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Larry Ribstein will be remembered as one of the most creative, innovative and courageous legal scholars of his generation. He contributed importantly to fields as diverse as corporate law, the law of unincorporated business associations (which he virtually single-handedly revitalized), choice of law and legal professions. In the latter field alone, Ribstein wrote importantly about topics ranging from the internal organization of law firms and changes in the law firm market,¹ the influence of lawyers on state competition to make new law,² to the economics of lawyers as law producers.³ Ribstein was one of the first to analyze the commodification and unbundling of legal services and information. In this new world, some parts of traditional legal practice – representation of clients in litigation and legal advice in complex transactional and tax planning matters – are still provided in the form of traditional, individualized expert legal advice. But other aspects of traditional legal practice have been unbundled from law firms and traditional legal advice. In the new legal market, things such as the provision, completion and filing of standardized forms required to do things like create a closely held corporation or make a valid will are provided by legal product markets which themselves are increasingly entirely online. The legal world is now bifurcated. There remains a traditional realm of customized legal advice, where lawyers provide advice subject to i) professional ethical constraints, ii) fiduciary obligations and iii) potential malpractice liability. Alongside this stands the new (often online) legal product market, a world where attorneys do not (and probably legally cannot) provide advice but advice is instead provided by non-attorneys. How this new world of online legal products will or should be regulated is of the present time largely undetermined.

In this article, I set out some tentative thoughts about what an optimal regulatory regime might look like in this new bifurcated legal world. I look first at the online legal product regime, and then at how the regulation of online legal products might interact with the regulation of traditional (or what I call) full service legal representation.

I. Problems with Market Mechanisms for Online Legal Product Quality

As Bruce Kobayashi and Larry Ribstein observed,⁴ online provision has come to the world of law. Websites such as LegalZoom.com, LawDocs.com and

¹ Larry Ribstein, *The Death of Big Law*, 2010 Wis. L. Rev. 479 (2010); Larry Ribstein, *Delawyerizing the Corporation*, forthcoming __ Wis. L. Rev. (2012).

² Larry Ribstein, *Ethical Rules, Law Firm Structure, and Choice of Law*, 69 Cinn. L. Rev. 116 (2001); Erin O'Hara and Larry Ribstein, *Corporations and the Market for Law*, 2008 U. Ill. L. Rev. 661; Erin O'Hara and Larry Ribstein, *The Law Market* (2009).

³ Larry Ribstein, *Lawyers and Lawmakers: A Theory of Lawyer Licensing*, 69 Mo. L. Rev. 299 (2004); Bruce Kobayashi and Larry Ribstein, *Law's Information Revolution*, 53 Ariz. L. Rev. 1169 (2011).

⁴ Bruce H. Kobayashi and Larry E. Ribstein, *Law's Information Revolution*, 53 Ariz. L. Rev. 1169, 1194 (2011).

RocketLawyer.com provide templates and step by step assistance for consumers in constructing legal forms such as wills, trusts, real estate contracts, promissory notes, pre-nuptial agreements, powers of attorney and business association formation documents. As Kobayashi and Ribstein and others have also noted, the main obstacle to date with the online provision of and assistance with legal forms is that if too much active advice by nonlawyers is given, the firm may run afoul of state laws prohibiting the unauthorized practice of law.⁵ This particular form of potential legal trouble may be avoided by ensuring that nonlawyers provide only information regarding the law, while consumer questions requiring actual legal advice are routed to attorneys licensed in the user's state. The net effect of the need for online legal product providers to avoid the unauthorized practice of law is that such providers are relatively "dumb": they can provide forms to consumers but only quite simple, "non-legal" advice to such consumers about how to fill out the forms so as to effectuate their desired objectives.

Kobayashi and Ribstein are optimistic that the online market for legal products will itself provide the appropriate level of quality in such consumer legal services. They argue that the:

"legal product market can provide discipline comparable to or better than a licensing regime. Rather than having to rely on imperfect information and reputations, consumers could choose from products that many consumers have tested and about which information is widely available on the Internet and elsewhere. To be sure, this product information is likely to be imperfect, and the products may not be suitable for all consumers and uses. On the other hand, current rules effectively mandate a minimum level of service that may not be worth its cost in smaller transactions, thereby forcing potential customers to rely on self-help or inferior legal advice."⁶

