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Consumer Law

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ginia, and Arkansas have replaced and amended their constitutions at such a high rate that constitutional issues have virtually become part of everyday politics. Other states with high amendment rates include California, Hawaii, North Carolina, and Texas. The overall geographical bias in this pattern is interesting, but whether high or low in amendment and replacement rate, the apparent seriousness with which constitutional politics is viewed at the national and state levels indicates the continuing importance of constitutions in America.

[*See also* Constitutional Amendments]

• Max Farrand, ed., *The Records of the Federal Convention of 1787*, 4 vols., 1966. Daniel J. Elazar, *American Federalism: A View from the States*, 1984. Jack P. Greene, *Center and Periphery: Constitutional Development in the Extended Polities of the British Empire and the United States*, 1986. Donald S. Lutz, *The Origins of American Constitutionalism*, 1988. Kermit Hall, *The Magic Mirror: Law in American History*, 1989. Jack Rakove, *Interpreting the Constitution: The Debate Over Original Intent*, 1990. Bruce Ackerman, *We the People: Foundations*, 1991. Stephen M. Griffin, *American Constitutionalism: From Theory to Politics*, 1996. G. Alan Tarr, *Understanding State Constitutions*, 1998.

—Donald S. Lutz

CONSTRUCTIVE TRUST. *See* Equity.

CONSUMER LAW. Consumer laws govern personal, household, and family transactions in the marketplace. They provide avenues for the protection and vindication of consumers, as well as opportunities for producers to standardize their operations and insulate themselves from many liabilities. Broadly considered, consumer laws affect every aspect of the relationship between noncommercial buyers and sellers.

Consumer laws are created and enforced by private understandings and by public institutions and agencies. They are both formal and informal in nature, and they range in geographical scope from the local to the global. Private rules and informal trade customs, including voluntary industry standards, establish the context in which everyday consumer transactions take place. In many places, for example, local customs permit us to take a bite out of an apple in the vegetable market before we decide to buy. Standards-setting bodies (for example, the Society of Automotive Engineers or the National Association of Broadcasters) develop widely adhered-to standards for manufacturing, distributing, and retailing.

Public legislative acts embody state-sanctioned rules for buying and selling, thereby legislating rules for commercial behavior and for the quality of goods. Some consumer legislation has gained general approval from economists and consumer affairs professionals for its positive impact on the conditions and safety of the marketplace. Historically, however, many laws designated by their sponsors as "protecting" or "informing" consumers have been, by design or accident, unhelpful or even damaging.

Among the first consumer protection laws passed in Colonial America were ones enacted to alleviate problems connected with monopoly pricing (then referred to as "engrossing"), short weighting, and adulteration, as well as laws setting the hours during which some goods could be purchased. In some places laws restricted the consumption of certain goods (for example, tobacco and alcohol) and services (for example, abortions) on public health, religious, and moral grounds.

Court-fashioned or *"common law" rules regarding consumer transactions evolved from, and reinforced, customary rules about purchase transactions. In the absence of blatant fraud or deception, many early judicial rulings supported the maxim "caveat emptor" or "let the buyer aware." That maxim justified a multitude of sins—it presumed that buyers could and should inform themselves about the risks attached to purchasing decisions, and bargain. Until the late nineteenth century there were few special rules to distinguish consumer buyers from commercial buyers.

Accepting caveat emptor, however, never signified that fraud, misrepresentation, or negligent conduct was condoned by American consumer law. Determining what a consumer is entitled to recover as damages for a wrong depends upon the nature of the claim that has been brought and the type of losses suffered. If outright fraud, misrepresentation, or actionable negligence can be proven, the law of *torts (nonconsensual injuries) might return victims of nonconsensual injuries to their pre-injury state. *Contract law, including the common law interpretations of warranties, might award an aggrieved consumer with sums to compensate for the difference between the value of a product as received and the value as it was represented and agreed on. A fraudulently induced contract, or one tainted by bad faith in its performance, might be rescinded (abrogated or repealed). Consumers might be excused from meeting their payment obligations; or they might recover, in addition to direct costs, costs that were the forseeable consequences of a seller's wrong or act of neglect.

