] Disparate impact is one of three ways consumers can establish a violation. The other two theories are overt discrimination and disparate treatment. Disparate impact relies on statistical data to show that covered classes under Regulation B (e.g., African-American consumers) were harmed even though the policy is facially neutral. Put differently, disparate impact occurs when an otherwise facially neutral practice or policy results in a covered class suffering financial harm. We looked at two cases--*Coleman v. GMAC*[35] and *Beaudreau v. Larry Hill Pontiac/Oldsmobile/GMC, Inc.*[36]--noting that the plaintiff in the latter case also attempted to attack the practice of dealer participation under UDAP theories.

The discussion of fair lending segued nicely into an overview of the Consumer Financial Protection Bureau (CFPB), which was born out of the Dodd-Frank Wall Street Reform and Consumer Protection Act[37] in 2010. We discussed the new authority of the CFPB to exercise supervisory and examination authority over "covered entities," such as the largest automobile finance companies. We also discussed some of the major enforcement actions the CFPB has taken to date to enforce fair lending. Finally, we discussed the authority of the CFPB to prohibit "abusive" practices by companies subject to CFPB regulation, expanding the existing UDAP rubric to "UDAAP."[38] To conclude the segment, students were broken into groups of five and given approximately fifteen minutes to develop a "checklist" of compliance guidelines for a hypothetical car dealer looking to maximize dealer participation while also remaining compliant with Regulation B. By examining some of the key enforcement actions discussed earlier in the segment, we identified the paying of a flat fee for each assigned contract or the establishment of a rate cap as some of the possible guidelines for a finance company to institute with dealers.

D. Consumer Product Warranties and Third-Party Financing

[32] 15 U.S.C. §§ 1691-1691f.

[33] Equal Credit Opportunity Act (CFPB Regulation B), 12 C.F.R. pt. 1002 (2011).

[34] *See* Kevin M. McDonald & Kenneth J. Rojc, *Warning Lights Flashing*, 618 BUS. L. 617, 618-21 (2015) (discussing application of the disparate impact theory by the CFPB against Ally Financial).

[35] *Coleman v. GMAC*, 296 F.3d 443 (6th Cir. 2002).

[36] *Beaudreau v. Larry Hill Pontiac/Oldsmobile/GMC, Inc.*, 160 S.W.3d 874 (Tenn. Ct. App. 2004).

[37] Dodd-Frank Wall Street Reform and Consumer Protection Act, Titles X and XIV, Pub. L. No. 111-203, 124 Stat. 1376. *See also* Kevin M. McDonald, *Who's Policing the Financial Cop on the Beat? A Call for Judicial Review of the Consumer Financial Protection Bureau's Non-Legislative Rules*, 35 OUT REV. BANKING & FIN. L. 225 (2015-16).

[38] *See* 12 U.S.C. § 5531 authorizing the CFPB to take 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.

After wrapping up our discussion of the CFPB, we transitioned to a review of warranty law that included a refresher on express and implied warranties, including a refresher of statutory requirements for product warranties under the Magnuson-Moss Warranty Act.[39] Kevin led the discussion of "lemon law," one of the more famous and important examples of statutory warranty law that provides consumers additional remedies when automobile manufacturers do not conform a vehicle through repair to express warranties. Among the assigned cases, we spent the most time discussing *Vultaggio v. General Motors Corp.*,[40] which held that lemon rights can also be triggered when a vehicle exceeds the number of days down, not just when a manufacturer exceeds the number of repair attempts.

We transitioned into a segment on the prohibition against "secret warranties," which can occur when vehicle manufacturers create a warranty adjustment program to cover the costs of defects without notifying all similarly situated consumers. If a manufacturer covers the costs of a defect for some, but not all, similarly situated consumers, it may run afoul of the prohibition against "secret" warranties. Although manufacturers do not have to reimburse repair costs for repairs that are no longer covered by an express warranty, *if* a manufacturer undertakes reimbursement of costs for repairs that affect service life, dependability or performance of multiple vehicles for customers, then the manufacturer must extend similar coverage for all affected customers. We focused this discussion on two cases involving the Ford Motor Company: *Cuellar v. Ford* [41] and *Annelli v. Ford*.[42]

