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Credit Cards, Attorney's Fees, and the Putative Debtor: A Pyrrhic Victory? Putative Debtors May Win the Battle But Nevertheless Lose the War

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*Jennifer M. Smith**

"Another such victory over the Romans and we are undone."
Pyrrhus, the Greek king

I. INTRODUCTION

For decades, scholars have written about credit cards and attorney's fees, but rarely together. This Article addresses the current financial crises of Americans, the credit card industry (including the Bankruptcy Abuse Prevention and Consumer Protection Act) and attorney's fees—perhaps a unique combination. It is based upon an actual case that left the putative debtor in a worse financial crisis than before the lawsuit was filed. This Article addresses the current credit card industry and its detrimental impact on society, and it discusses the history and purpose of attorney's fees, as well as the pitfalls in attorney's fee legislation. It analyzes the case study under various state laws, with heavy emphasis on Florida and California law, then recommends a legislative change or judicial intervention to ensure that creditors incur financial responsibility when they erroneously sue consumers. With these changes, consumers are made whole when they must defend themselves against small claims lawsuits erroneously filed against them, so as not to become victims of needless debt.

II. BACKGROUND

In America, credit card debt is so pervasive that it has gained national attention in our presidential debates.[1] Indeed, during a 1996 presidential debate against then-President William Clinton, Senator Robert Dole stated, "Credit card debt has never been higher."[2] Yet, notwithstanding this financial management crisis, American consumers have become even more dependent on deficit spending via credit cards.[3]

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1. Lawrence M. Ausubel, *Credit Card Defaults, Credit Card Profits, and Bankruptcy*, 71 AM. BANKR. L.J. 249, 250 (1997).

2. *Id.* (citing *Clinton-Dole Debate II: Full Text of the Second Presidential Debate Between President Clinton and Republican Candidate Bob Dole in San Diego, Calif.*, WALL ST. J. INTERACTIVE ED., Oct. 17, 1996, http://www.wsj.com).

3. *See generally* IN DEBT WE TRUST, AMERICA BEFORE THE BUBBLE BURSTS (A Danny Schechter

Consequently, the virtually unregulated credit card industry has grown more powerful and profitable as Americans have increased their purchasing power in a manner that has caused them to grow poorer.[4] Strapped by high interest rates, substantial late fees, and other penalties, Americans are now swamped with credit card debt, yet are offered little protection through federal and state laws.[5]

Seeking to deplete all avenues of potential revenue, credit card issuers lure high-risk borrowers into borrowing credit at usurious rates with compounded fees and penalties, and then sue these same consumers when they are unable to pay.[6] A common "bait and switch" tactic used by credit card issuers is to entice customers with "subprime" rates (some as low as zero percent), charge them a "transaction fee" on the date of the loan, and increase the zero percent rate to as much as thirty percent if the consumer is one day—or even an hour—late on a monthly payment.[7] Recently, one of the largest credit card issuers reportedly increased customer rates to as high as twenty-eight percent without any apparent decrease in these customers' credit scores, and without providing an explanation to these customers for the rate increase.[8]

Film 2007) [hereinafter IN DEBT WE TRUST] (investigating why so many Americans are being strangled by debt and facing imminent financial crisis).

4. *Id.*

5. *See* Seana Valentine Shiffrin, *Are Credit Card Late Fees Unconstitutional?*, 15 WM. & MARY BILL RTS. J. 457, 460-61 (2006) (describing the decline of federal protection first by the Supreme Court decision in Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299 (1978), which allowed nationally-chartered banks to circumvent state usury laws by affirming that the National Bank Act (NBA), 12 U.S.C. § 85 (2006), authorized these banks to apply its home state's interest rate to transactions occurring in other states, followed by the Comptroller's 1995 regulation, 12 C.F.R. § 7.4001 (2006), which interpreted the NBA as allowing credit card issuers administered by nationally-chartered banks to impose on customers in any state whatever late fees are allowable by the home state of the bank, and followed by the Depository Institutions Deregulation and Monetary Control Act of 1980, 12 U.S.C. § 226 (2006), which granted the same powers to federally-insured state-chartered banks that the NBA grants to nationally-chartered banks, resulting in many banks relocating to states permitting higher interest rates, such as Delaware and South Dakota). *See also* Smiley v. Citibank, 517 U.S. 735, 740-47 (1996) (approving of the Office of Comptroller of Currency's definition of interest found in 12 C.F.R. § 7.4001(a) (2004) to include credit card charges such as late fees, over-limit fees, cash advances, returned check fees, and membership fees); Carolyn Carter et al., *The Credit Card Market and Regulation: In Need of Repair*, 10 N.C. BANKING INST. 23, 25 (2006) (providing an overview of the consumer protection weaknesses of the Truth in Lending Act, 12 U.S.C. § 226 (2004)); Kevin G. Toh, *Are Credit-Card Late Fees "Interest"? Delineating the Preemptive Reach of Section 85 of the National Bank Act of 1864 and Section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980*, 94 MICH. L. REV. 1294, 1310 (1996) (noting that interest rate regulation was increasingly becoming the concern of states because of the federal government's gradual withdrawal from the field since 1980).

6. *A Big Lender's Credit Card Trap*, BUS. WK., Aug. 5, 2008, http://articles.moneycentral.msn.com/Banking/CreditCardSmarts/ABigLendersCreditCardTrap.aspx (defining "subprime borrowers" as "people with low incomes and/or bad credit histories").

7. See *infra* note 51.

8. Robert Berner, *A Credit Card You Want to Toss*, AMERICA ONLINE, Feb. 7, 2008, http://money.aol.com/creditdebt/article/business-week/_a/a-credit-card-you-want-to-toss/20080207143309990001 (reporting that Bank of America's fine print provided an "1-800" number to obtain the reason for the rate increase, but customers stated that when they called no one could provide an explanation, and that Bank of America confirmed that some customers may be receiving rate hikes as part of a "periodic review" for reasons such as running higher balances with its card or other creditors, even though the customers had no decline in credit scores).

Because of federal laws[9] and state laws[10] favoring credit card issuers,[11] the labor-intensive nature of litigation, and the relatively small amount owed, litigation is generally cost-prohibitive for the consumer—and credit card issuers know this. For example, if a consumer is being sued for $1,000, unless he or she can obtain attorney's fees, the consumer cannot realistically pursue a defense with adequate legal representation because of the cost of attorney's fees. Indeed, cases in which creditors are suing over unpaid consumer debts[12] are the most common default cases.[13]

Many credit card issuers have adhesion agreements with consumers providing that if the issuers must sue to collect the amount owed, then they are entitled to attorney's fees from the consumer. Although those provisions are generally unilateral—running only in favor of the credit card issuer—many states have enacted bilateral or mutuality fee-shifting provisions allowing the prevailing party to recover attorney's fees if one of the parties could have recovered attorney's fees under the contract.[14] Despite these laws, there are still some major gaps that are causing consumers to incur needless debt.

One major gap involves putative debtors, as credit card issuers often sue the wrong party. This may occur as a result of the credit card issuer erroneously sending an account statement to an individual not indebted to the credit card issuer. Because of the presumptions favoring credit card issuers, the debtor then has to show that he or she is not the proper party being sued. In these cases, the putative debtor is not a signatory to the credit card agreement under which the credit card issuer is suing the putative debtor; therefore, when the putative debtor prevails during litigation, he or she will not be able to recover attorney's fees under the typical state mutuality fee-shifting statutes.

But what is so significant about attorney's fees? Legal and economic scholars have written about attorney's fees for decades.[15] Why? When it comes to litigation,

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9. *See* Shiffrin, *supra* note 5, at 460-61.

10. *See, e.g.*, DEL. CODE ANN. tit. 5, § 950 (2008) (permitting delinquency charges without specifying any limit); S.D. CODIFIED LAWS §§ 54-3-1, -1.1 (2008) (designating late fees as interest and declaring that no maximum interest rate in South Dakota exists); VA. CODE ANN. § 6.1-330.63(A) (2001) (allowing late fees irrespective of any statute or other law to the contrary).

11. *See* Shiffrin, *supra* note 5, at 460-64 (providing an historical background of credit card late fee laws).

12. *See also* 11 U.S.C. § 101(8) (2006) (defining "consumer debt" as "debt incurred by an individual primarily for personal, family, or household purpose"); *In re* Jeffares, 119 B.R. 872, 874 (Bankr. M.D. Fla. 1990) (finding debt incurred to be "consumer debt" because the funds obtained were used by the debtor "to pay utility bills, to pay mortgage payments and to purchase food, lodging and other miscellaneous items of a consumer nature, all of which are clearly payments of consumer needs").

13. STEPHEN C. YEAZELL, CIVIL PROCEDURE 471 (6th ed. 2004) ("The most common default case involves a creditor's suit over an unpaid consumer debt."). *See also* Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC'Y REV. 219, 243 (1975) (noting the high number of default cases in small claims court and the high number of consumer defendants who fail to appear in court at all).

14. *See infra* note 135.

15. *See, e.g.*, Lucian Arye Bebchuk & Howard F. Chang, *An Analysis of Fee Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11*, 25 J. LEGAL STUD. 371 (1996); Ronald Braeutigam et al., *An Economic Analysis of Alternative Fee Shifting*, 47 LAW & CONTEMP. PROBS. 173 (1984); Kevin Clermont & John Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978); John C. Hause, *Indemnity, Settlement, and Litigation, or I'll be Suing You*, 18 J. LEGAL STUD. 157 (1989); John Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473 (1981); John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW &

the opportunity for an attorney to collect his or her fees from an opponent plays a significant part in an attorney's decision as to whether he or she will represent a potential litigant who does not have the resources to pay legal fees. That is, will a potential litigant have access to adequate legal representation? Access to legal representation is crucial because creditors can garnish wages and attach property to satisfy debts in some states.[16]

Because of the nature of the American judicial system, attorney's fees are substantial and account for the majority of the cost of the litigation.[17] Thus, while the chance of recovery of attorney's fees may not seem decisive, it is in many cases. This is particularly true in credit card debt collection cases where the amount in question is often very small, especially compared to the attorney hours required to litigate the case.[18]

This Article was inspired by an actual case, in which a credit card issuer sued a Florida consumer, who was ultimately determined to be the wrong party, for approximately $1,800 in small claims court.[19] After almost two years of active litigation and almost $30,000 in attorney's fees, the consumer was adjudged to have been the wrong party sued because he was not a signatory to the credit card agreement with the credit card issuer. That is, there was no privity of contract between the defendant and the credit card issuer. Lacking privity of contract, the defendant fell into the chasm in the law that prevented him from obtaining attorney's fees. This was surely a classic Pyrrhic victory for this consumer as he was no longer obligated to the credit card issuer in the amount of $1,800, but because he engaged an attorney to defend himself, he owed more than fifteen times the amount of his original claim to his attorney.[20]

This Article will address defendants' access to legal representation when they are sued by a purported creditor with whom they never entered into a contract. Part III will set forth an actual case study because it accurately portrays the malady of the

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CONTEMP. PROBS. 9 (1984); Philip J. Mause, *Winner Takes All: A Re-Examination of the Indemnity System*, 55 IOWA L. REV. 26 (1969); Michael F. Mayer & Wayne Stix, *The Prevailing Party Should Recover Counsel Fees*, 8 AKRON L. REV. 426 (1975); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Review*, 1982 DUKE L.J. 651; Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139 (1984); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982).

16. *See* Jane Birnbaum, *Debt Relief Can Cause Headaches of Its Own*, N.Y. TIMES, Feb. 9, 2008, http://www.nytimes.com/2008/02/09/business/yourmoney/09credit.html?ex=1203224400&en=bb109b0467dc4104&ei=5070&emc=eta1 (reporting that creditors can attach wages and property to satisfy debts owed depending upon the states in which debtors live).

17. YEAZELL, *supra* note 13, at 287 (finding that high attorney's fees result because the U.S. legal system assigns responsibility for conducting the lawsuit to the parties and their lawyers, whereas in other societies these responsibilities are assumed by a judge or other state official, thus resulting in lower fees and higher taxes).

18. Courts have recognized that attorney's fees often are much larger than the amount sued upon in consumer credit cases and have allowed such fees because "[w]ithout the prospect of an award of attorney's fees as an additional incentive, it is unlikely that persons of ordinary means would choose to bring [Fair Debt Collection Practices Act] cases." Johnson v. Eaton, 958 F. Supp. 261, 264 (M.D. La. 1997).

19. *See* Unifund CCR Partners v. Smith, No. 03-20446 SP 23 (Fla. County Ct. Jul. 13, 2005).

20. *Johnson*, 958 F. Supp. at 264 (awarding attorney's fees nearly twenty-seven times the damage award).

average person who is embroiled in litigation in small claims court ("the people's court") with a mammoth credit card company that has all the rules stacked in its favor. Part IV will discuss the credit card industry and its goals and tactics to ensure profitability at almost any cost. Part V will discuss attorney's fees and will analyze the case study under various state laws. Part VI will recommend solutions to ensure that consumers are adequately protected against "big business," and Part VII is the conclusion.