The legal requirements that nineteenth- and early twentieth-century common law courts tra-

ditionally applied to the complaints of aggrieved consumers often involved an excessively exacting presentation of proof. For example, a consumer trying to avoid a contract for a used automobile because of a misrepresentation that led her to purchase a car with much more mileage on it than she thought, would have to show not only that she had sustained an injury after she relied on the seller's misrepresentation, but also that the reliance was justified—that the seller made an actual representation of a present fact that was material and false, and was known or recklessly assumed to be false, and was made for the purpose of inducing the buyer to buy (*Jones* v. *West Side Buick Auto Co.* (1936)).

The common law rules, furthermore, made a direct connection between individual sellers and buyers that was virtually indispensible to recovery through the courts. Where consumers were injured by manufactured products, neither the law of contracts and warranties nor the law of torts would permit a consumer to recover from any contractor or supplier of a seller, except in rare instances. Requirements such as these might be relaxed under special circumstances, but these legal rules made elements of proof difficult for consumers to satisfy.

The differences between ordinary household consumer transactions and typical commercial transactions (in which the buyers were typically companies) became more pronounced as manufacturing processes grew more complicated, and as selling techniques became more sophisticated. Commercial entities retained specialized purchasing expertise while most household consumption was undertaken individually without effective laws that might disclose information that would allow for meaningful analysis and comparison.

Until the nineteenth century, handcrafted goods generated nonuniform product defects and idiosyncratic misrepresentations; thereafter, a defect in a single product's design might be multiplied through techniques of mass-production and mass consumption into hundreds of thousands of defective products and sold (and sometimes misrepresented) nationally to millions of people under advertised brand names.

Disparities in bargaining power, in the inability to estimate the risk of entering into a transaction, and in the costs associated with obtaining information about a product became wider than before. Doctrines of privity (connectedness between the parties) generally insulated remote manufacturers from suit by consumers when they bought from intermediary retailers.

Sellers developed many protective contractual provisions, and other legal tools that helped them to enforce consumer payment obligations. For example, rules governing the ability of creditors to take most kinds of property as "security" or "collateral" and to enforce judgments against consumers for nonpayment of debts permitted wage garnishments, liens on the property of consumer debtors, forclosures and self-help repossession of collateral such as houses (via the law of real property), and personal property including vehicles, furniture, and other consumer goods (via Article 9 of the Uniform Commercial Code, concerned with secured transactions).

By the late nineteenth century, older common law remedies for consumer problems seemed to many to be patently inadequate. Some higher courts and legislatures departed from the traditional approaches. Legislatures tried to curb monopolistic and other anti-competitive behavior through laws aimed at unfair and deceptive trade practices, and through independent regulatory agencies. Courts developed relational theories of contracting, in which the relative strength of the parties could affect the enforceability of an agreement, and modified classical exchange doctrines in recognition of modern merchandising realities: individual consumers often had neither the bargaining power nor the information they needed to give informed and meaningful consent to the terms of a bargain and accept all the risks attached to it. In *Delancey* v. *Insurance Co.* (1873), for example, Chief Justice Doe of New Hampshire determined that the boilerplate language of an insurance contract had worked a fraud on the payer of a premium: "It was printed in such small type, and in lines so long and so crowded, that the perusal of it was made physically difficult, painful and injurious. Seldom has the art of typography been so successfully diverted from the diffusion of knowledge to the suppression," the chief justice wrote.

In *MacPherson* v. *Buick Motor Co.* (1916), a breakthrough case in the law of products liability, Judge *Cardozo held that the Buick Motor Company was responsible for an injury to a driver that resulted from a defective wheel manufactured by one of Buick's suppliers. Buick "was not at liberty to put the finished product on the market without subjecting the component parts to ordinary and simple tests," the Judge wrote. Doctrines of *strict liability and implied warranty were broadened in the law of products *liability to make manufacturers and some other remote producers responsible for the physical injury caused by the dangerous products that they had manufactured,

regardless of the manufacturers' good intentions, reasonable care, or remoteness from the seller.

