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INTRODUCTION TO THE SYMPOSIUM: CONSUMER FINANCIAL SERVICES LAW IN THE 1990s

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The Section of Business Law of the American Bar Association (ABA) is composed of nearly 60,000 lawyers working in various capacities. Some 6000 of these members are also actively involved in roughly 60 committees and 300 subcommittees, and attend meetings and educational programs presented each year at the spring meeting of the Section and the annual meeting of the ABA.

One of these committees is the Consumer Financial Services Committee (CFSC), currently chaired by Robert P. Chamness, with some sixteen subcommittees and task forces. Alphabetically, they range from Consumer Litigation to Truth in Lending. The CFSC has over 500 members and is actively involved in sponsoring a variety of activities, including an annual fall-winter program and an annual meeting of the Committee.

The Committee's activities also include such things as monitoring and reporting on the multifaceted legislative,

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regulatory, and judicial developments that affect consumer financial services, and sponsoring the *Annual Survey of Consumer Financial Services Law* in *The Business Lawyer*. The Committee meets and sponsors substantive programs during ABA and Section meetings. In addition, the Committee sponsors ABA National Institutes, such as the *National Institute on Consumer Financial Services in the 1990s*, held in March of 1990, in Washington, D.C. This Symposium is an outgrowth of that Institute.[1]

All of these activities reflect the widespread interest in this expanding area of the law. The work of the Consumer Financial Services Committee is designed not only to perform an educational function but also to help shape many of the legislative and regulatory developments that affect consumer financial services law. This Symposium illustrates that commitment and is designed to provide a broad perspective on the need and prospects for improvement in the law of consumer financial services during the 1990s.

For example, in *Electronic Money in the 1990s: A Net Benefit or Merely a Trade-Off?*, Professor Mark Budnitz raises and analyzes important questions concerning the costs and benefits of electronic money for consumers, retailers, financial institutions, and the government. His Article considers both retail electronic funds transfers (EFT) by financial institutions, and the proposed electronic transfer of government benefits. While the advantages of electronic money have been highly touted by those promoting these services, Professor Budnitz notes that "[f]or every benefit there is a countervailing cost."[2] He then seeks to describe and analyze the costs and benefits of electronic money in the 1990s.

In general, Professor Budnitz is critical of the current laws governing EFT disclosures, arguing that they do not provide consumers the information needed to measure the potential costs and benefits of EFT. He sees additional disclosure requirements as the best way to balance the need for consumer protection against the countervailing need to allow free market mechanisms

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1. These symposia have been presented once each decade since 1971. The proceedings of the *National Institute on Consumer Credit in the Seventies* were published beginning at 26 BUS. LAW. 753 (1971). The *Symposium on Consumer Financial Services in the 1980s* was published beginning at 37 BUS. LAW. 1293 (1982).

2. Mark Budnitz, *Electronic Money in the 1990s: A Net Benefit or Merely a Trade-Off?*, *infra* this Symposium.

HeinOnline -- 9 Ga. St. U. L. Rev. 738 1992-1993

to accommodate changing technologies without a restrictive regulatory regimen.

Professor Budnitz' Article represents a focal point in the debate over consumer credit protection in the 1990s. The controversy over the new Truth in Savings disclosures serves as a reminder that increased disclosure itself imposes costs that are likely to be borne by consumers. *Consumer Disclosure in the 1990s,* which follows Professor Budnitz' Article, points out that more disclosure is not necessarily a cost-effective solution, and together these two Articles ably reflect the current debate on this issue.

Professor Budnitz acknowledges the well-known benefits of electronic money, including speed, safety, and convenience. In no way does his Article resist the progress permitted by advancing technologies. However, Professor Budnitz contributes to an understanding of the issues by emphasizing that there are costs associated with the technological revolutions sweeping through the financial industry. For example, while EFT promises ultimate cost savings, the initial outlays tend to be significant and there is a risk that consumers will be asked to pay this price without benefiting directly from subsequent cost savings. Of course, with proper disclosure and a competitive marketplace, consumers will be able to make these judgments for themselves. As noted by Professor Budnitz, however, proposals to make mandatory the electronic delivery of government benefits raise questions that are not so easily answered.

