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THE FEDERALIZATION AND PRIVATIZATION OF PUBLIC CONSUMER PROTECTION LAW IN THE UNITED STATES: THEIR EFFECT ON LITIGATION AND ENFORCEMENT

Mark E. Budnitz*

INTRODUCTION

The public law of consumer protection in the United States is a mess. As a result, the effectiveness of litigation and other methods to enforce those laws is in jeopardy. This has occurred because those who decide the country's public policy on consumer protection are torn between two opposing perspectives. On the one hand, policymakers strive to preserve freedom of contract and a marketplace unburdened by the costs that result from government agencies and individuals enforcing strong consumer laws. Under this free market model, favored by the business community, consumers are responsible for their actions, and "free" to enter into bad deals, including contracts that take away their right to resolve disputes in court. Consumers should be able to sue companies only for breach of contract and common law fraud in individual, not class, actions. Government regulation that protects consumers should be kept to a minimum, and should be enacted and enforced by the federal government rather than the states so companies do not have to comply with fifty different state laws.

On the other hand, policymakers have tried to respond to persistent practices by exploitative merchants and creditors who often target those consumers who are most vulnerable: the elderly, the sick, the poor, and the uneducated. This article describes the current state of the public law that has resulted, focusing on enforcement of that law by government agencies and litigation pursuant to that law. As used in this article, public consumer protection law refers to those laws that are intended to protect the public as a whole, not just to provide

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rules for deciding private disputes.¹ These laws typically authorize government agencies to promulgate regulations and enforce the law.² Recognizing the resource limitations of government agencies, many consumer laws provide a private right of action so individual consumers also can litigate violations of these laws. Many of these laws also provide class actions and statutory damages which encourage consumers to act as “private attorneys general.”³ Reflecting the principle of federalism that is a long-standing national tradition, federal statutes often include provisions that generally preempt state law but permit states to have laws that are more protective than the federal law.

There is great variation among consumer protection laws, however, because each law deals with a specific matter, and deals with it in its own somewhat unique way. The law varies depending on whether a transaction involves credit cards or debit cards, home mortgage loans or loans not secured by a personal residence, heavily regulated financial institutions such as banks or loosely regulated institutions such as companies that cash checks. There is no uniformity and no consistency among the various consumer protection laws and how they are enforced because there is no national consensus on what laws are necessary to protect consumers and who should enforce those laws.

The development of public consumer law in the United States differs significantly from the approach of the European Union where there is a modicum of consensus and uniformity.⁴ The trend in the United States since the 1980s has been to rely less on statutes and

1. See, e.g., Federal Trade Commission (FTC) Act, 15 U.S.C. § 45 (2000). In contrast, “private” law consists primarily of the obligations, allocation of risks, liability, and remedies provided in the parties’ contract. Enforcement is limited to an action for breach of the duties imposed by the contract. Government agencies do not police these contracts.

2. E.g., 15 U.S.C. § 1607 (2000).

3. FED. R. CIV. P. 23 (permitting class actions). Statutes typically impose restrictions on consumer class actions to prevent them from forcing a company into bankruptcy. See, e.g., 15 U.S.C. § 1640(a)(2)(B) (2000); 15 U.S.C. § 1640(a)(2)(A) (2000) (providing statutory damages).

4. Jane K. Winn & Mark Webber, *The Impact of EU Unfair Contract Terms Law on U.S. Business-To-Consumer Internet Merchants*, 62 BUS. LAW. 209, 214 (2007); Jane K. Winn & Brian H. Bix, *Diverging Perspectives on Electronic Contracting in the U.S. and EU*, 54 CLEV. ST. L. REV. 175, 183 (2006).

regulations to protect consumers and increasingly on litigation to enforce the laws enacted in the 1960s and 1970s, and “economic regulation” to foster market competition.⁵ The European Union, in contrast, has taken a “social regulation” approach, treating consumer protection as one aspect of its duty to protect public health and safety.⁶ Therefore, the goal of consumer legislation in the European Union is to make markets safe for consumers. Regulatory agencies take the lead in enforcing consumer laws, rather than litigation.⁷

Two increasingly robust developments receive special attention in this article because they pose serious threats to the viability of effective enforcement of the public law of consumer protection. One development is the federalization of consumer law. The prime example is preemption of state law by federal agencies. That type of preemption often negates aggressive state law protection and replaces it with lax federal enforcement.⁸ The second is the privatization of consumer law, primarily through mandatory pre-dispute arbitration. Arbitration privatizes the justice system, hiding litigation involving consumers from government review. Arbitration also stymies effective and efficient consumer enforcement by banning class actions. In addition, privatization has occurred in payment system law, where a private organization has issued the rules that govern many aspects of the electronic transfer of funds.

The consumer protection laws discussed in this article are those involving consumer sales, payment, and credit transactions. Part I describes several of the major federal statutes and regulations that govern the consumer marketplace. This is followed by a description of how government agencies enforce that law. Part II describes some of the laws the states have enacted to protect consumers, the federal agency preemption battles that have erupted as a result, and the effect of preemption on litigation and enforcement. Part III focuses on

5. Winn & Webber, *supra* note 4, at 212–13.

6. *Id.* at 212. Several other countries have adopted a similar approach, including Canada, Australia, New Zealand, and Japan. *Id.*

7. *Id.* at 213.

8. The term “preemption” also is used in relation to federal statutes that preempt state law. Federal agencies that preempt state law base that action on alleged authority to do so in federal statutes.

litigation brought by consumers, describing some victories as well as defeats, and what they reveal about the development of consumer protection law. Part IV examines the role of private organizations in drafting legislation, commenting on proposed regulations, and enforcing the law. This article concludes with recommendations for dealing with the threats posed by federalization and privatization.

I. FEDERAL LAW

A. Federal Laws and Regulations: The Lack of Uniformity and Spotty Coverage

Federal consumer protection law is not uniform and its coverage is not comprehensive. These characteristics have a substantial effect on litigation and the enforcement of these laws.

Over the course of several years, Congress seemed to be headed in the direction of establishing a national uniform law to protect consumers. The Consumer Credit Protection Act regulates the disclosure of credit terms⁹ and discrimination in the granting of credit.¹⁰ Despite the title of the Act, it also covers many areas besides credit transactions, for it governs consumer leases,¹¹ consumer reporting agencies gathering information for non-credit transactions such as employment and insurance,¹² debt collection,¹³ and electronic fund transfers.¹⁴ Other federal statutes contribute to providing national protection for consumers. The Magnuson-Moss Warranty

9. Truth-in-Lending Act, 15 U.S.C. § 1631 (2000). The Truth-in-Lending Act is primarily a disclosure statute, requiring creditors to disclose how much they are charging consumers, but not imposing limits on those fees and rates. Some members of Congress, however, have expressed impatience with this approach in light of what they regard as abusive practices by the issuers of credit cards, and have threatened to introduce legislation that industry characterizes as price controls. Stacy Kaper, *Levin Takes Broad Aim at Card Tactics*, AM. BANKER, May 16, 2007, at 1, available at 2007 WLNR 9608538.

10. 15 U.S.C. § 1691(a)–(c) (2000).

11. 15 U.S.C. §§ 1667–1667(f) (2000).

12. 15 U.S.C. § 1681(a)(d)(1)(A), (B) (2000).

13. 15 U.S.C. §§ 1692–1692(o) (2000).

14. 15 U.S.C. §§ 1693–1693(r) (2000).

Act governs aspects of consumer sales transactions.¹⁵ The Expedited Funds Availability Act ensures that depositors have prompt access to their funds,¹⁶ and the Check 21 Act provides a re-credit and error resolution procedure for some consumers with checking accounts.¹⁷ The Federal Reserve Board (FRB) has promulgated extensive regulations under many of these statutes.¹⁸ In addition, the Federal Trade Commission (FTC) has authority to enforce the sweeping terms of the FTC Act, prohibiting “unfair and deceptive acts or practices.”¹⁹ The FTC has promulgated a wide array of regulations under that authority.²⁰

Another federal statute that has a public law function is a section in the U.S. Code that was enacted in 2006.²¹ A Department of Defense study found that predatory lending practices targeting military personnel and their families had national security implications because those practices adversely affected the morale of the troops.²² In response, Congress passed a law aimed especially at transactions such as payday lending and other high interest credit, but the law is not limited to any particular type of high interest loan. The law imposes a ceiling on interest rates, prohibits mandatory arbitration, rollovers and refinancing by the same lender, check holding, allotments of military paychecks, auto title lending, access to a

15. 15 U.S.C. §§ 2301–2312 (2000).

16. 12 U.S.C. §§ 4001–4010 (2000).

17. 12 U.S.C. §§ 5001–5018 (2000).

18. *E.g.*, Equal Credit Opportunity Act, 12 C.F.R. pt. 202 (2007); Truth In Lending, 12 C.F.R. pt. 226 (2007); Electronic Fund Transfers, 12 C.F.R. pt. 205 (2007). The FRB continues to try to improve its regulations. *See, e.g.*, FRB Proposal to Revise the Rules on Disclosure of Credit Card Terms, Truth in Lending, 72 Fed. Reg. 32,948 (proposed June 14, 2007).