III. CASE STUDY: *ANY CREDIT CARD COMPANY V. CONSUMER*

One early morning in September 2003, a nightmare began for Mr. Consumer (Consumer). His ex-wife called him to inform him that someone had left a package outside of her house with his name and her address on it.[21] Consumer retrieved the package from his ex-wife. The package included a complaint filed in Small Claims Court[22] for breach of contract from a credit card issuer (Any Credit Card Company or ACCC) for a credit card debt.[23] Specifically, the complaint alleged that Consumer was indebted to ACCC in the amount of $1,879.83, plus interest from June 2003 at a rate of six percent per annum, $1,400 for attorney's fees based on an hourly rate of $175.00 and an estimated minimum of four hours, and a contingency risk multiplier of 2.0 for attorney's fees.[24] Consumer did not recall applying for or receiving a credit card from ACCC.

Having no legal experience, Consumer contacted a lawyer. He explained that he had not lived at the address listed on the complaint for almost three years, and had moved from that address for a year during marital separation.

In the spirit of first seeking to understand before seeking to defend, Consumer's lawyer contacted ACCC's lawyers several times and asked for any documents related to the matter. Although ACCC's counsel agreed to send the documents to Consumer's lawyer, ACCC's lawyer failed to make these available and subsequently did not bring

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21. *See* Yngvesson & Hennessey, *supra* note 13, at 243 (reporting studies that found that default judgments are not always rendered on the merits, but also because defendants often do not receive summonses due to the fact that dishonest process servers "drop them down the sewer" and swear to proper service of the defendants).

22. Small claims courts have been described as "valuable" because they do not require an aggrieved party to have legal experience or to obtain an attorney. *See* Arthur Best & Deborah Zalesne, *Peace, Wealth, Happiness, and Small Claims Courts: A Case Study*, 21 FORDHAM URB. L.J. 343, 344 (1993-94). *See also* Suzanne E. Elwell & Christopher D. Carlson, *Contemporary Studies Project, The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA LAW REV. 433, 439 (1990) (noting the aim of small claims courts was to provide a "speedy, inexpensive, and simple" process to solve claims involving minor sums). The small claims case that is the subject of this Article, however, suggests otherwise.

23. *See generally In re* Amendments to Florida's Small Claims Rules, No. SC07-1724 (Fla. 2007), *available at* http://www.floridasupremecourt.org/clerk/comments/2007/07-1724_Petition%20(SCRC)%208-6-07.pdf (reporting that in Duval County, Florida, almost 5000 cases were filed in Small Claims Court between January 1, 2006, and May 31, 2006, and the vast majority were credit card debt collection cases). *See also* Elwell & Carlson, *supra* note 22, at 441-44 (finding that the small claims system is used primarily by businesses for debt collection, and that low and middle income individuals have less success than wealthy individuals in small claims court because of their unfamiliarity with the legal process and fear of appearing pro se).

24. *See Unifund*, No. 03-20446 SP 23.

them to the pretrial conference.[25] At the pretrial conference, the judge granted the parties an opportunity to attend mediation and ordered the parties to comply with discovery pursuant to Small Claims Rule 7.020,[26] so that Consumer's attorney could obtain the needed documents. Consumer's lawyer filed an answer and formally requested discovery to prepare for mediation and determine whether the alleged debt was legitimate. Consumer's lawyer informed opposing counsel that the documents underlying the allegations in the complaint were needed prior to mediation because Consumer did not believe that he owed ACCC any sum of money. ACCC's lawyers ignored the discovery deadline and did not produce the documents required under the discovery rules. The few documents that ACCC's lawyers brought to mediation did not show that ACCC did, in fact, extend credit to Consumer. After contending that Consumer was not offering to pay any money to ACCC, and that there was no evidence of a debt incurred by Consumer, ACCC's lawyers filed a motion for sanctions for Consumer's alleged refusal to engage in mediation/settlement. The court denied the motion.

Two weeks later, ACCC's attorney responded to the discovery requests. ACCC produced a self-generated account statement that lacked a date as to when it was created, a 2001 credit card statement to Consumer with his ex-wife's address, and a generic credit card agreement. Consumer's lawyer filed a motion to dismiss, or in the alternative, for summary judgment. Opposing counsel did not file a response, but appeared in court to argue the motion. The trial judge asked ACCC whether any discovery was outstanding, and both parties responded in the negative. The trial judge asked ACCC how Consumer opened the credit card account, and ACCC's counsel responded that it may have been through the internet or phone, but she did not know for certain. Finding no evidence that Consumer entered into a contract with ACCC, the Court granted Consumer's motion for summary judgment.[27]

ACCC's lawyers filed a motion for a rehearing, arguing that discovery remained outstanding and unanswered, and that summary judgment was premature. The court denied the motion. ACCC's lawyers filed a motion to strike portions of Consumer's attorney's response to the motion for a rehearing. The court denied that motion also.

ACCC appealed, arguing that (1) the trial court's ruling was premature; (2) the trial court improperly shifted the burden of persuasion to ACCC; (3) the lower court improperly drew inferences against ACCC, the non-moving party; and (4) genuine issues of fact existed. ACCC's essential argument was that Consumer's answers to discovery did not resolve material issues because his answers were mainly that he had

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25. *See* CLERK OF COURTS, 11TH JUDICIAL CIRCUIT OF FLORIDA, MIAMI-DADE COUNTY, SMALL CLAIMS COURT, http://www.miami-dadeclerk.com/dadecoc/Small_Claims.asp (setting out the process for the truncated legal proceedings in small claims court—claims up to $5,000—where cases are scheduled for a pretrial conference after a claim is filed, parties should bring documents to assist in proving the case (but not witnesses), and if the case does not settle, then it may be set for mediation, and if it does not settle at mediation, then it will be set for trial).

26. *See* FLA. ADMIN. CODE ANN. r. 7.020(b) (2001) ("[A]ny party represented by an attorney is subject to discovery pursuant to Florida Rules of Civil Procedure . . . directed at said party, without order of court.").

27. *See Unifund*, No. 03-20446 SP 23 ("The Court granted summary judgment for Defendant on the basis that there was no evidence to support Plaintiff's claim and no response or affidavit filed in opposition to Defendant's motion.").

no recollection. Therefore, while discovery was not pending at the time of the hearing, ACCC lacked sufficient time to serve supplemental discovery as of the date of the hearing. Further, ACCC noted that the credit card agreement upon which the lawsuit was based was not signed by Consumer, but argued that under Regulation Z of the Federal Truth in Lending Act, 12 C.F.R. § 226, and section 655.954 of the Florida Statutes, a credit card agreement is a valid contract of adhesion and need not be signed by the debtor to be valid. Finally, ACCC contended that the mere existence of a credit card agreement and the credit card statement bearing Consumer's name created a genuine issue of fact, precluding summary judgment.

The appellate court reversed the summary judgment in favor of Consumer and remanded the case to the trial court for further proceedings.[28] Specifically, the appellate court found that the record contained a billing statement from ACCC, naming Consumer as carrying a balance of $1,688.23 on the credit card, ACCC's purchase and sale agreement showing that ACCC bought the debt from the original creditor, ACCC's self-generated invoice to Consumer, and an admission from Consumer that although the listed address on the bill is incorrect, he lived at that address in the past.[29] Thus, the appellate court found that there existed a genuine issue of material fact as to the identity of the debtor.[30] While the court recognized that Consumer's argument that the credit card agreement was generic (as it did not contain his identification, address, or signature), the court also noted that it could not ignore the conflicting evidence, which arguably indicates that the debt was indeed his.[31] Therefore, ACCC successfully appealed, and a bench trial was set to determine whether there was a genuine issue of material fact as to the identity of the debtor—even though the credit card agreement did not contain Consumer's identification, address, or signature.[32]

During trial, ACCC's lawyers argued that the credit card statement mailed to Consumer at a prior address was presumed accurate as a matter of law pursuant to Florida law.[33] However, ACCC's designated representative testified that she had no knowledge as to how Consumer may have opened the alleged account, acknowledged that ACCC never received a payment from Consumer, was unaware of when Consumer allegedly opened the account, did not know what was purchased on this account, and further stated that ACCC never received a response to its demands of payment from Consumer.

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28. *See* Unifund CCR Partners v. Smith, No. 04-158AP (Fla. Cir. Ct. App. Div. Jan. 11, 2005).

29. *Id.* at 2.

30. *Id.*

31. *Id.*

32. *See infra* note 180 and accompanying text.

33. FLA. STAT. ANN. § 817.685 (West 1985). The statute provides:

> In any action brought under this part, the authentication or identification of the business records of a credit card issuer is evidence sufficient to support a finding that the record in question is what its proponent claims, if the records are supported by the testimony of a designated representative of the credit card issuer. Such designated representative who has received the business records from the custodian of such records shall be considered a qualified witness within the meaning of § 90.803(6)(a).

Id.

The court entered final judgment in favor of Consumer.[34] The court found that the documents to support ACCC's claim included a purchase and sale agreement between the debt seller (original credit card issuer) and the successor in interest (ACCC), one billing statement addressed to Consumer dated July 2001, and an unsigned cardholder agreement.[35] Finding the evidence insufficient, the court ruled in favor of Consumer.[36] Even with all of the presumptions in its favor, ACCC was unable to meet its burden of proof and failed to establish that Consumer applied for or used the credit card at issue. That is, ACCC did not show that Consumer was the debtor who had entered into the credit card agreement (contract) with ACCC. However, this was a classic Pyrrhic victory.

After almost two years from when Consumer became aware of the complaint, Consumer proved that he was not obligated to pay the credit card debt of $1,879.83. However, he now had a legitimate debt of more than fifteen times that amount for attorney's fees. Consumer's small claims litigation was not "inexpensive, simple and speedy."[37] Without an attorney, Consumer likely would have lost due to his lack of experience with, and expertise in, the legal system. Accordingly, Consumer would have been liable to ACCC for the amount of the judgment plus its attorney's fees.[38] Because of the heavy use of business plaintiffs crowding the court dockets, small claims court—also referred to as the people's court—is often perceived as a business court.[39] Yet, the majority of cases in small claims courts are collection-type cases brought by business-type plaintiffs.[40]

Moreover, unbeknownst to Consumer, ACCC had reported this bad debt to the credit bureaus well before ACCC ever proved the debt and before Consumer was aware of the alleged debt. Although not an issue in the case, it is quite possible that Consumer was charged higher rates for insurance and other products because of this reported bad debt on his credit report.[41]

Thus, Consumer was the biggest loser, unless he could recoup his attorney's fees and costs, and remove this bad debt from his credit report. Like the Greek King Pyrrhus, Consumer was elated that he was not obligated to pay this credit card debt, but another such victory for him would ruin him too.

The credit card industry is a powerful machine, teamed with savvy lobbyists who convince federal and state legislators to enact laws in its favor.[42] Consumer's financial woes also stemmed from the fact that the mutuality fee-shifting provisions for

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34. *See Unifund*, Case No. 03-20446 SP 23.

35. *Id.* at 1-2.

36. *Id.* at 2.

37. *See* Best & Zalesne, *supra* note 22, at 346 (reporting that several states have conducted studies to determine how their small claims courts can provide "inexpensive, simple, and speedy" justice to people who are unfamiliar with the court system).

38. *See* Elwell & Carlson, *supra* note 22, at 449 (finding that "*pro se* parties going to trial may be at a disadvantage when facing represented opponents because of the great disparity in experience and expertise, coupled with a strong intimidation factor").

39. *See* Elwell & Carlson, *supra* note 22, at 444 (citations omitted).

40. *See* Yngvesson & Hennessey, *supra* note 13, at 235 (finding that small claims courts are criticized for serving as collection agencies to creditors).

41. SmartMoney.com, *Guess Who's Looking at Your Credit Report*, Aug. 20, 2001, http://www.smartmoney.com/consumer/index.cfm?story=20010820 (reporting that property and auto insurers look at individuals' credit information when underwriting policies).

42. See *infra* Part IV for discussion.

attorney's fees in most states do not go far enough to assist consumers who prevail against the credit card industry and show that they were not a party to the contract under which the credit card issuer filed suit.[43] Thus, the combination of credit card industry-favored laws and the inability to recover attorney's fees in instances where the consumer prevails is financially detrimental to wrongly accused debtors.

IV. THE CREDIT CARD INDUSTRY

In its aggressive attempt to increase profits through expanding the market for borrowers, the financial services industry is wreaking havoc on many Americans. Having saturated the market for "qualified buyers," credit card issuers began targeting the riskiest borrowers: the working poor (which includes a disproportionate number of minorities), consumers with blemished credit histories, single mothers, senior citizens, and college students.[44] The benefit of this access to credit is that these consumers have had greater access to computers, cars, homes, and other goods and services that were heretofore beyond their financial means. The burden is that, like subprime mortgages,[45] creditors have lured these unsophisticated borrowers into a web of debt from which they may never escape.[46] However, studies have shown that Americans have been using credit cards to bridge the gap between household earnings and necessary goods and services, such as housing and health care, rather than on frivolous purchases.[47] Despite limiting spending to only necessities, some women's debt has risen to such high levels that they are even selling their biological eggs to pay their credit card debt.[48]

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43. See *infra* Part V for discussion.

