CONSUMER PROTECTION CHOICE OF LAW: EUROPEAN LESSONS FOR THE UNITED STATES

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INTRODUCTION

In the United States, the choice-of-law analysis of consumer contracts is governed generally by the Second Restatement of Conflict of Laws. According to §187, the "chosen law" in a contract will be applied unless the application of that law would violate a fundamental public policy of that state.[1] Unfortunately, American courts applying this method have produced inconsistent interpretations of consumer contracts,[2] since not all courts have been willing to use the public policy exception to offer consumers the protections of the laws of their home state. The United States would be well served to look at Europe's example of consumer contract interpretation to develop a more uniform and consistent legal approach that honors the protections of consumers' home state laws.

Under Council Regulation 593/2008 on the Law Applicable to Contractual Obligations (Rome I), consumers in Europe are permitted to select the applicable law of a contract, to the extent that the protections under the selected law do not derogate from the protections of the laws of their home jurisdiction.[3] Adopting this approach in the United States would not only further the goals of protecting consumers in America but would also encourage consumer confidence in cross-border transactions. In addition, such a change would provide U.S. courts with a straightforward choice-of-law model

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1. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

2. *See infra* Part II.

3. *See* Council Regulation 593/2008, art. 6, 2008 O.J. (L 177/6) (EC) [hereinafter Rome I Regulation].

that encourages consistency and reliability in judicial interpretations of choice-of-law provisions in consumer contracts.

Part I of this note explores consumer protection choice-of-law in America under §187. The selected cases illustrate the inconsistency of the application of home-state protections to consumer litigants in U.S. courts. Part II examines the European conflicts approach for consumer contracts to help understand the benefits and drawbacks of the Rome I approach. Finally, in part III, this Note analyzes whether a new American approach based on the European model would offer a more predictable and consistent methodology for interpreting choice-of-law provisions in consumer contracts.

I. AMERICAN COURTS HAVE BEEN INCONSISTENT IN PROTECTING CONSUMERS BY ENFORCING THE LAWS OF THEIR HOME STATES

Though not always applied with the same degree of uniformity, American courts examining the "public policy" exception sometimes look to the same goal as European system: protecting consumers from a choice of law that is detrimental to the protections their home jurisdiction's laws and customs allow.[4] Under the Second Restatement of Conflict of Laws § 187(2), the state law chosen by the parties to govern a contract will be applied unless the selected state lacks a "substantial relationship" to the parties or the transaction or the application of the chosen state's law "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state . . . which, under § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties."[5] Similarly, prior to the 2001 revisions,[6] the Uniform Commercial Code (U.C.C.) permitted parties to a transaction to select the law of any state or nation to which the transaction "bears a reasonable relation."[7]

4. *See infra* Parts I.B, I.C.

5. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1)-(2) (1971).

6. This aspect of choice of law for American consumers has been the subject of attempted reforms to adopt a more European approach. *See infra* Part III. For the new section which replaced U.C.C. § 1-105, see U.C.C. § 1-301(e)(1) (2003).

7. U.C.C. § 1-105 (1977).

At its core, § 187 aims to protect both consumer and state interests.[8] The Restatement provides that "chosen law should not be applied without regard for the interests of the state which would be the state of the applicable law . . . in the absence of an effective choice by the parties."[9] These state interests affect consumer interests because the "[p]rime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract."[10] Thus, the Restatement uses the interests of the state as means to protect the expectations of contracting parties.

However, some American courts have not followed these principles embodied in the Restatement. In particular, parties to an agreement have not been able to "foretell with accuracy"[11] their rights and protections under contract, since some American courts have given consumers the protection of the laws of their home state while others have denied such protections to similarly-situated consumers.

Section A below examines the general application of the fundamental public policy exception. Sections B and C examine the inconsistent application of this exception in applying the home state protections for consumers in the areas of class action waivers and credit card contracts, respectively. These examples are particularly pertinent because a substantial amount of jurisprudence exists in these two areas, which constitute a growing portion of cross-border transactions involving American consumers. These specific examples are indicative of the larger problem with American consumer conflicts law, namely that consumers are not treated consistently under the fundamental public policy exception.

A. General Application of Fundamental Public Policy Exception

If an American court finds that a choice of law violates a fundamental public policy, the Restatement empowers the court to decline to apply the chosen law.[12] However, the scope of the public policy exception has not been interpreted on a consistent basis. While some U.S. courts have referred to the fundamental public policy

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8. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g ("Fulfillment of the parties' expectations is not the only value in contract law; regard must also be had for state interest and for state regulation.").

9. *Id.*

10. *Id.* cmt. e.

11. *Id.*

12. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187.

exception of §187(2) as "broad,"[13] other courts have taken the opposite approach, applying the exception only in "extremely limited" circumstances.[14] Since courts have divergent views regarding the scope of the exception it is little wonder that they have produced inconsistent results.

