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REGULATORY REFORM AND CONSUMER PROTECTION:

Hold Wrongdoers Accountable To the Individuals They Harm

A National Consumer Law Center
Issue Brief

November 2009

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> *"Every right when with-held must have a remedy, and every injury its proper redress."* William Blackstone, Commentaries on the Laws of England (1769)

For over 200 years, it has been a fundamental tenet of American law, derived from our Anglo-Saxon heritage, that "for every right, there's a remedy." The concept is common sense: wrongdoers who violate laws should be accountable to those they injure.

But the converse is also true: a right without a remedy is no right at all. In recent years, alongside a deregulatory culture that valued *laissez-faire* "buyer beware" capitalism over protection for individuals, freedom from enforcement has been valued over accountability. Industry lobbyists have created a knee-jerk resistance to laws that are actually enforceable by injured consumers against violators.

Lawmakers are now reassessing the wisdom of deregulatory fervor and are considering new, long needed protections. As they do so, it is essential that new rules be enforceable by the individuals they are designed to protect.

Enforceable protection for consumers is critical whether the wrongdoer is a person, a bank, or another type of entity. As abuses in the nonbanking world begin receiving more well-deserved scrutiny, enforcement by individuals on the ground is critical. No agency can possibly police the millions of actors involved in offering credit transactions to consumers. For example, in the debt collection area, the Federal Trade Commission received over 78,000 complaints against debt collectors in 2008, but filed only three debt collection enforcement actions, relying on individual enforcement to bear the heaviest burden.[1]

Similarly, as the banking industry agitates to retain its immunity from state laws, any violations of federal laws cannot be countenanced. Banks too have created their share of problems and need to be more accountable to consumers. In the peak year of 2006, over 32% of subprime loans, 40% of alt A loans, and 51% of dangerous exotic prime loans were made by banks or their subsidiaries.[2]

Both deterrence and redress are enhanced when laws permit individual enforcement:

- No matter how vigorous and how fully funded enforcement agencies are, they will never be able to directly redress the vast majority of violations against millions of individuals.

[1] Federal Trade Comm'n Annual Report 2009: Fair Debt Collection Practices Act at 4, 11, (Feb. 26, 2009); Fed. Trade Comm'n, Collecting Consumer Debts: The Challenges Of Change at 66 (Feb. 26, 2009) ("Private actions, not FTC actions, were intended to be and should continue to be the main means of promoting [debt collection] industry compliance with the Fair Debt Collection Practices Act.").
[2] *See* Nat'l Consumer Law Ctr., "Restore the States' Traditional Role As 'First Responder'" at 11-13 (Sep. 2009).

- Individuals have much more complete information than agencies looking in from the outside about the effect of products and practices and are in the best position to identify violations of laws and take action to address the harm they suffer.

- Individuals are an early warning system that can alert states and federal regulators to problems when they first arise, before they become a national problem requiring the attention of a federal agency.

- Bolstering public enforcement with private enforcement conserves public resources.

- Consumer enforcement is a safety net that ensures compliance and accountability after this crisis has passed, when good times return, and when it becomes more tempting for regulators, who may become captured by industry, to think that all is well and to take a lighter approach.

- In the end, there is no consumer protection, no accountability, and no access to justice if individuals have no recourse when they suffer harm.

No remedy for victim of unfair and deceptive mortgage

Lydian Private Bank gave Guillermo Nava a mortgage with a 1.5% initial rate. A schedule showed payments fixed for 3 to 5 years based on the 1.5% rate. The bank did not reveal that the rate would shoot up 30 days later or that making the payments on the schedule would result in negative amortization and not in payoff by the date indicated. Nava could not refinance because the loan had a prepayment penalty.

Nava could not enforce state laws against unfair, deceptive and fraudulent practices because they were preempted.

A similar federal law banning unfair and deceptive practices gave Nava no relief because individuals cannot enforce it and it provides no remedies for individuals.

Nava v. VirtualBank, 2008 WL 2873406 (E.D. Cal. July 16, 2008)

Strong government enforcement is an essential piece of the picture, but it is only a piece. Agencies can only act selectively and can never address the vast majority of individual violations. If we have learned anything from the current credit crisis, it is that we cannot put all of our eggs in the government enforcement basket – state or federal. The Supreme Court has recognized that private and public enforcement play complementary roles, conserving limited government resources, uncovering unknown hazards, and ensuring that injured persons receive compensation.[3]

Agencies and individuals have different goals, resources and incentives. Some actions that might not be worth time or effort to an agency might be a high priority for individuals, and vice versa.

Because citizens are more likely than government agencies to be aware of corporate practices that cause consumer harm, consumer suits can actually drive regulation and reform by exposing bad practices.[4] For example, some states were motivated by a series of class actions alleging discriminatory lending practices to restrict the amount that automobile dealers can mark-up auto loan interest rates.[5]

Legislative and administrative regulation and enforcement can also lag behind emerging issues, leaving large gaps that can only be filled by private citizens.[6] Regulatory agencies like the Federal Trade Commission, Securities and Exchange Commission,[7] and Food and Drug Administration have recognized that civil liability provides an additional layer of protection for the public.[8]

Fundamentally, there are so many businesses, transactions, and practices, and the day-to-day economic activity of the country is so immense, that public enforcement cannot do the job no matter how well-funded. The market can never be policed adequately from above. Consumers must be able to protect themselves.