44. Karin Braunsberger et al., *The Effectiveness of Credit-Card Regulation for Vulnerable Consumers*, 18 J. SERV. MKTG. 358, 358 (2004) ("In response to these tighter market conditions [of increased competition in the industry], credit card issuers have begun to target non-traditional consumers, including college students and other low-income populations, who may have little or no experience with credit cards and often no credit history."). *See also* Jessica Silver-Greenberg, *The Dirty Secret of Campus Credit Cards*, BUS. WK., Sept. 6, 2007, http://www.businessweek.com/bwdaily/dnflash/content/sep2007/db2007095_053822.htm (reporting that students believe that if their university is in contract with the credit card companies to offer credit cards, then the university will seek to protect them when in fact the contracts are profit-makers for the school and not about student services); Timothy Egan, *Newly Bankrupt Raking in Piles of Credit Card Offers*, N.Y. TIMES, Dec. 11, 2005, http://www.nytimes.com/2005/12/11/national/11credit.html?pagewanted=1 (reporting about a single mother who fell into insurmountable debt by using her credit cards for necessities after cancer surgery).

45. *See* Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 FORDHAM L. REV. 2039, 2040 n.3 (2007) ("The subprime market charges higher interest rates and fees and is designed for borrowers with weaker credit.").

46. Brian Grow & Keith Epstein, *The Poverty Business*, BUS. WK., May 21, 2007, http://www.businessweek.com/magazine/content/07_21/b4035001.htm. *See also* CONSUMER FEDERATION OF AMERICA, LEVIN HEARING EXPOSES WIDESPREAD CREDIT CARD ABUSES, March 7, 2007, *available at* http://www.consumerfed.org/pdfs/Credit_Cards_Levin_Hearing_Group_Release030707.pdf ("Credit card companies push debt on people without caring whether folks can afford to pay it back . . . . The companies profit either way, but many Americans are being buried under a mountain of debt.").

47. Bob Herbert, *Caught in the Credit Card Vice*, N.Y. TIMES, Sept. 22, 2003, at A17.

48. Roni Caryn Rabin, *As Demand for Donor Eggs Soars, High Prices Stir Ethical Concerns*, N.Y. TIMES, May 15, 2007, at F6, *available at* http://www.nytimes.com/2007/05/15/health/15cons.html ("Ethicists and some women's health advocates worry that lucrative payments are enticing young women with credit-card debt and steep tuition bills to sell eggs without seriously evaluating the risks.").

Although access to credit could help the responsible, sophisticated working poor with upward social and financial mobility, credit card issuers are preying on individuals with a history of not paying their bills in a timely manner and those with limited or fixed incomes.[49] Low-income families are quite profitable for the industry because they pay extraordinary rates of interest.[50] Credit card issuers actually want debtors to pay late or miss a payment so that credit card issuers can add penalties, increase interest rates,[51] and impose late payment fees.[52] Lenders retort that "higher rates are justified to account for the bigger risks posed by borrowers who have a poor record at paying their bills on time and defaulting on debts."[53] Though the rationales may be specious, it is clear that the credit card industry is a highly profitable industry that makes fifty-four percent net profit from the poorest of society.[54]

The credit card segment of the banking industry is generally the most profitable, earning returns higher than commercial bank loans.[55] By the end of 2007, American debt had jumped to over $900 billion.[56] As consumers became increasingly cautious in evaluating the need to incur more debt, credit card issuers were likewise increasing their marketing and the availability of credit.[57] Credit card issuers comprise some of the top national advertisers and represent the fastest growing segment of purchased

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49. *See* Grow & Epstein, *supra* note 46.

50. RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 201-02 (2006).

51. *See* Secret History of the Credit Card: Eight Things a Credit Card User Should Know, http://www.pbs.org/wgbh/pages/frontline/shows/credit/eight/ (last visited Dec. 21, 2008) (reporting that there is no limit on what credit card companies may charge for consumers who pay their bills late, even by a few hours); Patrick McGeehan, *Soaring Interest Compounds Credit Card Pain for Millions*, N.Y. TIMES, Nov. 21, 2004, http://www.nytimes.com/2004/11/21/business/21cards-web.html?_r=1&adxnnl=1&oref=slogin&pagewanted=1&adxnnlx=1217962828-L2D+Xb0LD07PVRXauRwhJg (reporting that Discover increased the interest rate from zero to 19.99% for a single late payment and applied the increased rate for late payments from eleven months before the disclosure notifying the consumer of the new terms); Liz Pulliam Weston, *Credit Card Companies' Evil Tricks*, http://articles.moneycentral.msn.com/Banking/CreditCardSmarts/CreditCardCompaniesEvilTricks. aspx (last visited Dec. 21, 2008) (reporting that credit card issuers take advantage of consumers by hiking their interest rates up when payment has arrived only hours late).

52. Testimony of Travis B. Plunkett, Legislative Dir., Consumer Federation of America, Consumer Action and Consumers Union, *The Effect of Current Credit Card Industry Practices on Consumers* (Jan. 25, 2007), *available at* http://www.consumerfed.org/pdfs/Credit_Card_Senate_Testimony_01-07.pdf ("Traditionally, penalty fees were designed to deter irresponsible cardholder behavior, but in recent years fees have become primarily a revenue enhancer for credit card issues.").

53. Vikas Bajaj & Ford Fessenden, *What's Behind the Race Gap*, N.Y. TIMES, Nov. 4, 2007, http://www.nytimes.com/2007/11/04/weekinreview/04bajaj.html.

54. *See* IN DEBT WE TRUST, *supra* note 3.

55. *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE PROFITABILITY OF CREDIT CARD OPERATIONS OF DEPOSITORY INSTITUTIONS 2 (2004), *available at* http://www.federalreserve.gov/boarddocs/rptcongress/creditcard/2004/ccprofit.pdf.

56. Birnbaum, *supra* note 16 (stating that the Federal Reserve reported that by the end of 2007, revolving debt—an estimated ninety-five percent of which was from credit cards—jumped to a record high of $943.5 billion).

57. *See* Testimony of Travis B. Plunkett, *supra* note 52, at 3 ("[A] careful analysis of lending patterns by credit card companies shows that aggressive and even reckless lending by issuers has played a huge role in pushing credit card debt to record levels.").

advertising.[58] Most credit card solicitations are by mail,[59] and unsolicited credit card mailings have increased.[60] As the number of solicitations increased from 1.1 billion in 1990 to 6.06 billion in 2005, the consumer response rate has decreased from 2.1% to 0.3%, respectively.[61]

Interest rates have been at historical lows over the past several years, yet credit card companies have used this rate reduction as a profit margin windfall rather than passing these savings on to consumers.[62] Conversely, credit cards generally have an escalation clause that permits an increase in interest rates if the prime rate increases or if the card issuer concludes that the cardholder has become an increased risk, the latter being determined by late payments to the credit card issuer or delinquencies on other non-related debt.[63] Interest and penalty fees make up more than three-quarters of the revenue of credit card issuers.[64]

In addition to credit card purchases, credit card companies issue checks that can be used for cash, balance transfers, or payment of other bills. These checks are generally promoted as having low, and in some cases zero, interest rates—for the promotional period. What is not highlighted, however, is the fact that an upfront transaction fee is assessed at the time the check is cashed.[65] Thus, using a $1,000 check with no interest but with a transaction fee of $100 is tantamount to an annual percentage rate (APR) of over 150 percent.[66] This amount is included on the consumer's credit card bill and although no additional interest is charged during the promotional period, interest may be added if payments are delinquent.

In a further effort to increase profits while continuing to steer families into unmanageable debt, credit card issuers have reduced their costs by limiting the

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58. NIELSEN MONITOR-PLUS, *U.S. Advertising Spending Rose 6.3% in 2004*, March 1, 2005, *available at* http://nielsenmonitorplus.com (reporting that television advertising as increasing to $1.7 billion in 2004, just under a thirty-three percent increase in 2003). *See also*, Robin Sidel, *Card Issuer MBNA Lets the Public Take a Peek at Its Hand*, WALL ST. J., Jan. 20, 2005, at C1 (reporting that MBNA, the Nation's fourth largest credit card issuer, launched its first national advertising campaign during the 2005 Super Bowl).

59. *See* Testimony of Travis B. Plunkett, *supra* note 52, at 4; Braunsberger et al., *supra* note 44, at 358 (recognizing that direct mail solicitations are at an all time high).

60. Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 157 (2006).

61. *See* Testimony of Travis B. Plunkett, *supra* note 52, at 4.

62. Liz Pulliam Weston, *7 Credit-Card Trends that Can Cost You*, http://articles.moneycentral.msn.com/Banking/CreditCardSmarts/7CreditCardTrendsThatCanCostYou.aspx (last visited Dec. 21, 2008) (reporting that credit card issuers pass on the Federal Reserve rate hikes along with their added hikes to consumers).

63. Testimony of Travis B. Plunkett, Legislative Dir., Consumer Federation of America, Consumer Action and Consumers Union, *Examining the Current Legal and Regulatory Requirements and Industry Practices for Credit Card Issuers with Respect to Consumer Disclosures and Marketing Efforts* (May 17, 2005), *available at* http://www.consumerfed.org/pdfs/credit_card_testimony_0505.pdf at 15.

64. *See* Testimony of Travis B. Plunkett, *supra* note 52, at 18.

65. *See* Weston, *supra* note 62 (reporting that one credit card issuer, Chase, recently removed its cap of $75 on balance transfer fees for some of its low-rate offers).

66. "APR" is the one year rate that is charged for borrowing. The Free Dictionary, http://financial-dictionary.thefreedictionary.com/Annual+Percentage+Rate (last visited Aug. 5, 2008) (for example, a credit card company might charge one percent per month, but the APR is one percent multiplied by twelve months, which equals twelve percent).

assistance offered to consumers who are in financial trouble and are seeking credit counseling as an alternative to bankruptcy.[67] Generally, debt counseling services negotiate lower payments with credit card issuers and then send credit card issuers monthly payments from the consumer by electronic transfer.[68] Because the credit card issuers pay the counseling services' fees, which is a portion of the payments the counseling service sends to the credit card issuers, some have criticized these services as favoring credit card issuers.[69] However, this fee arrangement, known as "fair share," has inspired the growth of these debt counseling services, which began courting consumers who were not having trouble paying their debts by promising them lower interest rates, which has angered credit card issuers.[70] Presently, about a thousand debt counseling companies exist, and their reputations for engaging in honest dealings are questionable at best.[71]

Additionally, more reports are identifying credit card companies' abusive lending practices.[72] Not only are credit card issuers targeting consumers who are already in financial distress,[73] but credit card issuers have also been sued for engaging in unfair and deceptive practices,[74] including abusive debt collection.[75] But abusive debt collection practices are not novel. Indeed, tactics by debt collectors, such as calling consumers during the night, threatening consumers, or revealing a consumer's personal information to neighbors or employers, provided the impetus for Congress to enact the Fair Debt Collection Practices Act[76] (FDCPA) in 1977.[77] The FDCPA was enacted in an effort to eliminate debt collectors' abusive tactics.[78] Although the FDCPA has brought relief to some consumers, who are the actual debtors, such relief would be insufficient in the example of *Any Credit Card Company v. Consumer*, wherein the

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67. *See* Testimony of Travis B. Plunkett, *supra* note 63, at 16.

68. Liz Pulliam Weston, *The Consumer's Guide to Credit Counseling*, at http://articles. moneycentral.msn. com/Banking/YourCreditRating/TheConsumersGuideToCreditCounseling.aspx (last visited Feb. 21, 2009).

69. *Id.*

70. *Id.* (reporting the debt counseling industry to have grown into a $7 billion industry).

71. *See* Birnbaum, *supra* note 16.

72. *See* Carter et al., *supra* note 5, at 32 (reporting various credit card abuses and noting that most of the top ten credit card issuers are exploiting consumers).

73. *See* Testimony of Travis B. Plunkett, *supra* note 52, at 10 (citing *Frontline: The Secret History of the Credit Card*, PBS Televison Broadcast (Nov. 2004) (Mr. Kahr, a credit card industry consultant, reports that the average subprime consumer will make two to three late payments in a year, resulting in late payment penalty fees that can greatly exceed interest payments on the small lines of credit issued)).

74. *See, e.g.*, OFFICE OF THE COMPTROLLER OF THE CURRENCY, PRESS RELEASE, STATEMENT OF COMPTROLLER OF THE CURRENCY JOHN D. HAWKE, JR. (June 28, 2000) (reporting that Providian, a credit card company, was ordered to pay $300 million in restitution to its subprime cardholders for unfair and deceptive practices).