The standards used by courts to determine whether a policy is fundamental are similarly vague. For example, the Supreme Court of Wyoming looked to §187 and declared that it "[would] not apply foreign law when it is contrary to the law, public policy, or the general interests of Wyoming's citizens."[15] This standard shows that the criteria for whether a policy is a fundamental one can be vague and inconsistent. Without further specificity, the "general interests" of a state's citizens will be of little assistance in guiding the choice-of-law analysis toward a uniform application. For example, Wyoming's high court decided in favor of a defendant company and enforced the chosen law of a contract, finding that no fundamental policies were implicated simply because the laws of Wyoming and Pennsylvania were "similar."[16] But the fundamental public policy exception is not meant to serve as a proxy for similarity in state laws. The Restatement provides that a difference in results of state laws should not alone implicate the existence of a fundamental policy.[17]

Without a clear understanding of what constitutes a fundamental policy and how the analysis should be conducted, consumers in America will be unable to predict whether courts will apply the chosen law of the contract. A consumer hoping for the protections of their home jurisdiction's laws must hope to find themselves before a judge who sympathizes with their "general interests."

B. Class Action Waivers in Consumer Contracts

When evaluating choice-of-law questions with regard to class action waivers in consumer contracts, American courts have used different justifications and rationales. These divergent approaches have lead to a wide range of results, leaving only some consumers with the protections of their home-state laws.

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13. *See* Jackson v. Pasadena Receivables, Inc., 921 A.2d 799, 805 (Md. 2007).

14. *See* Fiser v. Dell Computer Corp., 165 P.3d 328, 332 (N.M. Ct. App. 2007) (citing Reagan v. McGee Drilling Corp., 933 P.2d 867 (N.M. Ct. App. 1997)).

15. Resource Tech. Corp. v. Fisher, 924 P.2d 972, 975 (Wyo. 1996).

16. *Id.*

17. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. g.

1. Fundamental Public Policy used to Protect Consumers

At the state and federal levels, some courts have undertaken choice-of-law analyses that ensure consumers receive the protections of their home states. However, even though these courts reach a similar result, they often employ different justifications. In *Aral v. Earthlink*,[18] a California state appellate court applied California law to allow for a private class action suit against an internet service provider by its former customers. Since Earthlink's principal place of business was in Georgia, the court found that § 187 provided a reasonable basis for the choice of Georgia law, which permitted the waiver of class action suits in consumer contracts.[19] However, the court noted that class action waivers were frowned upon by the laws and policies of California.[20] In fact, the court went as far as to say that the fundamental policy at issue was not only the right to pursue class action remedies, but also "the right of California to ensure that its citizens have a viable forum in which to recover minor amounts of money allegedly obtained in violation of [state unfair competition laws]."[21] More specifically, the court said that the policy was fundamental since application of the chosen law would act to deprive consumers of any realistic opportunity to recover small sums that were obtained by fraud.[22] Thus, the court here afforded California consumers the protection of the laws and policies of their native state, even where the selection of another state's laws would have been a valid choice of law to govern the contract.

Yet, the court's decision to protect consumers went further than simply allowing consumers to rely on the laws of their home state. This court explicitly relied on the right of the state itself to provide for a process that allows its citizens to recover against unfair competition on the part of a commercial seller.[23] Presumably, the choice-of-law analysis did not turn on a court merely selecting its own public policy over that of another state but was influenced by the pronouncement that a state could determine the minimum protections that it would afford its citizens when they act as consumers in an interstate transaction.

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18. 134 Cal. App. 4th 544 (Ct. App. 2005).
19. *Id.* at 564.
20. *Id.* at 554-57.
21. *Id.* at 564.
22. *Id.*
23. *See id.*

The same court in California was presented with another class action waiver choice-of-law question in *Klussman v. Cross Country Bank*[24] and again resolved the question in favor of the consumer's home-state laws.[25] In refusing to enforce the class action waiver provision in a consumer contract with a national company, the court held that the right to seek redress as a class was "more than a mere procedural device in California" and that the rejection of class action waivers in California was based on public policy expressions against that practice in state statutes.[26] The court pointed to many justifications in favor of class-action consumer litigation, including facilitating efficient consumer recovery from fraudulent business practices, assisting lawful businesses by curtailing unscrupulous competitors, and consolidating the litigation of multiple identical claims.[27] Thus, the prohibition of class actions, which function as procedural mechanisms that benefit the entire court system, was interpreted to be in violation of "fundamental fairness and public policy."[28]

However, this court went further than simply looking to state consumer protection laws. Instead, the court offered an additional rationale in support of protecting class claimants – the orderly functioning of the judicial system. By declining to enforce the provision on the grounds that it violated a fundamental public policy, the court not only afforded the consumer the statutory protections of their home jurisdiction but also the benefits obtained from the underlying goals of these protections, specifically the ability to recover against fraudulent commercial sellers.

Other courts have employed different justifications in choice of law analyses that offer consumers the protection of their home state laws. When faced with a class action waiver in a telephone contract that would have been valid under New York law, the Supreme Court of Washington refused to enforce the contract on the grounds of fundamental public policy.[29] The court recognized that the question of whether a class action waiver amounted to a fundamental public policy was a different inquiry than whether such a waiver was

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24. 134 Cal. App. 4th 1283 (Cal. Ct. App. 2005).

25. *See id.* at 1300.

26. *Id.* at 1296.

27. *Id.* at 1294 (quoting American Online, Inc. v. Superior Court, 90 Cal. App. 4th 1 (Cal. Ct. App. 2001)).

28. *Id.* at 1295.

