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Consumer Credit in America: Past, Present, and Future

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CONSUMER CREDIT IN AMERICA: PAST, PRESENT, AND FUTURE

PAMELA FOOHEY,* JIM HAWKINS,** CREOLA JOHNSON,*** AND NATHALIE MARTIN****

We began organizing this symposium at the start of 2016 with the recognition that consumer credit and financial services were in a state of flux prompted in significant part by the Great Recession.¹ The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) brought with it the Consumer Financial Protection Bureau (CFPB).² The CFPB’s creation marked the most significant moment in modern American consumer law.³ Consumers gained an advocate charged with protecting them through researching, monitoring, and regulating the providers of consumer financial products and services, enforcing federal consumer financial protection laws, and, as importantly, empowering consumers.⁴

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⁴ See Peterson, supra note 2, at 1060–61 (describing the CFPB’s mission).
Since its creation, the CFPB has tackled debt collection,5 mortgages,6 payday loans,7 prepaid debit card accounts,8 and student loans,9 among other products and services.10 It has processed over a million consumer complaints.11 Its supervisory and enforcement actions routinely make headline news, and, at the five-year mark, have collectively returned more than $11 billion to consumers.12

At the same time, Congress, states, and municipalities have also taken significant action to regulate and police providers of consumer financial products and services. The Credit Card Accountability, Responsibility, and Disclosure (CARD) Act of 2009,13 which mandated changes in credit card underwriting, has helped consumers avoid more than $16 billion in credit card fees since its enactment.14 Several states have passed legislation aimed at curbing the payday

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and auto-title lending industries.\textsuperscript{15} And when other states failed to enact substantial legislation to reform payday lending, municipalities around the nation stepped up to enact ordinances of their own that limit expansion of these lenders into their borders.\textsuperscript{16}

Much like the law, the consumer credit business itself is rapidly changing. Technological innovations have fundamentally altered the ways in which people access credit and financial services. Mobile pay and banking are becoming mainstream, leaving more and more banking deserts in the physical world, as opposed to in the virtual one.\textsuperscript{17} Even the providers of alternative financial products like payday loans are abandoning the brick and mortar locations that had once filled the voids left by disappearing banks, and increasingly are selling their products online, where studies suggest they can make more money.\textsuperscript{18}

Other consumer credit profit centers likewise have shifted, and businesses are adjusting their product offerings in accordance. The housing bubble led to a decline in subprime mortgages, only to be replaced with subprime auto loans and fears that these loans are fast creating a new bubble as lenders package them into securities similar to subprime mortgages.\textsuperscript{19} Subprime auto loans come with a


proliferation of a new take on rent-to-own stores: "Buy Here Pay Here" used-car dealerships.\textsuperscript{20}

Although the potential for exploitation is manifest, technological advances and changing markets also bring the promise of increased access to credit and banking services for underserved populations and others in need of short-term help. With the approach of the decade mark since the beginning of the Great Recession, and all that has occurred since, we felt it was time to assess the state of consumer credit in America—to review and examine its recent history, to consider arguments for and against regulation, and to discuss the potential for future innovation. The articles published in this symposium collectively highlight concerning practices, predict trends, find hope in new practices, and remind us of how far we have come and how far we still need to go to empower consumers.

In \textit{Prosecuting Creditors and Protecting Consumers: Cracking Down on Creditors that Extort via Debt Criminalization Practices}, Creola Johnson documents how creditors use the criminal justice system to coerce debtors into paying their civil debts, argues that these practices constitute prosecutable extortion, and offers solutions to regulate “debt criminalization tactics.”\textsuperscript{21} Lauren Willis’s \textit{Performance-Based Remedies: Ordering Firms to Eradicate Their Own Fraud} details another troubling practice—the ability of companies to use “rapid iterative testing of consumers’ responses to different designs” to confuse customers through advertising and other practices.\textsuperscript{22} She proposes two remedies—customer confusion injunctions and customer consequences injunctions, both enforced through third-party audits—that will require companies to repurpose the techniques they currently use to confuse customers to instead offer customers products and services more suited to their needs.\textsuperscript{23}