To close out this section of the course, we reviewed the FTC's *Guidelines on Trade Regulation Rule Concerning the Preservation of Consumers' Claims and Defenses*.[43] This rule is known more commonly as the "Holder in Due Course Rule," which the FTC issued in 1975 to enhance the rights of consumers who purchase goods through an installment sales contract subsequently sold to an assignee. The old holder in due course doctrine relegated consumers to private actions against only the seller of the goods, not the assignee to whom the seller often sold the installment contract. This was a problem because the retailers were frequently on the move and judgment proof. By 1975, the FTC found this problem so unacceptable that it issued a rule preventing the seller from making the consumer's obligation to pay independent of the seller's obligation to perform the contract and comply with consumer protection law. If the seller was out of business or sold defective merchandise, then, as between the consumer and the assignee-lender (i.e., bank or finance company that bought the installment sales contract), that assignee-lender was in the best position to protect itself against dealer misconduct, thus policing the consumer marketplace.

E. Privacy and Data Protection

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[39] 15 U.S.C. §§ 2301-2312.

[40] *Vultaggio v. Gen. Motors Corp.*, 429 N.W.2d 93 (Wis. Ct. App. 1988).

[41] *Cuellar v. Ford*, 723 N.W.2d 747 (Wis. Ct. App. 2006).

[42] *Annelli v. Ford*, 2007 WL 1828320 (Conn. Super. Ct. 2007).

[43] FTC Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses (Holder in Due Course Rule), 16 CFR 433 (2015).

The final session of the day was devoted to consumer privacy and data protection. Steve started by noting the absence of any one definitive "privacy law" in the United States. Instead, privacy law is largely sectoral and based on the FTC Act's notions of either unfairness or deception, under the much discussed UDAP principles. Even when data is breached, no one federal law applies, except perhaps for health-related data. International laws add a layer of complexity to businesses doing business overseas, but time limitation prevented us from going into detail.

We thus focused on U.S. law, and turned to the federal Gramm-Leach-Bliley Act,[44] which applies to "financial institutions" and includes both a privacy rule (requiring initial and annual privacy notices to customers) and a safeguards rule (requiring an information security program to protect data). We discussed *In the Matter of TaxSlayer, LLC*[45] as an example of a case in which company was alleged to have violated both rules because hackers gained access to nearly 9,000 TaxSlayer accounts and used information to file fraudulent tax returns and obtain tax refunds.

Common privacy failures include breakdowns in how companies collect, use, share, or secure consumer data contrary to representations those companies have made to consumers. Common security failures include breakdowns in how companies store or protect consumer data. Steve provided several examples, including the *Accretive Health* settlement with the FTC over charges that the company failed to adequately protect consumers' personal information[46] and *BJ's Wholesale Club* settlement[47] with the FTC over charges that the company's lax security compromised thousands of credit and debit card accounts. Other examples of companies' failures to safeguard data security includes using default or other easy-to-guess passwords (e.g., case against Twitter[48]); failing to take steps to segment or restrict access to data; failing to ensure service providers implement reasonable security measures; failing to secure paper, physical media, and devices (e.g., mortgage broker who dumped consumer records).

We touched on the COPPA, which requires operators of commercial websites, apps, and online services to provide notice and obtain parental consent before collecting personal information from children under the age of 13. Steve showed how the FTC generally relies also upon Section 5 of the FTC Act (again, applying UDAP concepts).

Most cases end in injunctive relief for the FTC. This can include prohibitions against misrepresentations; comprehensive data security or privacy program appropriate to the company's size and activities; third-party assessment of these programs; and other case-specific requirements (e.g., disclosures, destruction of data).

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[44] Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801 et. seq.

[45] FTC File No. 162-3063, *available at* https://www.ftc.gov/enforcement/cases-proceedings/ 162-3063/taxslayer.

[46] *In the Matter of Accretive Health, Inc*., FTC File No. 122-3077, *available at* https://www.ftc.gov/enforcement/cases-proceedings/122-3077/accretive-health-inc-matter.

[47] *In the Matter of BJ's Wholesale Club, Inc*., FTC File No. 042-3160, *available at* https://www.ftc.gov/enforcement/cases-proceedings/042-3160/bjs-wholesale-club-inc-matter.

[48] *In the Matter of Twitter, Inc.*, FTC File No. 092-3093, *available at* https://www.ftc.gov/enforcement/cases-proceedings/092-3093/twitter-inc-corporation.