29. *See* McKee v. AT&T Corp., 191 P.3d 845, 852 (Wash. 2008).

substantively unconscionable.[30] In examining previous cases applying the state's Consumer Protection Act, Washington's high court found that the policy favoring adjudication of small claims in the class context was a fundamental one.[31] Yet this court based its decision not on state statute alone but also on general concepts of consumer protection. The court reasoned that "protecting parties in a position of weaker bargaining power from exploitation" is the type of fundamental public policy that is implicated by § 187.[32] In essence, the underlying motivation for the state law—here, the protection of the weaker party in a consumer transaction—formed the basis for concluding that the state's policy against class action waivers amounted to a fundamental rule.

Examples where American courts provided consumers with the protections and policies of their home states are not limited to state courts. In *Douglas v. District Court*,[33] customers filed a class action lawsuit in federal court to challenge a phone company's attempt to alter the terms of the contract unilaterally.[34] The U.S. Court of Appeals for the Ninth Circuit suggested that the customers could not be subjected to the revised terms of the contract, in part because the revised agreement would be unconscionable in California and thus contrary to that state's fundamental public policy.[35] The court relied upon California decisions that rejected the idea that alternative service options could provide the sole grounds to survive a claim for unconscionability of a contract.[36] Since a class action waiver could be unconscionable under California law, this court found that the availability of other services would not foreclose the action brought by the class claimants.[37] As in the above cases discussing class action waivers, the Ninth Circuit in *Douglas* applied the home-state protections to consumers on the basis of both the applicable laws of their home jurisdictions and the closely held principle that the availability of substitute services should not insulate otherwise unfair commercial arrangements.

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30. *Id.*
31. *Id.*
32. *Id.*
33. 495 F.3d 1062 (9th Cir. 2007).
34. *See id.* at 1066.
35. *See id.* at 1067.
36. *Id.* at 1068 (citing Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1283 (9th Cir. 2006) (en banc)).
37. *See id.*

2. Courts Decline to Protect Consumers through Fundamental Public Policy

Notwithstanding the above examples, courts in other cases have not found that class action waivers constitute a fundamental public policy and have declined to extend home-state protections to the consumers who brought suit. One example is *Discover Bank v. Superior Court*,[38] where a consumer contested the decision by the credit card company to amend the terms of the agreement and add a class action waiver to the contract.[39] That court sought guidance from the state's highest court, which directed that when such a waiver was present in a consumer contract of adhesion where one party with greater bargaining power "has carried out a scheme to deliberately cheat large numbers of consumers . . . such waivers are unconscionable under California law and should not be enforced."[40] Despite this pronouncement, however, the lower court decided that the substantive law of Delaware should apply.[41]

Discover Bank was decided within about a week of both *Aral* and *Klussman* by the very same court.[42] While the latter two cases relied on the unconscionability of class action waivers and applied California law to protect home state consumers, the same court in *Discover Bank* took an entirely different course of action. The stated reason for this departure was that the single plaintiff in *Discover Bank*, as opposed to the class represented by the plaintiffs in both *Aral* and *Klussman*, was asserting claims on the basis of Delaware laws and on behalf of consumers everywhere, instead of just California residents.[43] Although the plaintiff in *Discover Bank* was also a resident of the state of California, the court thought less of the wide-ranging policies—the orderly administration of justice in California courts, the availability of claims for consumers who fall victim to fraud, and the need for the state to create a viable forum for consumers to recover against unfair competition—espoused in *Aral* and *Klussman* as the basis for those decisions. The fact that the same court within such a short span of time decided similar cases differently demonstrates the inconsistency of the approach. When

38. 134 Cal. App. 4th 886 (Cal. Ct. App. 2005).

39. *Id.* at 889.

40. *Id.* at 894.

41. *Id.*

42. *Aral* was decided on November 29, 2005, *Klussman* on December 15, 2005, and *Discover Bank* on December 7, 2005.

43. *See Discover Bank*, 134 Cal. App. 4th at 895.

similarly situated claimants receive different protections from the same court under the fundamental public policy analysis, the logical conclusion is that a more predictable choice-of-law approach is necessary.

C. Credit Card Agreements

The inconsistency in choice-of-law analysis in class action waivers is also present in the treatment of credit card agreements in American courts. Many states have taken steps to regulate credit card agreements and practices in order to shield consumers from unfair business practices.[44] As a result, this area of the law is an important aspect of consumer protection in the United States. As with class action waivers, American courts have sometimes protected consumers by applying the laws of their home states. However, courts have also failed to extend this protection to similarly situated claimants on other occasions.

1. Fundamental Public Policy used to Protect Consumers

On some occasions, courts have interpreted the fundamental public policy exception to protect consumers by applying the laws of their home states. For example, in *Coady v. Cross Country Bank*,[45] cardholders challenged a credit card company for illegal debt collection practices, including allegations of threats, harassing phone calls, and obscene language by the company's representatives.[46] Though the plaintiffs were residents of Wisconsin, the agreement provided for Delaware law to govern the contract.[47] The Court of Appeals of Wisconsin decided that statutory protections afforded to state residents under the Wisconsin Consumer Act amounted to an important public policy.[48] The court invalidated this contract in part because the choice-of-law provision in the agreement effectively prevented the plaintiffs from asserting any of the protections, claims, or remedies that Wisconsin law provided to them.[49] The choice-of-law clause was coupled with an arbitration clause, which the court viewed

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44. *See* Jeffrey I. Langer & Kathleen E. Keest, *Interest Rate Regulation Developments in 1995: Continuing Liberalization of State Credit Card Laws and "Non-Filing" Insurance as "Interest" Under State Usury Laws*, 51 BUS. LAW. 887 (1996).

