
PREFACE TO THE FIRST EDITION

Until less than a decade ago, if one wanted to study consumer finance from a legal perspective, there was one clear place to go: bankruptcy court. From the 1980s until 2010, consumer bankruptcy scholarship was the primary lens for examining consumer finance. The pioneering empirical work of Teresa Sullivan, Elizabeth Warren, and Jay Westbrook on consumer bankruptcy was so powerful not because it was bankruptcy scholarship but because it was a lens into the realities facing American consumers. Bankruptcy cases generated the data for examining consumer finances at a time when other data sources were quite limited, and this data told the story of families struggling to hang on to life in the middle class.

Consumer finance markets completely changed during this period. First there was the rise of credit cards in the 1980s, then the invention of payday loans and increased use of debit cards in the 1990s, and then the explosive growth of subprime mortgage lending and the movement online of financial services in the 2000s. All the while the credit reporting system expanded.

Yet despite the sea changes in consumer finance, regulation was largely moribund. Yes, states had to come up with new regulatory regimes to deal with payday lending and the problems of identity theft raised by the increasingly electronic nature of commerce, but otherwise the regulatory regime remained relatively static after the 1970s other than a race to the bottom in usury regulation set off by the Supreme Court's 1978 *Marquette* decision.

All of that changed in 2010. The financial crisis of 2009 paved the way for the passage of the CARD Act in 2009, followed by the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010. The Dodd-Frank Act fundamentally changed the dynamics of consumer finance regulation by creating the Consumer Financial Protection Bureau (CFPB).

The CFPB's creation meant three critical things for consumer finance regulation from an academic's perspective. First, it meant that consumer finance regulation would be done on the federal level through a single agency rather than through a dozen different agencies (although the Departments of Defense, Education, and Housing and Urban Development still play roles in some parts of the market even today). That made it a lot easier to focus a course. Second, it meant that consumer finance was now going to be regulated on the front end through the regulatory process of rulemaking, supervision, and enforcement, rather than on the back end in the (primarily bankruptcy) courts. As a result, the action in consumer finance has shifted from the study of consumer bankruptcy to the study of the CFPB. And third, the CFPB meant that there would be a lot more and better quality data about the consumer finance industry available. It has not disappointed.

These three factors have made it possible for the creation of a new course that I hope will become a standard offering in the law school curriculum. I began teaching a consumer finance class in 2011 based on these ideas. I also saw the moment

as analogous to that in 1934, following the creation of the Securities and Exchange Commission. Securities law was not yet a part of the law school curriculum, but by the 1940s it was a standard offering. Today there is a major and powerful federal agency that regulates consumer finance, which affects an enormous part of the U.S. economy. It only makes sense that it should receive coverage in the law school curriculum, but without a book that is hard to do. My hope is that this book will serve as the catalyst for making consumer finance a standard offering in the law school curriculum.

The course this book is designed to teach is a course on the regulation of retail financial services. There is, of course, a well-established financial institutions regulation course in the law school curriculum. But the banking law class is largely focused on prudential regulation—that is, safety-and-soundness regulation to ensure that banks do not fail—which involves only the banks and their regulators. To understand the retail banking market and its regulation, it is necessary to also understand another party—the consumers. Moreover, consumer finance involves a much broader range of financial institutions than are covered by a typical bank regulation class, which focuses on the regulation of depositories.

There is also a well-established “consumer law” class in the law school curriculum, but that course, too, differs materially from the one this book seeks to facilitate. Consumer law courses are focused on the experience of the consumer, particularly the *protection* of the consumer. Consumer law is also not particularly concerned with the substance of the transaction or about the risk incurred by other parties to the transaction. Moreover, consumer law covers an enormous range of topics from financial transactions to sales of goods and services, from mortgages to telemarketing and used car sales. This range of topics makes it impossible for a consumer law course to focus on the substance of the transactions. In contrast, I see the substance of the transactions—the particular product markets involved—as a major focus of consumer finance in part because some products are (imperfect) substitutes for others. Thus, consumer finance is neither bank regulation nor consumer law but a distinct field that combines some elements of those courses with a brand new regulatory agency and a focus on both the consumer *and* businesses involved in consumer financial transactions.

In my vision, the substance of a consumer finance course itself—and the design of the book—has two components: regulation and markets. The first component deals with the questions of who regulates consumer finance and how. Is regulation to be done by private law (contract and tort) or by public law? If by public law, should it be done on the state or federal level? If on the federal level, by which regulator? And if public law, what tools should be used? Disclosure requirements? Licensing requirements? Bright-line rules prohibiting or requiring particular practices or product terms? Standards prohibiting unfair, deceptive, or abusive acts or practices? Accordingly, this is the coverage of the first part of the book. This part of the book is on regulation, generally, but taught through a particular focus on consumer finance.