75. *See* Testimony of Travis B. Plunkett, *supra* note 63, at 10 (citing Mitchell Pacelle, *Pushing Plastic*, WALL ST. J., Nov. 5, 2004, at A1 (reporting that Cross Country Bank was investigated by state and federal regulators for misleading consumers about the terms of its subprime credit card accounts and engaging in abusive collection practices)).

76. Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (2006).

77. *See* Elwin Griffith, *Identifying Some Trouble Spots in the Fair Debt Collection Practices Act: A Framework for Improvement*, 83 NEB. L. REV. 762, 763-64 (2005).

78. 15 U.S.C. § 1692(e) (2006).

putative debtor has not acknowledged the debt as legitimate and is ultimately exonerated from the debt liability.

In many cases, consumers owe as much or more in fees and penalty charges as in the principal loan amount.[79] This can usher consumers into "negative amortization, where the principal on their credit card debt continues to rise despite making payments."[80] To avoid hostile courts and costly settlements, "credit card issuers introduced mandatory arbitration clauses into their contracts with cardholders."[81] Specifically, credit card issuers have been inserting pre-dispute binding mandatory arbitration clauses, thereby waiving a consumer's right to a court trial as a condition of using the credit card.[82] Mandatory arbitration clauses have the practical effect of deterring consumers from challenging credit card issuers and defending themselves because of the costs and other drawbacks.[83] Scholars have written extensively on these drawbacks and the lack of consumer protection.[84] Nevertheless, the United States Supreme Court has increasingly supported arbitration through its interpretation of the Federal Arbitration Act (FAA).[85]

Arbitration clauses have been criticized because these clauses are not mutually beneficial in that they often allow credit card issuers to go to court for collection purposes, but do not provide similarly for consumers.[86] In addition, arbitration fees are higher than court costs, arbitrators generally favor creditors and the arbitration process (including the limiting of discovery and the inability to prosecute class actions), and arbitration forums are often inconvenient for consumers.[87] Also, with arbitration,

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79. *See* Testimony of Travis B. Plunkett, *supra* note 52, at 13.

80. *Id.*

81. Mark Furletti, *Mandatory Arbitration Clauses in the Credit Card Industry* 3 (Fed. Reserve Bank of Phila., Discussion Paper No. 03-01, Jan. 2003), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927078#PaperDownload.

82. *Id.* at 3-4.

83. *Id.*

84. *See, e.g.*, Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Mark E. Budnitz, *Arbitration of Disputes Between Consumers and Financial Institutions: A Serious Threat to Consumer Protection*, 10 OHIO ST. J. ON DISP. RESOL. 267 (1995); Richard B. Cappalli, *Arbitration of Consumer Claims: The Sad Case of Two-Time Victim Terry Johnson or Where Have You Gone Learned Hand*, 10 B.U. PUB. INT. L.J. 366 (2001); Frederick L. Miller, *Arbitration Clauses in Consumer Contracts: Building Barriers to Consumer Protection*, 78 MICH. B.J. 302 (1999). *But see* Roger S. Haydock, *Forum: Arbitration vs. Litigation*, STAR TRIBUNE, Nov. 11, 2007, http://www.startribune.com/business/11763816.html.

85. 9 U.S.C. §§ 1-16 (2000). *See* Johanna Harrington, Comment, *To Litigate or Arbitrate? No Matter—The Credit Card Industry is Deciding for You*, 2001 J. DISP. RESOL. 101, 106 (2001) (citing several Supreme Court cases upholding arbitration clauses and noting the strong support the Court has given to arbitration). *See also* Preston v. Ferrer, 128 S. Ct. 978, 979 (2008) (citing *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984), which determined that "the [FAA] establishes a national policy favoring arbitration when the parties contract for that mode of dispute resolution," and *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006), which determined that when parties agree to arbitrate all disputes arising under their contract, questions concerning the validity of the entire contract are to be resolved by the arbitrator in the first instance, not by a federal or state court).

86. *See* Furletti, *supra* note 81, at 5.

87. *Id. See generally* Miller, *supra* note 84 (noting that limitations often involve discovery, evidence, remedies, rights of appeal, an option of the administering agency, and the availability of statutory attorneys fees and injunctive relief); Carter et al., *supra* note 5, at 46 n.80 (reporting that the National Arbitration

consumers waive their right to a jury trial, arbitration clauses may violate a federal or state statute authorizing consumers to go to court or bring a class action, and the clauses are a part of adhesion contracts ("take-it-or-leave-it" contracts).[88] Ultimately, when faced with litigation and mandatory arbitration, consumers are on the losing end. Nevertheless, these mandatory arbitration clauses—favoring creditors—have been upheld as valid and binding by many state courts.[89]

Credit card issuers, being lobbying behemoths, have also maintained the favor of Congress.[90] This is evident in the most recent amendments to the bankruptcy laws. These amendments that were debtor-friendly prior to the 2005 amendments have made bankruptcy laws more pro-creditor.[91]

Despite its title, the Bankruptcy Abuse Prevention and Consumer Protection Act[92] (BAPCPA) is more about creditor protection than it is about consumer protection.[93] Heavy lobbying by banks, retailers, and credit card issuers eventually prompted

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Forum's documents show that consumers won in only 87 out of 19,705 arbitrations it conducted for First USA Bank).

88. *See* Furletti, *supra* note 81, at 5.

89. *See, e.g.*, Tickanen v. Harris & Harris, Ltd., 461 F. Supp. 2d 863, 867-68 (E.D. Wis. 2006) (upholding arbitration agreement where credit card issuer sent subsequent notice to its cardholders that further use of the card would bind them to arbitration). *See also* Phuong Cat Le, *Binding Arbitration a Loser for Consumer*, SEATTLE POST-INTELLIGENCER, Sept. 27, 2007, http://seattlepi.nwsource.com/money/333453_arbitration28.html (last visited Dec. 21, 2008) (reporting that in a sample of 19,300 cases, arbitrators favored consumers only five percent of the time, but arbitration firms used by credit card companies (Discover Financial Services, Visa, Master Card, American Express, etc.) ruled in favor of those companies ninety-five percent of the time). *But see* Haydock, *supra* note 84 (reporting on an editorial by the managing director of the National Arbitration Forum that arbitrations are cheaper and faster than court, and that arbitrators are "neutral and unbiased" in deciding cases); NATIONAL ARBITRATION FORUM, CALIFORNIA CCP 1281.96 REPORTS, *available at* http://www.arb-forum.com/main.aspx?itemID=563&hideBar=False&navID=188&news=3 (reporting on the win-loss record of California consumer arbitrations since 2003 pursuant to CCP 1281.96).

90. Kathryn Jean Lopez, *Hammering K Street*, NAT'L REV., April 18, 2006, http://www.nationalreview.com/interrogatory/qa200604180713.asp (interviewing Matthew Continetti, author of *The K Street Gang: The Rise and Fall of the Republican Machine*, who commented that "lobbyists draft the laws, design the earmarks, recruit from congressional staffs, recruit from the ranks of former legislators themselves").

91. Michelle J. White, *Bankruptcy Reform Gave Creditors Too Much*, WASH. POST, Aug. 21, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/08/19/AR2006081900413.html. *See generally* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005) (detailing the progressive bankruptcy proposals to tighten bankruptcy laws against debtors).

92. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in title 11 of the United States Code).

93. *See generally* Mechele Dickerson, *Regulating Bankruptcy: Public Choice, Ideology and Beyond*, 84 WASH. U. L.R. 1861 (2006) (providing an overview of the history of the BAPCPA); Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 376 (2007) ("The [BAPCPA] radically altered the policies underlying consumer bankruptcy in this country, marking a significant shift in favor of creditors."); Eugene R. Wedoff, *Major Consumer Bankruptcy Effects of BAPCPA*, 2007 U. ILL. L. REV. 31 (2007) (discussing the major changes in consumer bankruptcy law since the passage of BAPCPA).

Congress to enact the BAPCPA on April 14, 2005.[94] Congress had bandied with bankruptcy reform legislation since 1997—some eight years before its enactment.[95]

During this time, credit card lobbyists and supporting politicians minimized the real bankruptcy issues by the repetitive sound bite: "[B]ankruptcy is being filed as a method of financial planning by those with the means to pay their debts."[96] The facts, however, showed that Americans who filed bankruptcy during this time were as bad off, or even worse off, financially than those who filed in the early 1980s.[97] During this time, the number of Americans filing bankruptcy was only about one-third of what it was in the late 1990s when the BAPCPA was under consideration.[98]

Although bipartisan majorities in the House and Senate recognized significant flaws in the American bankruptcy system at the time the BAPCPA was being considered, opponents of the BAPCPA were convinced that it was a bill drafted by credit card companies for their own benefit.[99] Elected officials ignored women's groups, civil rights groups, and unions to get this bill passed.[100] Among other things, the new bankruptcy law abolishes the right of debtors to decide whether to file Chapters 7 or 13, disallows debtors to advance their own plans for repayment, and significantly increases bankruptcy costs by adding new requirements for debtors and their attorneys.[101] Thus, scholars have concluded for these and other reasons that the new bankruptcy law will significantly benefit credit card issuers, rather then consumers.[102]

In response to the abuse by credit card issuers, governments have enacted predatory lending laws.[103] Even before those laws, however, many states attempted to level the playing field between big corporations (e.g., credit card issuers) and consumers by enacting legislation providing for fee-shifting in attorney's fees.

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94. *See* Alan Zibel, *In '07, Personal-Bankruptcy Filings Rise*, ORLANDO SENTINEL, Jan. 4, 2008, at C2 (reporting that banks, retailers and credit card companies campaigned Congress for eight years before Congress passed the biggest changes to U.S. bankruptcy laws in a quarter-century). *See also* IN DEBT WE TRUST, *supra* note 3 (reporting that banks, credit card companies, accounting firms and business associations spent a combined $154 million to get this one bankruptcy bill passed); Michelle J. White, *Bankruptcy Reform and Credit Cards*, 21 J. ECON. PERSP. 175, 175 (2007) (noting that in response to an increase in personal bankruptcies from 1980 to 2004, "[l]enders responded with a major lobbying campaign for bankruptcy reform that lasted nearly a decade and cost more than $100 million").

95. *See* Mann, *supra* note 93, at 376 n.5 (noting that the credit-industry drafted bills starting with H.R. 2500, 105th Cong. (1997)).

96. Jean Braucher, *Options in Consumer Bankruptcy: An American Perspective,* 37 OSGOODE HALL L.J. 155, 158 (1999). *See also* Dickerson, *supra* note 93, at 1867-70 (finding that proponents of the Act relied upon moral arguments of how shameful it was for Americans to walk away from debt so easily); Charles J. Tabb, *The Top Twenty Issues in the History of Consumer Bankruptcy*, 2007 U. ILL. L. REV. 9, 29 (2007) (noting the rhetoric in recent years has painted debtors as "abusers").

97. *See* Braucher, *supra* note 96, at 158.

98. *Id.*

99. *See* Mann, *supra* note 93, at 376 n.1.

100. *See* IN DEBT WE TRUST, supra note 3.

101. *See* White, *supra* note 94, at 183-88.

102. *See* Mann, *supra* note 93, at 376. *See also* White, *supra* note 94, at 176 (explaining that after the BAPCPA, bankruptcy was less attractive to debtors, since some were forced to repay credit card debts out of post-bankruptcy earnings).

103. Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1259-70 (2002) (defining predatory lending as a syndrome of loan abuses benefiting mortgage brokers, securitizers, and lenders to the detriment of the borrowers).

V. ATTORNEY'S FEES

There are generally two widely recognized rules regarding attorney's fees. One is the English rule, which provides that the losing party pays its own attorney's fees and those of the other party.[104] The other is the American rule, which provides that each party assumes responsibility for its own legal fees, irrespective of who prevails in the lawsuit.[105] Nevertheless, the historic development of what we know today as the American rule shows the value that lawyers place on their ability to obtain attorney's fees.[106]

During colonial times, legislation allowed for fee recovery as a component of comprehensive attorney fee regulation, and almost all of the colonies attempted statutory regulation of attorney's fees.[107] In doing so, the legislatures prescribed the fees a lawyer could charge and those that could be recovered from the losing party.[108] This was less about shifting fees from one party to another and more about ensuring that attorney's fees were limited.[109] Because statutory regulation limited attorney's fees and often resulted in an award of fees from the losing party that was considerably less than what the client could pay, lawyers freed themselves from legislative control after the American Revolution.[110]

Lawyers desired higher fees than they had been receiving, and soon the American rule emerged because lawyers found that they could recover more from their clients than the legislatures were allowing them to collect from losing parties.[111] Thus, the American rule has been couched as a "rough compromise" in that lawyers obtained the ability to collect higher fees from their clients and legislative cost recovery restrictions remained as a symbolic vestige of the prior regulatory method.[112] During the twentieth century, the phrase, "American rule," was coined.[113]

The American rule is one of four models of "fee-shifting" (the others are two-way shifting under the English rule, and one-way shifting allowing fee awards to prevailing plaintiffs or prevailing defendants).[114] The American rule has been diluted in various aspects, but has not been repealed. Each party paid its own expenses unless a party was deemed to have litigated in bad faith, a common fund was established through

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104. *See* Bebchuk & Chang, *supra* note 15, at 373.