Even as common law doctrines recognized important distinctions between consumer contracts and other types of doctrines, the court-fashioned remedies were proving to be inherently inadequate to the task of providing legal *regulation of consumer transactions. Judicial opinions, after all, were promulgated post hoc. They were uncodified, and nonuniform among the states. Thus, statutes and regulatory agencies were created—according to their political sponsors, to create better rules and enforcement procedures than common law jurisprudence allowed. Major federal departments and agencies charged with consumer protection responsibilities were generated by federal statutes. These established different sorts of legal standards—for minimum quality, minimum disclosure, or merchandising conduct—in connection with different kinds of consumer goods and services.

Significant laws and amendments passed in the first half of the twentieth century to regulate consumer transactions include: the Mail Fraud Act (1872), prohibiting the use of the mails to conduct fraudulent sales activities; the Meat Inspection Act (1904), establishing a system for government inspection of conditions under which meat was manufactured and sold; the Food and Drugs Act (1906), creating an agency to enforce minimum food and drug standards; the Federal Trade Commission Act (1914), charged with preventing unfair and deceptive trade practices; the Food, Drug and Cosmetic Act (1938), setting standards for truth in pharmaceutical labeling; the Securities Act (1933), mandating disclosure standards for certain investment instruments; the Flammable Fabrics Act (1953), requiring the use of fire-retardant fabrics in certain clothing; and the Food Additives Amendments to the FDA (1958), mandating that food additives generally be recognized as safe prior to their use.

President Kennedy, in 1960, reflected the emerging social concern for consumer legal rights by asserting that consumers had at least four of them: a right to safety, to be informed, to choose, and to be heard. And so, as the movement grew during the 1960s, laws to promote consumer welfare in the marketplace multiplied. Those who were injured by the unfair or deceptive practices of a seller did not need, after the late 1960s, to be concerned with the many burdens of proving a court action at common law. By then, every state in the union had passed antifraud legislation which did not require that sellers have an evil intent, nor that consumers were justified in relying on a deceptive representation.

Congress adopted significant consumer protection legislation at a record pace during 1960s and 1970s. This legislation included the Hazardous Substances Labeling Act (1960), setting disclosure rules for dangerous household and other products; the Kefauver-Harris Drug Amendments (1962), promoting competition in the pharmaceutical industry; the Fair Packaging and Labeling Act (1965), providing standardized disclosure rules for many foods and other products; the National Traffic and Motor Vehicle Safety Act (1966), setting vehicle safety standards and creating an agency charged with the same; the Cigarette Labeling Act (1966), mandating warnings to consumers about the perils of smoking; the Truth in Lending Act (1968), requiring the disclosure of information about the costs associated with consumer debt transactions; the Toy Safety Act (1969), permitting government to monitor the children's toy market; the Fair Credit Reporting Act (1970), controlling information contained in consumer credit reports and the conditions for their release; the Equal Credit Opportunity Act (1974), barring certain kinds of discrimination in the extension of credit by lenders; the Magnuson-Moss Warranty Act (1975), regulating disclosure and certain substantive aspects of warrantees; and the Fair Debt Collection Practices Act (1978), designed to discourage excessive collection efforts.

Although the pace of consumer reform legislation slowed after 1980, various laws deregulated the economy (for example the Airline Deregulation Act (1978)); increased the nutritional information available (the Nutrition Labeling and Education Act (1990)); and broadened services and incentives available to serve consumer needs in the face of licensed monopolies (the Consumer Cable Communications Law (1993)). Over the ensuing decade, special problem areas for consumers led to national proposals to more effectively regulate managed health care, bankruptcy, electronic privacy, abusive lending practices, and fraud on the Internet.

State and local laws were enforced by state attorney generals, consumer affairs departments, and other bodies. Whether such state laws were preempted by the federal laws through the Supremacy Clause of the U.S. Constitution became a major point of contention in many consumer law disputes. Some state laws allowed consumers to act as private attorneys general by bringing actions individually, and to recover attorneys' fees, court costs, and punitive damages. Rules of evi-

dence and procedure in several states permitted representative parties to file *class action lawsuits. In cases involving serious injuries caused by defective mass-produced products and devices, or in cases involving collectively large but individually minor overcharges, common questions of law and fact made class actions a superior method for recovery.