45. 729 N.W.2d 732 (Wis. Ct. App. 2007).

46. *Id.* at 736.

47. *See id.* at 735-36.

48. *See id.* at 737.

49. *See id.* at 739.

as a device to limit the substantive laws applicable to any consumer claim to those of Delaware and federal law only.[50] This limitation on the type of relief available to consumers seemed to be a strong motivation in this court's choice of law decision.

In sum, the problem with this choice-of-law provision was not that the chosen law (Delaware) contained provisions which ran contrary to a fundamental public policy of Wisconsin. Instead, the court decided that the fundamental policy implicated in this dispute was Wisconsin's consumer protection scheme to protect its residents from unfair lending practices.[51]

2. Courts Decline to Protect Consumers through Fundamental Public Policy

However, not all courts have used the fundamental public policy exception to protect consumers in credit card contract disputes. Unlike *Coady*, where the Wisconsin court assumed that the mere existence of a statute constituted a fundamental public policy,[52] the Court of Appeals of Maryland in *Jackson v. Pasadena Receivables, Inc.*[53] decided that the fundamental public policy question regarding credit card holders turned on *whether* a consumer protection statute could constitute a fundamental public policy.[54] The Maryland court determined that the existence of a similar statute did not create a fundamental public policy.[55] Maryland state law imposed several restraints on credit card companies, including requiring the signature of the cardholder, limiting the maximum allowable interest rate, and requiring that certain information be disclosed to the cardholder.[56] In *Jackson*, the plaintiff contended that the card issuer had violated the applicable Maryland laws by failing to make a reasonable attempt to obtain her signature on the agreement.[57] As the court considered whether to apply Maryland law or the contract's chosen law, South Dakota, it looked to whether the Maryland law amounted to a

50. *Id.* at 740.

51. *Id.* at 740-41 ("The clause violates an important state public policy as embodied in the Wisconsin Consumer Act because it bars the plaintiffs from asserting any claims or seeking any remedies under the Act.").

52. *Id.*

53. 921 A.2d 799 (Md. 2007).

54. *See id.* at 805.

55. *See Jackson*, 921 A.2d at 808.

56. *Id.* at 800.

57. *Id.* at 799.

fundamental public policy.[58] The court looked to its previous case law, under which courts in Maryland applied a *lex loci contractus* approach,[59] and determined that the law did not constitute fundamental public policy.[60]

Leaving aside the problems inherent in the court's decision to combine a conflicts analysis using both the Second Restatement and *lex loci,* the *Jackson* case provides an example of the unpredictable nature of the fundamental public policy exception. While a Wisconsin consumer, like that in *Coady*, can rely on a state statutory consumer protection initiative to protect her interests from a detrimental chosen law, a Maryland consumer cannot. Instead, under *Jackson*, a Maryland cardholder would benefit from the protection of her home state's laws only if the law on which she relied was one of enough importance that her state's courts would deem it to be fundamental. Though the two statutes appear to function similarly in the different states, one court decided it to be a fundamental policy while the other did not. These differences among states, as well as the difficulty in determining whether a law might rise to fundamental importance, make relying on this choice-of-law approach problematic. Ultimately, consumers are left to suffer from these unpredictable results.

The unpredictability in choice-of-law analysis of credit card agreements is not limited to state courts. In *Vigil v. Sears National Bank*,[61] a consumer in Louisiana challenged the contract governing her credit card agreement, which contained a choice-of-law provision specifying that the contract had been entered into in Arizona and that the laws of that state would govern.[62] The plaintiff's suit relied on Louisiana state consumer law, which directed courts to invalidate consumer credit transactions where the consumer consented to the jurisdiction and fixed venue of another state,[63] but the federal district court determined that Louisiana's laws did not allow for an invalidation of this contractual provision.[64] In another case, *Gay v. CreditInform*, the U.S. Court of Appeals for the Third Circuit declined to offer a consumer the protections of his home-state laws

58. *Id.* at 805.

59. *See id.* (recognizing that the *lex loci contractus* approach will apply the law of the place where the transaction occurred, unless that decision would be dangerous to public policy).

60. *See id.* at 808.

61. 205 F.Supp.2d 566 (E.D. La. 2002).

62. *See id.* at 569.

63. *Id.* (citing LA. REV. STAT. ANN. § 9:3511(c) (2001)).

64. *Id.*

against a credit card corporation.[65] The Pennsylvania plaintiff alleged that a branch of the Capital One credit card company had violated Pennsylvania state credit repair regulations[66] that gave consumers the right to bring claims against a credit provider in a judicial forum.[67] The contract's arbitration provision was valid under the Virginia law stipulated by the contract, and would prevent a consumer from bringing the suit authorized under Pennsylvania law.[68] Despite recognizing that Pennsylvania had "an interest in protecting its consumers," the court determined that applying Virginia law, instead of the law of the consumer's home state, would not violate a fundamental public policy of Pennsylvania.[69] Thus, *Vigil* and *Gay* provide two additional examples where courts have held that statutory consumer protection regimes do not constitute fundamental public policies. This inconsistency deprives consumers of the predictability and confidence that is necessary to conduct cross-border transactions.