To function properly, markets require the rule of law and reliable enforcement mechanisms.[9] Civil litigation can remedy problems like agency capture, selective enforcement, and secret settlements.[10]

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[3] *See, e.g., Wyeth v. Levine*, 129 S.Ct. 1187, 1202 (2009).

[4] *See* Elizabeth Chamblee Burch, *CAFA'S Impact On Litigation As a Public Good*, 29 CARDOZO L. REV. 2517, 2548 (2008).

[5] *See* Nicole F. Munro, Jean L. Noonan, R. Elizabeth Topoluk, *Recent Development in Fair Lending and the ECOA: A Look at Housing Finance and Motor Vehicle Dealer Participation*, 60 BUS. LAW. 627, 644-45 (2005).

[6] *See* Jane Birnbaum, *Credit Card Overhauls Seem Likely*, N.Y. Times, July 5, 2008 at C1 ("'When the Federal Reserve or Congress tries to nip off specific abuses that the credit card industry practices, it becomes a game of Whack-A-Mole,' Mr. Levitin said. 'As soon as they put the kibosh on one, the industry figures out another.'").

[7] *See* Elizabeth Chamblee Burch, *CAFA'S Impact On Litigation As a Public Good*, 29 CARDOZO L. REV. 2517, 2522 (2008).

[8] *See* Margaret Jane Porter, *The Lohr Decision: FDA Perspective and Position*, 52 FOOD & DRUG L.J. 7, 11 (1997) ("FDA product approval and state tort liability usually operate independently, each providing a significant, yet distinct, layer of consumer protection.").

[9] Raymond H. Brescia, *Capital in Chaos: The Subprime Mortgage Crisis and the Social Capital Response*, 56 CLEV. ST. L. REV. 271, 279 (2008); Chamblee Burch, *supra* note 4, at 2526-27.

[10] *See* Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63, 65 (2008).

The collapse of our economy should show us that lawsuits provide an important check and balance against abuses. Indeed, businesses themselves are better off if problems are checked early, rather than allowed to flourish. Responsible businesses are not undercut by unscrupulous competitors, and those who are engaged in risky practices have a check on behavior that is self-defeating in the long run.

Statutes that lack private enforcement mechanisms are notable for a lack of compliance. The most obvious example is the prohibition against unfair and deceptive practices in Section 5 of the Federal Trade Commission Act. Abuses in the mortgage, credit card and overdraft protection areas took off and flourished for years because consumers could do little to protect themselves.

Two other statutes that lack private enforcement mechanisms have low compliance. The right of action under the Truth in Saving Act was eliminated in 2001. A 2008 General Accounting Office survey found that 22% of depositories were not complying with the Truth In Savings Act's simple disclosure requirements.[11] That is a shockingly high number and shows the effect of the lack of enforcement.

Similarly, the Real Estate Settlement Procedures Act's requirement that homebuyers be given a good faith estimate (GFE) of closing costs ahead of time also lacks private enforcement, with predictable results: it is honored in the breach. Estimates are often given to homebuyers only moments before a closing, too late to do any good. When they are given in advance, they often bear little resemblance to the actual closing costs. In the Department of Housing and Urban Development's latest proposed rulemaking, it explains that one reason to make the GFE binding is the prevalence of "surprise 'junk fees'" at closing.[12]

Private enforcement, paid for by the wrongdoers themselves through attorney-fee shifting, is an indispensable part of protecting consumers. A homeowner's ability to engage legal help is the most direct and effective way of stopping individual foreclosures. The same is true of a consumer facing collection of a predatory loan that contains illegal terms. Consumers armed with legal representation are in the best position to articulate the particular problems with their situation.

Private enforcement is the norm and has worked well as a complement to public enforcement in the vast majority of current federal consumer protection statutes. There are private remedies in the Truth in Lending Act, Home Owner's Equity Protection Act, Fair Debt Collection Practices Act, Fair Credit Reporting Act, Electronic Funds Transfer Act and parts of the Real Estate Settlement Procedures Act, among other consumer protection statutes. New rules against unfair and deceptive credit card and mortgage practices will be privately enforceable.

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[11] *See* Federal Banking Regulators Could Better Ensure That Consumers Have Required Disclosure Documents Prior to Opening Checking or Savings Accounts," GAO-08-281 (Jan. 2008).
[12] 73 F.R. 14020, 14034

There is no reason to treat new consumer protection rules any differently. Private enforcement is one tool to see that rules are followed, benefiting both the individuals who use the product and the honest competitors who follow the rules. The three pillars of enforcement - federal, state, and individual enforcement - are critical to making a new consumer protection regime work in practice. This approach ensures that there are no gaps in protections and that lagging attention in one location does not bring down the system. This tripartite approach ensures a friendly competition, a race to the top, not a dangerous scheme of eggs all in one basket.