Jim Hawkins also shows how advertising may confuse consumers in \textit{Exploiting Advertising}.\textsuperscript{24} He argues that companies can use advertisements to influence people’s purchasing decisions based on the systemic mistakes people make in the face of imperfect information.\textsuperscript{25} Using reverse mortgages as a case study, he suggests that these lenders mislead consumers—a trend worthy of further study.\textsuperscript{26} Similarly, in \textit{Addressing the Commercialization of Business Reputation}, David Friedman examines the funding structure of websites such as Yelp and Facebook that disseminate information and therefore influence

\begin{thebibliography}{99}
\bibitem{20}See Bensinger, \textit{supra} note 19 (noting the expansion of Buy Here Pay Here); Jim Hawkins, \textit{Renting the Good Life}, 49 \textit{WM. & MARY L. REV.} 2041, 2047--69 (2007) (overviewing rent-to-own).
\bibitem{22}Lauren E. Willis, \textit{Performance-Based Remedies: Ordering Firms to Eradicate Their Own Fraud}, 80 \textit{LAW & CONTEMP. PROBS.}, no. 3, 2017 at 7.
\bibitem{23}Id. at 8.
\bibitem{25}Id. at 44.
\bibitem{26}Id. at 56--71.
\end{thebibliography}
people's purchasing decisions, again raising concerns about and highlighting possible marketing trends.²⁷

Not all of the articles in this symposium find reason for concern. Richard Hynes's contribution, "Maximum Possible Accuracy" in Credit Reports, examines the current regulation regarding errors in credit reports and argues that further regulation would not improve consumer welfare.²⁸ In Consumer Litigation Funding: Just Another Form of Payday Lending?, Paige Marta Skiba and Jean Xiao identify that nonrecourse loans to personal injury plaintiffs based on the lawsuits' net proceeds could change the emerging area of consumer litigation funding, possibly for the better.²⁹ Nathalie Martin and Robert Mayer's What Communities Can Do To Reign In Payday Lending: Strategies for Successful Local Ordinance Campaigns Through a Texas Lens traces how communities have rallied to convince their local governments to pass payday lending regulations and suggests strategies communities can use to press for meaningful local ordinances going forward.³⁰

Pamela Foohey's Calling on the CFPB for Help: Telling Stories and Consumer Protection focuses on the CFPB. Foohey surveys a random sample of public consumers' narratives detailing their complaints about consumer credit and financial service providers, and identifies a subset of complainants who tell often disturbing stories of how their financial problems have impacted their lives and affect their ability to survive.³¹ She offers recommendations for how the CFPB and other agencies with similar narrative functions can use linguistic markers to identify those most in need.³² Her article is an important reminder of how credit intertwines with other aspects of people's lives, especially in light of the time of this issue's publication.

We write this introduction in the spring of 2017, shortly after the presidential election. Its insights are more critical than ever. The futures of Dodd-Frank, the CFPB, and financial regulation generally are unknown.³³ But regardless of the

²⁸. Richard M. Hynes, "Maximum Possible Accuracy" in Credit Reports, 80 LAW & CONTEMP. PROBS., no. 3, 2017 at 115.
³². Id. at 207–09.
regulatory state, consumer credit will continue to expand and morph in the coming years. If history is any guide, the CFPB will continue to work to protect and empower consumers for as long as possible.\textsuperscript{34} States, municipalities, consumer advocates, academics, and industry representatives also will advocate for changes in regulations, with differing views on how to make credit and financial products beneficial to consumers. The coming years' debates and tests will strike a new balance among the recurring themes of opportunity, disadvantage, and exploitation that have marked America's history of consumer credit. These articles offer our collective efforts to contribute to those debates.