The second component deals with particular consumer financial products and their regulation. This is the markets part of the book. The chapters in this part of the book seek to acquaint students with various consumer financial products, make sure they understand how the products work and what they are used for, what their

market structures look like, what risks the products pose for *both* consumers and businesses and the policy concerns these engender, and then what the regulatory regimes for these products look like and how well they address the policy concerns.

The initial challenge for a consumer finance book, in terms of both components, is scope of coverage. Consumer finance as a field (broadly) is functionally defined to include moving funds between parties in the present (payments), moving funds from the future to the present (credit), moving funds from the present to the future (savings and investment), contingent movements of funds to manage risk (insurance), and also advice and information services related to movements of funds (financial advisers and data intermediaries). See Peter Tufano, *Consumer Finance*, 1 ANN. REV. FIN. ECON. 227 (2009).

Conceptually, one might wish for a consumer finance book that covers all these areas. Such a book, however, would be a truly unwieldy tome, unsuitable for teaching a law school course with a reasonable number of credits. While payments, credit, and certain ancillary services (plus a smidgen of savings and insurance) fall into the regulatory ambit of the CFPB, investments and insurance and associated ancillary services are in the bailiwick of other regulators, such as the SEC, CFTC, and state insurance regulators, that administer detailed and complex regulatory regimes. Moreover, these other regulatory regimes—securities, commodities, and insurance—are not consumer-specific regimes, but regimes that cover both consumers and businesses. In contrast, there is relatively little regulation of payments and credit other than for consumers; business credit is largely unregulated, and business payments are much more thinly regulated than consumer payments.

As a result, I have not attempted to cover insurance or investment products in this book. Those are topics best left for other books and other courses. Instead, I have focused on consumer payments and credit—conveniently the regulatory reach of the CFPB—and also regulation of consumer financial data. The development of consumer data markets has been key to creating a national consumer finance market and moving from retail credit to financial institution credit. Data is also an area that links payments and credit. Payments generate a tremendous amount of consumer data that can then be used for underwriting credit. Moreover, the theft of consumer payments data is often used for fraudulent credit purchases. The CFPB plays an important role in data privacy, although less so in data security—yet it is hard to fully understand either consumer payments markets or credit reporting markets without understanding the consumer financial data ecosystem and its regulation.

The book is organized in two parts with an introductory chapter. The introductory chapter provides an overview of consumers' finances and the consumer finance industry using a median-income family, the Smiths. The key point in that chapter is about why consumer finance is so important. Without payment systems, modern life is impossible, while because of the state of American consumers' economics, most of them are like the Smiths and cannot, without credit, finance any large purchases—a house, a car, education, or even a new furnace. The Smiths' reliance on credit, however, is a Catch-22, making their financial state ever more precarious. The Smiths' reliance on credit also points to the importance of financial data—data that is critical to creditors' ability to underwrite credit for the Smiths. Without that data, the Smiths' opportunities would be much more constrained.

After setting the scene about why payments, credit, and data matter, the book then turns to the first part, Chapters 2-13, which deals with who regulates and how. It is divided into three sections. Section *A* covers private law regulation, including limitations imposed by arbitration agreements. Section *B* covers public law regulation. It begins with state regulation of consumer financial services and then turns to federal regulation with a deep dive into the scope of the CFPB's regulatory authority for its different powers—rulemaking, supervision, and enforcement—as well as a close look at the CFPB's organic power of prohibiting unfair, deceptive, and abusive acts or practices. Section *C* rounds out Part I with an examination of disclosure mandates and behavioral economics as general tools in the regulatory toolkit.

The second part, Chapters 14-37, deals with specific product markets and their regulation. The second part is also divided into three sections. Section *A* covers payments. It starts with deposit accounts, which are the lynchpin of most modern payment systems, and then covers overdraft, the unbanked, prepaid cards, anti-money laundering regulations, paper- and electronic-based payment systems, and the critical rules covering liability for unauthorized transactions and error resolution in payments.

Section *B* turns to credit products. It begins with some chapters on topics of general applicability to credit: basic terminology, usury, fair lending, and Truth in Lending regulation, before turning to specific products—auto loans, credit cards, mortgages, small-dollar loans, and student loans—and then addresses secondary markets and debt collection. Section *C* deals with the regulation of consumer data: credit reporting, financial privacy, and financial data security and identity theft.

The book's structure enables it to be used with course conceptions that differ from mine. Some might consider using it to teach a more discrete course on consumer credit (focusing on the third part with possible selections from the first part). Alternatively, some might consider using it to teach a course on consumer payments, combining the second and fourth parts. (To be clear, though, it would *not* be a traditional UCC Articles 3/4/4A payment systems course, not least because the UCC is relatively unimportant as a source of law for consumer payments.) The point is that it is possible to teach parts of the book without teaching all of it, as the chapters are generally standalone pieces.