The final part of this argument seems unassailable. If the law insists upon legal products that are fully customized and optimal for a particular client, then the cost may be so high that many people go without such products and are much worse off than they would be with standardized, albeit non-optimal products. An example of this would be wills: even if a will is not perfect, it is likely to better effectuate the intent of the testator and be far cheaper for the legatees/devisees to take under, leaving them a higher net payoff, than would occur under intestacy.

b) Legal Forms as Experience/Credence Good

The first part of Kobayashi and Ribstein's argument is more problematic. In the quoted passage, Kobayashi and Ribstein reject consumer reliance on "imperfect information and reputations" in favor of a presumed internet market selection process for online legal products, information about which is available both on the internet and

⁵ Kobayashi and Ribstein, *supra* note ____ at 1194-1195. See also Cristina L. Underwood, Balancing Consumer Interests in a Digital Age: A New Approach to Regulating the Unauthorized Practice of Law, 79 Wash. L. Rev. 437 (2004); Lindzey Schindler, Skirting the Ethical Line: the Quandary of Online Legal Forms, 16 Chapman L. Rev. 185 (2012).

⁶ Kobayashi and Ribstein, *supra* note ____ at 11906.

“elsewhere.” Kobayashi and Ribstein seem to imagine a world where consumers pick up information about legal forms from other consumers, perhaps via internet consumer reviews, and where the mass of consumer experience somehow selects out inferior forms.

As for internet reputation, there is an accumulating body of empirical evidence showing that buyers pay more for goods offered by internet sellers with good reputations and that such sellers have higher sales.⁷ Such reputations are generated by online consumer reviews. Although simple economic theory suggests that such uncompensated and yet time-consuming reviews ought to be under-provided and when incentivized (as by reciprocity) may be unreliable, there continues to be a large volume of consumer feedback about online product and service purchases. Indeed, there are companies, such as TripAdvisor, that have been taken public and which rely entirely on such free consumer reviews.

It is not at all clear, however, that reputation for high quality legal products can be generated via the same online mechanisms that generate information about hotels or different sellers of bicycles. Hotel stays, like most durable goods, are what economists would call experience goods: while their quality may not be determinable upon simple inspection, it is revealed by use. It would seem that online legal forms are quite different. Information about the true quality of the transactional forms that are typically provided online – for example, prenuptial agreements and promissory notes -- may not be known by the consumer until many years after the form is used. A wife will not discover whether her prenuptial form works until it is time for divorce. A lender will not discover whether her promissory note is sufficiently well-drafted until a potential dispute with the borrower arises. And in the case of at least one legal form, the will, the effectiveness of the form in achieving the decedent’s intent will never be known by the decedent (at least while he she is alive). As these examples suggest, with many legal forms, there is a long delay between the time of purchase and the time period when the consumer-user of the form gets a signal of its quality, and even then, the signal is not perfect and is not certain to ever occur. That is, if one lends money to a perfectly trustworthy borrower who repays precisely as promised, one will never learn whether the promissory note was especially well-drafted. And even for lenders who are less fortunate and end up in some sort of litigated dispute with the borrower, the litigation may or may not actually inform the consumer-lender about the quality of the promissory note she bought years ago online.

From an economic point of view, many important online legal products are thus an odd type of experience good, one where the consumer/user’s experience occurs typically only with long delay and in certain states of the world, and where experience is generally only imperfect informative as to product quality. These features of online legal products make online reputation likely a much less effective quality assurance mechanism than it is for other online products or services. Consumers would very often, perhaps typically, not have any experience with an online form until years after it had been completed online (and filed if necessary). In addition, some consumers who end up in litigation years after buying and using the form might ultimately enjoy success due not to the quality of the form, but to high quality traditional legal representation at the ex post litigation stage. Hence it would seem that very few consumers might ever learn that the quality of the online form was low. It is that small subset of consumers who would have

⁷ See Luís Cabral, Reputation on the Internet, in

to be relied upon to provide online feedback. But that feedback will be uniformly negative. This negative bias in online feedback about legal forms would mean that even a highly sophisticated consumer would learn very little from online reviews of legal forms. Unsophisticated consumers could be seriously misled by the predominance of negative online reviews. Such distortion would deter people from using legal forms that might well advantage them. To avoid such distortion, it might be better for online legal form providers to simply eliminate consumer reviews entirely. In any event, the situation with online legal forms is likely to be exactly the opposite of that with most existing online goods and services, where evidence to date indicates that most online consumer reviews are positive. Overall, the case for effective reputation mechanisms in the online legal form market seems a difficult one to make.

