Oklahoma City University School of Law

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Chapman University Presents Consumer Law Symposium on Responsibility and Reform

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Chapman University Presents Consumer Law Symposium on Responsibility and Reform

By Alvin C. Harrell and Kurt Eggert

I. Introduction

On January 30, 2004, Chapman University School of Law presented its Sixth Annual Law Review Symposium. The 2004 Symposium was entitled "Responsibility and Reform: Striking a Balance in the Marketplace," and was held at the Chapman University campus in Orange, California.

Each of the four panels of speakers addressed one of the four primary topics: Consumer and Predatory Lending, Punitive Damages, Gun and Tobacco Liability, and the Consumer Protection Statute. Each panel was designed to be well-balanced, with speakers representing various points of view for each topic. The speakers included academics, practitioners, consumer advocates, representatives of intellectual property institutes, and other scholars.

The Symposium was introduced by Chapman University Vice President and School of Law Dean Parham Williams, and chaired by the Chapman Law Review, the Orange County Federalist Society, the Piano Factory, Westlaw, the Chapman Law Student Bar Association, and Occidental College.

The program provided valuable insight into some of today's most vexing consumer law issues.

This article reflects your authors' perceptions regarding the Symposium presentations. It is intended only briefly to describe those presentations, and is not designed as a full explanation of the issues or the views of the Symposium speakers, nor should it be construed as endorsing the authors' views or their agreement or disagreement with any particular speaker. Comments and views should not be attributed to the individual speakers without further, direct confirmation from the speaker. Still, it is hoped that this report on the Symposium will reflect the intellectual flavor of the Symposium and promote improved understanding of these important issues.

More detailed Symposium articles were published earlier this year in Volume 7 of the Chapman Law Review, and interested parties are invited to consult the Law Review for further information.

II. Panel One—Gunns and Tobacco

The first speakers' panel was entitled "Consumer Responsibility versus Manufacturer Liability: Recent Litigation in the Gun and Tobacco Industries." It was chaired by Chapman Law Professor Melissa Berry.

Panelist Dr. Stephen F. Halbrook criticized what he described as efforts of firearm control advocates to use a high level of litigation for the purpose of generating high litigation costs for gun manufacturers, in order to achieve political results that have been rejected by the courts. He reported that the basic legal foundation for many of these suits is the law of nuisance, and this use has been largely rejected by the courts, but the litigation costs and risks would adversely affect industry, driving up its costs and profits. He also noted the fact that several of these cases, and continual evolution of the creative legal theories being asserted, may seem a familiar story to those who follow consumer litigation trends.

A bill has been pending in Congress to preclude these lawsuits against firearm manufacturers. It would preempt state law causes of action. This is a response somewhat parallel to the recent federal regulatory preemption of state predatory lending laws and implicating some of the same policy issues. It seems a narrow proposal to address issues with such broad implications.

Robert A. Levy of the Cato Institute began his presentation by discussing the recent tobacco litigation settlements, alleging essentially an unusual kind of relative alliance that allowed politically powerful plaintiffs to recover damages without proof of individual causation. At the same time rewarding the large tobacco companies with windfalls to the extent of new market share. The plaintiffs' attorneys were claimed to have sought attorneys' fees in the range of $25,000 per hour in some of these cases, with Mr. Levy noting allegations that some of the money may have made its way back to the politicians who statutorily barred the defendants' primary legal defense. He noted by Mr. Levy, perhaps not the finest hour of our legal and political systems.

The following panelist, Richard F. Scruggs, is a plaintiffs' lawyer who was involved in the tobacco litigation and settlements. He noted that the tobacco and firearms litigation is between industries and the states, based on the external costs (e.g., medical expenses) related to tobacco use and firearm sales. These are not individual claims or subtraction claims for individual injuries; they are based on the broad social costs (e.g., an anomaly is environmental pollution). Thus, whether the defendants' actions are lawful, and whether there is proof of individual causation, is irrelevant: the resulting social costs to taxpayers that are the damages—the foreseeable result of the defendants' activities is increased medical expenses for the state; these are the stated legal damages irrespective of individual remedies. The resulting higher cigarette prices an intended effort to reduce these damages by reducing tobacco use. The premise is that the cost of public health services (e.g., the states' contributions to Medicaid benefits) provides a basis for imposing costs on this specific industry, to compensate for the costs the states (and, indirectly, decisions to guarantee of health benefits).