II: CONSUMER PROTECTION CHOICE OF LAW IN EUROPE: POSSIBLE ADVANTAGES FOR THE UNITED STATES

Generally, European courts will not enforce a law selection clause if doing so would ignore the binding laws of the consumer's native jurisdiction. Though premised on the concept of choice, the European choice-of-law rules, at their core, have aimed to protect the weaker party in consumer transactions.[70] In 1979, the European Court of Justice in *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* overturned a German regulation prohibiting the sale of drinks of a certain alcoholic content, implicitly deciding that member states should mutually recognize the laws of other states.[71] This decision was later extended from production standards to services and represents an obligation on states to recognize foreign law, especially when that law concerns the country

65. *See* Gay v. CreditInform, 511 F.3d 369 (3d Cir. 2007).

66. *Id.* at 374.

67. *Id.* at 376.

68. *Id.* at 390.

69. *Id.*

70. *See* Dennis Solomon, *The Private International Law of Contracts in Europe: Advances and Retreats*, 82 TUL. L. REV. 1709, 1717 (2008).

71. Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), 1979 E.C.R. 649.

of origin of one of the parties.[72] This development of the concept of free movement influenced the European approach to permitting consumer choice. While consumer choice became the "guiding principle" of European consumer law,[73] particular rules were developed for some contracts where it was generally accepted that one party to the contract required some level of additional protection.[74] The European development of specific contract laws in the consumer protection context is one such area.

Section A below traces the development of the rules regarding contractual obligations in Europe and the special approach taken to consumer protection. Section B discusses the applications of Europe's choice-of-law approach. Finally, section C analyzes the criticisms and possible shortcomings of the European rule.

A. Development of Europe's Approach to Consumer Contracts

The Convention on the Law Applicable to Contractual Obligations (Rome Convention)[75] took effect within Europe in 1980.[76] The ability of parties to stipulate to a choice of law was one of the basic rules of the Rome Convention, which explicitly states that "[a] contract shall be governed by the law chosen by the parties."[77] Yet the extent of such choice was limited in some contexts, including those relating to consumer transactions and employment contracts.[78] Specifically, Article 5 provides that a selection could "not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence," subject to requirement that the seller was essentially doing business in that jurisdiction.[79] In sum, the Rome Convention showed that the importance of contractual choice in Europe functioned only to an extent in the consumer protection

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72. *See* Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 TUL. L. REV. 1607, 1626 (2008).

73. Gert Straetmans, *The Consumer Concept in EC Law*, *in* ENFORCEMENT OF INTERNATIONAL CONTRACTS IN THE EUROPEAN UNION 295, 303 (Johan Meeusen, Marta Pertegás & Gert Straetmans eds., 2004).

74. Solomon, *supra* note 70, at 1717.

75. Convention on the Law Applicable to Contractual Obligations, *opened for signature* June 19, 1980, 1980 O.J. (L 266) 1 [hereinafter Rome Convention].

76. Patrick J. Borchers, *Categorical Exceptions to Party Autonomy in Private International Law*, 82 TUL. L. REV. 1645, 1650 (2008).

77. Rome Convention, *supra* note 75, art. 3.

78. *Id.* arts. 5-6.

79. *Id.* art. 5.

context. The rules governing consumer contracts provide a greater degree of protection to consumers by limiting contractual choice so that consumers cannot select a set of laws that would deprive them of the protections of their home laws.[80]

As the Rome Convention gave way to the Rome I regulation,[81] the various drafts of rules applicable to consumer contracts evinced these concerns about balancing consumer choice with the protection of the weaker party. Originally, the Rome I regulation guaranteed consumers the protection of their home state laws by preventing them from choosing a governing law for the contract.[82] In the first proposed draft of the regulation, the law applicable to consumer contracts in Article 5(1) read: "Consumer contracts . . . shall be governed by the law of the Member State in which the consumer has his habitual residence."[83] This approach sought to strengthen the rights of consumers and limit the ability of large companies to choose a favorable set of laws and impose them across the European Union through choice-of-law clauses in cross-border consumer contracts.[84] The Rome I proposal also contained a habitual residence exception to the mandatory home-state rules. The habitual residence requirement applied where the professional seller pursues commercial activities in that jurisdiction.[85] A seller was only excused from this requirement if it was unaware of the consumer's home state and this lack of knowledge was not the result of the seller's own negligence.[86]

In response to the initial Rome I proposal, the European Economic and Social Committee (EESC) reviewed the first draft and published a response.[87] Regarding Article 5 and the proposed rules on consumer contracts, the EESC described the new rules as "a thorough reworking" and praised the regulations as a "step in the

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80. *Id.*

81. *See* Rome I Regulation, *supra* note 3.

82. *See Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)*, at 16, COM (2005) 650 final (Dec. 15, 2005) [hereinafter *Commission Proposal*].

83. *Id.*

84. *See* Answer of Ms. Kuneva to Written Question: E-1751/2007, June 13, 2007, http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2007-1751&language=EN.