Other problems are also noted, including the consumer's loss of "float," the rising incidence of crime at automatic teller machines (ATMs), and the possible economic implications of system-wide mechanical failures.[3] Professor Budnitz also raises concerns relating to customer privacy and error-resolution systems.

Few doubt that these concerns will be addressed and perhaps resolved as technologies evolve and society learns to deal with the resulting legal and social issues. It is clear, however, that the issues are there to be resolved. Changing technologies permitting

3. *Id.;* see also the discussion of these issues in the 1990 *Annual Survey of Consumer Financial Services Law.* David Teitelbaum, *Violent Crimes at ATMs,* 45 BUS. LAW. 1967 (1990); Daniel I. Prywes, *ATM Network Restraints on Surcharges,* 45 BUS. LAW. 1973 (1990); David Teitelbaum, *Accessibility of ATMs to Handicapped Persons,* 45 BUS. LAW. 1981 (1990). Other ATM issues are also discussed in this Symposium. *See* Grimm & Balto, *Consumer Pricing for ATM Services, infra* this Symposium.

HeinOnline -- 9 Ga. St. U. L. Rev. 739 1992-1993

the increased use of electronic money, efforts by the government and others to impose those technologies on consumers and businesses, and the resultant evolution of our legal system represent more than just a change in the mechanics of the payment system. There are serious financial and societal interests at stake, and the Article by Professor Budnitz provides an important contribution to the emerging debate by calling attention to important issues that are yet to be resolved.

In *Consumer Disclosure in the 1990s*, Griffith L. Garwood, Robert J. Hobbs, and Professor Fred H. Miller discuss the role of disclosure as the cornerstone of our consumer credit protection laws. This Article provides a wide-ranging perspective on the past importance of consumer disclosure and its likely importance in the 1990s. Along with a discussion of the purposes of the various disclosure laws, and an analysis of the public policies behind the disclosure approach to consumer protection, the Article also confronts the limitations of this system. Perhaps the most important of the disclosure laws, the Federal Truth in Lending Act,[4] is analyzed extensively. *Consumer Disclosure in the 1990s* explains how disclosure has worked in the past and under prior circumstances and then specifically considers the prospects for disclosure in the 1990s, ultimately concluding that "[m]ore disclosure may be inevitable and necessary."[5] Nonetheless, the authors recognize that at some point the consumer reaches a level of information overload, and at that point "merely adding more disclosures can amount to less effective disclosure."[6] Balancing these concerns presents a serious challenge for policymakers in the 1990s, and this Article provides a reference point and a road map for those efforts.

Of course, an alternative to disclosure as a means of consumer protection is direct controls on transaction terms as discussed by James L. Brown in the subsequent Article in this Symposium.[7] Brown recognizes that price controls are considered "almost axiomatically negative" by the economics profession as a public policy choice,[8] and he admits that efforts to implement credit

4. 15 U.S.C. § 1601 (1982).

5. Griffith A. Garwood et al., *Consumer Disclosure in the 1990s, infra* this Symposium.

6. *Id.*

7. Brown, *An Argument Evaluating Price Controls on Bank Credit Cards in Light of Certain Reemerging Common Law Doctrines, infra* this Symposium.

8. *Id.*

HeinOnline -- 9 Ga. St. U. L. Rev. 740 1992-1993

price controls inevitably lead to difficult legal and operational issues. Nonetheless, this Article forcefully argues that controls on selected lender charges may be both appropriate and necessary for the 1990s. It further indicates that the law may be evolving to recognize the possible application of various common-law notions to reflect that alleged inadequacies in certain unfettered markets are driving the need for, or at least, the desirability of, explicit controls of some sort. Specifically, Brown focuses on the example of open-end three-party credit, commonly known as "bank card" credit.