But, others asked, when the government decides to pay medical benefits, should that cost be allocated to the tobacco industry? It seems appropriate to ask why this industry should be singled out for such treatment, as many business interests and professions (from food and beverages, to automobiles, gaming, and even television and films)—indeed, almost everything we do can be argued to have effects on our health or finances. Tobacco use remains among the leading causes of death among Americans, and tobacco companies may have been less than forthright about the hazards of their product. But the issue is now deceptively, though of course new dangers may yet be discovered, the fact that tobacco use is hazardous is currently well known. So this still leaves the basic question: Is this the appropriate direction for the U.S. litigation system?

III. Panel Two—Punitive Damages

Panel Two, on "Punitive Damages and Tort Reform," was chaired by Chapman Law Professor Lisa Litwiler. The first speaker was Michael L. Rustad, the Thomas F. Lombard Jr. Professor of Law and Co-Director of the Intellectual Property Law Concentration at Suffolk University School of Law in Boston, Professor Rustad presented the results of his empirical study of the role that punitive damages have played in redressing consumer injuries in cyberspace. He reported his research findings about the number, size, types, and aggravating circumstances underlying punitive damages awards in cyberspace cases. Punitive damages are rarely awarded in internet cases, and when awarded are generally proportionately to compensatory damages; and they are frequently reduced on appeal. Professor Rustad stated that no consumer is awarded punitive damages in an action focused on the internet in a state or federal court between 1992–2002. He then explained why he thinks...
punitive damages do not yet punish and deter internet-related wrongdoing such as spamming, online invasions of privacy, and fraud, but would be useful.

He argued that this lack of effectiveness is due to difficulties in obtaining personal jurisdiction, adroit choice of law and choice of forum clauses in the terms of service agreements, and the wide immunity granted internet service providers in the context of the Communications Decency Act.

Professor Rostad proposed that section 230 be amended to parallel the intermediary liability standards of the Digital Millennium Copyright Act. This qualified immunity would permit content providers in the state laws against providers with notice of tortious activities being conducted on their websites. Finally, he argued that awarding punitive damages is a necessary remedy to punish and deter wrongful acts such as impersonating employees, charging excessive fees, and consumer cheating. According to Professor Rostad, punitive damages would send a clear message to the e-business corporate headquarters or offshoring haven that it is risky to defraud customers, and so should deal with such behavior.

Next, Professor Colleen Murphy of Roger Williams University School of Law discussed the standards in State Farm v. Campbell. In this case, the U.S. Supreme Court clarified that punitive damages are mitigated by the standards for punitive damages articulated by the U.S. Supreme Court in the State Farm case. The court held that in a punitive damages case, the trial court should consider whether the harm is sufficiently serious to warrant a finding of punitive damages. The court found that the harm was sufficiently serious to warrant a finding of punitive damages. The court also considered the standards for punitive damages in the case of punitive damages in a royalty dispute. The state argued that the award was justified by the harm that would have occurred if the wrongdoing had not been discovered. The $11 billion award was excessive. The Supreme Court's ratio guidepost, as articulated in cases like State Farm and State v. Shrewsberry, found that the judgment in $11 billion was excessive. Professor Eastman noted the decision of judges in the state of Washington and the potential impact of tort reform. This issue, of course, is not uncommon in consumer credit cases. Professor Eastman also noted the decision of the judges in the state of Washington and the potential impact of tort reform. This issue, of course, is not uncommon in consumer credit cases.

Professor Eastman also noted that the secondary markets can easily discern evidence of warning signs of predatory loans by checking whether a loan is overpriced given the credit score of the borrower and the security for the loan. Concluding that the secondary market supports adverse selection by dropping loans with high credit scores, the court found that if the court found that the secondary market would be entitled to prevent predatory lending.

