The CFSC has actively promoted its Consumer Fellows program for nearly 20 years. Under that program, a number of lawyers active in the field of consumer financial services law but not practicing primarily with or on behalf of financial services providers, have attended regular Committee meetings. These lawyers typically are recruited by the Committee leadership from legal services programs, academia, private practice, foundations, advocacy organizations, and regulatory agencies. Some of our more prominent Fellows have recently gone on to prominent positions in federal agencies, e.g., Kathleen Keest to the FDIC and Chris Peterson to the CFPB, while others have come to the Committee from agencies, e.g., Joel Winston from the FTC. This interplay between the consumer community and the agencies reflects the importance of the perspectives that the Fellows are charged with representing.

One obvious purpose of the Fellows program is to bring thoughtful, informed perspectives from outside the industry to the discussions and work of the Committee, and thereby to educate and inform the representatives of the industry to those perspectives, ultimately to the end of improving their ability to serve their industry clientele. Perhaps as important, though maybe not so obvious, is to expanded and deepen the interactions between the industry and its external observers and critics to the end of improving the understanding of the industry's observers and critics as to its workings, its constraints, and its actions.

The Committee is actively committed to involving its Consumer Fellows extensively in the committee presentations at its regular meetings, as well as other projects of the Committee. Subcommittee Chairs and Vice Chairs are actively encouraged to seek out Fellows to participate in the presentations provided. Doing so not only makes the presentations more balanced, it also usually enlivens them, often substantially.

Len Bernstein of Reed Smith recently wrapped up a four year term as Board President of the Support Center for Child Advocates in Philadelphia, PA.

The Support Center for Child Advocates is Philadelphia's volunteer lawyer program for abused and neglected children. (www.advokid.org) Child Advocates provides direct legal and social service advocacy to child victims of physical and sexual abuse. Each child receives the service of a staff social worker who is teamed with a volunteer attorney from the Philadelphia legal community.

As a member of the Young Lawyers Division of the Philadelphia Bar Association, Len initially became familiar with the group at a fundraiser. Years later, after stepping away from his law firm's management, he got more involved again.

Child Advocates has 27 employees and works with about 300-400 volunteer lawyers. Each social worker/lawyer team works together to advocate for a particular child client. During court proceedings, the city, the parents, and the social work agency struggle to achieve either adoption, foster care, family reunification, or another solution. Someone needs to look out for the child's best interests and make sure he or she is represented and has access to the safety, education, and medical rights he or she is entitled to.

Len says being a Board member during the recession made fundraising difficult and that support for social workers and legal aid organizations is difficult to come by. At each Board meeting, Child Advocates starts with the story of a child told by volunteers and social workers; this is especially moving and helps the Board understand and remember why they are doing what
While the existing Fellows bring a wealth of experience and knowledge on a variety of consumer financial services issues, they also are deeply connected with a web of other attorneys and academics across the country working in a variety of arenas on a host of topical areas. Committee Chairs and Vice Chairs are encouraged to utilize the Fellows to assist them in identifying and recruiting appropriate speakers for various presentations, even when the best speakers might not be among the current Fellows. The Section is equally committed to this process by providing financial support for such occasional speakers to participate at Committee meetings.

In short, the presence and active participation of the Fellows is intended not only to make for more balanced and thought-provoking presentations, but also to enhance the educational experience for both industry practitioners and the interested external observers and critics of the industry.

For help in identifying and recruiting such speakers for upcoming meetings, please contact any of the current Consumer Fellows, or, Jim Brown, CFS Committee Vice Chair, at lbrownuwm@hotmail.com.

Jim Brown
Vice Chair
Consumer Financial Services Committee

they do. Len says it was helpful for the group to have a banking lawyer on the team. He found working with the staff of Child Advocates rewarding.

Len took on a personal case involving a young female client. His client's parents are deceased and she had no family support at all. Len has worked with her through her time in a foster home, through high school, and now into college. She has struggled with a number of things common to such a situation, e.g. lack of funds, anger management issues, etc. A child can stay in the program until she is 21 years old providing she is still in school. Len's client is now 23 years old and he is still helping her unofficially, trying to keep her in school and help her with the basics, food, community college, a part time job, etc. Len says, "My kids have gotten to know her and now have a better perspective on how lucky they are."