19. 15 U.S.C. § 45 (2000).

20. *E.g.*, Door-to-Door Sales Rule, 16 C.F.R. pt. 429 (2007); Credit Practices Rule, 16 C.F.R. pt. 444 (2007); Holder-In-Due-Course, 16 C.F.R. pt. 433 (2007).

21. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 670, 120 Stat. 2083 (2006) (to be codified at 49 U.S.C. § 987).

22. DEPT. OF DEFENSE, REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS (2006), available at http://www.defenselink.mil/pubs/pdfs/Report_to_Congress_final.pdf; *see also* NAT'L CONSUMER LAW CENTER, IN HARM'S WAY—AT HOME CONSUMER SCAMS AND THE DIRECT MARKETING OF AMERICA'S MILITARY AND VETERANS (2003), http://www.nclc.org/issues/military/content/report_military.pdf.

service member's bank accounts, and prepayment penalties.²³ The law requires certain loan disclosures, prohibits a state from permitting waiver of the state's consumer lending protections by service members and their dependents if those protections are available to non-military residents of the state, makes a knowing violation a misdemeanor, and makes contracts prohibited by the law void from their inception.²⁴

It would be wrong, however, to conclude that the United States has a comprehensive and adequate uniform national statutory framework for consumer protection and its enforcement. Some of the most important elements of consumer transactions are completely unregulated. For example, the Depository Institutions Deregulation and Monetary Control Act of 1980 deregulated interest rates for an entire segment of the consumer credit market.²⁵ Other types of fees and charges also are unregulated.²⁶ Privacy protection has become increasingly important with the development of electronic databases

23. 10 U.S.C. § 987 (Supp. 2007). Soon after the law was enacted, several bank trade associations urged the Department of Defense to limit application of the law to payday loans and exclude other credit products. *Banks, Credit Unions Seek Relief from DOD, but Regulatory Watchdog Opposes Requests*, 75 U.S.L.W. 2406 (Jan. 16, 2007). The Department of Defense's final rule largely conforms to banks' wishes, excluding credit cards, overdraft loans, military installment loans, and all forms of open-end credit. See *Limitations on Terms of Consumer Credit Extended to Service Members and Dependents*, 72 Fed. Reg. 50,580, 50,591 (Aug. 31, 2007). Consumer groups condemned the regulations as too narrow in scope and easy to evade. Press Release, Center for Responsible Lending, Pentagon Adopts Narrow Credit Rules, Invites Evasion by Predatory Lenders (Sept. 6, 2007), <http://www.responsiblelending.org/press/releases/page.jsp?itemID=34005726>. The American Bankers Association, the Independent Bankers of America, and the American Financial Services Association announced their approval of the DOD rules. *DOD Issues Final Regulation to Protect Military Members From Unethical Lending*, 89 BANKING REP. (BNA) 345 (Sept. 10, 2007). With few exceptions, states have not extended the protections in the federal law to non-military consumers. Joe Adler, *In Focus: Fears About a Spate of Cap Laws Unrealized*, AM. BANKER, July 16, 2007, at 1, available at 2007 WLNR 13400806 (reporting that only six states have passed laws imposing interest rate caps or banning payday lending, and the few laws enacted exclude banks from coverage).

24. 10 U.S.C. § 987 (Supp. 2007).

25. State Usury Laws, Pub. L. No. 96-221, 94 Stat. 164 (1980); see ELIZABETH RENUART & KATHLEEN E. KEEST, *THE COST OF CREDIT* 92-98 (3d ed. 2005).

26. For example, rather than regulate fees for overdraft protection programs, the FRB merely imposed disclosure requirements, amending Reg. DD, 12 C.F.R. pt. 230, which implements the Truth in Savings Act, 12 U.S.C. §§ 4301-4313. See James J. White, *NSF Fees*, 68 OHIO ST. L.J. 185, 199 (2007); Mark E. Budnitz, *Developments in Payment Systems Law*, 10 J. CONSUMER & COM. L. 116, 119 (2007). In 2004, the FRB received more complaints concerning payment card fees and penalties than any other category of complaint. Arnold S. Rosenberg, *Better Than Cash? Global Proliferation of Payment Cards and Consumer Protection Policy*, 60 CONSUMER FIN. L.Q. REP. 426, 443 (2006).

and the epidemic of identity theft. Rather than enacting laws instituting broad privacy protection, however, federal law has inserted narrowly focused protections into a few consumer laws.²⁷

A significant aspect of every consumer transaction involves the consumer paying for goods or services. Payments law is chaotic, with great variations. Whether or not federal law governs the payment aspect of a consumer transaction depends on what type of payment device the consumer uses and what system processes the payment. For example, one kind of stored value card is subject to federal regulation, but all others are not, and few states regulate them.²⁸ Some aspects of check transactions are subject to federal law.²⁹ But many other features are subject to the Uniform Commercial Code (UCC), a state law that specifically eschews protecting consumers.³⁰ Electronic fund transfers are subject to federal law, but they also are subject to rules issued by a private organization.³¹ Consumers and

27. See, e.g., Gramm-Leach-Bliley Financial Services Modernization Act of 1999, Pub. L. 106-102, 113 Stat. 1338 (1999); *Privacy, Security Protection Will Remain Key Parts of FTC's Enforcement Agenda*, 91 ANTITRUST & TRADE REG. REP. (BNA) 491 (Nov. 10, 2006) (reporting that Professor Fred Cate characterized privacy law as "incomplete and often 'incoherent.'"). The FCC recently issued a regulation imposing restrictions on the ability of telecommunications carriers to provide information on its customers to third parties. *FCC Releases Rules to Beef Up Customer Phone Data Protections*, 75 U.S.L.W. 2603 (Apr. 10, 2007).

28. Examples of stored value cards include gift cards and prepaid telephone cards. MARK BUDNITZ & MARGOT SAUNDERS, *CONSUMER BANKING AND PAYMENTS LAW* 177-79 (3d ed. 2005); Judith Rinearson, *Regulation of Electronic Stored Value Payment Products Issued By Non-Banks Under State 'Money Transmitter' Licensing Laws*, 58 BUS. LAW. 317 (2002). The only type of stored value card subject to federal regulation is the payroll card. *Electronic Fund Transfer*, 71 Fed. Reg. 51,437 (Aug. 30, 2006). The case law is unsettled on the issue of whether state law on gift cards in which national banks are involved is preempted. *Compare* SPGGC, LLC v. Ayotte, 488 F.3d 525 (1st Cir. 2007) (holding that state law is preempted), *with* SPGGC, LLC v. Blumenthal, 505 F.3d 183 (2nd Cir. 2007) (holding that state law is not preempted).

29. Expedited Funds Availability Act, 12 U.S.C. §§ 4001-4010 (2000); Check 21 Act, 12 U.S.C. §§ 5001-5018 (Supp. 2005). Under the Check 21 Act, only consumers who receive a "substitute check" are entitled to the rights to a recredit and indemnification. Consumers whose checks are truncated do not have those rights.

30. See U.C.C. § 4-401 cmt. 3, 2B U.L.A. 98 (2002). It is not always self-evident whether consumers or industry will fare better under federal or state law. See Stacy Kaper, *Suddenly Banks Seem To Like Data Bill Impasse*, AM. BANKER, Feb. 27, 2007, at 1, available at 2007 WLNR 4196050 (reporting that financial services companies that formerly supported federal legislation to impose uniform national requirements to protect consumers when there was a data security breach looked more favorably upon inconsistent, non-uniform state legislation once the Democrats won control of Congress).

31. 2007 ACH RULES: A COMPLETE GUIDE TO RULES & REGULATIONS GOVERNING THE ACH NETWORK (2007); BENJAMIN GEVA, *THE LAW OF ELECTRONIC FUNDS TRANSFERS* §§ 5.03-5.08 (2006).

government agencies can take advantage of provisions in federal payments statutes that are designed to facilitate litigation to enforce the law. Enforcement is far more problematic where federal law does not apply.

Whether consumers are protected also depends upon the type of institution with whom the consumers do business. The federal law regulating debt collectors applies only to third party collectors.³² While a national bank is subject to many federal regulations, check cashing operations and the Internet lender PayPal are subject to state money transmitter laws that provide far less consumer protection.³³ A national bank is subject to regulations issued by the Office of the Comptroller of the Currency (OCC), while a state chartered bank is subject to Federal Deposit Insurance Corporation (FDIC) regulations.³⁴

Because of the lack of uniformity and comprehensive coverage, consumers and their lawyers face a formidable task identifying what laws apply to the consumers' disputes, what litigation strategy may be successful, and what regulatory agency, if any, they might turn to for assistance.