This analysis reveals advantages that provision of even simple forms by actual human attorneys has over online provision of legal products. With only delayed and random experience revealing the quality of the form, legal forms are perhaps better understood as credence goods. As with other credence goods, it may well be that the best a consumer can do is to estimate the quality of the form by using observable features of the provider: the attorney's general word-of-mouth reputation, the observable quality of her interaction with the attorney and other observables about the attorney such as education and her performance on smaller tasks where quality really is observable. But the best a consumer can do may not be very good at all. As with auto repair, medical services and host of other credence goods and services, the equilibrium in an unregulated online legal product market may involve low prices, but also a relatively low level of quality – in other words, a high probability of forms that do not well serve the consumer's objective.

b) The Market for Law and Online Information Intermediaries

The immediate response one expects to arguments such as this is that just as there are lots of internet intermediaries rating other products, internet intermediaries would arise to rate online legal products. One could shop among alternative legal product suppliers just as one shops for automobiles or even auto repair shops, relying in large part on online reviews. Interestingly, behavioral law and economics scholars -- who are otherwise quite suspicious of how providers take advantage of various consumer cognitive limitations – are quite optimistic about the ability of such third-party online intermediaries to provide information that helps consumers in comparative shopping decisions.

Consider, for example, mortgage contracts, an online product that is at least as (if not more) complex than many online legal forms. Based on behaviorist experimental evidence that people have a difficult time comprehending complex, multi-part pricing schemes, Sunstein and Thaler⁸ advocate requiring that providers of consumer products with such complex pricing schemes make all fees public in a spreadsheet format (which would include the formulas by which fees are calculated). In addition, once a year, providers would provide a “listing” of how consumers had used the product and incurred fees. Now it might seem that such a spreadsheet and potentially very long and detailed

⁸ Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness* 93-94 (2008).

annual report wouldn't be much of an improvement over existing online or hardcopy contractual disclosures. The improvement in consumer understanding, according to Thaler and Sunstein, would come about because “[p]rivate Web sites similar to existing travel sites would emerge to allow an easy way to compare services.” For mortgages in particular, lenders would provide a “machine readable detailed RECAP report, one that incorporates all the fees and interest rate provisions, including teaser rates, what the variable rates are linked to, caps on the changes per year, and so forth,” and this information would “allow independent third parties to offer much better advice.”⁹ Thus Thaler and Sunstein clearly imagine that if only the terms of complex mortgages were provided in a machine readable format, markets will provide an incentive for information intermediaries to restate that information in simple and understandable online forms that facilitate comparison shopping by consumers.

It is difficult to see how this proposal would actually succeed, either for mortgages or online legal forms. There are, it is true, examples of online sites that facilitate comparison shopping. For example, kayak.com presents comparative prices for things such as flights, hotels and rental cars. But as any visitor to kayak.com can see, only the most basic information – prices – are presented in a way that facilitates immediate comparison by consumers. To compare other terms – such as hotel amenities, weekend specials, etc. – the consumer actually has to spend some time, and focus some attention, reading through more detailed and traditional disclosures. The fact that they are made online does not make such traditional disclosures any more understandable to a consumer. Indeed, it has long been argued that consumers do not really have an opportunity to read and in any event have no opportunity to object to basic online End User License Agreements and Terms of Service.

This may be either too optimistic or too pessimistic about the online contracting world. Optimistically, apps may be developed that allow consumers to opt out or even to propose changes to the standard form terms offered by online service providers. Gamer Opt Out (<https://www.gamersoptout.com/optout>) for example, is a new website that provides opt out forms from certain companies' End User License Agreements (at last look, from Sony's Playstation and Electronic Arts). Since 2009, the Electronic Frontier Foundation has operated the website www.TOSBack.org, a real time tracker of changes and updates to the Terms of Service offered by companies such as Google, Facebook and eBay.