IV. DAY THREE

One of the top legal news stories during our immersion course was Facebook's exposure of fifty million user accounts to Cambridge Analytica. We devoted most of our last day to discussing privacy law applications to this case and how UDAP concepts apply to the facts as reported by the news media. We began by asking, just as we had with "consumer," what is "privacy" and what interests does the law protect? The law does not provide a single definition of "privacy" or "personal information." Looking back in history, starting in the late nineteenth century, we began to find courts first beginning to form notions of "privacy," including a right to be "left alone." *Roe v. Wade*[49] was mentioned as an example of the Supreme Court's recognizing a woman's right to privacy over her own body in 1973. One definition of privacy offered by the International Association of Privacy Professionals is "the protection of personal information of an individual from unauthorized or illegal collection, use, and disclosure in accordance with applicable laws, regulations, and business obligations."[50] The categories of personal information protected under various state and federal laws vary, but some common examples include first and last name; identification numbers (e.g., social security, driver's license); financial account information; and health information, biometrics, and medical records.

Many of the guiding principles surrounding personal data and the collection of personal information are found in OECD's *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (FIPPS), which were issued in 1980.[51] The FTC followed in 1998[52] to focus on notice, choice and consent. Notice refers to clearly informing consumers what information will be collected and how it will be used. Choice refers to giving consumers the option to opt out of data collection and use practices. Consent refers to obtaining permission from consumers to use their personal information, particularly for activities separate from those whereby they provided the information.

We examined a typical bank privacy notice by examining Citibank's Privacy Notice. As we discussed the notice, we offered suggestions on "best practices" for consumer privacy policies, noting as an overarching principle that these policies should reflect what the company actually does in practice. Once a business discloses its privacy practice, it must actually align its policies and practices to follow suit. Key provisions of a consumer privacy notice should include: collection of personal information provided directly by the consumer; a description of the collected information; use of and restriction on sharing data; description of security measures taken to protect personal information;

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[49] *Roe v. Wade*, 410 U.S. 113 (1973).

[50] *See* IAPP, *What Is Privacy?*, https://iapp.org/about/what-is-privacy/ (last visited on Apr. 14, 2018).

[51] OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, *available at* http://www.oecd.org/sti/ieconomy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldata.htm.

[52] *See* Federal Trade Commission, Privacy Online: A Report to Congress (June 1998), *available at* https://www.ftc.gov/sites/default/files/documents/reports/privacy-online-report-congress/priv-23a.pdf.

and providing consumer choices on information collection, use, and sharing. As a company's use of consumer data changes, so should its privacy policy, including obtaining consent of the consumer to the new or different use. Failure to do so could trigger a UDAP claim. One point we discussed was the nature of harm. If a company fails to obtain consumer consent, for example, should it matter if there is no consumer harm? We did not arrive at any consensus on this point.

We also discussed the approach taken under the European Union's existing data protection laws and the new General Data Protection Regulation that is to become effective in May, 2018. The purpose of this discussion was to provide an example of a different perspective toward protecting consumers and protecting personal information. We noted that instead of using patchworks or sector- and industry-specific laws, the European Union's drive toward harmonization has resulted in a law that is generally applicable to everyone and includes strong enforcement authority for the governmental agencies who will be charged with enforcement.

V. STUDENT FEEDBACK AND CONCLUSION

An anonymous online survey conducted just a week after the class provided positive results. Students enjoyed the immersion experience. We assigned quite a bit of background reading for the course (exceeding two hundred and fifty pages). Several students expressed a desire to have more time to review this material before the course. We also included a lot of detail in our presentation materials, which several students asked to keep. However, given the condensed timeframe for the course and our goal of teaching the students about how consumer laws have developed and work (instead of learning the details about any particular law or set of laws), we did not make those slides available. Going forward, we may also offer a section on how the law protects consumers as investors through the SEC. Time permitting, we may also draw upon the FTC's recent enforcement actions against fraud and deception in automobile sales, financing, and leasing ("Ruse Control")[53] as part of a larger case study.

[53] *See* FTC, Multiple Law Enforcement Partners Announces Crackdown on Deception, Fraud in Auto Sales, Financing and Leasing, FTC Press Release (March 26, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/03/ftc-multiple-law-enforcement-partners-announce-crackdown.