For this reason, Professor Eastman asserted that assignee liability is an important method to deter predatory lending. Professor Egbert was followed by his colleague, Professor Harrell, who compared contract law and regulatory rights and remedies, endorsing the formation of the new preemption doctrine and the creation of a uniform standard. Professor Harrell noted the difficulties that can arise when regulatory agencies take over an area of law affecting consumers and effectively prevent consumers from protecting themselves through their own civil actions.

Laurel Williams of Stanford Law School pointed out that credit card companies have engaged in predatory lending. Ms. Williams commented that many borrowers receiving high-priced subprime loans would qualify for lower-priced prime loans. The current federally-mandated Truth in Lending credit disclosure does not assist many borrowers. Ms. Williams asserted that if borrowers were informed that:

1. borrowers do not understand the disclosures;
2. the disclosures come after the borrower is psychologically committed to the transaction;
3. the disclosures are too voluminous, creating an information overload (although the disclosures must be complete to fully reflect all price characteristics of the transaction);
4. borrowers mistakenly believe that creditors are required to give them the lowest rate for which they qualify;

Ms. Williams argued that the market will not fit these problems on its own; subprime creditors cannot advertise prices in the home loan market; subprime credit depends on each borrower's cost and risk characteristics; creditors have no market incentive to charge fees on loans that borrowers are willing to accept, particularly for up-front fees and prepayment penalties which must be paid in advance even if the borrower repays the loan elsewhere; and yield spread premiums encourage brokers to sell borrowers credit products priced higher than the rate for which they qualify. She also noted that consumer financial education is a public good.

Ms. Williams concluded by presenting a proposal to change the home mortgage regulatory regime to better facilitate price shopping. Her proposal, applicable to both new and existing mortgages, requires the secondary market, where she said most overpricing occurs, to disclose pricing information earlier to give borrowers more time to price shop. These disclosure rules would state price levels for mortgages.

Ms. Lample then described recent state law legislative patterns, including consumer credit reform, which is a common element of threshold-based predatory lending laws. She described the current state of predatory lending laws in terms of consumer protection and consumer education. Ms. Lample stated that these new state laws act as usage ceilings because mainstream lenders will not make loans above these thresholds. She argued that these laws are bad policy, stating that it is preferable to regulate the point of sale, where credit is actually granted, rather than essentially bar all credit claims of important transactions. Ms. Lample noted the "nunribiter price problem"—a small number of gut-wrenching stories of abuses creates a public desire to prevent these abuses at any cost, creating a political demand for onerous restrictions, regardless of the impact on a much larger pool of beneficial transactions.

Mr. Lample argued that statistics showing an adverse impact from these laws on credit availability are products of consumer advocacy, not serious research. He stated that payday, pawnshop, title pawn, and deferred check-cashing transactions have increased in North Carolina, a benchmark state, which he argues is the
result of North Carolina's predatory lending mortgage law. Above-threshold lending by mainstream lenders is down.16 Mr. Lampe said that federal prosecution was all but invited, and that litigation is up, and that these are not the intended or desirable consequences of true reform.

Elia Raber, former executive director of the Consumer Law Center spoke next. He began with questions to the audience designed to demonstrate that it is very difficult for even sophisticated consumers to judge which loan product is less expensive, assuming they have or are given shopping options. For example, which loan would be better to take, one with an interest rate of ten percent plus five "points," or an alternative loan with ten and a half percent interest with no points? If the consumer finances the points, the lower rate may be worse, because the interest the points will be more than any savings. It is less expensive to consolidate a $5,000 credit card debt at 18 percent interest which could be paid off in five years into a 30-year mortgage loan at seven percent? Ms. Remaut stated that it is less expensive to pay off the credit cards.

Ms. Remaut argued that most Ameri cans cannot do the math. Financial literacy in the United States is surprisingly low. In particular, many people who are sold credit products in the negative space to understand basic transaction information, the multitude of documents provided, and even the basic TILA disclosures, Ms. Remaut stated. Mortgage loan closings include about an inch or so of documents. The closings are often rushed and the stack is not ordered with the most important documents on top. Furthermore, high foreclosure rates are being seen in many states, which Ms. Remaut argued suggests the exist ence of abusive loans.