Child Advocates honored Len as a Distinguished Advocate after he stepped down as Board President. Frank Cervone, Executive Director of Child Advocates, said that Len was responsible for significant structural changes to improve and strengthen the Board of Directors. In fact, notwithstanding a long history of excellence in leadership and membership, the Board found a new gear with Len in the driver's seat: robust committees, new members, increased donations. He left the Board a force, and in good stead.

Since stepping down as Board President, Len still supports Child Advocates. He feels that business lawyers sometimes have difficulty with pro bono but there are things all of us can do, even if it is something outside of business law. Lawyers are organizers/doers by nature and we can get involved.

Meeting Promos/Postcards

Join Us in Chicago August 2-5

We look forward to seeing you in Chicago, Illinois for the CFSC Annual Meeting August 2-6, 2012. Our meetings will be held at the Chicago Downtown Marriott, starting with the "Beer and Basics" program on Thursday, August 2, at 4:30 pm. Our Welcome Reception will follow at 7:00 pm. A "Blues Bus Tour" also is scheduled for August 2, starting at 8:30 pm.*

Friday morning at 8:00 am we kick-off 2 ½ days of excellent programs. Although the scheduled CFSC programming ends on Sunday, August 5 at 11:00, many other excellent ABA programs continue through Monday, August 6. Please plan to join us at Sunday for the CFSC dinner* Friday evening, August 3, with a cocktail reception starting at 7:00 pm.

Please thank the following firms for their sponsorship of the Welcome Reception, the Blues Bus Tour, and the CFSC dinner: Arnstein & Lehr, LLP, Dykema Gossett PLLC, Grady Pilgrim Christakis Bell LLP, Mendelsohn Horwitz & McNally PC, Terreno.

CFSC Constituents

Barkley Clark: The Man Behind the Treatises
By Rachel F. Marin, Maurice & Needleman, P.C.

Editor's Note: The American College of Consumer Financial Services Lawyers honored Barkley Clark with its Senator William Proxmire Lifetime Achievement Award at the College's annual dinner on March 24, 2012. This prestigious award is granted to individuals who have made significant contributions in the field of Consumer Financial Services throughout their career. We extend our hearty congratulations to Mr. Clark and we know you will enjoy getting to know him a bit better through this article.

Most people in the legal community know Barkley Clark for his informative legal treatises. This article focuses on the leadership experiences that made him the legal scholar he is today. To read the full article, click here.

Meet Consumer Fellow Malini Mithal
By Arielle Harry-Bess

Malini Mithal became a Consumer Fellow with the ABA Business Law Section's Consumer Financial Services Committee (“CFSC”) in the Fall of 2011 after the previous FTC Consumer Fellow retired. The main priority areas for Malini in her role as a Consumer Fellow are auto financing, debt collection, payday
The Third Annual Consumer Financial Services National Institute will be held October 8-9, 2012 on the campus of American University in Washington, DC. This program provides a fantastic learning experience for new consumer financial services lawyers and lawyers who want to brush up on the sweeping changes in consumer financial services laws over the past several years. For complete program details and to register, log on to www.ambar.org/cfs2012 or call 1-800-285-2221.

Subcommittee Spotlight

Compliance Management Subcommittee

By H Joshua Kotin, BuckleySandler LLP

The Compliance Management Subcommittee, which is headed by Agnes Bundy Scanlan, Dacie Le and Christine Poulon, focuses primarily on exploring pressing compliance issues at both depository and non-depository financial institutions. Most recently, the Subcommittee held a joint panel with the Banking Subcommittee to dissect the first year of activity at the Consumer Financial Protection Bureau ("CFPB"). The panel featured participants with a range of perspectives, including representatives from the CFPB and Federal Trade Commission, compliance consultants, outside and in-house counsel, and a consumer advocate. While Compliance Management is broadly focused on all aspects of regulatory compliance, it will continue to look at emerging consumer-compliance issues, which have been front and center in the debate over U.S. financial-services policy.

This August, at the ABA's annual meeting in Chicago, the Subcommittee, in conjunction with a host of other committees, has chosen to tackle recent developments in electronic contracting. The Panel, which is titled "Clickwraps, Browserwraps and Why ESIGN Deserves a Burn Rap," will explore how to effectively obtain consumer consent to online agreements while still maintaining a positive website design and customer experience.