85. *See Commission Proposal*, *supra* note 82, at 16.

86. *See id. See also* Answer of Ms. Kuneva to Written Question: E-1751/2007, *supra* note 84 (noting that this was the "only exception" to the rule that the law of the consumer's habitual residence must apply to consumer transactions).

87. *See Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)*, 2006 O.J. (C 318) 56.

right direction."[88] The committee supported the idea of protecting consumers by providing them with the protection of their home-state laws, since such laws would likely be most familiar to consumers and in their native language, and thus would make it easier to obtain legal advice.[89] However, the EESC questioned the wisdom of eliminating all opportunities for the consumers to choose the laws governing contracts.[90] Instead, the committee believed that consumers would benefit from the ability to select the applicable law, so long as "certain protective measures" were in place to protect the party to the transaction who is presumably less experienced and possesses weaker bargaining power.[91] The EESC urged subsequent revisions to the Rome I proposal reflecting this recommendation.[92]

The European Parliament shared these concerns and suggested to amend the Rome I regulations accordingly.[93] In the amendments to Article 5, the European Parliament proposed that 5(1) still require that a commercial contract be "governed by the law of the country where the consumer has his or her habitual residence."[94] But Article 5(2) was changed to allow parties to choose the law applicable to the contract, so long as that choice would not "have the result of depriving the consumer of the protection afforded to him by such provisions that cannot be derogated from by contract by virtue of the law which, in the absence of choice, would have been applicable on the basis of [Article 5(1)]."[95] These proposed changes were eventually adopted and are reflected in the final text of the Rome I regulations.[96]

Thus, the legislative history of Rome I demonstrates that both safeguarding consumer choice and protecting the weaker parties to such transactions were the primary purposes behind the various drafts of the consumer contracts rule. While consumer choice was seen as an important freedom-of-contract principle, it was deemed essential in the consumer contracts context that this freedom to select the applicable law be coupled with certain protections. This approach

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88. *Id.* § 3.3.1.

89. *See id.*

90. *See id.*

91. *Id.*

92. *See id.*

93. *See* Comm. on Legal Affairs, *Report on the Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Consumer Contractual Obligations (Rome I)*, U.N. Doc. A6-0450/2007 (Nov. 21, 2007) (*prepared by* Cristian Dumitrescu).

94. *Id.* at 28.

95. *Id.*

96. Rome I Regulation, *supra* note 3.

does not permit consumers to select (either intentionally or at the suggestion of a sophisticated commercial seller) the laws of another jurisdiction that deprive them of the benefits and protections they have come to know and expect in the state of habitual residence.

B. Application of Rome I in the Consumer Protection Context

Under the Rome I regulation, consumers are protected by the application of the laws of their habitual residence so long as the other party—the "professional" acting in furtherance of a professional trade—pursued these commercial activities in that consumer's home country.[97] If a company advertises or holds itself out for business in a jurisdiction, a consumer who resides in that state is entitled to the protection of those laws.[98] Therefore, Europe has chosen to provide a basic guarantee to consumers who enter into contracts with professional sellers. These requirements show that home law protection is not boundless but is instead based on the expectation of reasonable corporate and consumer actions. Consumers that contract within their home jurisdictions are entitled to the protection of those laws. Similarly, sellers are responsible for complying with the laws of those states where they advertise or conduct business. Any consumer contract, therefore, cannot abrogate those protections under Europe's choice-of-law analysis. Thus, Rome I has allowed for a more consistent choice-of-law system for consumer protection in Europe.[99]

The judicial application of the European approach to consumer choice shows that it would be a good development for the United States. European courts have generally considered the mandatory provisions of the consumer's home country to apply when the parties choose a foreign law.[100] The German Federal Court invalidated a credit contract between an Austrian bank and a German customer that was to be governed by Austrian law.[101] The German Federal Court held that German provisions against doorstop-selling remained applicable for the German consumer under the rules of the

97. *Id.* art. 6(1)(a)-(b).

98. *Id.*

99. *See* Solomon, *supra* note 70, at 1719.

100. Jürgen Basedow, *Consumer Contracts and Insurance Contracts in a Future Rome I Regulation*, *in* ENFORCEMENT OF INTERNATIONAL CONTRACTS IN THE EUROPEAN UNION: CONVERGENCE AND DIVERGENCE BETWEEN BRUSSELS I AND ROME I 269, 280 (Johan Meeusen, Marta Pertegás & Gert Straetmans eds., 2004).

101. *Id*. (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 26, 1993, IPRspr., 1993, No. 37, 97).

predecessor to Article 5(2) in Rome I.[102] Since German laws provided this protection for habitual residents of that country, the court interpreted those protections as ones that could not be abrogated by a choice of another state's law. Another court invalidated a contract that selected English law to apply to a futures transaction with a German consumer, since the protection under the British regulations was considerably lower than the consumer protection under the German laws.[103] In essence, European courts have approached the rules from the standpoint of protecting consumers with the protections of their home laws. The European Court of Justice, for example, has developed a model of consumer protection choice-of-law in which the "reasonably well informed and reasonable observant and circumspect consumer" will prevail.[104]

The European consumer rules also act in conjunction with a variety of Directives that affect the Community's choice-of-law approach. One such Directive, governing distance contracts, notes the wide variance in protections afforded by different jurisdictions and articulates a need for a minimum level of common rules that would protect consumers.[105] In addition, the Unfair Contract Terms Directive states that a contract term that is not individually negotiated is unfair if it runs contrary to the requirement of good faith and "causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer."[106] These directives are based on the idea that the confidence of consumers will be strengthened when they expect equal rights and remedies regardless of where the transaction took place.[107] Thus, the European approach of providing for basic and predictable rules on which consumers can rely not only protects consumers in the

102. *Id*. (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 26, 1993, IPRspr., 1993, No. 37, 97).