B. Federal Agency Regulation and Enforcement

Congress has delegated to government agencies the task of filling in many of the details lacking in the statutes.³⁵ The Federal Trade Commission has the greatest discretion because it promulgates regulations pursuant to the very broad statutory provision in the FTC Act prohibiting unfair and deceptive acts or practices. In the 1970s the FTC sought to ameliorate many consumer problems by issuing

32. 15 U.S.C. § 1692(a)(6) (2000).

33. Budnitz, *supra* note 26, at 121. See generally Christopher B. Woods, *Stored Value Cards*, 59 CONSUMER FIN. L.Q. REP. 211, 218 (2005).

34. MICHAEL P. MALLOY, *THE REGULATION OF BANKING* 830 (1992).

35. Professor Miller notes that, unlike members of Congress, those issuing agency regulations are not elected by the public. He calls regulation by federal agencies "a type of legislation without representation." Fred H. Miller, *Note: A Perspective on the Regulation B "Effects Test,"* 62 BUS. LAW. 559, 561 (2007).

regulations covering a wide variety of practices.³⁶ The FTC can enforce those regulations simply by showing a company violated the specific requirements in the regulation. The FTC does not have the more difficult burden, which it has if there is no regulation, of proving a company acted unfairly or deceptively.

Starting with the Reagan administration, however, the FTC called an abrupt halt to that effort and instead concentrated on attacking unfair and deceptive practices on a case-by-case basis.³⁷ Whereas a regulation automatically and instantly requires compliance by an entire industry, an action by the FTC against one company at a time results in far less comprehensive protection, for it affects only the company targeted. Action against one company sends a warning to other companies that they also may be subject to an FTC enforcement action if they engage in the same or similar conduct.³⁸ In actuality, however, the FTC may never act against other companies committing the same offense for a variety of reasons.³⁹ The FTC has not completely abandoned regulatory activity. But most recent FTC regulations have been issued pursuant to specific mandates from Congress in legislation dealing with narrow issues rather than under its discretion to draft regulations under its broad authority to regulate unfair and deceptive acts or practices.⁴⁰

There are other limitations on the FTC's enforcement efforts. Most FTC actions have been resolved by voluntary settlements in which the company does not admit it has violated the law. In addition, at

36. See *supra* note 20.

37. Mark E. Budnitz, *The FTC's Consumer Protection Program During the Miller Years: Lessons for Administrative Agency Structure and Operation*, 46 CATH. U. L. REV. 371 (1997).

38. MICHAEL GREENFIELD, CONSUMER TRANSACTIONS 87 (4th ed. 2003).

39. Among the reasons why the FTC may not act are the following: It may not be aware of other companies that are engaging in that conduct. Even if it is aware, it may not have the resources to act. Victor E. Schwartz & Cary Silverman, *Common Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 12 (2006). Other abusive practices may take priority, requiring the FTC to direct its efforts elsewhere. Finally, a company may structure its act or practice in a way that is somewhat different from that of the business against which the FTC acted, giving the company the argument that its conduct should be distinguished from that which the FTC found illegal. The FTC may choose to act instead against companies where such distinctions cannot be made because they are easier to win.

40. E.g., 16 C.F.R. pt. 600 (2007) (issued pursuant to the Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681(x) (2000)).

times the FTC has struggled when trying to find the proper analytical basis for exercising its authority when confronting new types of illegal practices.⁴¹ Furthermore, the FTC cannot seek civil penalties unless a company violates an agreement with the FTC or an FTC order.⁴²

The (FRB) has issued extensive regulations under the authority granted by legislation.⁴³ At times it has gone beyond what the law specifically states to provide consumers with broader coverage. For example, recently it extended protection to consumers using payroll cards.⁴⁴ On the other hand, it has refused to subject financial institutions to regulations for practices consumers contend violate existing laws.⁴⁵ Courts defer to agency judgment because of agencies' expertise. If the FRB refuses to declare a practice violates the law, it is very difficult for consumers to be successful in litigation to enforce a consumer protection law.

The actions of the OCC illustrate several features of the public law of financial institutions in the United States. The OCC has issued several regulations governing the national banks it is charged with

41. *E.g.*, FTC v. ReverseAuction.com, Inc. (F.T.C. 2000), <http://www.ftc.gov/os/caselist/reverseauction/index.shtml>. Compare Statement of Commissioner Mozelle W. Thompson (2000), <http://www.ftc.gov/os/2000/01/reversemt.htm> (finding respondent liable for engaging in unfair conduct) with Statement of Commissioners Orson Swindle & Thomas B. Leary (2000), <http://www.ftc.gov/os/2000/01/reversesl.htm> (finding respondent liable for engaging in deceptive conduct). *Privacy, Security Protection Will Remain Key Parts of FTC's Enforcement Agenda*, 91 ANTITRUST & TRADE REG. REP. (BNA) 491 (Nov. 10, 2006) (reporting that the Chair of the FTC admitted that developing "'sound public policy can be a daunting challenge'" because of the dynamic environment created by technological change).

42. *FTC Renews Support for Legislation to Raise Penalties in Data Privacy Cases*, 75 U.S.L.W. 2613 (Apr. 17, 2007) (reporting that the FTC supports legislation to grant it authority to assess civil penalties against companies that engage in telephone pretexting, spyware, and data security breaches).

43. *E.g.*, Electronic Fund Transfers, 12 C.F.R. pt. 205 (2007); Consumer Credit Disclosures, 12 C.F.R. pt. 226 (2007); Prompt Availability of Bank Deposits, 12 C.F.R. pt. 229 (2007).

44. Electronic Fund Transfers, 71 Fed. Reg. 51,437, 51,438 (Aug. 30, 2006).

45. An example is the FRB's refusal to adopt strong regulations regarding overdraft fees. Budnitz, *supra* note 26, at 119; see also Steven Sloan, *Bernanke Talks Subprime, Private Equity*, AM. BANKER, May 18, 2007, at 3 (reporting that FRB Chairman Bernanke admitted the FRB had the authority to prohibit abusive lending practices, but favored better disclosure to consumers and guidance to financial institutions by supervisory agencies instead). In addition, the FRB has stated that it does not need to draft rules defining its authority to bring enforcement actions for unfair and deceptive acts or practices. Instead, it favors taking action on a case-by-case basis. Nevertheless, the FRB has never brought an enforcement action based on unfair or deceptive practices. Cheyenne Hopkins, *The Fed's Record on Abusive Loans*, AM. BANKER, Aug. 29, 2007, available at 2007 WLNR 16799815.

regulating.⁴⁶ For example, there are rules governing the fees that banks can charge customers, an issue of growing importance to consumers.⁴⁷ On its face, this would seem to be beneficial to consumers since neither federal law nor the UCC regulates fees.⁴⁸ The OCC regulation, however, provides no protection for consumers. Instead, the OCC issued a regulation that ensures banks a steady stream of income from customer fees.⁴⁹ That is arguably consistent with its regulatory obligation to permit banks to act in ways that will promote their safety and soundness,⁵⁰ but contrary to the interests of consumers.

C. Preemption

The OCC has weakened consumer protection and enforcement by challenging the enforcement of state laws to protect consumers on the ground that its regulations preempt state law.⁵¹ By preempting state

46. Arthur E. Wilmarth, Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225 (2004).

47. 12 C.F.R. § 7.4002 (2007); see Katie Kuehner-Hebert, *Debit Reward Payoff: More Bounce Fees*, AM. BANKER, Mar. 1, 2007, at 1 (describing a study of the overdraft fees banks collected from consumers using debit cards); Budnitz, *supra* note 26, at 119 (discussing overdraft fees and bounced check protection programs).

48. The UCC does not regulate bank fees. U.C.C. § 4-406 cmt. 3, 2B U.L.A. 116 (2002).

49. The regulation states that the amounts a bank charges for account services is a business decision to be made "according to sound banking judgment and safe and sound banking principles." 12 C.F.R. § 7.4002 (2007). A bank "may consider" the costs incurred by the bank, plus a profit margin, in providing the service, and the deterrence of misuse by bank customers. *Id.* The latter means a bank can charge more than its cost and a reasonable profit margin in order to deter customers from engaging in practices such as bouncing checks.

50. The former general counsel of Citigroup's Europe and North America card business claims: "The role the OCC prefers is to help maximize the profits of banks by protecting them from competition, consumers, and state laws." Duncan MacDonald, *Eventually, Industry Will Regret Watters Ruling*, AM. BANKER, May 18, 2007, at 11. Comptroller John Dugan denies that the OCC is concerned only with safety and soundness to the exclusion of consumer protection. Cheyenne Hopkins, *Consumer Protection, and Image Protection*, AM. BANKER, Feb. 9, 2007, available at 2007 WLNR 3006983. An OCC critic, however, claims the OCC is "an agency whose mission is in conflict." *Id.*; see Eugene A. Ludwig, *Enforcement Disconnect Causes Undue Harm*, AM. BANKER, Feb. 23, 2007, available at 2007 WLNR 3956521 (describing the banks' difficulties when facing enforcement actions by state attorneys general as well as federal agencies).

