

Professor DeWolf  
Summer 2013

Consumer Law  
July 2, 2013

SAMPLE ANSWER TO FINAL EXAM

QUESTION 1

This facts from this question are purely hypothetical.

Carl Chester (“CC”) has a number of issues to be concerned about. He will need additional information to evaluate whether or not the steps he is planning to take will comply with the variety of consumer protection statutes and principles.

*The Email List.* Email marketing is an attractive way to solicit new customers, but it is subject to a variety of constraints. To begin with, we are assuming that the magazine obtained the email addresses in a way that is consistent with the users’ consent and/or privacy protection. While it is not clear that CC could be held liable for failure to obtain such consent, CC might ask the magazine for assurance on that point, and perhaps some sort of hold-harmless for any complaints that arise from his use of the list. In sending out email solicitations, CC should pay attention to CANSPAM, which imposes a series of requirements for the transmission of unsolicited email marketing. One requirement is that the email must provide an easy way for the recipient of the email to “unsubscribe.” Another requirement is that the email itself must clearly state in both its subject line and in the body of the message that it is an advertisement, and the email must list both the domain name of the sender as well as the postal address.

*The Mastercard List.* Mastercard is not forbidden from supplying the names and addresses of customers who fit certain profiles, subject to the requirement (similar to that of the email list) that the customers whose names and addresses CC is obtaining have agreed to this use of their information. Typically the terms and conditions for the use of information about customers is contained in a disclosure form that accompanies the monthly statement from Mastercard. Presumably with a company as big as Mastercard, they have dotted their I’s and crossed their T’s, but it would still be worth the step of verification. With direct mail there is the significantly larger expense (compared to email) of physically preparing and mailing out the promotional material, but presumably it will be to a more focused audience.

*Credit.* CC will have a number of hurdles to offering credit. First, he must comply with the Truth in Lending Act (TILA), which requires that any offer of credit contain a full disclosure of all of the relevant terms, such as the APR, financing charge, etc. He should consider whether or not this would be closed-end financing, which is a single credit transaction, or whether he would be offering open-end financing, where the amount charged to the account might increase or decrease over time. It sounds like he would be doing a single, closed-end transaction, but again this should be clarified before he advertises the terms of credit. If it is a closed-end transaction he must include in the actual financing documents a “federal box” that contains the information specified in TILA in a particularized way.

Additional considerations, if he goes ahead and actually sells the product on credit, would be whether or not the payment history of his customers would be reported to a Credit Reporting Bureau, which might trigger compliance issues under the Fair Credit Reporting Act, or if he wound up with some accounts in collection, triggering potential exposure under the Fair Debt Collection Practices Act. Because of the complications, it might be best for CC, at least for now, to postpone any extension of credit.

## QUESTION 2

The AG obviously is faced with limited resources to address a wide variety of consumer complaints. Only those cases that are likely to provide substantial benefit to consumers should be

---

This question reflects the issue raised in *Feiner v. Innovation Ventures LLC*, 2013 WL 2386656 (S.D.Fla., 2013), which denied the defendant's motion to dismiss a complaint alleging violation of the state UDAP statute and unjust enrichment.

---

undertaken. On the one hand, the fact that there is already a private action pending suggests that the AG might leave it to private enforcement. On the other hand, the widespread use of the product suggests that success in this litigation would have significant effects on the marketplace.

As to the merits, one important question would be whether this product is advertised (or is understood) to have some kind of medical benefit. With respect to products like aspirin, there must be clinical verification of the product's effectiveness. I doubt that this product would be considered to have medical properties. On the other hand, there may be side effects of the product that (given the number of users) could have medical consequences. Still, I doubt that I.V. would be subject to the medical verification standard.

A second consideration would be whether this state has adopted a standard for its consumer protection ("UDAP") statute that relies upon the *Charles of the Ritz* standard, which is based upon the "least sophisticated consumer." More recently the FTC set a higher threshold in the *Cliffdale Associates* case that now requires the plaintiff to show that an advertisement is likely to deceive a reasonable consumer. If this jurisdiction has retained the "least sophisticated consumer" standard, it would be easier to prove that this advertising is deceptive.

Weighing against intervening on the plaintiff's side is the consideration that most consumers ingest caffeine with knowledge of its effects, and to the extent that the product discloses that it contains caffeine, but in a form more convenient to use than other products like coffee or energy drinks, it is not significantly deceptive.

## QUESTION 3

---

The facts of this case were drawn from *Middleton v. Rogers Ltd., Inc.*, 804 F.Supp.2d 632 (S.D. Ohio, 2011). The court wound up dismissing the complaint against Rogers Ltd., while the case against Citibank was settled.

---

Despite all of the frustration that Middleton ("M") has been through, she may be limited in the compensation she will be entitled to. Citibank and Rogers have done a poor job of giving her accurate information about the state of her account, and they may have permitted someone to steal M's identity to the extent of running up a bill in her name, but it does not appear that she has suffered any actual financial loss. That will make it difficult for her to prevail in a claim against either Citibank or Rogers.

*Violations of FCBA.* The Fair Credit Billing Act, 15 U.S.C. § 1666, requires creditors to

respond to consumer complaints about billing errors by conducting a reasonable investigation to determine whether the charge was justified or not. In this case Citibank and Rogers M had a series of charges placed on her account that were unjustified. They certainly qualify as a “billing error.” 15 U.S.C. § 1666(b). The consumer must notify the creditor within sixty days of receipt of the statement containing the billing error.