103. *Id*. at 281 (citing Oberlandesgericht [OLG] [Trial Court for Criminal Matters] Dusseldorf, Mar. 8, 1996, IPRspr., 1996, No. 144, 347).

104. Straetmans, *supra* note 73, at 303 (citing Case C-126/91, Yves Rocher, 1993 E.C.R. I-2361).

105. Council Directive 97/7 on the Protection of Consumers in Respect of Distance Contracts, pmbl., 1997 O.J. (L 144) 19 (EU).

106. Council Directive 93/13 on Unfair Terms in Consumer Contracts art. 3, 1993 O.J. (L 095) 29 (EC).

107. *See* Cristina Poncibò, *The Challenge of EC Consumer Law* 3 (European Univ. Inst., Max Weber Programme Working Paper, MWP No. 2007/24, 2007).

conduct of modern transactions, but also benefits the market by ensuring greater consumer confidence.[108]

C. Criticisms and Possible Shortcomings of European Approach

Commentators have not been uniformly supportive of Europe's choice-of-law approach to consumer protection. Supportive commentators have observed, for example, that its "practical approach . . . will lead to the same results [preferred] by academic writers in most cases, but it has the advantage of speed and low costs."[109] The critics, however, view European law as granting excessive protection to consumers and being too liberal with the interpretation of choice-of-law clauses.[110] Consumer contract law under Rome I might benefit from a more explicit definition of the consumer concept and also from a limitation that the rules only apply in business-to-consumer contracts.

Some case law has developed that could suggest the Rome I consumer protection approach is too precise. The *Gran Canaria Cases*, decided in German courts, concerned the marketing strategies employed by a Spanish company at German tourists.[111] The sales contracts were written in German, for goods to be delivered in Germany, and the consumers were spoken to in German, but the transaction was to be governed by the laws of the Isle of Man. At the time, Spain had not yet implemented some consumer protection directives.[112] The Bundesgerichtshof held that the choice-of-law clause in these contracts was valid because the contract concerned immovable property, not goods or services.[113] The *Gran Canaria Cases* suggest that Rome I is not a perfect fit for all cases, since the consumers should have been the beneficiaries of their home state protections. Broader consumer contract rules would have allowed for their application in this instance.

Despite these shortcomings, European consumer protection conflicts jurisprudence can still serve as a model for positive improvements in the American system. American choice of law with

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108. *See id.*

109. Basedow, *supra* note 100, at 281.

110. *See, e.g.*, Solomon, *supra* note 70, at 1740.

111. Basedow, *supra* note 100, at 276 (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 19, 1997, IPRspr., 1997, No. 34).

112. *Id.* (citing Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 19, 1997, IPRspr., 1997, No. 34).

113. *Id.* at 276-77.

regard to consumer contracts could benefit from a more European approach by allowing consumers the freedom to contract, qualified by an important protective measure that would not deprive them of the laws of their home state. In addition, such a system would have the added benefit of bringing clarity and consistency to a field of law that has seen little certainty under the current application of § 187 and the fundamental public policy analysis.[114]

III: POSSIBLE REFORM OF AMERICAN CONSUMER PROTECTION LAW IN LIGHT OF EUROPEAN LAW

Based on the European experience, the United States would be well served to adopt a conflicts regime that applies specifically to consumer contracts. This proposal would be most effective if it permitted a limited amount of consumer choice. As such, a new regime should ensure that consumers could not choose the laws of another American state or foreign country that would deny them protections afforded by the state laws of their legal residence. By doing so, the United States would not only implement the concept underlying the European approach—encouraging choice but protecting the weaker party in a consumer transaction—but would also develop a rule that functions more consistently than the current fundamental public policy approach.

Also, the new approach should incorporate Rome I's limitation that companies must be advertising or otherwise holding themselves out for business in jurisdictions before consumers can have the benefits of those laws. In carving out a conflicts approach for one specific type of contract, it would be important to make sure that the rule reaches only the types of consumer transactions that require protection of the weaker party. By limiting its application to consumer-seller agreements, this approach would learn not only from the benefits of the European approach but also from its shortcomings. Thus, adopting a rule in the same basic vein as Rome I that contains several improvements and limitations would allow the United States to improve its overall approach to choice of law in the consumer protection context.

This idea highlights a major difference between the European and American approaches: consumer contracts in Europe are evaluated through their own specific category of rules while American law tends to treat consumer agreements through the

114. *See supra* Part I.

traditional choice-of-law approach to contracts. Still, American courts should provide a degree of protection to consumers by ensuring that a contractual choice does not derogate from the protections afforded by the laws of their home state.