105. *Id.*

106. *See generally*, Leubsdorf, *supra* note 15 (asserting that history shows that American courts have always allowed prevailing litigants to recover their costs from the losing party as prescribed by the legislature and exploring the American rule's impact on the finances of the American bar).

107. *Id.* at 10 (citing A.H. CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA 85-327 (1965)).

108. *Id.*

109. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1571 (1993) ("Almost all colonial legislation regarding attorney's fees reflect an intent to control the amount an attorney could charge the client rather than an intent to shift attorney's fees as costs to be collected by the prevailing litigant.").

110. *See* Leubsdorf, *supra* note 15, at 13.

111. *Id.* at 13-17.

112. *Id.* at 16.

113. *Id.* at 27-28 (noting that the earliest use of the term known to author was in Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 856 (1929)).

114. *See* Rowe, *Predicting the Effects of Attorney Fee Shifting*, *supra* note 15, at 140-41.

which the attorney could be paid, and the legislature had enacted a statute allowing for fee recovery or parties agreed to fee recovery by contract.[115] Scholars have argued that the American rule denies access to low income litigants or those with small claims.[116] But one scholar argued that the bulwark of the American rule, contingency fees, ensures that everyone—rich or poor—has access to the courts and will be able to avail themselves of the assistance of an attorney.[117] This may be true in cases other than small claims debt collection cases where the claim is often modest. Thus, few lawyers will take a case on a contingency fee basis that would result, if they prevailed, in a return less than the standard hourly fees.[118]

Fee statutes have varied.[119] State legislatures have used fee-shifting statutes to address problems in particular areas of litigation. For example, Florida enacted a two-way fee shifting statute in medical malpractice actions[120] and Illinois enacted a one-way fee shifting statute for a prevailing defendant credit card holder who was sued by a credit card issuer for unauthorized use liabilities.[121] Although this one-way fee shifting to prevailing defendants is rare,[122] it does exist and perhaps should be given more thought by legislatures, especially in credit card collection cases where the amount in question is generally small. According to one scholar, the prospect of fee-shifting encourages attorneys to invest more in litigating the case.[123]

A. Analysis Under Florida Law

An analysis under Florida law of *Any Credit Card Company v. Consumer*, shows the inherent unfairness in the law as it relates to misidentified debtors. With respect to attorney's fees, Florida follows the American rule.[124] There are exceptions, however, which allow parties to shift their share of attorney's fees to the losing party.

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115. *See* Leubsdsorf, *supra* note 15, at 28-30 (providing an historical account of attorney's fees and their dilution).

116. Lorraine Wright Feuerstein, *Two-Way Fee Shifting on Summary Judgment or Dismissal: An Equitable Deterrent to Unmeritorious Lawsuits*, 23 PEPP. L. REV. 125, 157 (1995).

117. Stephan Landsman, *The History of Contingency and the Contingency of History*, 47 DEPAUL L. REV. 261, 262 (1998) (stating that a fundamental goal of the contingency fee arrangement is to ensure that both rich and poor will be able to access the courts and legal counsel).

118. *See* Feuerstein *supra* note 116, at 158.

119. Rowe, *Predicting the Effects of Attorney Fee Shifting*, *supra* note 15, at 141. Rowe states:

> A fee rule can apply across the board to all or nearly all civil litigation (as is true, for example, of the English rule), or only to certain types of actions (as with the Civil Rights Attorney's Fees Awards Act [codified at 42 U.S.C. § 1988]), or to certain aspects of civil proceedings (as is the case of fee shifting as a discovery sanction under Federal Rule of Civil Procedure 37.

Id.

120. FLA. STAT. ANN. § 768.56 (West Supp. 1983), repealed by 1985 Fla. Laws c. 85-175 § 43.

121. 815 ILL. COMP. STAT. ANN. 145/2 (West 2008).

122. *See* Rowe, *Predicting the Effects of Attorney Fee Shifting*, *supra* note 15, at 141 n.8.

123. *See* Bruce L. Hay, *Fee Awards and Optimal Deterrence*, 71 CHI.-KENT L. REV. 505, 511-13 (1995).

124. Inland Dredging Co. v. Panama City Port Auth., 406 F. Supp. 2d 1277, 1280 n.2 (N.D. Fla. 2005) (noting that Florida law requiring parties to bear their own attorney's fees unless a statute or contract provides otherwise is in accord with federal law and common law as generally followed throughout the United States).

In Florida, as in many other states, attorney's fees may be awarded to the prevailing party pursuant to statute or contract.[125] Florida courts have "no discretion to decline to enforce contractual provisions for an award of the prevailing party's attorney's fees any more than any other valid contractual provisions."[126] The prevailing party, under Florida law, is the one prevailing on the significant issues in the litigation.[127] Finally, "the object of contractual attorney's fees is to make the prevailing party whole."[128]

In *Any Credit Card Company v. Consumer*, Consumer appeared entitled to attorney's fees pursuant to contract, not because Consumer had entered into a contract with ACCC, but because it sued Consumer for breach of contract, alleging he was a party to a contract, which stated in pertinent part:

> Promise to Pay. You promise to pay us when due all amounts borrowed when you or someone else uses your Credit Card Account (even if the amount charged exceeds your permission), all other transactions and charges to your Credit Card Account and collections costs we incur, including, but not limited to, reasonable attorney's fees and court costs. (If we sue you to collect the debt and you win the suit, we will pay your reasonable attorney's fees and court costs.)

By successfully showing that ACCC had not met its burden to prove that Consumer was the person listed on the account statement, Consumer also proved he was not a party to the contract under which ACCC was suing. Thus, fee-shifting by contract would not apply because the parties in the lawsuit were not the parties to the contract. That is, ACCC and Consumer did not agree, or contract, to anything because Consumer was never in a contract with ACCC—he was not a signatory to the credit card agreement. Thus, no contract existed between ACCC and Consumer. Pursuant to Florida law, a party is precluded from claiming attorney's fees under a contract that is found to never have existed.[129]

Consumer also appeared to have a right to attorney's fees pursuant to section 57.105(7) of the Florida Statutes, which is a mutuality provision for contracting parties. Section 57.105(7) reads in its entirety:

> If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action,

125. *See* Price v. Tyler, 890 So. 2d 246, 250 (Fla. 2004) (quoting Pepper's Steel & Alloys, Inc. v. United States, 850 So. 2d 462, 465 (Fla. 2003)). *See also* Kittel v. Kittel, 210 So. 2d 1, 3 (Fla. 1968) (recognizing that in Florida attorney's fees may be awarded to a prevailing party in three circumstances: (1) where permitted by contract; (2) where authorized by constitutional legislative enactment; and (3) where awarded for services performed by an attorney in bringing into court a fund or other property).

126. Jacobson v. Jacobson, 595 So. 2d 292, 294 (Fla. Dist. Ct. App. 1992) (citations omitted). *See also* Am. Sign Co. v. Falconer, 696 So. 2d 473, 474 (Fla. Dist. Ct. App. 1997) (contractual rights to attorney's fees must be enforced like other provisions in the contract).

127. *See* Moritz v. Hoyt Enterprises, Inc., 604 So. 2d 807, 810 (Fla. 1992).

128. Nelson v. Marine Group of Palm Beach, Inc., 677 So. 2d 998, 1000 (Fla. Dist. Ct. App. 1996).

129. *See* David v. Richman, 568 So. 2d 922, 924-25 (Fla. 1990) (answering the certified question of whether a party is precluded from claiming attorney's fees under a contract which has been found to never have existed in the affirmative); Gibson v. Courtois, 539 So. 2d 459, 459 (Fla. 1989) (holding that there is no basis for an award of attorney's fees where there was no contract).

> whether as plaintiff or defendant, with respect to that contract. This subsection applies to any contract entered into on or after October 1, 1988.

The Florida Legislature enacted section 57.105(7) to bring some equity to contract negotiations where only one party has a right to recover attorney's fees in enforcing a contract.[130] That is, the statute ensures that "each party gets what it gives."[131] According to the legislative history, the effect of this provision

> would provide that if a contract allowed one party to recover attorney's fees when he is required to take any action to enforce the contract, the court could also award attorney's fees to the other party if that party prevailed in any action related to the contract, whether the other party was plaintiff or defendant in the action.[132]

Therefore, in the credit card context where so often the credit card agreement only provides unilateral attorney's fees for the prevailing credit card issuer, this provision would allow bilateral attorney's fees, allowing any party to recover these fees if it prevailed against the other party in an action related to the contract. Thus, ACCC could recover its attorney's fees had it prevailed in the lawsuit, and presumably Consumer could recover his attorney's fees if he prevailed with respect to the contract. Here, however, Consumer prevailed, but not *with respect to that contract*. That is, Consumer was adjudged not to be a party to the credit card agreement in question.

ACCC filed a breach of contract action and attached a generic contract under which it sought attorney's fees and costs. Assuming ACCC had shown that Consumer was a party to the contract, then it would have been entitled to the judgment and attorney's fees had it prevailed. Instead, Consumer prevailed and showed that he was not a party to the contract; therefore, arguably, he should be entitled to his attorney's fees. Otherwise, Consumer, a wrongly identified party—a putative debtor—would not be made whole, which is the very purpose for awarding attorney's fees; yet, ironically, now Consumer is in debt with attorney's fees to pay—a classic Pyrrhic victory.

Florida courts have interpreted section 57.105(7) to mean that where a party who is sued under a contract proves that he or she is not a party to the contract, then he or she is not entitled to attorney's fees. That is, the courts defer to Florida common law—the American rule—and require each party to bear its own expense of attorney's fees. Because of the legislative history of this section, it is hard to suggest that courts read the section more broadly to include scenarios such as *Any Credit Card Company v. Consumer* because ultimately it is determined that no contract even exists.

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130. *See Inland Dredging*, 406 F. Supp. 2d at 1282 (noting that these mutuality provisions are commonplace in various types of contracts, including promissory notes, which tend to give the holder of the note the right to recover attorney's fees incurred in enforcing the note, and thus if the debtor prevails in litigation with respect to the note, the debtor may recover attorney's fees).

131. *Id.* at 1283.

132. S. STAFF ANALYSIS & ECONOMIC IMPACT STATEMENT (Apr. 14, 1988) (Bill No. and Sponsor: S.B. 215, Sen. Grant). *See also* H.R. STAFF ANALYSIS & ECOMONIC IMPACT STATEMENT (Jan. 17, 1988) (Bill No. and Sponsor: H.B. 114, Rep. Drage) (reporting that at the time various Florida statutes provided attorney's fees for prevailing parties in particular types of contracts and that this proposed provision would apply to any contract that had a unilateral fee provision).

A leading case on this point is *Florida Medical Center, Inc. v. McCoy*,[133] where a patient's wife was found not to have assumed a responsibility for payment of the hospital bill after signing an assignment of benefits form as her husband's representative. Therefore, the court found that she did not incur an obligation to pay attorney's fees under the provision in which the signatory would be responsible for reasonable attorney's fees if the suit was instituted to collect on the hospital bill.[134] Thus, there was no basis to invoke the compelled mutuality provision under section 57.105(7). That is, the court held that a non-party to a contract (here, a contract did exist) having no obligations under the contract, has no right to recover attorney's fees under section 57.105(7) when prevailing on a claim for breach of the contract. This has remained Florida courts' interpretation of section 57.105(7). Thus, in Florida, a prevailing debtor in credit card contractual litigation cannot recover attorney's fees upon a showing that he or she is not a party to the contract in question. As such, Consumer was not made whole, and thus, the purpose behind the attorney's fee provisions was not effectuated.

B. Analysis Under Other Jurisdictions

Presently, several other states have fee-shifting provisions.[135] Some states' fee shifting provisions, however, extend further than those of other states. California's mutuality provision, section 1717(a) of the Civil Code, seems to extend the furthest in statutory language and judicial interpretation. Section 1717(a) reads in its entirety:

> In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, *whether he or she is the party specified in the contract or not*, shall be entitled to reasonable attorney's fees in addition to other costs.
>
> Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract.
>
> Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit. Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date

133. 657 So. 2d 1248 (Fla. Dist. Ct. App. 1995).

134. *Id.* at 1252. *See also* Univ. Ctr. Hotel, Inc. v. P.C.D. Constr., Inc., 323 B.R. 306, 309 (Bankr. N.D. Fla. 2005) (citing *McCoy* for the proposition that where a claim for attorney's fees is based on contract and there is no contract, then it is not possible for a claim to arise from the contract and thus attorney's fees may not be recovered on the contract); Fielder v. Weinstein Design Group, Inc., 842 So. 2d 879, 880 (Fla. Dist. Ct. App. 2003) (stating that where a party is found not to be a party to a contract, he cannot recover attorney's fees nor can they be assessed against him as a non-party).