CFSC Legal Feature

Each CFSC Newsletter will include article(s) authored by the CFSC members. We are always looking for volunteers to help with articles. Therefore, please let us know if you have an article that you would like to be featured in an upcoming newsletter. This edition’s feature is:

Supreme Court Weighs in on RESPA Section 8(b)

By: Clint Rockwell, BuckleySandler LLP

On May 24, 2012, the Supreme Court of the United States unanimously held that section 8(b) of the Real Estate Settlement Procedures Act ("RESPA") can be violated only if a charge for settlement services is divided between two or more persons and that the section does not cover the collection of an unearned, unsplit fee by a single settlement-service provider. Freeman v. Quicken Loans, Inc., 132 S.Ct. 2034 (U.S. May 24, 2012). The decision resolved a split between the Circuits as to whether Section 8(b) prohibits a settlement-service provider from charging a borrower fees for which no actual services were rendered to the borrower.

Section 8(b) of RESPA states that "no person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate service...other than for services actually performed." 12 U.S.C. § 2607(b). The plaintiffs in Freeman obtained mortgage loans from Quicken Loans and alleged that they were charged loan discount fees, but that Quicken did not provide plaintiffs with lower interest rates in return. Plaintiffs argued that because Quicken Loans provided no services for these fees, they violated RESPA by accepting a portion or percentage (albeit the entire portion or percentage) of a charge for fees that were "unearned." Freeman v. Quicken Loans, Inc., 132 S.Ct.
experience. The Panel will feature experts from private practice, the industry, and consumer advocates.

Housing Finance Subcommittee
By Katie Wechsler, Barnett Siron & Natter, P.C.

Supreme Court cases, a national mortgage settlement and upcoming regulations from the Consumer Financial Protection Bureau (CFPB) that will shape housing finance from origination to servicing are keeping the Housing Finance Subcommittee busy. Chaired by Sandy Shatz of Severson & Werson with vice chairs David Permut of Goodwin Proctor and Melissa Klimkiewicz of Buckley Sandler and young lawyer liaisons Christine Acree of Mavent Inc. and Katie Wechsler of Barnett Siron & Natter, the Subcommittee is focused on facilitating topical discussions of the recent developments in housing finance.

At the Spring Meeting, the Subcommittee's session concentrated on two cases on the U.S. Supreme Court's docket this term. First American Financial v. Edwards poses the question of whether a private purchaser of real estate settlement services has standing to sue under the Real Estate Settlement Procedures Act (RESPA) when a violation of the RESPA kickback prohibition does not affect the price, quality, or other characteristics of the settlement services provided. The issue in Freeman v. Quicken Loans, Inc. was whether section 8(b) of RESPA prohibits a real estate settlement services provider from charging an unearned fee only if the fee is divided between two or more parties. (The Court has since decided this case finding that a plaintiff must demonstrate that a charge for settlement services was divided between two or more parties to establish a violation of section 8(b). (132 S. Ct. 2034)). The expert panel, including the Subcommittee chair and vice-chairs, Thomas Heffron of Goodwin Proctor, Cy Smith of Zuckerman Spadaer, and Charles Newman of SNR Denton discussed the issues raised by each case, the arguments asserted by each party, and the implications for consumers and the industry.

The Subcommittee is planning a program for the ABA Annual Meeting in Chicago on the proposed rules from the CFPB and other federal regulators affecting mortgage finance and the implementation of the national mortgage servicer settlement. Specifically, the session will address proposed and upcoming regulations including: the ability to repay and the definition of qualified mortgage, risk retention and the qualified residential mortgage definition, harmonizing TILA and RESPA disclosures, mortgage servicing, and loan originator

2038. Plaintiffs' interpretation was derived from a 2001 policy statement issued by the Department of Housing and Urban Development ("HUD") prohibiting a settlement-service provider from charging such unearned fees under RESPA. 66 Fed.Reg. 53057(2001).