51. The Supreme Court recently upheld the OCC's power to preempt state law. *Watters v. Wachovia Bank*, 127 S. Ct. 1559 (2007); see MacDonald, *supra* note 50, at 11 (the former general counsel of Citigroup's Europe and North America card business opining that "[t]he industry's justification for

consumer protection laws, the OCC promotes the interests of national banks. The OCC's preemption of state law has a substantial effect on enforcement. According to the New York State Superintendent of Banks, the OCC's preemption of state law will make national bank charters "more attractive . . . [and] is likely to chill state regulation and/or encourage the migration of state institutions to states with less regulation."⁵² In addition, preemption "will further impede local [enforcement] efforts to respond quickly and with innovative measures."⁵³

II. STATE LAW

States have enacted a wide variety of laws to protect consumers. Chief among them are laws prohibiting unfair and deceptive acts and practices, called "UDAP" or "mini-FTC" statutes. Every state has enacted a version of a UDAP law.⁵⁴ Typically, in addition to a general prohibition of unfair and deceptive acts or practices, these statutes include a "laundry list" of specific acts and practices that are deemed to be unfair or deceptive.⁵⁵ Most importantly, the state's attorney general is authorized to enforce UDAP laws, and consumers have a private right of action.⁵⁶ The latter is of major significance

Watters—that a myriad of federal laws will adequately protect consumer interests—is a joke. Much of federal law provides only nominal protection of consumers and some of it is actually harmful to their interests.") While aggressively attacking states for trying to enforce consumer protection laws against national banks, the OCC is also trying to gain the cooperation of other federal agencies to pool resources to assist consumers. Cheyenne Hopkins, *OCC Seeks Help With Its One-Stop Consumer Site*, AM. BANKER, July 17, 2007, available at 2007 WLNR 13556787.

52. Hilary Johnson, *N.Y. Official Gives Views on Subprime, Preemption*, AM. BANKER, May 14, 2007, at 2.

53. *Id.* See Cheyenne Hopkins, *Taylor, Going Repeats Dual System Fears*, AM. BANKER, March 9, 2007, at 1 (quoting the former N.Y. State Superintendent of Banks opining that preemption results in large banks applying for federal rather than state charters in order to avoid state consumer protection laws and reporting on the substantial reduction of revenue to the state banking agency that resulted, providing an incentive for that agency to be less aggressive in enforcing those laws).

54. JONATHAN SHELDON & CAROLYN L. CARTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES 1 (5th ed. 2001).

55. *E.g.*, O.C.G.A. § 10-1-393(b) (Supp. 2007); SHELDON & CARTER, *supra* note 54, at 93.

56. SHELDON & CARTER, *supra* note 54, at 469–535, 775–807.

because consumers have no private right of action under the FTC Act.⁵⁷

As significant as UDAP laws are to consumer protection in the United States, the European Union Directive on Unfair Contract Terms provides even greater protection than the UDAP statutes.⁵⁸ The Directive's definition of unfair terms is so broad that it could strike down as unfair many terms found in standard American consumer contracts.⁵⁹ For example, in cases brought pursuant to laws enacted by individual countries to implement the Directive, the following terms have been found unfair: disclaiming warranty liability, permitting the company to change sales terms at any time, disclaiming liability for late delivery, and a choice of forum clause requiring litigation to be filed in the forum where the merchant's place of business is located.⁶⁰ The Directive requires contracts to be written in "plain language," and the United Kingdom understands that to mean consumers must be able to understand the contract's terms without having to consult a lawyer.⁶¹ The European Union has issued regulations on unfair terms. Those regulations include a non-exclusive list of unfair terms including the following that might be subject to successful challenge if the United States had comparable laws: denying consumer full redress when the business breaches the

57. Courts also have refused to find a private right of action in other statutes. *See, e.g., Deceptive Practices: TCPA's Identification Requirements Are Not Enforceable in Private Action*, [Highlights] Antitrust & Trade Reg. Rep. (BNA), at D10, May 2, 2007 (rejecting contention that section 227(d) of the Telephone Consumer Protection Act provides a private right of action).

58. Winn & Webber, *supra* note 4, at 217.

59. Under the Directive, "contract terms not individually negotiated are unfair if they create a significant imbalance, to the consumer's detriment, between the rights and obligations of the contracting parties." *Id.*

60. *Id.* at 221–22. The Brazilian Consumer Protection Code of 1990 also regulates unfair terms including voiding clauses that reduce the business' liability for defective goods, fail to provide consumers with a refund option, require mandatory arbitration, and permit the business to unilaterally change its obligations to perform under the contract. Jennifer S. Martin, *An Emerging Worldwide Standard for Protections of Consumers in the Sale of Goods: Did We Miss an Opportunity with Revised UCC Article 2?*, 41 TEX. INT'L L.J. 223, 257–58 (2006). Mexico's consumer protection law invalidates certain terms in adhesion contracts, such as those allowing the seller to unilaterally modify its obligations. *Id.* at 257. Japan's Consumer Contract Act voids as unfair terms clauses that exclude or restrict the seller's liability for damages when the seller does not perform. *Id.* at 249.

61. Winn & Webber, *supra* note 4, at 218.

contract, permitting the business to vary the terms of the contract after it was formed, and subjecting consumers to unfair penalties.⁶²

In addition to UDAP statutes, states have enacted laws regulating many specific types of transactions including retail installment sales contracts⁶³ and motor vehicle sales financing.⁶⁴ States also regulate home solicitation sales⁶⁵ and usury.⁶⁶ While these statutes provide consumers another layer of protection besides the UDAP laws, they have a very narrow scope.

State attorneys general have established a national organization, the National Association of Attorneys General, that has a unit devoted to sharing information about illegal behavior towards consumers and coordinating enforcement actions.⁶⁷ A few attorneys general have been particularly active enforcing laws that protect consumers. For example, former New York Attorney General Eliot Spitzer brought a number of major consumer cases.⁶⁸ Former

62. *Id.* The French trial court found that the terms in AOL's contract were unfair. *See id.* at 222–23.

63. *E.g.*, O.C.G.A. §§ 10-1-1 to -16 (2000 & Supp. 2007).

64. *E.g.*, O.C.G.A. §§ 10-1-30 to -42 (2000 & Supp. 2007).

65. *E.g.*, O.C.G.A. § 10-1-6 (2000).

66. ELIZABETH RENUART & KATHLEEN E. KEEST, *THE COST OF CREDIT* 26–31 (3d ed. 2005).

67. Dennis Cuevas, Nat'l Ass'n of Attorney Generals, Consumer Protection, http://www.naag.org/consumer_protection.php (last visited June 30, 2007).

68. *ING Settles with N.Y., N.H. for \$32.75 Million*, MONEY MGMT. EXECUTIVE, Oct. 23, 2006, at 3, available at 2006 WLNR 18377197 (describing Spitzer's action against ING for paying millions each year to teachers unions which in turn steered business to ING); Paul Grimaldi, *CVS to Pay \$152,000 Fine to New York State*, PROVIDENCE J. BULL., Oct. 17, 2006, available at 2006 WLNR 18092324 (describing Spitzer's action against CVS for failing to make sweepstakes entry forms available to those who did not purchase goods from CVS, in violation of N.Y. law); *Settlement Reached Between State and Mobile Home Retailer*, BUS. REV., Sept. 19, 2006, available at 2006 WLNR 16262748 (describing Spitzer's action against a mobile home retailer that failed to complete timely installations and other repair work); Fred O. Williams, *Spitzer, Faso Address Abusive Collectors*, BUFFALO NEWS, Aug. 12, 2006, available at 2006 WLNR 14005733 (describing Spitzer's actions against debt collectors who hound consumers to pay obligations consumers have already satisfied). Spitzer's successor, Andrew Cuomo, appears to intend an aggressive consumer protection administration. *See First Premier Bank to Pay Penalty*, N.Y. TIMES, Aug. 16, 2007, at C2 (reporting that Cuomo reached a settlement whereby a bank paid \$4.5 million for refunds to consumers for allegedly deceptive credit card marketing practices); Michelle Kessler, *Cuomo Sues Dell on Behalf of Customers*, USA TODAY, May 17, 2007, at 3B (reporting that Cuomo sued Dell for inducing consumers to sign up for what they believed was no-interest financing, then charging interest, and not honoring service contracts); *see also* Kate Berry, *Wide Scope in Ohio AG's Subprime Legal Plans*, AM. BANKER, May 15, 2007 (reporting that the Ohio Attorney General announced his intention to sue mortgage lenders, bond rating agencies, and Wall Street investment banks that invested in bonds backed by subprime mortgages).

Minnesota Attorney General Mike Hatch did the same.⁶⁹

UDAP laws are not a panacea, however. State attorneys general have limited resources and many other duties besides enforcing the UDAP law. Even when an attorney general office devotes substantial resources, its efforts may be aggressively opposed by federal enforcement agencies, resulting in a halt to state actions. For example, the OCC has successfully challenged major cases brought by New York's former Attorney General.⁷⁰ The OCC's actions against the New York Attorney General likely dissuaded other attorneys general from bringing actions against national banks violating the laws of their states. In 2007, the United State Supreme Court upheld the OCC's preemption of certain types of state laws that otherwise would have applied to the real estate operating subsidiary of a national bank.⁷¹ The sharply differing views of the majority and dissent in that case illustrate the continuing battle between the states and the federal government over who has authority to regulate financial institutions operating within a state. The battle continues because the United States still has not determined the proper balance of power between the states and the federal government.