135. *See* ARIZ. REV. STAT. ANN. § 12-341.01 (West 2008); CAL. CIV. CODE § 1717 (West 2008); MONT. CODE ANN. § 28-3-704 (West 2008); OR. REV. STAT. ANN. § 20.096 (West 2003); TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 2008); UTAH CODE ANN. § 78-27-56.5 (West 2008); WASH. REV. CODE. ANN. § 4.84.330 (West 2006).

of this section. Any provision in any such contract which provides for a waiver of attorney's fees is void.[136]

It allows prevailing, nonsignatory contracting parties to recover attorney's fees. Thus, if a creditor sues a putative debtor under a credit card agreement and the putative debtor successfully shows that he is not the contracting party, the putative debtor is entitled to his attorney's fees under the California statute. Such a provision actually provides total consumer protection for the alleged debtor, and thus, the underlying purpose of consumer protection is actually realized.[137]

Initially, California appellate courts interpreted section 1717 inconsistently. Some courts held that only parties to the contract could recover fees under section 1717,[138] while other courts faced with similar fact patterns came to the opposite conclusion.[139] Finally, the California Supreme Court addressed the issue in *Reynolds Metals Co. v. Alperson*.[140]

In *Reynolds*, the plaintiff filed a creditor's claim against defendants who were alleged to be "alter egos" of two bankrupt companies.[141] The court found for the defendants and awarded attorney's fees.[142] Upon the plaintiff's appeal, the Supreme Court of California held: "Had plaintiff prevailed on its cause of action . . . , defendants would have been liable on the notes. Since [defendants] would have been liable for attorney's fees pursuant to the fees provision had plaintiff prevailed, they may recover attorney's fees pursuant to section 1717 now that they have prevailed."[143] Thus, the defendants, as the prevailing party, may recover their attorney's fees pursuant to section 1717 because it includes persons who had not signed the contract, but were sued on it and determined not to be in privity of contract with the credit card company.

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136. CAL. CIV. CODE § 1717(a) (West 2008) (emphasis added).

137. Int'l Billing Serv., Inc. v. Emigh, 84 Cal. App. 4th 1175, 1188 (Cal. Ct. App. 2000) (stating that section 1717's purposes would be thwarted and attorney's fees claims used as tools of oppression if the statute did not allow attorney's fees for non-signatories who were sued under a contract, and would additionally pressure parties to settle unmeritorious claims). *See also* Kent S. Scheidegger, Comment, *Attorney's Fees and Civil Code 1717*, 13 PAC. L.J. 233, 236 (1981) (section 1717 is a consumer protection statute enacted to "protect persons of limited means who sign contracts with those in a superior bargaining position") (quoting Enrolled Bill Memorandum to Governor Reagan from his legislative secretary, June 5, 1968 (chaptered bill file 68-AB563, California State Archives)).

138. *See, e.g.*, Arnold v. Browne, 27 Cal. App. 3d 386, 397 (Cal. Ct. App. 1972) (relying on legislative intent to reject the argument that the phrase "whether he is the party specified in the contract or not" meant that any prevailing party in contract litigation containing an attorney's fees clause is entitled to fees). *See also*, Canal-Randolph Anaheim, Inc. v. Wilkoski, 78 Cal. App. 3d 477, 497 (Cal. Ct. App. 1978) (finding no right to attorney's fee where parties were not in privity with one another).

139. *See, e.g.*, Babcock v. Omansky, 31 Cal. App. 3d 625, 633 (Cal. Ct. App. 1973) ("As the language of the statute expressly indicates, a party need not be a signatory to the contract in order to recover attorney's fees as the prevailing party—as such prevailing party he becomes entitled to attorney's fees 'whether he is the party specified in the contract *or not*.'"). *See also* Care Constr., Inc. v. Century Convalescent Ctrs., Inc., 54 Cal. App. 3d 701, 707 (Cal. Ct. App. 1976) (allowing nonsignatory defendant to recover attorney's fees under a mutuality theory); Pas v. Hill, 87 Cal. App. 3d 521, 535-36 (Cal. Ct. App. 1978) (holding a nonsignatory could recover attorney's fees under an estoppel theory).

140. 599 P.2d 83 (Cal. 1979).

141. *Id.* at 84.

142. *Id.* at 84-85.

143. *Id.* at 86 (citation omitted).

The California Supreme Court essentially articulated a two-part test to determine whether a nonsignatory to a contract may recover attorney's fees under section 1717. The first part requires that the nonsignatory be "sued on a contract as if he were a party to it," and the second part requires that the signatory be "clearly entitled to attorney's fees should he prevail in enforcing the contractual obligation against the [nonsignatory party]."[144] Thus, the California Supreme Court interpreted section 1717 as allowing contractual nonsignatory parties to recover attorney's fees.

Although this interpretation has been criticized as leading to potential problems, several benefits have also been recognized. One commentator addressed the potential problems presented by the court's approach and argued that the current interpretation of section 1717 has no statutory basis in the language or history of the statute;[145] that the interpretation conflicts with basic contract principles that require parties to be bound only by contractual provisions to which they have agreed;[146] and that the justification theories of estoppel and mutuality are over-inclusive and result in inconsistent results.[147] As a consequence, he concludes that these perceived problems will ultimately cause increased litigation costs and distrust in the court system because judges will rely upon what is fair as opposed to the contractual obligations of the parties.[148] On the other hand, he also noted that such "fee-shifting is more equitable, it encourages meritorious claims and discourages frivolous claims, it properly compensates prevailing parties, it punishes losing parties who bring frivolous claims, and it encourages settlement."[149] Interestingly, he concluded that arguments in favor of fee-shifting are weaker than arguments against it.[150]

When one considers the express statutory purposes behind section 1717, arguments in favor of the *Reynolds* interpretation appear to effectuate the purposes of section 1717.[151] Nevertheless, under California law, Consumer would have been able to recover his attorney's fees and thus, be made whole.

California is the trendsetter in its language and interpretation of its mutuality provision and other states have followed California to some extent. For example, Oregon and Washington have language substantially similar to the language in section 1717, which suggests that nonsignatories to a contract may recover attorney's fees.[152]

144. *Id.* at 85.

145. *See* Robert S. Miller, *Attorney's Fees for Contractual Non-Signatories Under California Civil Code Section 1717: A Remedy in Search of a Rationale*, 32 SAN DIEGO L. REV. 535, 565-66 (1995) (arguing that the statutory language, "whether he or she is the party specified in the contract or not," may refer "to parties to the contract who are not specifically granted a right to recover attorney's fees by the contract, or . . . it could have the broader meaning of including non-parties as well").

146. *Id.* at 567.

147. *Id.* at 568-79.

148. *Id.* at 579.

149. *Id.* at 580.

150. *Id.* at 589.

151. *See Reynolds Metal Co.*, 599 P.2d at 85 (noting the legislature's purposes to create mutuality of remedy where a contract makes recovery of attorney's fees for only one party and to avoid oppressive use of one-sided attorney's fees provisions).

152. *See* Herzog Aluminum, Inc. v. Gen. Am. Window Corp., 692 P.2d 867, 871 (Wash. Ct. App. 1984) ("With the exception of a few additional words, [the Washington statute] is a duplicate of the Cal. Civ. Code § 1717 (Deering 1971) which had been adopted and judicially interpreted prior to 1977."); Golden W. Insulation, Inc. v. Stardust Inv. Corp., 615 P.2d 1048, 1057-58 (Or. Ct. App. 1980) (noting "the

In *Golden West Insulation, Inc. v. Stardust Investment Corp.*,[153] the Oregon Court of Appeals examined section 20.096 of the Oregon Revised Statutes[154] to determine "whether a litigant who was not a signatory party to a contract can recover fees."[155] The court held that the defendant, who was assigned the rights and obligations under the contract with the plaintiff, but who was not a party to the contract, could recover attorney's fees.[156] Recognizing that California had already addressed the issue, the court followed California case law and reasoned that had the plaintiff prevailed at trial, it would have been entitled to attorney's fees; and because the defendant had to hire counsel and defend the suit, the defendant was entitled to attorney's fees when he prevailed.[157] But this holding was subsequently limited—or clarified—in *Stevens v. Foren*,[158] where the court determined that *Golden West* "stands only for the proposition that one who is sued on the contract as an assignee has an entitlement to attorney fees equal to that of the signatory parties."[159]

In *Herzog Aluminum, Inc. v. General American Window Corp.*,[160] the Washington Court of Appeals examined whether a defendant could receive attorney's fees under section 4.84.330 of the Washington Revised Code.[161] Similar to *Golden West*, the

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California statute on the award of attorney's fees in a contract action is substantially similar to [the] Oregon statute").

153. 615 P.2d 1048 (Or. Ct. App. 1980).

154. The statute presently provides:

> (1) In any action or suit in which a claim is made based on a contract, where such contract specifically provides that attorney fees and costs incurred to enforce the provisions of the contract shall be awarded to one of the parties, the party that prevails on the claim, *whether that party is the party specified in the contract or not*, shall be entitled to reasonable attorney fees in addition to costs and disbursements.
>
> (2) Attorney fees provided for in a contract described in subsection (1) of this section shall not be subject to waiver by the parties to any such contract that is entered into after September 9, 1971. Any provision in such a contract that provides for a waiver of attorney fees is void.
>
> (3) As used in this section and ORS 20.097, "contract" includes any instrument or document evidencing a debt.

OR. REV. STAT. § 20.096 (West 2003) (emphasis added).

155. *Golden West Insulation*, 615 P.2d at 1057.

156. *Id.*

157. *Id.* at 1058.

158. 959 P.2d 1008 (Or. Ct. App. 1998).

159. *Id.* at 1013. *See also* Glaser v. Rock Creek Country Club, Inc., 683 P.2d 114, 116 (Or. Ct. App. 1984), *rev. denied*, 687 P.2d 796 (Or. 1984) (finding that the contractual provision was not a provision providing for attorney's fees; it was just an indemnity provision running from an insurer to its insured); John Deere Co. v. Epstein, 755 P.2d 711, 715, *aff'd*, 769 P.2d 766 (Or. 1988) (holding that a party may not avoid the contract and simultaneously at the same time claim the benefit of the provision for attorney fees).

160. 692 P.2d 867, 869-70 (Wash. Ct. App. 1984).

161. The statute provided:

> In any action on a contract or lease entered into after September 21, 1977, of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements. Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void. As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

WASH. REV. CODE ANN. § 4.84.330 (West 2006).

plaintiff sued the defendant on a contract containing an attorney's fees provision.[162] The defendant prevailed at trial on the theory that no contract had been formed between himself and the plaintiff.[163] Thus, the trial court awarded the defendant attorney's fees.[164] Noting that California addressed this issue in *Reynolds*, and that Oregon (also with a statute of similar wording) addressed the issue in *Golden West*, the Washington court held that the broad language in "any action on a contract" found in section 4.84.330 includes any action in which it is alleged that a person is liable on a contract, and thus defendant who successfully proved an absence of an enforceable contract was properly entitled to an award of reasonable attorney fees incurred at trial.[165] *Herzog* was distinguished, however, in *Wallace v. Kuehner*,[166] where the court noted that in *Herzog* and the cases which followed, there was intention to form a contract, as opposed to *Wallace* in which there was not an intention to form a contract, and thus the prevailing party was not entitled to an award of attorney's fees.[167] More recently, in *Labriola v. Pollard Group, Inc.*, the Washington Supreme Court awarded a prevailing party attorney's fees even where the contract containing the attorney's fees provision was invalidated.[168] However, in *Labriola*, the contract was deemed invalid, unlike in *Wallace*, where there was neither a contract nor an intention to form one.

Other states have fee-shifting statutes, but they are drafted more narrowly than in California, Oregon, and Washington.[169] California seems to be setting the trend of ensuring the comprehensive nature of its consumer protection statute through its broad interpretation.[170]

Analyzing *Any Credit Card Company v. Consumer* under Florida law and California law would result in entirely different results. Florida courts would refuse attorneys fees because Consumer was not a party to the contract. But, California courts might determine that (1) Consumer was "sued on a contract as if he were a party to it," and (2) the signatory party (ACCC) would have been "clearly entitled to attorney's fees should [it] prevail in enforcing the contractual obligation against the nonsignatory party" (Consumer). Finding both to be true, a California court would seemingly have

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162. *Herzog Aluminum*, 692 P.2d at 868-69.

163. *Id.* at 869.

164. *Id.* at 871-72.

165. *Id.* at 872.

166. 46 P.2d 823 (Wash. Ct. App. 2002).

167. *Id.* at 831.

168. 100 P.3d 791, 798 (Wash. 2004).

169. *See generally* ARIZ. REV. STAT. ANN. § 12-341.01 (West 2008); MONT. CODE ANN. § 28-3-704 (West 2008); TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 2007); UTAH CODE ANN. § 78-27-56.5 (West 2008).