The district court granted summary judgment in favor of Quicken on the grounds that RESPA could not be violated because the allegedly unearned fees were not split with another party. The Fifth Circuit affirmed on the basis that Section 8(b) "is unambiguous and does not cover undivided unearned fees." Freeman v. Quicken Loans, Inc., 626 F.3d 799, 803 (5th Cir. 2010). The Supreme Court granted certiorari to resolve split among the Circuits.

The Supreme Court, in an opinion written by Justice Antonin Scalia, held that section 8(b) "unambiguously covers only a settlement-service provider's splitting of a fee with one or more other persons; it cannot be understood to reach a single provider's retention of an unearned fee." Freeman v. Quicken Loans, Inc., 132 S.Ct. at 2036. The Court found that HUD's position articulated in its 2001 policy statement "is manifestly inconsistent with the statute HUD purported to construe," and that HUD's Policy Statement "goes beyond the meaning that the statute can bear." Freeman v. Quicken Loans, Inc., 132 S.Ct. at 2040, citing MCI Telecommunications Corp. v. American Telephone & Telegraph Co., 114 S.Ct. 2223 (1994).

The Supreme Court reasoned that the plain language of Section 8(b) that no person "shall give" or "shall accept" a charge that has been "made or received" clearly contemplates two distinct exchanges. Freeman v. Quicken Loans, Inc., 132 S.Ct. at 2040. Specifically, a charge must first be "made" to or "received" from a consumer by a settlement-service provider; and that provider then must "give" and another person "accept" a "portion, split or percentage" of such charge. Freeman v. Quicken Loans, Inc., 132 S.Ct. at 2040.

Under this rationale, the Court rejected plaintiffs' theory that these two stages could be merged by a settlement-service provider making and accepting the entirety of a charge simultaneously. First, the logical consequence of plaintiffs' interpretation presumes that the consumer "gives" and the provider "receives" the charge. But if the consumer "gives" the fee, he or she would likewise be liable for violating RESPA. The Court found it "virtually unthinkable" that Congress intended to subject liability to the very "class RESPA was designed to protect." Freeman v. Quicken Loans, Inc., 132 S.Ct. at 2041. Second, the Court held that the phrase "portion, split, or percentage" does not cover a situation in which a settlement-service provider retains the entirety of a fee received from a consumer, but instead contemplates, "a part of a whole." Freeman at 2042.
servicing, and loan origination
compensation. The Subcommittee
leadership is working to secure a panel for
this session to include federal and state
regulators and representatives of the
industry and consumers. We hope you will
join us for what is sure to be an interesting
discussion on these rules that will define
the future of mortgage finance.
Most people in the legal community know Barkley Clark for his informative legal treatises. This article focuses on the leadership experiences that made him the legal scholar he is today.

Clark views law reform as a form of leadership, and he has always had a compulsion to write. He enjoys seeing a newsletter hot off the press or online, or the publication of an update to one of the treatises he, and his wife, Barbara have authored. Barbara is an attorney also. Clark’s bank deposit treatise has been vital for 42 years, and he first published his secured transactions treatise 32 years ago. His warranties treatise was initially published in 1984 and continues to be as relevant as the day it first appeared. He has been publishing his newsletters since the 1990s. There is always something on his “to do” list.

The Dodd-Frank Act, and the new Consumer Financial Protection Bureau have provided great grist for the monthly newsletters that he and Barbara Clark co-author. The newsletters require substantial effort. Each newsletter contains five stories. “Clark’s Bank Deposits and Payments Monthly” covers topics such as reporting embezzlement schemes, and the latest FinCEN proposed rules and their impact on future litigation.

The authors provide concise takeaways, point out unusual aspects of cases, and comment on whether the court reached the right result. Future publications will comment on regulatory developments regarding preloaded cards stemming from the work of the Consumer Financial Protection Bureau. “Clark’s Secured Transactions Monthly” newsletter covers decisions stemming from the Lehman Brothers bankruptcy, the United States Supreme Court decision in Concepcion regarding arbitration agreements with class action waivers, and the pitfalls of perfecting security interests in a wide variety of collateral.

Leadership in Teaching and Public Service

Clark took on leadership roles during his high school years in Denver, where he was born and raised. While he never participated in Boy Scouts or Eagle Scouts (commenting that those organizations seemed too regimented), Clark concentrated on elective offices in school. He was elected Sophomore Class President. Then, as a senior, he campaigned and won the position of “Head Boy” and governed the large high school of about 3,000 students.