69. Thomas Lee, *Ameriquest Lawsuits Can Be Bundled, Judge Rules: Granting the Plaintiffs Class-Action Status Means the Subprime Lender Could Face 22,000 Minnesota Borrowers*, STAR TRIB., April 20, 2007, available at 2007 WLNR 7501596 (describing Hatch's investigation of subprime lender that uncovered illegal practices and led to major settlement); H.J. Cummins, *Searches Find Dissatisfaction; Top Executives Are Handing Over as Much as \$15,000 for Help in Landing a Dream Job. But Some Complain that Job "Agents" Don't Deliver*, STAR TRIB., July 10, 2006, available at 2006 WLNR 12036538 (describing Hatch's action against a company that falsely claimed it had "special access to the hidden job market" and promising it could find consumers jobs in 120 days); Glenn Howatt, *Hatch Criticizes Blue Cross' Fund Reserves: He Says Premiums Continue to Rise While Reserves Total More Than \$1 Billion*, STAR TRIB., Apr. 27, 2006, available at 2006 WLNR 7098505 (describing Hatch's investigation of Blue Cross and Blue Shield).

70. Office of Comptroller of the Currency v. Spitzer, 396 F. Supp. 2d 383 (S.D.N.Y. 2005); see also *Mortgage Market Turmoil: Hearing on H.R. 1182 Before the S. Comm. on Banking, Housing & Urban Affairs*, 110th Cong. 1-10 (2007) (statement of Joseph A. Smith, Jr., North Carolina Commissioner of Banks) (testifying that the OCC has supported national bank's challenges to Spitzer's attempts to enforce federal laws, while refusing to enforce those laws itself); Duncan A. MacDonald, *Viewpoint: Electoral Tide, a Warning on Preemption*, AM. BANKER, Dec. 15, 2006, available at 2006 WLNR 22374624 (predicting that Congress will pass legislation supporting Spitzer's position that the OCC does not have the authority to preempt state enforcement of laws against national banks).

71. Watters v. Wachovia Bank, 127 S. Ct. 1559 (2007).

III. ENFORCEMENT BY CONSUMERS

Several federal statutes include specific provisions to encourage enforcement by enabling the consumer to act as a “private attorney general.” These laws permit class actions and allow a successful consumer to collect not only actual damages, but also statutory damages, costs, and attorney’s fees.⁷²

A. *The ECOA Still Has Potential*

Perhaps the consumer statute with the most obvious characteristics of public law is the Equal Credit Opportunity Act (ECOA).⁷³ That law prohibits discrimination in granting, increasing, or terminating credit⁷⁴ based on “race, color, national origin, sex or marital status, or age,” income derived from public assistance, or the good faith exercise of any right under the Consumer Credit Protection Act.⁷⁵ Private enforcement is encouraged: consumers who prove a business failed to comply with the ECOA are entitled to actual damages, costs, and attorney’s fees.⁷⁶ Consumers’ ability to prove discrimination under the ECOA has been mixed.⁷⁷ The recent string of favorable settlements in cases against automakers accused of charging higher loan rates to blacks and Hispanics, however, demonstrates that the ECOA is still a powerful tool under the right circumstances.⁷⁸

72. Truth in Lending Act, 15 U.S.C. § 1640 (2000); Electronic Fund Transfer Act, 15 U.S.C. § 1693(m) (2000).

73. 15 U.S.C. §§ 1691–1691f (2000).

74. 12 C.F.R. § 202.2(c) (2007).

75. 15 U.S.C. § 1691(a) (2000).

76. 15 U.S.C. § 1691(e)(a), (d) (2000).

77. *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026 (N.D. Ga. 1980) (holding that consumers can try to prove discrimination using the “effects test,” but noting that it is difficult for consumers to satisfy its requirements and finding consumer in the instant case failed to do so). See generally DEANNE LOONIN & CHI CHI WU, CREDIT DISCRIMINATION (4th ed. 2005).

78. The cases are described at <http://www.nclc.org>. For a critical assessment, see John L. Ropiequet & Nathan O. Lundby, *Dealer Rate Participation Class Actions Under the ECOA: Have We Reached the End of the Road?*, 62 BUS. LAW. 663 (2007). See also Will Lester, *Report: Race Bias Found in Auto Loans*, ATLANTA J.-CONST., May 8, 2007, at C3 (reporting on a Consumer Federation of America study that concluded, based on FRB data, that blacks were more likely than whites and Hispanics to be charged higher auto loan rates).

B. State UDAP Laws and Their Limitations

State UDAP statutes provide a fertile ground for consumers seeking redress for abusive behavior. Much conduct can be subsumed under the rubric of “unfair or deceptive acts or practices.” Courts in many jurisdictions, however, have greatly restricted the utility of these laws. Some have reasoned that the statutes truly are “public law.” Therefore, consumers cannot pursue cases unless they can prove that the defendant’s conduct not only injured the consumer plaintiff, but also that bringing the action is in the public interest.⁷⁹

One could argue that it is reasonable to so limit a cause of action based on a violation that is as broad and vague as “unfair or deceptive.” Requiring consumers to demonstrate an action is in the public interest, however, is problematic. For instance, such a requirement forces the court to read into the statute a requirement that the legislature did not include.⁸⁰ Moreover, it is a requirement that is contrary to the statute’s objective of providing broad relief for consumers.⁸¹ “Unfair and deceptive” are broad terms, but were used because of the ability of fraudsters to constantly alter their conduct to escape coming within the scope of laws drafted to combat specific conduct. Imposing a public interest requirement by judicial fiat also conflicts with the mandate in UDAP laws that require courts to construe the statute liberally to promote its objective to protect consumers.⁸² Finally, the public interest requirement has been difficult to apply to specific cases.⁸³ Courts have struggled to describe which acts are purely private, and which affect not only the consumer plaintiff, but also the consuming public generally.

79. GREENFIELD, *supra* note 38, at 151.

80. *Id.*

81. O.C.G.A. § 10-1-391(a) (2000) (stating that the purpose of the Georgia UDAP law is “to protect consumers and legitimate business enterprises . . .”).

82. O.C.G.A. § 10-1-391(b) (2000).

83. Compare *Paces Ferry Dodge v. Thomas*, 331 S.E.2d 4 (Ga. Ct. App. 1985) (holding consumer satisfied public interest requirement because cars were sold on seller’s lot), with *Burdakin v. Hub Motor Co.*, 357 S.E.2d 839 (Ga. Ct. App. 1987) (holding that public interest requirement not satisfied where truck was repaired by a vehicle repair shop).

According to some courts, only if the latter is affected is the business subject to the UDAP statute and its enforcement.⁸⁴

UDAP statutes contain many limitations.⁸⁵ Some state UDAP laws prohibit class actions.⁸⁶ This prevents UDAP statutes from having a public law function, as consumer plaintiffs cannot use the law to protect anyone except themselves. UDAP statutes do not invalidate industry conduct that is permitted by other law. For example, conduct permitted by the UCC is immune from a UDAP challenge. This undermines consumer protection because the UCC is not intended to protect consumers.⁸⁷ Moreover, the UCC's rules are primarily default rules; they do not apply if the parties agree to something else.⁸⁸ Consequently, a business can avoid the default rules by drafting contracts imposing terms more favorable to the business than those provided for in the UCC. As a result, there is far less of a "public" law characteristic to the UCC than to typical consumer protection laws that impose mandatory obligations on companies dealing with consumers.

C. *The Limits of the Unconscionability Doctrine*

Consumers have challenged the contracts they entered into based on the doctrine of unconscionability. A threshold issue is whether it is appropriate to categorize the law of unconscionability as public law. Ordinarily unconscionability arises as a defense in breach of contract cases. A breach of contract case typically is a private dispute between

84. See, e.g., *Zeeman v. Black*, 273 S.E.2d 910 (Ga. Ct. App. 1980). In trying to articulate which situations fall under the scope of the Georgia UDAP law, the court used terms that are difficult to apply such as an act or practice that "had or has the potential harmful effect on the general consuming public." *Id.* at 914. The statute does not cover "private wrongs occurring outside the context of the public consumer marketplace." *Id.*

85. *SHELDON & CARTER*, *supra* note 54, at 18–88 (describing the exemptions of certain transactions and types of sellers, the exclusion of certain persons such as assignees, and conflict with federal law).