170. California is also setting a trend by requiring that arbitration companies publicly disclose pertinent details of their arbitration cases and that they will not be liable for such publication. *See* CAL. CIV. PROC. CODE § 1281.96 (West 2004) (mandating publication of the name of the nonconsumer party, type of dispute involved, which party prevailed, on how many prior occasions the nonconsumer party has been in arbitration or mediation by the private arbitration company, whether the consumer party had legal representation, date of arbitration demand, arbitrator appointment and disposition of arbitration, manner in which the dispute was disposed (e.g., settlement, withdrawal, default, hearing), amount of the claim, award and any other relief granted, arbitrator's name, arbitrator's fee, and how the fee was allocated between the parties). Another trend California is setting is not permitting attorneys to litigate in small claims courts. *See* California Courts Self-Help Center: Small Claims, http://www.courtinfo.ca.gov/selfhelp/smallclaims (stating that lawyers cannot represent parties in California small claims court).

awarded Consumer his attorney's fees. Thus, the Florida law fails to provide adequate consumer protection and the California law ensures that all, even nonsignatories who have to defend themselves against suit under a contract to which they are not parties, have adequate legal access in these kinds of credit card cases where the amount in question is generally minimal. Because of the prominent place that credit scores have taken in loans, insurance, and other financial products, consumers cannot afford to gamble when deciding whether to vigorously defend themselves against credit card issuers.[171]

Thus, it remains that something needs to be done to bring relief to putative debtors. If our society believes that everyone should have adequate access to legal representation, then change is even more critical.

VI. RECOMMENDATION

"Legal scholars have long recognized the need for a practical solution to the problem of unfairness in consumer contracts."[172] That inherent unfairness, coupled with the credit card industry's abusive lending and debt collection practices, suggests that action must be taken soon.

Because of the well-documented credit card industry abuses, federal and state governments are becoming more active in their efforts to protect consumers.[173] Meanwhile, the credit card industry is cutting back its zero percent interest offers and mail solicitations.[174] These efforts are laudable and quite necessary, but they still do not address the issues surrounding the putative debtor who is ultimately adjudged to be the wrong party sued. "The effectiveness of a consumer protection law usually can be prejudged accurately by its enforcement mechanism."[175] Although there exists state legislation designed to protect consumers, often the legislation simply does not go far enough or its ultimate goals are too narrow.[176] Most states do not provide any real protection for putative debtors who prove that they are the wrong party in debt collection cases, but some viable solutions do exist.

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171. *See* Richard Burnett, *Woman Wins Historic Jury Verdict from Equifax*, ORLANDO SENTINEL, Dec. 4, 2007, at A1 (reporting that because of an identity mix-up, a consumer had her credit ruined and was denied student loans, credit card accounts, and other financial products).

172. Jeffrey Davis, *Revamping Consumer-Credit Contract Law*, 68 VA. L. REV. 1333, 1333 (1982).

173. *See, e.g.*, Credit Cardholders' Bill of Rights Act of 2008, H.R. 5244, 110th Cong. (2008) (amending, among other things, TILA to establish fair and transparent practices relating to credit extension under an open end consumer credit plan); Liz Pulliam Weston, *The Credit Card Party is Officially Over*, http://articles.moneycentral.msn.com/Banking/CreditCardSmarts/TheCreditCardPartyIsOfficiallyOver.aspx?page=1 (last visited Dec. 21, 2008) (reporting that Congress held hearings on the "controversial" practices in the credit card industry in 2007 and that Democratic Rep. Carolyn Maloney introduced a bill that would prevent those practices and require 45 days advance notice of any changes in rates or terms).

174. *See* Weston, *supra* note 173 (reporting the decline of zero percent interest rate offers and the drop in direct mail solicitations).

175. Ronald L. Hersbergen, *Consumer Protection*, 41 LA. L. REV. 443, 443 (1980-81).

176. *See, e.g.*, Florida Consumer Collection Practices Act, FLA. STAT. ANN. § 559.55 (West 2008); Florida Equal Access to Justice Act, FLA. STAT. ANN. § 57.111 (West 2008).

A. Legislative Action

1. Follow the Trend

One solution is for Florida and other states to follow California's lead. Attorney's fees provisions are substantive law[177] and it is the responsibility of each state's legislature to enact substantive changes.[178] For example, Florida could adopt California's mutuality provision language and interpretation of section 1717, as well as its legislative purposes. Section 1717 appears to be the most comprehensive law that would allow adequate consumer protection in these types of cases. Considering that the California Supreme Court has recently been branded as the "most influential state court in the nation," following California's trend would not be unusual.[179]

Following California's trend would be the most equitable approach. In the case of *Any Credit Card Company v. Consumer*, for example, if the creditor had prevailed it would have received attorney's fees, but the putative debtor who prevailed was denied attorney's fees.

Such a rule would also discourage frivolous claims by credit card issuers and would encourage debtors to raise small, meritorious claims and defenses. Additionally, the putative debtor would be made whole, which in turn would encourage settlement for both parties. As it stands now, however, creditors have no real reason to settle, especially when they are able to come to court suing under a breach of contract cause of action without the parties' contract and argue that some innocent consumer is a party to the contract—as was the case in *Any Credit Card Company v. Consumer*. In this case, the appellate court was aware that the credit card issuer did not have a signed agreement with him, but it found that the credit card issuer's billing statement delivered to his old address was sufficient to overcome a motion for summary judgment and reverse the trial court. However, this outcome is not unusual in these kinds of cases.[180]

Adopting California's approach to awarding attorney's fees seems unlikely, given the credit card industry's power and the legislature's preference for credit card issuers. Such biases are evidenced by the BAPCPA and other federal and state pro-creditor laws. The current climate in America, however, appears to be growing increasingly adverse to the credit card industry's controversial practices.[181] Moreover, the federal

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177. *See* Bitterman v. Bitterman, 714 So. 2d 356, 363 (Fla. 1998) (quoting L. Ross, Inc. v. R.W. Roberts Constr. Co., 466 So. 2d 1096, 1098 (Fla. Dist. Ct. App. 1985) ("The ability to collect attorney's fees from an opposing party, as well as the obligation to pay such fees, is substantive in nature.").

178. TGI Friday's, Inc. v. Dvorak, 663 So. 2d 606, 611 (Fla. 1995).

179. *See* Adam Liptak, *Around the U.S., High Courts Follow California's Lead*, N.Y. TIMES, Mar. 11, 2008, at A12, *available at http://www.nytimes.com/2008/03/11/us/11bar.html?_r=1&ref=us&oref=slogin* (referring to a study that determined that California's high court was followed more than any other state).

180. As one author explains:

> [C]redit card companies, or the debt buyers to whom they sell the debt, often initiate collection cases against consumers without any documentation of a credit card agreement signed by the consumer or even periodic statements to show transaction activity. Instead, they simply offer up an affidavit from an employee in their loss recovery department and/or sue on an account stated theory. This deprives the consumer of the ability to challenge erroneous transactions or demonstrate how much of their debt is due to purchases versus finance charges and junk fees.

Carter et al., *supra* note 5, at 44-45

181. *See, e.g.*, Weston, *supra* note 173.

government's efforts, pushed by politicians, encourage lenders to aid in the current financial crisis of many homeowners who are caught in a web of debt, including being over-mortgaged.[182] This recommended solution would only require the state legislatures to act—not Congress. The financial portfolio of Americans is so poor that now our politicians—federal and state—who have heretofore been wooed by the credit card industry lobbyists, may actually denounce the practices of the industry and seek solutions on behalf of their constituents—the people. Further, it may be that the states' legislatures did not foresee the dire results of these kinds of cases, and perhaps they will act, as appears to be the rising trend with the recent intervention by the federal government and the introduction of congressional bills.

Like other states, Florida has the "offer of judgment" rule, which allows a defendant to offer a settlement and recover attorney's fees if the plaintiff receives a judgment at least twenty-five percent less than the settlement offer.[183] One might argue that attorneys representing putative debtors may now utilize the offer of judgment rule now by offering a nominal settlement at the start of lawsuits. However, this is exactly what California's section 1717 is designed to prevent—pressuring parties to settle unmeritorious claims. An offer of judgment—being a partial settlement—would likely also have adverse effects on the defendant's credit report as well as the defendant's taxes.[184]

Moreover, the Florida Legislature has provided for attorney's fees in various other analogous statutes. For example, in the Florida Deceptive and Unfair Trade Practices Act (FDUTPA),[185] a consumer protection law, the Florida Legislature has provided for statutory attorney's fees to the prevailing party.[186] As with most attorney's fees provisions, statutes granting the right to recover attorney's fees must be strictly construed because recovery of attorney's fees is in derogation of the common law.[187] Nevertheless, courts have awarded attorney's fees in a manner that appears broader than what courts allow under section 57.105(7). Florida courts have awarded

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182. 6 Big Lenders to Offer Broad Mortgage Relief, *available at* http://memphisminute.com/6-big-lenders-to-offer-broad-mortgage-relief (last visited Dec. 21, 2008) (reporting that the federal government is launching "Project Lifeline" where six major mortgage lenders, Bank of America Corp., Citigroup Inc., Countrywide Financial Corp., JP Morgan Chase and Co., Washington Mutual Inc., and Wells Fargo & Co., will broaden their efforts to help homeowners with their loans).

183. FLA. STAT. ANN. § 768.79(6)(a) (West 2008). The statute states:

> [If] a defendant serves an offer which is not accepted by the plaintiff, and if the judgment obtained by the plaintiff is at least 25 percent less than the amount of the offer, the defendant shall be awarded reasonable costs, including investigative expenses, and attorney's fees . . . incurred from the date the offer was served, and the court shall set off such costs and attorney's fees against the award.

Id. See also MGR Equipment Corp. v. Wilson Ice Enter., 731 So. 2d 1262, 1263 (Fla. 1999) (quoting the statutory language of section 768.79 to hold that the buyer's pretrial offer of judgment was valid).

184. *See* Birnbaum, *supra* note 16 (reporting that in debt settlements, consumers may face tax consequences).

185. FLA. STAT. ANN. § 501.201(10) (West 2007).

186. *See* Guyana Tel. & Tel. Co. v. Melbourne Int'l Commc'n Ltd., 329 F.3d 1241, 1246 (11th Cir. 2003) (In 1993, the Florida Legislature amended the FDUTPA to provide protection to the "consumering public at large . . . from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices").

187. *See* Ghodrati v. Miami Paneling Corp., 770 So. 2d 181, 183 (Fla. Dist. Ct. App. 2000) (stressing the need to strictly construe such statutes).

attorney's fees to the prevailing party under the FDUTPA when they have found that the defendant, who prevailed, was erroneously sued. In *Smith v. Bilgin*,[188] one business sued another under the FDUTPA.[189] The defendant argued that the act only applies to consumer transactions—not for those between businesses.[190] Accordingly, the defendant's attorney sought attorney's fees. The court held that the defendant was entitled to recover its attorney's fees because the plaintiff failed to establish its claim under the FDUTPA.[191] That is, the defendant was erroneously sued under the FDUTPA. This is arguably akin to the circumstances in *Any Credit Card Company v. Consumer*, where Consumer was erroneously sued under a contract that never existed between the parties. The lawsuit should have never been filed. As such, he should be entitled to recover his attorney's fees.

2. *Change the Current Practice*

One of the practices unique to the credit card industry is filing lawsuits against consumers absent a signed credit card agreement.[192] This practice does not allow consumers the ability to challenge the debt.[193]

In the case of *Any Credit Card Company v. Consumer*, the appellate court found that ACCC did not have a credit card agreement signed by Consumer, but nevertheless, the court reversed the trial court's grant of summary judgment to Consumer because the appellate court found that a genuine issue of material fact existed regarding the identity of Consumer.[194] Because ACCC never produced a credit card agreement signed by the Consumer—to ACCC's ultimate detriment—it was obvious that it did not have one.[195]

The legislature ought to require that a credit card issuer suing under a breach of contract theory provide the underlying contract between the parties with the consumer's signature. Thus, a credit card issuer would have to maintain the original account application to initiate a lawsuit.[196] This would seem to be much easier in this computer age because companies now store almost all of their information electronically.[197] If the

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188. 534 So. 2d 852 (Fla. Dist. Ct. App. 1988).

189. *Id.* at 852.

190. *Id.* at 852-53.

191. *Id.* at 854.

192. *See supra* note 180 and accompanying text.

193. *Id.*

194. *See Unifund*, No. 04-158AP. The court explained:

> We find that there exists a genuine issue of material fact as to the identity of the debtor, despite no written response or affidavit presented at trial by [ACCC]. While we have noted [Consumer's] argument that the credit card agreement is generic (as it does not contain [Consumer's] identification, address, or signature), we cannot ignore the conflicting evidence which arguably indicates that the debt is indeed his.

Id. at 2.