It may be that these sites presage an era of enhanced consumer online bargaining ability and contractual awareness. On the other hand, any online site that provides products or services that are tailored to particular consumer preferences also has potential risks. The most obvious of these is the concern with unauthorized disclosure by the providers to others of information about the consumer. The less obvious but probably more serious risk is that of steering. Online providers have an opportunity to gather and analyze vast amounts of information about consumers, not only their purchase history but also personal information, and to use this information to steer a consumer to other products or services which that consumer's profile indicates might be of interest to her. Sometimes, as with Amazon.com suggestions, such steering is minimally intrusive and simply tells consumers about other products that he or she may be interested in. Other times, however, such steering has been more controversial. Orbitz, for example,

⁹ Thaler and Sunstein, Nudge, supra note ___ at 138.

apparently shows more expensive hotel recommendations to Mac users versus PC users. Such steering was based on Orbitz data indicating that Mac users are 40-50% more likely to book a four or five star hotel than PC users. Orbitz has defended the practice by noting that it was not charging Mac and PC users different prices for the same hotel, and also that price-conscious consumers were always free to rank hotel search results by price.¹⁰

Of course, to a practitioner of behavioral law and economics, the fact that consumers could with some effort ignore what is most salient in a search result is of little comfort. What the Orbitz example illustrates is that the ability of providers of goods and services to use information about individual consumers and exploit consumer cognitive errors may be greater online than in traditional bricks and mortar sales. It would seem that such market manipulation would be a serious problem with online legal form providers. In the process of filling out legal forms such as wills, trusts and prenuptial agreements, a consumer would reveal a great deal of information. That information could be stored, analyzed and then used to suggest a variety of additional online products and services tailored to the quite detailed individual profile developed by the online legal form provider. And of course consumer cognitive misperceptions and failures of various kinds would be fully exploited. If the behavioral economists are right about how market actors take advantage of consumer cognitive failures and limitations, then it cannot be that the solution to market exploitation is to put faith in a market intermediaries, for those intermediaries themselves are exploiters. In the words of Dr. Suess, it is turtles all the way down.

II. Regulating the Unbundled Legal Product Market

As argued above, relatively speaking, to the ordinary lay consumer, legal products are complex and arcane, indeed so much so that until now been provided only by attorneys, professionals with far more training than, say a typical bank loan officer. One would expect that the average consumer is much less familiar with legal products such as wills and trusts than he or she would be with even a relatively complex mortgage. It would seem difficult to design a step-by-step online process for creating legal documents that overcomes the variety of cognitive imperfections that will influence a consumer's understanding of such forms.

Online legal products are also risky, where the wrong choice can inflict large harm on a consumer. For example, an estate planning lawyer in Santa Ana, California used Legal Zoom to create a will for a fictitious customer or reasonably complex needs – one seeking to put his Subchapter S corporate stock in a living trust, with retirement accounts for both himself and his wife, and with two children plus a son from a previous marriage.¹¹ According to the lawyer, the advice he received from Legal Zoom - that his S corporation stock could not be placed in a living trust but that their retirement account should be placed in a trust with the trust named as beneficiary – would, contrary to his

¹⁰ Dana Mattioli, On Orbitz, Mac Users Steered to Pricier Hotels, WSJ, August 23, 2012.

¹¹ See Schindler, Skirting the Ethical Line, supra note ____ at 193.

intent, have disinherited his son and could have cost “tens of thousands in probate fees and potentially hundreds of thousands in taxes.”¹²

Of course, the Santa Ana estate planning attorney’s little experiment was hardly unbiased, as it attorneys in solo practice or in small firms who are most threatened by competition from online legal product providers. Still, it seems safe to say that online legal products are typically quite complex and may be quite risky. These are precisely the characteristics that have driven the Dodd-Frank law’s regulation of consumer mortgages and other consumer financial products. In addition, unlike online brokerage services, where a broker can avoid liability simply by executing trades with no recommendation (acting as an “order clerk” as the courts put it),¹³ it is impossible for an online provider not to give the consumer some kind of advice (even if not legal advice) in crafting legal forms. With recommendations seemingly an intrinsic part of the provision of online legal products, there is every reason to expect that if markets for consumer legal products become at all economically significant, they will become regulatory targets.

[to be completed: optimal regulatory regime]

¹² Schinder, *suprate* note ____, quoting David A. Hiereskorn, So, What’s so Bad about LegalZoom, Anyway, available at <http://www.kctrustlaw.com/files/Download/LegalZoom.pdf>.

¹³ See, e.g., *Associated Randall Bank v. Griffin, Kubik, Stephens and Thompson, Inc.*, 3 F.3d 208 (7th Cir. 1993); *Robinson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 337 F. Supp. 107 (N.D. Ala. 1971).