86. E.g., O.C.G.A. § 10-1-399(a) (2000); see *SHELDON & CARTER*, *supra* note 54, at 648.

87. E.g., U.C.C. § 4-401 cmt. 3, 2B U.L.A. 98 (2002); see also *id.* § 4-406 cmt. 3, at 116.

88. *Id.* § 4-103(a), 2B U.L.A. 14 (2002).

two parties with no effect on other members of the public.⁸⁹ Procedural unconscionability examines the process of making the contract and considers factors such as “the conspicuousness and comprehensibility of the contract language . . . and the presence or absence of a meaningful choice.”⁹⁰ This is, in part, an inquiry into whether there was, in reality, an agreement by the parties to the term the consumer is challenging. Moreover, the consumer’s remedy is to have the court strike those contract terms that are unconscionable.⁹¹ All of these factors illustrate the private law character of the doctrine of unconscionability.

In other respects, however, unconscionability bears characteristics of public law. It has been defined as “abhorrent” to the public values of “good morals and conscience.”⁹² Most courts go beyond procedural unconscionability and also require the consumer to prove substantive unconscionability. In deciding if the consumer has satisfied this requirement, the court considers “the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of risks between the parties, and similar *public policy concerns*.”⁹³

Courts have recognized the public law aspect of unconscionability, and it has contributed to their caution in permitting consumers to prevail on this theory. Some courts acknowledge that unconscionability promotes important public policy objectives because it is “a potent tool for shielding disadvantaged and uneducated consumers from overreaching merchants.”⁹⁴ But instead of boldly using unconscionability as a public law doctrine to protect consumers, courts are restrained by contrary public policy. They believe they have an obligation to apply state law that “protects the

89. *But see* *In re Orkin Exterminating Co.*, 108 F.T.C. 263 (1986), *aff’d*, 849 F.2d 1354 (11th Cir. 1988), *cert. denied*, 488 U.S. 1041 (1989) (finding a breach of contract by a company constituted an unfair practice under the FTC Act).

90. *NEC Technologies, Inc. v. Nelson*, 478 S.E.2d 769, 772 (Ga. 1996).

91. U.C.C. § 2-302(1), 1 U.L.A. 409 (2004).

92. *F.N. Roberts Pest Control Co. v. McDonald*, 208 S.E.2d 13 (Ga. Ct. App. 1974).

93. *NEC Technologies*, 478 S.E.2d at 772.

94. *Id.* at 774.

freedom of parties to contract.”⁹⁵ In addition, courts refuse to be overly paternalistic and to release consumers from “bad bargains.”⁹⁶ Consequently, courts often decline to find that contract terms are unconscionable unless they believe a “decent, fair-minded person would view the ensuing result [of enforcing the challenged term with] . . . a profound sense of injustice.”⁹⁷ The end result is that, because of countervailing policy considerations, the doctrine of unconscionability has limited utility for consumers. The courts’ reluctance to use the doctrine of unconscionability as a tool to promote consumer protection reflects the United States’ general failure to reach a consensus on the need for effective enforcement of strong consumer protection laws. The European Union’s Directive on unfair contract terms provides greater protection.⁹⁸

D. Arbitration, Privatization, and Class Actions

Consumers have won many victories in their battle against abusive practices. Many laws are on the books, and consumer lawyers have brought thousands of successful lawsuits to enforce those laws and protect the public. Nevertheless, formidable obstacles to strong enforcement remain. The class action is the most effective way for consumer advocates to enforce laws to protect consumers.⁹⁹ Businesses, however, have inserted mandatory pre-dispute arbitration clauses into most consumer contracts.¹⁰⁰ These clauses prohibit consumers from bringing their actions in court. This results in the privatization of the judicial system.

95. *Id.*

96. *Id.* at 774–75 (quoting *Fotomat Corp. of Florida v. Chanda*, 464 So.2d 626, 630 (Fla. Dist. Ct. App. 1985)).

97. *Id.* at 774.

98. Winn & Webber, *supra* note 4, at 217; see *supra* notes 58–62.

99. *E.g.*, *Wells Fargo Settles Class Suit over California Mortgage Practices*, 88 BANKING REP. (BNA) 761 (Apr. 30, 2007) (reporting that Wells Fargo agreed to settle a consumer class action claiming that the bank did not provide correct information about fees and penalties).

100. Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1240 (2001).

Businesses defend the use of arbitration clauses.¹⁰¹ They contend that arbitration often is faster and less expensive than litigation in court. One reason it often is faster is that discovery is far more limited. Faster resolution means a successful consumer can obtain the arbitrator's award more promptly. Quicker litigation can result in lower attorney fees for the parties.

The disadvantages for consumers and public law enforcement far outweigh these alleged benefits, however. Arbitration is a secret proceeding; litigation in that forum is not a matter of public record. Consequently, government enforcement agencies have no easy way to learn what cases are being arbitrated. In addition, the agreements bar consumers from bringing their arbitration cases as class actions.¹⁰² Businesses point out this makes resolution of consumer cases much faster and less expensive than if class actions were allowed. Unfortunately, it also often makes it infeasible for consumers to enforce consumer laws.¹⁰³ The courts are divided as to the validity of barring class actions in arbitration.¹⁰⁴ Even if a consumer were permitted to bring a class action before an arbitration panel, there is no assurance that public laws to protect consumers would be enforced, because arbitrators' awards cannot be challenged in court on the basis that the arbitrators failed to follow the law.¹⁰⁵

101. Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 252–57 (2006).

102. Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75 (2004).

103. *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007).

104. *Compare Muhammad v. County Bank of Rehoboth Beach*, Del. 912 A.2d 88 (N.J. 2006), *cert. denied*, 127 S. Ct. 2032 (2007) (class action waiver unconscionable under New Jersey law where consumer had a small claim involving complex issues), *with Delta Funding Corp. v. Harris*, 912 A.2d 104 (N.J. 2006) (class action waiver not per se unconscionable in case where consumer sought large award). *See also Dale*, 498 F.3d 1216 (finding class action waiver unconscionable where the cost of vindicating consumers' claims is greater than each consumer's potential recovery; Cable Act does not provide for recovery of attorney's fees; and bad faith must be shown to recover attorney's fees under Georgia law).

105. Some courts permit the losing party to appeal based on the arbitrator's "manifest disregard of the law." But courts define that doctrine very narrowly. *See, e.g., Am. Laser Vision, P.A. v. The Laser Vision Inst.*, L.L.C., 487 F.3d 255 (5th Cir. 2007).

The role of arbitration in other countries is very different. In Mexico and countries in South America, arbitration is rare, and when it takes place, usually is voluntary and conducted by a government body, not a private organization.¹⁰⁶ Mandatory consumer arbitration generally is banned by the European Union¹⁰⁷ and mandatory arbitration clauses are deemed void in Brazil.¹⁰⁸

E. Other Class Action Restrictions

Not all litigation is subject to arbitration agreements. But a transaction not subject to an arbitration clause may nevertheless be denied class action status for not satisfying the requirements for class certification, either under the Federal Rules of Civil Procedure or the applicable consumer statute.¹⁰⁹ Even a successful class action in a court may do little to protect consumers. Consumer protection statutes typically place a cap on the amount of damages the consumer class can recover.¹¹⁰ This prevents a class action from forcing a company into bankruptcy. As a result, where the defendant has limited assets, class recovery will be small.¹¹¹

Many major consumer cases are brought by legal services offices representing low-income consumers. Their ability to do so effectively, however, is severely hampered by an amendment to the

106. Jean Sternlight, *Is the Consumer Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 852 (2002); Robert G. Vaughn, *Consumer Protection Laws in South America*, 17 HASTINGS INT'L & COMP. L. REV. 275, 316–17 (1994).

107. Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 156 (2006).

108. Martin, *supra* note 60, at 257–58.

109. See, e.g., *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418 (1st Cir. 2007) (holding that Congress intended the right of rescission under TILA to be a personal remedy only); see Harry Terris, *Should Class Action Suits Trigger Bulk Rescissions?*, AM. BANKER, Mar. 8, 2007, available at 2007 WLNR 4828396.

110. E.g., 15 U.S.C. § 1640(a)(2)(B) (2000).

111. *Stolicker v. Muller, Muller, Richmond, Harms, Myers & Sgroi, P.C.*, No. 1:04-CV-733, 2007 U.S. Dist. LEXIS 26338 (W.D. Mich. Apr. 10, 2007) (granting preliminary approval of the settlement of a class action for violation of the Fair Debt Collection Practices Act, where because of the defendant's low net worth, if all 505 members of the class file claims, each will receive only \$1.75).

Legal Services Corporation Act that forbids Congress from funding any such office that initiates or participates in class action lawsuits.¹¹²

In addition, in 2005 the federal Class Action Fairness Act went into effect. That law makes it easier to remove multi-state class action cases to federal court.¹¹³ The statute was pushed by businesses who accused consumers of bringing cases in state courts where they could shop for consumer-friendly judges. According to a recent study, the Act is working as its proponents had hoped, resulting in more cases being removed to the federal courts.¹¹⁴

IV. THE ROLE OF PRIVATE ORGANIZATIONS

A law may permit certain business practices, thus precluding litigation challenging them. A law may impose requirements on business, but restrict enforcement so greatly that there is no way to ensure compliance. Consequently, it is relevant to consider the crucial role private organizations play in drafting public laws affecting consumers. The National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI) drafted the Uniform Commercial Code, which governs sales, personal property leases, negotiable instruments, and secured transactions.¹¹⁵ They also drafted amendments to keep these laws up to date.¹¹⁶ Most states have enacted the UCC as proposed by these private organizations.¹¹⁷ As a result, this privately drafted law has become public law. Critics complain that many major issues have

112. 42 U.S.C. § 2996(e)(d)(5) (2000); see 45 C.F.R. § 1617.3 (2007).