Clark learned certain early leadership lessons, including setting goals and planning for success. Another life lesson included learning to express himself in a way that is persuasive to others, which has helped him in teaching, writing, and appearing before courts to argue cases. Finally, Clark learned to delegate, work with teams, and to involve many people in projects.

Teaching at a number of institutions as a law school professor, Clark considers his professorships to be leadership experiences and training. He began his teaching career working part time at the University of Colorado in 1965. He later taught full time at the University of Kansas in Lawrence, Kansas, where for 17 years commercial and consumer law were his fortes. Clark has also taught at Georgetown, George Washington, the University of Michigan, and most recently at the University of Virginia. He explains that, as a professor, “I always felt like I learned something from the students in each class. I tried to call on
students in a way that was not overly intrusive but got them to come up with ideas about cases and problems they were trying to solve in class."

While he has now stopped formal law school teaching, he continues to travel around the country lecturing on consumer and commercial law issues. While lawyer or banker groups often make up his audience, he recently gave a talk to the recreational vehicle industry. He spoke on the topic of warranties, specifically situations where consumers buy a defective mobile home and want their money returned. Clark explained to the group consumers’ rights under federal and state law and how the different rules apply.

In the midst of his professorships, Clark also served as the outside director of a national bank. Many of Clark’s family members were bankers in his hometown of Denver, and he worked at a bank in Denver for three summers, cultivating his interest in the field. At the time he became a bank director, he was living in Lawrence, Kansas, teaching commercial and banking law. He knew the president of Lawrence National Bank (now U.S. Bank), was a customer of the bank, and had addressed the local bankers association more than once. Clark describes the position as “eye opening and broadening,” and it served to complement his teaching of banking law courses.

When Clark lived in Kansas, he was elected Mayor of Lawrence. He intended to make a difference as an elected official. He also incorporated issues he faced as a mayor into the classroom, and his local government law students benefited from his on-the-job experience. Clark also served for 10 years on the City Commission of Lawrence. He took away a “great appreciation” for local government, the “level of government closest to the people.” While his elective office holding gained him extra credibility with his students, he was obliged to take late night calls from constituents complaining about things like loose dogs in the neighborhood. The City Commission was blessedly nonpartisan, and he had no knowledge of whether his colleagues were Democrats or Republicans. His 10 years in public service gave him an inside view of cities and the way they operate. He learned to delegate authority to other members of the commission and encouraged them to carve out areas of expertise in the local government.

Leadership in Law Reform and Legal Publications

From day one of his legal career, Clark was interested in law reform. He attended Harvard Law School where in his second year he decided to focus on commercial law. His law school mentor was Professor Vern Countryman, who stimulated his interest in this area of law. In 1965, the Uniform Commercial Code (“UCC”) was just appearing in the different states. Clark knew that developing an expertise in UCC issues would be advantageous to his practice. Professor Countrryman suggested that the commissioners developing the uniform state law call Clark for his assistance in drafting a new uniform consumer code. Clark worked on it for the next two years, beginning in 1968. He then became involved with law reform on the legislative level. As special counsel, Clark assisted several committees in the Kansas legislature with the enactment of commercial and consumer protection legislation, including one of the country’s first consumer protection acts.

In 1990, working with the Commissioners on Uniform State Law at the American Law Institute, Clark helped develop comprehensive amendments to Article Nine of the UCC. The Amendments were based on case law that had revealed ambiguities in the statutory language. One pertinent consideration was how to address consumer protection. Clark worked on this for three years, and then worked with the drafting committee as a consultant from time to time. The new version of Article Nine was implemented in all 50 states on July 1, 2001.

What are the lessons of Clark’s long and distinguished career? Looking back, Clark has “learned to appreciate the talents that other people have,” rather than trying to do everything himself. He learned
team work at his current law firm, Stinson Morrison Hecker LLP. “Doing something as part of a team is more fun than doing something by your lonesome,” he observes, citing how he teamed up with the attorney next door, Katie Becker (a bankruptcy expert), to represent clients in automobile finance litigation and big ticket litigation involving consumer bankruptcy issues. As a team, the two have successfully argued in front of the Second, Sixth, Eighth, and Eleventh Circuit Courts of Appeals. Clark enjoys being a partner at Stinson where he works on a steady list of interesting commercial law cases.