The Article reviews several of the most commonly expressed objections to credit price controls in the bank card example, for instance that the effects are likely to involve a reduction in the availability of credit to marginal borrowers. Brown points to the significant increases in bank card debt during the 1980s, both in states retaining price controls and in states which "deregulated" such debt.[9] He generally rejects the contention that such limits have acted to deprive less advantaged consumers of credit opportunities in this particular system. He argues further that even if that were the case, consumers in the aggregate may nonetheless be relatively benefitted by such limitations in the form of lower interest costs paid by the many, as opposed to being harmed by a reduction in the availability of credit to the few. He also maintains that the argument that credit price controls result in some borrowers unfairly subsidizing others is essentially beside the point regarding the bank card system, in that the proposed "remedy," removal of existing controls, will not

9. *Id.* The author acknowledges the de facto relaxation of rates in some states due to case law permitting the "exportation" of higher rates across state lines, but claims that such debt has expanded proportionately in "states where rate controls have remained in effect." *Id.* at n.12 and accompanying text (citing Marquette Nat'l Bank v. First of Omaha Service Corp., 439 U.S. 239 (1978)); *see also* Michael C. Tomkies, *Interstate Consumer Credit Transactions; Card Issuers Win Fee Exportation Cases*, 47 CONSUMER FIN. L.Q. REP. (forthcoming 1993); Michael C. Tomkies, *Interstate Consumer Credit Transactions: Greenwood Trust Co. and Other Developments*, 46 CONSUMER FIN. L.Q. REP. 50 (1992); Harvey N. Bock et al., *Developments in Interstate Delivery of Consumer Financial Services*, 46 BUS. LAW. 1223 (1991); Michael C. Tomkies, *Interstate Consumer Credit Transactions: Recent Developments*, 43 CONSUMER FIN. L.Q. REP. 152 (1989); Jeffrey I. Langer & Jeffrey B. Wood, *A Comparison of the Most Favored Lender and Exportation Rights of National Banks, FSLIC-Insured Savings Institutions, and FDIC-Insured State Banks*, 42 CONSUMER FIN. L.Q. REP. 4 (1988).

HeinOnline -- 9 Ga. St. U. L. Rev. 741 1992-1993

seemingly act to reduce or eliminate such subsidies, and in fact may well exacerbate them.

Brown deals with interest rate limits in a specific, definable system—the bank card system—and in so doing addresses not only controls on interest rates but also controls on various ancillary charges and fees associated with that system. He recognizes that the feasibility (as well as the desirability) of controls on various consumer credit services may well vary substantially among differing systems. He examines the application of certain doctrines in several recent court cases regarding alleged deficiencies in market pricing of certain services.[10] He describes what he calls an emerging doctrine, based on *Perdue v. Crocker National Bank*,[11] that permits the courts to examine (and by implication to regulate) transactions based on economic imperatives. This doctrine, which may represent a significant departure from accepted common-law norms concerning the role of the judiciary in society, is described by Brown in the context of various attributes of bank card credit as a potential emerging model for the 1990s.

This model could dramatically alter the fundamental nature of the debtor-creditor relationship, perhaps interjecting the judicial system into the economic sphere on an unprecedented scale. It is not clear how such a system would coexist with basic common-law concepts of party autonomy and freedom of contract, or whether a trend in this direction even exists. Nonetheless, Brown is correct that these concepts are being embraced by some courts and that this represents a possible model for consumer protection in the 1990s and beyond.[12] Over the coming decade interested

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10. California Grocers v. Bank of America, No. 643607-4 (Cal. Super. Ct., Alameda County, July 3, 1991); *see also* Tolbert v. First Nat'l Bank of Oregon, 772 P.2d 1373 (Or. Ct. App. 1989); Best v. United States Nat'l Bank of Oregon, 739 P.2d 554 (Or. 1987).

11. 702 P.2d 503 (Cal. 1985), cited in Brown, *supra* note 7; *see also* Warren L. Dennis & John Simon, *Minimizing the Risk of Lender Liability: Understanding the Relationship between Lender and Borrower*, 47 CONSUMER FIN. L.Q. REP. (forthcoming 1993); Alvin C. Harrell, *The Bank-Customer Relationship: Evolution of a Modern Form?*, 11 OKLA. CITY U.L. REV. 641 (1986).

12. *See supra* note 10. At the same time, there are some indications of a trend in the other direction. *See, e.g.*, Copesky v. Superior Court, 14 U.C.C. Rep. 525 (Cal. Ct. App. 1991) (rejecting Commercial Cotton Co. v. United Calif. Bank, 209 Cal. Rptr. 551 (Cal. Ct. App. 1985)); Rodgers v. Tecumseh Bank, 756 P.2d 1223 (Okla. 1988); Frontier Fed. S&L v. Commercial Bank, 806 P.2d 1140 (Okla. Ct. App. 1990) (U.C.C. § 1-203 does not create an independent cause of action for breach of the duty of good faith outside the contract). These trends have been reflected in the *Annual Survey of*

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Chamness et al.: Introduction to the Symposium: Consumer Financial Services Law in

parties can expect to confront these issues in the courts and elsewhere, and Brown's article for this Symposium should help bring these issues into focus.