The other real challenge for a consumer finance book is its depth of coverage. The sum total of consumer financial regulations is immense; one cannot possibly master all of the regulations that apply to payments, credits, and financial data. And yet the details of some of these regulations matter quite a bit for understanding how and why consumer finance works (or doesn't work). Students may feel somewhat deluged by the amount of information contained in this book—there are new agencies and products to learn, and on top of that some detailed statutes and regulations, and occasional cases on top of that. If students come away with the big picture—who regulates and what the products do and the policy issues involved—plus a knowledge of the key regulations, I will consider the book a success. It is not meant to be a treatise, but a sophisticated guide into the world of consumer finance.

The book has relatively few cases in it—indeed, I do not call it a “casebook,” but a “textbook.” Court rulings play only a secondary role in consumer finance regulation. As students will see, the economics of consumer finance makes litigation the exception, rather than the rule. Instead, the real action is in the statutes and regulations implementing those statutes, but those statutes and regulations are filled with terms that are open to interpretation. That means there are a lot of unanswered questions. Students need to get comfortable with that as a fact of life in consumer finance, and, indeed, to see it as a good thing for them professionally, for it means that they cannot be readily automated away. When there are judgment calls involved in legal compliance, lawyers have business.

Instead of cases, the book has a large amount of expository text, quite a few graphics, some regulatory materials, but also, in some instances, a type of material students are unlikely to have encountered elsewhere in their law books—complaints. A complaint is just one party’s opinion, not law, but when a complaint is filed by a government agency, it gives a reasonably good impression of how that government agency interprets the law, and when the typical reality of enforcement actions is settlement, rather than trial, the government’s interpretation of the law, rather than a court’s, is what matters.

Each chapter of the book concludes with a problem set. The book is designed so that the problem sets can constitute all or the majority of class discussion. They are not the only way to teach the book—one can skip the problem sets entirely and teach the book as a lecture course or as a Socratic dialogue—but the problems are meant to reinforce what I think are the important pieces of the business issues and the regulatory regimes for various products. They are also meant to provide realistic issues that consumer finance lawyers must address and to underscore the interaction between legal regimes (and their uncertainty) and business concerns. Most chapters’ problem sets also contain a question that sets the stage for a more open-ended discussion on consumer finance policy.

Finally, a word about what’s not in the book: politics. Consumer finance regulation has become an intensely politicized and increasingly partisan area. This book does not attempt to cover the politics of consumer finance in any systematic way. It does contain an occasional observation about the political dynamics that led to particular regulations or the defeat of particular proposals, and I suppose it is unavoidable that my own political priors occasionally color the text, but I have striven to ensure that this is not a political book.

My concern that this not be a political book is reflected in its very conception as a consumer finance book rather than a “consumer law” book. The consumer finance focus is not just about the focus on financial products rather than, say, odometer fraud. Instead, it is because consumer finance is a field that necessarily involves consideration of both the consumer and the financier. Throughout the book, I have emphasized the concerns of financial services firms and of merchants in consumer transactions, as well as those of consumers. While this is not politics of a partisan sort, it is a different type of politics, one that does not see everything solely from the vantage point of the put-upon consumer, but also considers the concerns of other parties to the transaction. Part of the need for this approach is because students are as likely to find themselves representing financial

institutions or merchants as consumers, but ultimately it is driven by a conviction that an informed approach to consumer finance regulation requires understanding the concerns of all parties to transactions. With any luck that is what students will come away with from this book.

Adam J. Levitin
Somerset, Maryland
July 2018

PREFACE TO THE SECOND EDITION

What a wild few years it has been in the consumer finance world since the first edition of this book came out. The first edition was conceived and substantially written during the years of the Cordray CFPB (let's call it CFPB 1.0), but it came out during the Mulvaney-Kraninger CFPB (BCFP), and now it's early in the Chopra CFPB (CFPB 2.0). While consumer finance went for a bumpy political ride during these changes in leadership, as well as constitutional challenge to the existence of the CFPB, the law did not substantially change. To be sure, the Payday Rule was partially repealed and Reg F came into effect, and a pair of Supreme Court cases explicated more narrow limits on Article III standing, but, by and large, the substance of the legal materials in this book have not required revision.

While the law has remained largely static, there have been some important developments in the consumer financial product space that are addressed by this second edition: the growth of buy-now-pay-later, earned wage access, and income-share agreements. Additionally, this second edition expands its treatment of retail installment sales and rent-to-own products. The other major changes to this second edition are the elimination of some of the history materials in the book (including on the CFPB's history) and a condensation of the payment system materials. Beyond this, the second edition revises statistics and problem sets throughout the book and rewrites or expands on some of the expository text, while removing some superfluous or dated graphics and corrects as many of the inevitable errors as possible. Hopefully it is a tighter and easier to teach book than its progenitor.

Adam J. Levitin
Somerset, Maryland
March 2022