113. 28 U.S.C. §§ 1711–1715 (Supp. 2007). Some district courts place the burden of showing the \$5 million dollar controversy threshold was not met on the party opposing removal, but the Third Circuit recently decided the party seeking removal has that burden. *Morgan v. Gay*, 471 F.3d 469 (3d Cir. 2006).

114. Ralph Lindeman, *Federal Courts Take More Class Actions Since Passage of Business-Backed Law*, 88 BANKING REP. (BNA) 761 (Apr. 30, 2007) (reporting on study conducted by the Federal Judicial Center, showing an increase in cases raising state law contract and fraud claims).

115. MARION W. BENFIELD, JR. & MICHAEL M GREENFIELD, *SALES*, 2–4 (5th ed. 2007). Professor Budnitz is a member of the ALI.

116. *Id.*

117. *Id.*

been resolved to the detriment of consumer interests.¹¹⁸ Although immensely influential, NCCUSL is not always successful. In the 1970's NCCUSL promoted the Uniform Consumer Credit Code (UCCC), which was adopted by only eight states.¹¹⁹ The UCCC was opposed by those who claimed that, like the UCC, it did not provide adequate protection for consumers.¹²⁰ More recently, NCCUSL proposed a law governing software that garnered so much opposition from consumer groups and others that the organization stopped promoting it after it had been adopted by only two states.¹²¹

Another private organization drafts rules that govern an electronic payment processing system called the Automated Clearinghouse (ACH). Crucial payments to and from consumer bank accounts are governed by these rules, including debit cards, direct deposit, preauthorized transfers of mortgage and other recurring obligations, and electronic conversion of checks. Unlike the UCC that was drafted by NCCUSL and the ALI, the National Automated Clearinghouse Association (NACHA) rules do not have to be enacted into law by a legislature. In order to participate in the ACH system, businesses must sign contracts in which they agree to comply with the NACHA rules. The parties to these contracts are NACHA, financial institutions, and merchants. NACHA drafts the rules. Neither consumers nor any government agency has a formal role in drafting the rules because they are not members of NACHA.¹²²

118. See, e.g., Mark E. Budnitz, *The Revision of U.C.C. Articles Three and Four: A Process Which Excluded Consumer Protection Requires Federal Action*, 43 MERCER L. REV. 827 (1992); Gail K. Hillebrand, *Revised Articles 3 and 4 of the Uniform Commercial Code: A Consumer Perspective*, 42 ALA. L. REV. 679 (1991); Edward Rubin, *Efficiency, Equity and the Proposed Revisions of Articles 3 and 4*, 42 ALA. L. REV. 551 (1991).

119. Chris Peterson, *Failed Markets, Failing Government, or Both? Learning from the Unintended Consequences of Utah Consumer Credit Law on Vulnerable Debtors*, 2001 UTAH L. REV. 543, 552 (2001).

120. *Id.*

121. Daniel A. DeMarco & Christopher B. Wick, *Now UCITA, Now You Don't: A Bankruptcy Practitioner's Observations on the Proposed Uniform Computer Information Transactions Act*, AM. BANKR. INST. J. 34 (May 2004).

122. Mark E. Budnitz, *Consumer Payment Products and Systems: The Need for Uniformity and the Risk of Political Defeat*, 24 ANN. REV. BANKING & FIN. L. 247, 264 (2005). Another example of private lawmaking is the rules of the credit card associations. Arnold S. Rosenberg, *Better Than Cash? Global*

The issue for consumer protection enforcement is whether there is any practical significance to the fact that the NACHA rules are private law rather than public law. These rules would be an appropriate subject for public law since they govern a vast national system transferring billions of dollars every day, rules that directly affect many millions of consumers and their money. On the other hand, the rules do not, and legally cannot dilute any of the considerable protections guaranteed consumers in the Electronic Fund Transfers Act. Furthermore, in some respects the NACHA rules provide even more consumer protection than applicable law.¹²³

Nevertheless, there are serious consequences to the NACHA rules being private law. It is not at all clear whether consumers have any remedies when a financial institution, merchant, payment processor, or creditor violates NACHA rules. Courts are divided as to whether consumers can sue when a firm violates the rules because consumers are not a party to the agreements that are subject to the rules.¹²⁴

In addition, the government may refrain from enacting needed protections into law, believing they are not needed because they are in the NACHA rules. However, consumers could lose those protections overnight if NACHA decides to change their rules. If that happened, the government might come to the rescue and eventually pass laws to fill the gap. But it is also possible Congress would fail to act. And even if it did enact legislation, Congress typically does not consider and pass new laws quickly. Should a considerable amount of time elapse before Congress acted, consumers would be at risk during this time.

Private organizations are actively involved in attempting to influence legislation. National trade groups such as the American

Proliferation of Payment Cards and Consumer Protection Policy, 60 CONSUMER FIN. L.Q. REP. 426, 445 (2006).

123. BUDNITZ & SAUNDERS, *supra* note 28, at 87.

124. *Volden v. Innovative Fin. Sys., Inc.*, 440 F.3d 947 (8th Cir. 2006) (holding that consumer cannot bring breach of contract claim for failure of check casher to comply with NACHA rules). *But see* *Security First Network Bank v. C.A.P.S., Inc.*, No. 01 C 342, 2002 WL 485352 (N.D. Ill. Mar. 29, 2002) (permitting non-party to sue for violation of NACHA rules).

Bankers Association, America's Community Banks,¹²⁵ the Community Financial Services Association,¹²⁶ and the Mortgage Bankers Association, as well as individual companies such as CitiBank, often submit testimony to Congress and regulatory agencies, urging them to enact statutes and regulations favorable to them.¹²⁷ Organizations such as Consumer Federation of America, Public Justice (formerly Trial Lawyers for Public Justice), Consumers Union, the National Consumer Law Center, and U.S. PIRG do the same for consumer interests.¹²⁸ The major tactical

125. The American Bankers Association and America's Community Bankers agreed to merge their groups. Sarah Colwell, *Colorado Springs Financial Briefs*, COLO. SPRINGS BUS. J., June 29, 2007, available at 2007 WLNR 12480997.

126. The Community Financial Services Association, an organization representing payday lenders, has been particularly active in response to widespread challenges to its industry. In 2007 it began a \$10 million consumer education project and established a code of best practices for its members. William Launder, *Payday Loans Get Seal of Approval from Trade Group*, AM. BANKER, Feb. 22, 2007, at 7, available at 2007 WLNR 3870122. A consumer advocate criticized the Association's efforts: "It's really just a halfhearted attempt at self-regulation and a full-scale push for self promotion of a junk product . . . [The CFSA is] trying to preempt state legislation efforts by framing themselves as an effort at self-regulation." *Id.*

127. *Improving Credit Card Consumer Protection, Hearing Before the H. Comm. on Financial Services, Subcomm. on Financial Institutions and Consumer Credit*, 110th Cong. (2007) (Statement of John Carey, Chief Administrative Officer, CitiCards), available at 2007 WL 1651810; *Credit Card Regulation Issues, Hearing Before H. Comm. on Financial Services, Subcomm. on Financial Institutions and Consumer Credit*, 110th Cong. (2007) (Statement of Edward L. Yingling, President, Am. Bankers Assoc.), available at 2007 WL 1228858; *Protecting Homebuyers From Mortgage Abuse, Hearing Before S. Comm. on Banking, Housing & Urban Affairs, Subcomm. on Housing, Transportation & Community Development*, 110th Cong. (2007) (Statement of John Robbins, Chair, Mortgage Bankers Assoc.), available at 2007 WL 1834523; *Industrial Banks, Hearing Before H. Comm. on Financial Services*, 110th Cong. (2007) (Statement of Arthur R. Connelly, First Vice Chairman, America's Community Banks), available at 2007 WL 1213346; *Predatory Lending To Military, Hearing Before S. Comm. on Banking, Housing & Urban Affairs*, 110th Cong. (2006) (Statement of Hilary B. Miller, President, Payday Loan Bar Assoc., on behalf of the Community Financial Services Assoc.), available at 2006 WL 2629206.