As a counterpoint, Thomas A. Durkin's Article, *An Economic Perspective on Interest Rate Limitations*, explains the "near-unanimous" conclusion of economists that interest rate ceilings produce shortages of credit, waste resources, and have other negative economic effects. This belief is so widespread, is of such long standing, and is based on such fundamental analyses that it must be confronted by those who propose to regulate the economic terms of credit transactions. Indeed, the adverse effects described in this Article appear to be so severe and far-reaching as to represent a major factor that courts and policymakers should consider when considering controls on the economics of credit transactions. By helping to relate the relevant economic concepts to the legal issues, this Article makes an important contribution to the continuing development of consumer credit law.

An Economic Perspective on Interest Rate Limitations also goes beyond the economic arguments and candidly discusses the philosophical issues inherent in any debate over credit pricing and allocation. While these issues unavoidably involve subjective judgments, the issues must be recognized as a part of the arguments being made on all sides of the debate. These considerations relate to such fundamental social issues as the proper role of government in our society and the legal relevance of individual definitions of social justice. As suggested by these considerations, it is important to understand the political agendas involved in this debate as a backdrop to the economic and legal arguments and their relevance to larger societal issues. Durkin analyzes these issues and then provides guidelines designed to minimize the economic damage should a decision be made to impose interest rate controls in a particular context. Together with the preceding Article, this provides an overview of

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Consumer Financial Services Law and other commentary. *See, e.g.*, Dwight Golann, *Beyond Truth in Lending: The Duty of Affirmative Disclosure*, 46 BUS. LAW. 1307 (1991); Warren L. Dennis & Mark Masling, *Death Knell for Fiduciary Duties of Lenders to Consumer Borrowers*, 46 BUS. LAW. 1323 (1991), Peter G. Pierce & Alvin C. Harrell, *Financiers as Fiduciaries: An Examination of Recent Trends in Lender Liability*, 42 OKLA. L. REV. 79 (1989); Carolyn S. Smith, *Allis-Chalmers v. Lueck: The United States Supreme Court Rejects Tort Liability for Breach of Good Faith*, 43 CONSUMER FIN. L.Q. REP. 258 (1989); and commentary cited *supra* note 11.

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Georgia State University Law Review, Vol. 9, Iss. 4 [1993], Art. 6

the economic considerations to be faced as the debate over credit pricing and availability proceeds during the 1990s.

The next Article in the Symposium deals with a topic that builds on the foundation provided by the previous articles. In *Consumer Pricing for ATM Services: Antitrust Constraints and Legislative Alternatives*, Karen Grimm and David Balto address legal issues relating to development of the newly emerging systems of ATMs. This Article explains how ATM systems have developed through joint venture arrangements and other networks that share costs and benefits. The cooperative nature of this approach has tended to reduce costs and optimize consumer convenience, but in turn suggests the need for mechanisms to resolve potential conflicts between interested parties within a newly developing legal framework. Furthermore, the cooperative framework in which these systems have developed has created a new range of antitrust concerns.

Grimm and Balto explain the different types of fee arrangements that are utilized by ATM networks, and discuss the pricing issues that must be considered and resolved by the participants. As noted, cooperative resolution of these issues raises questions regarding potential liability for violation of the federal antitrust laws. The authors explain these risks by describing the development of the antitrust case law pertaining to a wide range of ATM-related issues. This discussion illustrates the difficulty of merging new technologies and services into an existing legal framework that was designed for other purposes. The Article provides a specific example of the need for legal rules that can adapt to and accommodate changes in technology and the economy. Unfortunately, this example also illustrates the legal uncertainties, complexities, and expenses that often serve as artificial barriers to innovation. These are issues that must be confronted in the 1990s if the law is to avoid being stigmatized as an impediment to technological progress.