Clark views other partners in his firm as mentors. One such mentor is younger than him, but has been at the firm longer. Clark admires this attorney because he maintains a vigorous bankruptcy practice, but takes advantage of living in the dynamic city of Washington D.C. and manages to take time to go “to the beach.” Other mentors he remembers include veteran teachers at the University of Kansas who showed him the ropes when it came to the subjects of teaching and giving exams. Clark concludes, “Law is a very interesting part of life, and I’ve been fortunate to be able [to enjoy the law] from a writing point of view, practice, teaching, and legislative perspective. I greatly respect [the law] and am thrilled that I’ve had a career that has enabled me to embrace those different aspects of the law.”

What advice would Clark give to young lawyers? “Carve out an area of expertise and become indispensable to partners.” This is fun and a great way to get ahead, he submits. Other paths to success include writing articles and newsletters and becoming active in bar associations. “Network,” he adds, and have “fun!”

What does Clark do for fun, outside of the law? He enjoys living on his farm near Charlottesville, VA, two-and-a-half hours from Washington, D.C. He and Barbara also maintain an apartment in Washington. He loves to walk by the stream on his Charlottesville property and take his dog, Charlotte, hiking on the nearby Appalachian Trail. Walking is one of Clark’s passions, and he often enjoys doing so indoors, around art museums, including the Corcoran Gallery of Art and the National Gallery in Washington. He takes pleasure in observing Washington, city life, and feels like “a kid in a candy shop with the many monuments, landscaping, and the bustle and orchestra of languages on the street.” For years Clark ran long distances every day as a way to release endorphins and to clear his mind after looking at legal cases and statutes all day. While he was mayor of Lawrence, he even ran a marathon at the University of Kansas. He jokingly called it a “mayorthon.” Clark now walks three miles back and forth to his office most days, often skipping the metro. He also takes pleasure in traveling with his wife and children. He recently spent a week in Amherst, Massachusetts attending his son’s college graduation, and his own class reunion.

#
Meet Consumer Fellow Malini Mithal
By Arielle Harry-Bess,

Malini Mithal became a Consumer Fellow with the ABA Business Law Section’s Consumer Financial Services Committee (“CFSC”) in the Fall of 2011 after the previous FTC Consumer Fellow retired. The main priority areas for Malini in her role as a Consumer Fellow are auto financing, debt collection, payday lending, mobile payments, and loan modification and debt relief scams. Malini believes that it is important to discuss financial issues with members of the private bar, consumer groups, and other regulators so that regulators such as the FTC know what the most important issues are on both the business and consumer side thereby ensuring there is an appropriate balance between protecting consumers and avoiding hampering legitimate business activity.

As a Consumer Fellow, Malini participates on panels relating to a wide variety of financial topics, from debt collection to mobile payments. She enjoys meeting other ABA members who attend the CFSC meetings to discuss what they think the FTC should be doing to protect consumers in the financial arena and questions they have about the FTC’s work and priorities. Being a Consumer Fellow has been a rewarding experience and Malini invites input on significant or new financial protection issues the FTC should address.

Malini Mithal currently serves as an Assistant Director for the Bureau of Consumer Protection’s Division of Financial Practices at the Federal Trade Commission. In this capacity, she works on a broad range of consumer credit and financial services issues, including supervising federal court and administrative litigation enforcing the FTC Act and other consumer protection laws. These enforcement actions challenge deceptive or unfair practices by non-bank lenders, providers of mortgage assistance relief services, debt collectors, payday lenders, and other financial service providers, and often involve particular consumer credit-related statutes such as the Fair Debt Collection Practices Act; the Truth in Lending Act and its implementing Regulation Z; and the Electronic Fund Transfer Act. In addition, she manages the Bureau of Consumer Protection’s Mobile Unit and Auto Task Force. Prior to joining the FTC, she served as a Law Clerk for the Honorable Alan S. Gold of the United States District Court for the Southern District of Florida. Malini received her B.A. from Georgetown University and her J.D. from Columbia Law School.
On a personal note, Malini is the proud mother of two beautiful children and enjoys reality TV, Bollywood movies, bad literature and chocolate.