128. *Mandatory Arbitration Agreements, Hearing Before H. Comm. on Judiciary, Subcomm. on Commercial & Administrative Law*, 110th Cong. (2007) (Statement of F. Paul Bland, Jr., Public Justice), available at 1686340; *Consumer Credit Reports, Hearing Before H. Comm. on Financial Services*, 110th Cong. (2007) (Statement of Chi Chi Wu, Staff Att'y, National Consumer Law Center), available at 2007 WL 1750167; *Child Product Safety Bills, Hearing Before H. Comm. on Energy & Commerce, Subcomm. on Commerce, Trade, and Consumer Protection*, 110th Cong. (2007) (Statement of Edmund Mierzewski, Consumer Program Director, United States Public Interest Research Group), available at 2007 WL 1624049; *Foreclosures and Risky Lending, Hearing Before H. Comm. on H. Oversight & Government Reform, Subcomm. on Domestic Policy*, 110th Cong. (2007) (Statement of Jean Ann Fox, Director, Consumer Protection, Consumer Federation of America), *Housing Loans, Hearing Before S. Comm. on Banking, Housing & Urban Affairs, Subcomm. on Housing & Transportation* (2006) (Statement of Kevin Jewell, Consultant, Consumers Union), available at 2006 WL 886495.

difference between the industry groups and the consumer groups is the ability of the individual company members of the trade organizations to make huge political contributions to members of Congress.¹²⁹

In addition to legislative advocacy, consumer organizations play an active role enforcing the law through litigation. The National Consumer Law Center, the AARP Foundation, Public Justice, the National Association of Consumer Advocates, and Consumers Union have acted to ensure that public consumer laws are enforced.¹³⁰ For example, the National Consumer Law Center, together with private attorneys, brought a series of cases against auto-makers for violating the Equal Credit Opportunity Act.¹³¹

In bringing actions to enforce consumer protection laws, consumer organizations and private lawyers are fulfilling the “private attorney general” role that is encouraged by those public law statutes that provide for statutory damages, costs, and attorney’s fees.¹³² Public consumer laws are intended to protect the general consumer population, but Congress recognized that government enforcement agencies lack the resources to ensure satisfaction of that goal. The private attorney general provisions can go far toward achieving that goal if other obstacles do not stand in the way. As discussed above, there are major impediments that make this goal difficult to attain. Other countries go much further than the United States, granting

129. *How a Bad Bill Becomes a Law*, S.F. CHRON., Mar. 13, 2005, at C4 (stating that credit card issuers and finance companies spent \$40 million in political contributions and many additional millions in a successful fifteen year lobbying effort that resulted in changes to bankruptcy law favorable to them, but detrimental to consumers). Jim Tankersley, *Bush Fund-Raisers Cash in by Giving—Then Receiving*, THE BLADE, Dec. 18, 2005, available at <http://www.toledoblade.com/apps/pbcs.dll/article?AID=/20051218/NEWS09/512180341> (reporting that MBNA, a credit card issuer, spent almost \$20 million from 1998 to 2004 to lobby for a favorable bankruptcy law).

130. *E.g.*, In re: Washington Mutual Overdraft Protection Litigation, 201 F. App’x 409 (9th Cir. 2006) (National Consumer Law Center); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (Public Justice); *Delta Funding Corp. v. Harris*, 426 F.3d 671 (3d Cir. 2005) (National Assoc. of Consumer Advocates); *Cousin v. Trans Union Corp.*, 246 F.3d 359 (5th Cir. 2001) (AARP Foundation).

131. The cases are summarized at <http://www.nclc.org> (last visited June 28, 2007).

132. Robert Murken, *Can’t Get No Satisfaction? Revising How Courts Rescind Home Equity Loans Under the Truth in Lending Act*, 77 TEMP. L. REV. 457, 461 (2004) (describing how Congress included the private attorney general concept in the Truth in Lending Act).

consumer organizations an official role in ensuring that consumers are protected.¹³³

CONCLUSION: RECOMMENDATIONS TO HELP SAVE CONSUMER LAW

As discussed above, consumer law increasingly has become federal law. Having national public laws governing consumer transactions is sound because many consumer problems are national in scope and transactions increasingly cross state lines. States, however, have always played a critical role in protecting consumers. State laws can fill gaps left in the federal law, serve as laboratories that experiment with new approaches to deal with consumer problems, and respond to problems that have a particularly harsh impact on consumers in their state.¹³⁴ For example, a state with many Hispanic speaking residents may want to require bi-lingual disclosures of vital information. State agencies enforcing those laws often are an important component in protecting consumers. Federal agencies, however, have undermined this effort by aggressively pursuing a policy of preemption.¹³⁵ That does not necessarily result in substituting federal consumer protection rules and enforcement in place of state laws and enforcement. Rather, it often creates a vacuum, with the federal agency permitting the conduct that state law prohibited.¹³⁶

133. For example, Brazil's Consumer Code authorizes consumer organizations to bring lawsuits on behalf of consumers and request that the attorney general take action against companies using unfair contract terms. Vaughn, *supra* note 106, at 317. European Union rules authorize "group litigation" or "representative proceedings" that permit consumer advocacy groups to file cases. Winn & Webber, *supra* note 4, at 220, 222. In France, the Union Federale des Consommateurs is a particularly active consumer group recognized by that country's statutes. David Naylor & Cyril Ritter, *French Judgment Condemning AOL Illustrates EU Consumer Protection Issues Facing U.S. Businesses Operating in Europe*, 1 N.Y.U. J. L. & BUS. 881, 881-82 (2005).

134. "Consumer protection matters are typically left to the control of the states precisely so that different states can apply different regulatory standards based on what is locally appropriate." SPGGC v. Blumenthal, 505 F.3d 183, 196 (2d Cir. 2007). There are major obstacles, however, to state law providing consumers with robust protection. *E.g.*, O.C.G.A. § 10-1-399(a) (2000) (prohibiting class actions); *Zeeman v. Black*, 273 S.E.2d 910 (Ga. Ct. App. 1980) (adding public interest requirement).

135. See *supra* note 70.

136. Testimony of Joseph A. Smith, Jr., *supra* note 70; Duncan A. Macdonald, *supra* note 70. In addition, the Class Action Fairness Act restricts the ability of consumers to enforce consumer protection

The second major challenge to consumer protection is the privatization of consumer law, primarily through the pervasive use of mandatory pre-dispute arbitration clauses. Arbitration privatizes the public law in four respects. One, it relegates dispute resolution to private companies that are not subject to government oversight.¹³⁷ Two, arbitration agreements generally prohibit class actions.¹³⁸ As a result, no matter how clearly illegal and injurious the company's behavior, enforcement of the law to protect the public is crippled because consumers can gain redress only one case at a time. Three, arbitrators are not required to follow the law. Therefore, arbitrators can ignore these laws and entirely undermine the goal of the public nature of these laws. Four, arbitration operates in secret, hiding illegal practices from the scrutiny of government agencies. Consequently, those committing such practices are able to escape enforcement by the agencies. This privatization of the law and dispute resolution has substantially diluted the "public" law nature of consumer protection law.

In order to ensure that consumer law continues to adequately protect consumers, Congress should enact legislation to reduce the threats posed by federalization. Congress can do this by prohibiting federal agencies regulating financial institutions such as the OCC from preempting state consumer protection laws that do not directly interfere with federal law and do not significantly undermine the institution's ability to operate in a safe and sound manner. In addition, Congress should reduce the privatization of consumer law by prohibiting mandatory pre-dispute arbitration clauses in consumer contracts, as other countries have done.¹³⁹

laws where the public at large will be affected. Class Action Fairness Act of 2005, Pub. L. No. 109-2, §2, 119 Stat. 4 (2005). Jeffrey L. Roether, *Interpreting Congressional Silence: CAFA's Jurisdictional Burden of Proof in Post-Removal Remand Proceedings*, 75 FORDHAM L. REV. 2745 (2007).

137. The lack of any government oversight is in sharp contrast to securities arbitration of investor disputes. Marissa C. Marion, *Preemption of the California Ethical Standards in Securities Arbitration: Jevne v. Superior Court*, 7 U.C. DAVIS BUS. L.J. 401, 409 (2008) (explaining that the SEC must approve all NASD arbitration procedures and regulations).

138. Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?* 67 LAW & CONTEMP. PROBS. 75 (2004).

139. See *supra* text accompanying notes 107-08.

A more far-reaching goal should be to upgrade consumer protection law by making it consistent with the “emerging worldwide consensus” that has resulted in statutes in many developed countries, which guarantee substantially greater consumer protection than the laws in the United States.¹⁴⁰ Strengthening American law would serve two purposes. It would ameliorate the deleterious effect on consumers of overreaching by business. In addition, it would greatly simplify the ability of companies that do business with consumers around the world who now encounter lawsuits when they apply U.S. business practices in other countries.¹⁴¹

140. This phrase reflects Professor Jennifer S. Martin’s conclusion after reviewing the law of Sales in many countries. Martin, *supra* note 60, at 226, 229; *see also supra* text accompanying notes 58–62.

141. *See, e.g.,* Naylor & Ritter, *supra* note 133, describing litigation against AOL in France. *See* Winn & Webber, *supra* note 4, at 222–25 (describing the AOL litigation and Dell Corporation’s changes to its contract terms to avoid a similar challenge).