Numerous uniform state laws, including the Uniform Commercial Code, the Uniform Consumer Credit Code, and others, established imperfectly uniform rules for consumer transactions on the state and local levels. Broadly consistent standards of legal interpretation in consumer disputes developed only through professionally drafted restatements of law in such areas as torts, contracts, agency, and suretyship (guarantees of performance). These standards helped to determine when agreements were so one-sided as to be unconscionable, whether sellers performed their part of a bargain in bad faith, or whether consumers were acting the way reasonably prudent persons would act.

Standards by which consumer laws are interpreted, and the laws themselves, are being transformed continually by public and private bodies. New "topical" statutes, which deal with particular types of abuse, are frequently proposed. New approaches to consumer dispute resolution, especially provisions in standard form contracts that mandate binding consumer *arbitration, have become more common, despite the controversy they have aroused.

Regulatory consumer law appears destined to forever be playing catch-up with changing methods of selling, and with changing products and service delivery systems. The marketplace, furthermore, has become a global one, requiring global consumer protection rules. The "harmonization" of U.S. consumer laws with the laws of other nations and international bodies continues to raise difficult problems of protection and reconciliation.

• Norman Silber, *Test and Protest: The Influence of Consumers Union*, 1983. John A. Spanogle, et al., *Consumer Law*, 1991. Colston E. Warne, *The Consumer Movement* (Richard L. D. Morse, ed.), 1993. Michael Greenfield, *Consumer Law: A Guide for Those Who Represent Sellers, Lenders, and Consumers*, 1995. Stephen Brobeck, ed., *Encyclopedia of the Consumer Movement*, 1997.

—Norman I. Silber

CONTEMPT, CIVIL AND CRIMINAL. Contempt represents the power of a governmental body to compel enforcement of its decrees and orders. Most commonly, contempt refers to the authority of a court to punish or coerce individuals who violate its commands or offend the dignity of the judicial process. The term "contempt" is also used to refer to the disobedient or disrespectful behavior itself (e.g., "the defendant committed contempt by refusing to obey the court order"). American legislative bodies, such as Congress, also possess the power to hold witnesses before them in contempt for failing to answer questions or to produce required papers.

American courts after the Revolutionary War rested their authority to hold individuals in contempt upon the inherent contempt power claimed by the earlier English courts. For centuries English courts had asserted the ability to punish those who disobeyed a lawful court order or who disrupted judicial proceedings. In 1831, however, Congress passed a statute defining the exact scope of the criminal contempt power for American federal courts. Under this statute, which remains in effect today, a federal court may punish by fine or imprisonment only misbehavior in or near the court's presence, misbehavior of a court officer in an official transaction, or disobedience of a lawful court writ, rule, or order. 18 U.S.C. § 401 (1994).

Modern judicial contempt can be divided into four categories: direct contempt, indirect criminal contempt, coercive civil contempt, and remedial civil contempt. Any court of general jurisdiction, state or federal, normally has the power to impose any of the forms of contempt, provided that the court follows the appropriate procedures. Direct contempt constitutes disruptive or disrespectful behavior committed in the presence of the court or so near the court's presence as to disrupt the administration of justice. Thus shouting, cursing, and insulting the judge are examples of disruptive acts that could constitute criminal contempt. When direct contempt occurs, a court may summarily punish the individual committing the contempt by imposing a fine or term of imprisonment. Although normally *due process requires that an individual must have notice of the offense charged and an opportunity to be heard by the court, direct contempt of court may be punished without a hearing for two reasons: (1) the court must be able to punish disruptive or disrespectful behavior immediately to keep control over the proceedings before it, and (2) because the judge presumably witnessed the contemptuous behavior, there is no need for a hearing to establish the offender's guilt.

Indirect contempt usually consists of disobedience to a court order outside the court's presence,