Next, Ms. Remaut responded to some remarks made by Elia Raber. She posed the following questions: If the initial lender assigns the loan and is either absent or judgment-proof, who should be held responsible for the initial lender's bad actions? The homeowner who was present when the bad actions were committed, or the assignee of the loan who may be funding the spurious lender by purchasing its loans? Mr. Lampe and Ms. Remaut disagreed vigorously on these points. Ms. Remaut argued that the secondary market and the assignees should be responsible.17 This is generally not the case today, under state usury laws or federal statutes or the common law of assignment, except, for example, where laws governing high cost loans specifically make the assignee liable. Ms. Remaut disputed Mr. Lampe's characterization of various statistical studies as "junk science." She noted that one recent study was by the University of North Carolina, funded by the Ford Foundation, not a consumer advocacy group. Ms. Remaut argued that the studies favored by Mr. Lampe were funded by the mortg age industry. Ms. Remaut also noted that mortgage loans are a commodity on the secondary market, not a predatory lender's market, and therefore have an incentive to maximize the supply of consumer debt.

In issues of predatory lending, opposing sides may interpret the same facts from different viewpoints. For example, the Federal Reserve Board has noted that not every HOEPA loans are being made.18 While lenders argue that this reduction, and any reduction in lending that state predatory lending laws cause, is a sign that consumers are suffering from a reduction of available credit, consumer advocates assert that such reductions show that the laws are working and that fewer borrowers are falling victim to high-pressure sales techn iques that lead them into overpriced loans.

While consumers argue that high foreclosure rates are a sign of overpriced, predatory loans, lenders can in turn argue that high foreclosure rates and rising losses cause justifying the higher costs of subprime loans.

V. Panel Four—Practitioners Panel

The fourth panel was chaired by Chapman Law Professor Nhan Vu, focusing on California Business Code section 17200 (part of California's "Mini-FTC" antitrust law), and Ms. Remaut differed vigorously on these points. Ms. Remaut argued that the secondary market and the assignees should be responsible. This is generally not the case today, under state usury laws or federal statutes or the common law of assignment, except, for example, where laws governing high cost loans specifically make the assignee liable. Ms. Remaut disputed Mr. Lampe's characterization of various statistical studies as "junk science." She noted that one recent study was by the University of North Carolina, funded by the Ford Foundation, not a consumer advocacy group. Ms. Remaut argued that the studies favored by Mr. Lampe were funded by the mortgage industry. Ms. Remaut also noted that mortgage loans are a commodity on the secondary market, not a predatory lender's market, and therefore have an incentive to maximize the supply of consumer debt.

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because many consumers lack the sophistication to understand and insist on the protections that will maximize their use and enjoyment of the products or services. But this requires careful fine-drawing to avoid excessive interference with consumer choices.

In each area covered by the Symposium, from gun and tobacco litigation to lending issues, and punitive damages to unfair competition litigation, the speakers in this conference were faced with the difficulty of balancing these competing interests. The diverse viewpoints that the speakers at Chapman's Symposium presented should help others to better understand the competing views and considerations that must be weighed in addressing these issues.

Fourth Published California Appellate Decision...

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under Campbell, the "venerational limit" for punitive damages usually is four times the compensatory damages. Although an upward departure was held to be warranted in Bandis because the "amount of the compensatory damages does not fully reflect the outrageousness of the behavior," the court still reduced the punitive damages award to $1.5 million, about ten times the compensatory damages.

Bandis followed the Fifth Appellate District's reduction of a $280 million punitive damages verdict to $23.7 million (five times the compensatory damages) in a products liability case, and the Fourth District, Division Three's reduction of a $14 million punitive damages verdict to $1 million (3.8 times the compensatory damages) in an insurance bad faith case.7

These cases leave no doubt that, as Bandis put it, "[t]he shock waves from Campbell have already reverberated in the appellate courts of California." Although all three courts took a dim view of the defendant's conduct, each reduced the punitive damages by eighty percent to ninety percent. In May, 2004, a fourth example was added to this list.8

The California Supreme Court should be weighing in soon, as it has granted review in three other appellate decisions addressing punitive damages.9

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