The facts differ between the conduct of Citibank and Rogers.

Citibank contacted M by telephone in October 2012 informing her that her card balance was \$13,000 of the charges, but M claims that she never received a written statement. Depending on how the evidence turns out regarding whether or not M actually got a statement (perhaps it was sent by electronic means or otherwise got lost in the mail), she may or may not be timely in her notification.

Once M notified Citibank of the error, they were required to conduct an “investigation” (15 U.S.C. § 1666(a)(3)(B)(ii) ) before billing M again for the same charge. Here again the evidence is in conflict as to whether or not she actually was billed again

## CONSUMER LAW FINAL, Spring 2010 CHECKLIST

## QUESTION 1

- |   |  |
|---|--|
| <input type="checkbox"/> <b>Lemon Law</b>                             | <input type="checkbox"/> Can M <b>revoke</b> acceptance                    |
| <input type="checkbox"/> State <b>variations</b>                      | <input type="checkbox"/> UCC requires <b>non-conformity</b>                |
| <input type="checkbox"/> What is a " <b>Lemon</b> "?                  | <input type="checkbox"/> Lemon law remedies <b>supersede</b>               |
| <input type="checkbox"/> reasonable opportunity to <b>reapair</b>     | <input type="checkbox"/> Use of the <b>UDAP</b> / CPA                      |
| <input type="checkbox"/> " <b>substantial impairment</b> " standard   | <input type="checkbox"/> Was there an Unfair or Deceptive Act or Practice? |
| <input type="checkbox"/> Would car be considered <b>driveable</b> ?   | <input type="checkbox"/> Would Lemon Law = " <b>per se</b> "?              |
| <input type="checkbox"/> No <b>loss of use</b> for an extended period | <input type="checkbox"/> Can M get <b>treble</b> damages                   |
| <input type="checkbox"/>  | <input type="checkbox"/> Will <b>use</b> value offset award?               |
| <input type="checkbox"/> Consumer-favorable std ( <i>McCullough</i> ) | <input type="checkbox"/>   |
| <input type="checkbox"/> Dealer-favorable ( <i>Gasque</i> )           | <input type="checkbox"/> Attorney <b>fee</b> award                         |
| <input type="checkbox"/> <b>Which</b> does jx. follow?                | <input type="checkbox"/> How <b>generous</b> will judge be?                |
| <input type="checkbox"/>  | <input type="checkbox"/>   |
| <input type="checkbox"/>  |  |
| <input type="checkbox"/>  |  |

## QUESTION 2

- |  |  |
|--|--|
| <input type="checkbox"/> <i>Charles/Ritz</i> used "least sophisticated"  | <input type="checkbox"/> <b>Health</b> products ---> higher standard?    |
| <input type="checkbox"/> <i>Cliffdale</i> ---> "reasonable" consumer     | <input type="checkbox"/> Will consumers use <b>more care</b> ?           |
| <input type="checkbox"/> states have <b>option</b> to use diff. standard | <input type="checkbox"/> Is regulation by <b>FDA</b> adequate?           |
| <input type="checkbox"/> "least sophisticated" is in <b>FDCPA</b>        | <input type="checkbox"/> "Reasonable" standard is <b>familiar</b> in law |
| <input type="checkbox"/> Should standards vary?                          | <input type="checkbox"/>   |
| <input type="checkbox"/>   | <input type="checkbox"/>   |
|  | <input type="checkbox"/>   |

## QUESTION 3

- |   |   |
|---|---|
| <input type="checkbox"/> <b>Overview</b>                                | <input type="checkbox"/> Obviously <b>untrue</b> statement              |
| <input type="checkbox"/> <b>TILA / HOEPA</b>                            | <input type="checkbox"/> Form became <b>meaningless</b>                 |
| <input type="checkbox"/> History and <b>purpose</b> of TILA / HOEPA     | <input type="checkbox"/>  |
| <input type="checkbox"/> <b>3-day</b> waiting period / right to rescind | <input type="checkbox"/> If notice failed, borrowers can <b>rescind</b> |
| <input type="checkbox"/> Unless notice is given ---> <b>3 years</b>     | <input type="checkbox"/> Recovery of <b>statutory</b> damages           |
| <input type="checkbox"/>  |   |
| <input type="checkbox"/> <b>Waiver</b> of right to rescind              | <input type="checkbox"/> Suit v. <b>JumboLoans</b> as well as Rand      |
| <input type="checkbox"/> Can be done if <b>emergency</b> exists         | <input type="checkbox"/> Borrowers must still return \$\$ received      |
| <input type="checkbox"/> Can even be a <b>financial</b> emergency       | <input type="checkbox"/> But <b>Mortgage</b> no longer valid            |
| <input type="checkbox"/> Would <b>facts</b> support emergency finding?  | <input type="checkbox"/> Thus, no <b>foreclosure</b>                    |
| <input type="checkbox"/>  | <input type="checkbox"/> Recovery of <b>attorney fees</b>               |
| <input type="checkbox"/> Did notices <b>confuse</b> borrowers?          | <input type="checkbox"/> Class action?                                  |
| <input type="checkbox"/> Three days to " <b>review</b> " -- what then?  | <input type="checkbox"/>  |
| <input type="checkbox"/> Consumers said 3 days <b>had passed</b>        | <input type="checkbox"/>  |