Continuing this theme, the final Article in this Symposium deals directly with the need for an overhaul of the complex, conflicting, and uncertain systems of laws governing consumer credit transactions.[13] In *Multiple Sources of Consumer Law and Enforcement (Or: "Still in Search of a Uniform Policy")*, Dean

13. *See also* Huber, *The Dual Banking System: Interaction of Federal and State Law in the Regulation of Banking*, 42 CONSUMER FIN. L.Q. REP. 51 (1988).

HeinOnline -- 9 Ga. St. U. L. Rev. 744 1992-1993

Ralph J. Rohner laments the "patchwork" of legal rules that govern consumer financial services and inhibit the development of a rational, efficient, and inexpensive legal framework for consumer credit transactions. Although this is probably the largest single problem confronting consumer financial services law in the 1990s, progress has been very slow due to the enormity of the problem and the parochial nature of the competing interests.

At the heart of the problem is the conflict between state and federal legal and regulatory systems, although internal inconsistencies within individual states and federal agencies provide further complications. As Dean Rohner notes, in the final analysis these problems reflect the lack of any national consensus on the proper role and extent of regulation of consumer transactions.

Dean Rohner cites the disappointing reception received by the best effort to date at resolving some of these issues: the Uniform Consumer Credit Code (U3C). The U3C represents a balanced effort to simplify the law of consumer credit and to provide a level playing field designed to promote competition and the availability of consumer credit at reasonable cost.[14] Unfortunately the U3C fell victim to political infighting in many states, and as a result roughly eighty percent of the states retain archaic and fragmented systems of consumer credit law.

Congress has attempted to promote a national banking system and a market-driven system of consumer lending by, among other things, affording each national- and state-chartered bank uniform and nationwide usury authority based on the laws of the state where the bank is located. Despite the obvious congressional intent to create uniformity, consumer advocates have argued that the language chosen by Congress leaves the banks engaged in interstate lending subject to the fee and charge limits imposed by the laws of the fifty states.

The 1991 lower court decision in *Greenwood Trust Co. v. Massachusetts*[15] concluded that the federal statute in question, while it preempted foreign state limits on percentage-based interest charges imposed by federally-insured state banks, did

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14. *See, e.g.*, F. MILLER, ET AL., PRACTITIONER'S GUIDE TO THE OKLAHOMA UNIFORM CONSUMER CREDIT CODE Ch. 1 (1990); Fred H. Miller, *Administrative Interpretations of the Uniform Consumer Credit Code*, 43 CONSUMER FIN. L.Q. REP. 84 (1989).

15. 776 F. Supp. 21 (D. Mass. 1991).

HeinOnline -- 9 Ga. St. U. L. Rev. 745 1992-1993

Georgia State University Law Review, Vol. 9, Iss. 4 [1993], Art. 6

not extend to a flat late charge imposed by Greenwood Trust (the issuer of the Discover Card) on its Massachusetts cardholders. This surprising result triggered an onslaught of class actions throughout the country, challenging late charges, annual fees, and a wide variety of other loan charges imposed by many of the nation's largest credit card issuers. Recently, the United States Court of Appeals for the First Circuit correctly reversed the lower court decision in *Greenwood Trust Co.*,[16] and the Supreme Court declined to grant certiorari in the case.[17]

In *Multiple Sources of Consumer Law and Enforcement,* Dean Rohner provides a needed perspective on the development of consumer financial services law through the 1980s, and raises questions that need to be answered in the 1990s. These concerns must be addressed if there is to be any hope of reforming the system of laws that governs consumer credit transactions. While recent experience seems to provide little in the way of encouragement, the dramatic and continuing progress that has been made in reforming state commercial laws since World War II by means of the Uniform Commercial Code suggests that improvement in terms of consistency, uniformity, and simplicity remains a possibility.

If there is to be any such progress in this area of law, there must first be a focus on the needs of consumers and consumer financial services providers in the 1990s. This Symposium is intended to contribute to these efforts, and the American Bar Association Committee on Consumer Financial Services is pleased to present this Symposium in the hope that it will generate a greater understanding of the challenges confronting consumer financial services law in the final decade of the twentieth century.

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16. 971 F.2d 818 (1st Cir. 1992); see also, Michael C. Tomkies, *Interstate Consumer Credit Transaction: Card Issuers Win Fee Importation Cases, supra* note 9.
17. 61 U.S.L.W. 3478 (Jan. 11, 1993).

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