195. *See* Carter et al., *supra* note 5, at 45 ("There is evidence that credit card issuers would be unable to offer up the original agreement or application signed by the cardholder.").

196. *Id.* (citing Johnson v. MBNA, 357 F.3d 426, 432 (4th Cir. 2004) (wherein a credit card issuer admitted in litigation that it discarded original account applications after five years)).

197. David Thompson, *Legal Education for a Digital Age* 51-52 (Univ. of Denver Legal Studies Research Paper No. 08-27, 2009) (citing INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. AT THE UNIV. OF DENVER, ELECTRONIC DISCOVERY: A VIEW FROM THE FRONT LINES 10 (2008)).

legislature does not require credit card issuers to produce the actual credit card agreement signed by the putative debtor, courts should be leery to find in favor of credit card issuers that initiate breach of contract actions without the parties' contract.[198]

Such a legislative change would reduce the number of consumer debt lawsuits filed, because many credit card issuers do not have a signed credit card agreement from the consumer, and would also make the lawsuits easier and quicker to resolve, thus realizing the goal for a "speedy, inexpensive, and simple" small claims process. Further, it would restrict the credit card presumptions, which give the upper hand to credit card issuers at the expense of consumers, and bring some equity in the credit card industry with respect to litigating these kinds of cases.

3. Mistaken Identity

Another solution may be for the Florida Legislature to include a provision in section 57.105 that addresses mistaken identity. Specifically, the legislature could include a provision that provides the prevailing debtor with attorney's fees when he or she is erroneously sued by a creditor. This would encourage credit card issuers to thoroughly investigate when they receive notice that the putative debtor denies the allegations in the complaint, or else be subject to sanctions. That is, they would be strictly liable for the damages resulting from the erroneous lawsuit, and the putative debtor would not have to prove that the credit card issuer knew or should have known that its claim had no basis in fact or law under section 57.105. This would encourage creditors to be more cautious in issuing credit cards and punish creditors who file erroneous lawsuits. Punishing creditors for unscrupulous behavior is not a novel concept in our country's financial world.

In bankruptcy law, for example, creditors may seek a determination of dischargeability of a consumer debt pursuant to 11 U.S.C. § 523(a)(2)(A), wherein the creditor files a complaint alleging that the debtor used the card without the intention to pay the resulting bills.[199] Because of credit card issuers' "casual and inadequate lending practices and irresponsible actions" in mailing unsolicited pre-approved credit cards to the general public absent a proper investigation as to the creditworthiness of the consumer, courts have held creditors accountable.[200] The courts used § 523(d)[201] "as

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198. Even an account stated recovery theory in which the debtor has a reasonable amount of time to dispute the debt or it is presumed to be accurate has the potential for great abuse. In the case of *Any Credit Card Company v. Consumer*, such a theory would not have salvaged ACCC's unsupported claim because ACCC did not know when, where, or how Consumer allegedly opened the account; ACCC never received a single payment from Consumer; ACCC was not aware of what was purchased on this account; and ACCC never received a response from Consumer as to the alleged debt. That is, there was no evidence that Consumer actually received an account statement from ACCC to have an opportunity to dispute it.

199. *See In re* Sziel, 206 B.R. 490, 492 (Bankr. N.D. Ill. 1997).

200. Dennis J. Levine & D. Brett Marks, *Attorneys' Fees for Debtors Who Prevail in Credit Card Adversaries*, 72 FLA. B.J. 56, 56 (1998) (citing *In re* Valdes, Bankr. No. 94-14489-BKC-AJC, 1995 WL 618998 (Bankr. S.D. Fla. 1995)).

201. The statute states:

> If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if

a mechanism to punish creditors."[202] This enforcement mechanism was enacted "to discourage creditors from initiating false financial statement exceptions to discharge actions in hopes of obtaining a settlement from an honest debtor anxious to save attorney's fees. Such practices impair the debtor's fresh start."[203] To obtain attorney's fees, the debtor must show (1) the creditor requested a dischargeability determination pursuant to section 523(a)(2)(A); (2) the debt is a consumer debt; and (3) the debt was discharged.[204] The creditor, alternatively, may avoid the imposition of attorney's fees if it shows: (1) the creditor's actions were substantially justified and (2) special circumstances exist to make an award unjust.[205] Thus, the courts have not only recognized the abusive lending practices of credit card issuers in the past, but they have reacted by enforcing the attorney's fee provision pursuant to the statute.

B. Equitable Powers of the Court

As mentioned above, Florida courts generally "may only award attorney's fees when such fees are 'expressly provided for by statute, rule, or contract.'"[206] For decades, Florida courts have had the inherent power to award attorney's fees due to attorney misconduct during litigation, even though no statute authorizes such an award.[207] This inequitable conduct doctrine was to allow for attorney's fees for bad faith conduct against a party where no statute so provided.[208] Attorney's fee provisions often have different rationales and

> serve one or more of several distinct purposes—such as fairness, full compensation for legal wrong, punishment for misconduct either in litigation or out of court, encouragement of favored types of actions, equalization of sides in types of cases that usually involve resource imbalances, and impact on litigants' incentives to raise and pursue claims and defenses.[209]

> the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

11 U.S.C. § 523(d) (2007).

202. Levine & Marks, *supra* note 200, at 56.

203. Wells Fargo Fin. Nat'l Bank v. D'Alessandria (*In re* D'Alessandria), Bankr. No. 05-14163-BKC-AJC, 2006 WL 4347091, at *2 (Bankr. S.D. Fla. 2006) (quoting H.R. REP. NO. 95-595, at 365 (1977); S. REP. NO. 95-989, at 80 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5866, 6321). *See also In re Sziel*, 206 B.R. at 492 (reporting that a vast number of consumers are in "precarious financial condition when they file bankruptcy . . . that they can ill afford to pay additional fees to defend a lawsuit. These circumstances create a risk that the card issuers may coerce settlements from unrepresented consumers or obtain default judgments, regardless of the merits of the complaint.").

204. *See In re D'Alessandria*, 2006 WL 4347091, at *2.

205. *Id.*

206. Bane v. Bane, 775 So. 2d 938, 940 (Fla. 2000) (quoting Hubbel v. Aetna Cas. & Sur. Co., 758 So. 2d 94, 97 (Fla. 2000)).

207. *See* U.S. Sav. Bank v. Pittman, 86 So. 567, 572 (Fla. 1920) (awarding attorney's fees where the trial court found that the attorney conducted needless foreclosure proceedings for the sole purpose of increasing his attorney's fees, contrary to the desires of his client).

208. *See* Moakley v. Smallwood, 826 So. 2d 221, 222-24 (Fla. 2002) (noting that the trial court and the appellate court did not base their awards on section 57.105 of the Florida Statutes, allowing for attorney's fees where there is a lack of a justiciable issue based in law or fact).

209. Thomas D. Rowe, Jr., *Indemnity or Compensation? The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative*, 37 WASHBURN L.J. 317, 319 (1998) (citing Thomas D.

Considering the equitable powers and inherent authority of the court to award attorney's fees absent contract, statute, or rule, coupled with the purposes behind attorney's fees, the court should explore awarding attorney's fees in consumer credit cases in which the putative debtor prevails and the court finds that there is no other basis to award attorney's fees.

The purposes behind attorney's fees would provide the exception to the American rule based on equity. Thus, the basis of such an award would be an equity-based argument of fairness. It is simply unfair for a putative debtor to have to defend him or herself in consumer credit cases where the amounts may be so minimal that it is difficult to find legal representation. In addition, it is unfair to place the burden of proof on a putative debtor to show that the credit card issuer sued erroneously and yet, the putative debtor is saddled with a debt owed to his or her attorney. Alternatively, if the putative debtor is not able to obtain an attorney, he or she will likely lose the case against the credit card issuer.[210] The equitable solution of allowing attorney's fees is needed where the laws are slanted toward credit card issuers. Specifically, when a credit card issuer can sue a consumer without having the credit card agreement signed by the consumer or even a transaction account history, more protections are needed to ensure that these wrongly sued parties are made whole.

Currently, Florida judges have statutory authority to impose sanctions if the court determines that the losing party or its attorney knew or should have known that a claim or defense was unsupported by material facts needed to establish the claim or defense, or would not be supported by the application of then-existing law to the material facts under section 57.105.[211] The courts addressing claims under this statute have been awarding attorney's fees more often under this provision since its 1999 amendments, which make the statute broader than it was previously.[212]

However, this provision still does not reach far enough to tackle cases such as *Any Credit Card Company v. Consumer*, where the appellate court reversed the trial court's order of summary judgment in favor of the putative debtor, finding that there was a genuine issue of material fact regarding the identity of the debtor, even though the credit card issuer failed to provide a written response to Consumer's motion for summary judgment or an affidavit, and the credit card issuer was relying upon a generic credit card agreement and not one expressly between it and Consumer. Moreover, with the state law presumption that a credit card statement mailed to a consumer is accurate,[213] it would be extremely challenging for a consumer to show that

Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 653-66 (1992)).

210. *See* Elwell & Carlson, *supra* note 22.

211. FLA. STAT. ANN. § 57.105(1) (West 2008).

212. *See* John P. Fenner, *New § 57.105 Lawyer Sanctions, Our Ethics, and the Florida Constitution: Recent Developments and a Respectful Dissent*, 77 FLA. B. J., May 2003, at 26; *see also* Gary S. Gaffney & Scott A. Mager, *Section 57.105's New Look: The Florida Legislature Encourages Courts to Sanction Unsupported Claims and Dilatory Actions*, 76 FLA. B. J., Apr. 2002, at 8 (stating that the new amendments to section 57.105 will "discourage lazy or unscrupulous litigants (and their legal counsel) from asserting unsupported claims or defenses, or acting in any way to delay civil proceedings"); *Moakley*, 826 So. 2d at 223 (noting the statute is broader than it had been before the 1999 amendments).

213. *See supra* note 33.

there was no justiciable claim in these kinds of consumer collection cases,[214] especially after a reversal by an appellate court.

VII. CONCLUSION

If the object of contractual attorney's fees is to make the prevailing party whole, then the law as it exists today is inadequate. Not only is it inadequate, but it is causing erroneously sued consumers to go deeper into debt. This prospect is unsettling considering that many Americans are in debt, and the United States is in a financial crisis that is predicted to become worse.

For far too long, our elected officials have been in the pockets of the credit card issuers, resulting in laws that increasingly favor big businesses at the expense of the poor. Banks persuaded Congress to deregulate and end consumer protection against usury. Entities are lending payday loans, subprime loans, and other financial products to poor people at higher interest rates. Health crises, job losses, and divorces have Americans getting behind on their credit card debt. Health care, housing costs, and college tuition have skyrocketed. Our nation is in an economic crisis.

If Congress will not protect its constituents, then state legislatures must act. If state legislatures fall short, then our courts must be prepared to end the financial irresponsibility targeting our most vulnerable citizens. How does it profit America for most of its citizens to be in unmanageable debt?[215]

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214. *See, e.g.*, Wendy's of N.E. Fla., Inc. v. Vandergriff, 865 So. 2d 520, 524 (Fla. Dist. Ct. App. 2003) (reversing an award for attorney's fees where the court found that Wendy's position was not wholly unsupported by the facts at any time before the final summary judgment).

215. Since the completion of this Article, the world's credit markets have seized up and thus credit card issuers have tightened their lending standards for all potential creditors. Sara K. Clarke, *Orlando-Area Mom-and-Pop Businesses Hanging by Thread*, ORLANDO SENTINEL, Feb. 16, 2009, http://www.orlando sentinel.com/business/custom/thrifty/orl-nohelp1609feb16,0,7763422.story. In March 2008, Warren Buffet, a skilled investor, declared that the United States was in a recession, even though it had not reported two consecutive quarterly falls in gross domestic product, which technically defines a recession. Suzy Jagger and Dearbail Jordan, *Warren Buffett Declares America in Recession*, TIMES ONLINE, Mar. 3, 2008, http://business.timesonline.co.uk/tol/business/industry_sectors/banking_and_finance/article3476265.ece. Since that time, "credit markets seized up as confidence in the nation's financial system ebbed and people rushed to put money in Treasuries, the safest of investments." Vikas Bajaj and Jack Healy, *Stocks Drop Sharply and Credit Markets Seize Up*, N.Y. TIMES, Nov. 21, 2008, http://www.nytimes.com/2008/11/21/ business/21markets.html?fta=y. To date, the weak economy has taken a toll on the lending confidence, and even though lending rates have decreased, banks continue to be concerned about the credit quality of borrowers and thus banks are not lending as liberally as they had been. Ben Rooney, *Credit Strained by Skittish Lenders*, CNNMoney.com, Jan. 23, 2009, http://money.cnn.com/2009/01/23/markets/credit. Thus, the financial crisis in the United States has shifted the manner in which banks lend from liberal, careless lending targeting the riskiest borrowers (working poor, consumers with blemished histories, single mothers, senior citizens and college students) to borrowers with more established credit-worthy histories.