Legislators implementing this approach could also learn from the lessons of a failed attempt to import European concepts to the American choice-of-law structure in the recent revision of the Uniform Commercial Code (U.C.C.). While some scholars believe that the failure of recent modifications to the U.C.C. in the United States might counsel against an approach based on Rome I and mandatory norms,[115] several of the criticisms of the U.C.C. revision, including the opposition from commercial interests and the perceived danger of corporations applying their own law at the expense of consumers, would be avoided under an approach that more closely parallels Rome I. As described above, an approach that accounts for the primary goals of the Rome I regulation—permitting consumer choice but safeguarding the protections of home state laws—and implements some limitations on the scope of the rule would offer the United States a more palatable form of the European approach to choice of law in consumer contracts.

In revising the choice-of-law provisions of the U.C.C., the drafters of the proposed modifications looked to the European approach in the Rome Convention.[116] Section 1-105 allowed the parties to a transaction to select the law of any state that bore a "reasonable relation" to the transaction.[117] In 2001, the drafters sought to import the European mandatory rule concepts by offering proposed Section 1-301.[118] This new section still allowed parties to choose any law that bore a "reasonable relationship" to the transaction[119] but had specific rules if one of the parties to the transaction is a consumer. Looking to the Rome Convention,[120] the drafters of this section required that the application of the chosen law "not deprive the consumer of the protection of any rule of law . . . which both is protective of consumers and may not be varied by agreement," including the law of the consumer's home state.[121] The

115. *See* Borchers, *supra* note 76, at 1657.
116. *See id*. at 1656.
117. U.C.C. § 1-105 (1989).
118. *See* Borchers, *supra* note 76, at 1656.
119. U.C.C. § 1-301(e)(1).
120. *See* Borchers, *supra* note 76, at 1656.
121. U.C.C. § 1-301(e)(2).

influence of the European model on the new revision to the U.C.C. is clear because the new regulation allowed consumers the freedom to select the law governing a commercial transaction but prevented them from derogating from the protections of their home state laws.

However, new Section 1-301 did not enjoy widespread acceptance. In fact, the new provision "produced almost no positive results"[122] and only the Virgin Islands adopted it in full.[123] Twenty-one state legislatures introduced bills to adopt the new section, but no bills were adopted.[124] Of the fourteen states that adopted a majority of the proposed reforms, each one decided not to adopt Section 1-301.[125] Patrick Borchers describes this failure of proposed Section 1-301 in the United States as evidence that America is not receptive to European rules that exempt consumers from choice-of-law clauses that derogate from the protections offered by their home states.[126] But the substance of the debate surrounding proposed Section 1-301 shows that its rejection was instead the product of several competing considerations.

Since proposed Section 1-301 was aimed at consumer protection, it naturally drew criticism from industry groups.[127] In addition, commercial entities worried that moving away from the "reasonable relation" approach in favor of consumer-oriented protections would bring greater complexity to the process of reviewing contracts and thus add significant costs to consumer transactions.[128] Such costs would be mitigated by a Rome I-type of approach, wherein sellers are responsible for the laws of the habitual residence of the consumer if the seller advertises or holds itself out for business in that jurisdiction.[129] At worst, a national company in the United States would have to ensure that its choice of law would not derogate from the protections offered to consumers in any of those states.

Complying with the differing state-level regulations in the consumer protection context is an exercise that large companies

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122. *See* Borchers, *supra* note 76, at 1656.

123. Jack M. Graves, *Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. § 1-301 and a Proposal for Broader Reform*, 36 SETON HALL L. REV. 59, 59 (2005).

124. *Id.* at 59-60.

125. *Id.*

126. *See* Borchers, *supra* note 76, at 1657.

127. *See* Graves, *supra* note 123, at 61.

128. *See*, *e.g.*, Americans for Fair Electronic Commerce Transactions, Proposed Amendment to UCC Article 1-Section 301: Choice of Law, *available at* http://www.ucita.com/Legislation.htm [hereinafter Fair Electronic Commerce].

129. *See* Rome I Regulation, *supra* note 3, arts. 6(1)(a)-(b).

marketing their products in America already undertake. For example, the German car manufacturer BMW, which markets and sells cars all across the United States, adopted a policy for all American imports governing the disclosure of pre-sale repairs to new automobiles that incurred damage in transit.[130] BMW looked to the consumer protections laws in each state and decided to set its company policy at the level of the most stringent jurisdiction, which in this case required disclosure of repairs which cost more than three percent of the suggested retail price of the automobile.[131] While BMW or any other national company might incur costs and legal fees in determining the most stringent consumer requirements with regard to their transactions, the BMW policy is evidence that such an undertaking is already a part of the normal course of nationwide business in America. For companies that target consumers in a multitude of states, the idea of complying with consumer regulations in those jurisdictions is hardly a new concept.

A related, but similarly unfounded, concern with proposed Section 1-301 was the fear that a seller could rely on this provision to incorporate the protection of the laws of their own jurisdiction into a contract with a consumer, and thereby impose one state's laws on consumers across the country.[132] However, such a situation could not occur under the basic rules of Rome I and this fear misunderstands Section 1-301. As indicated earlier, such an approach would specifically prescribe that the selection of a foreign law would not have the effect of depriving the *consumer* of any protections offered by the jurisdiction where the *consumer* resides. Thus, it would seem that the commercial seller would be unable, under a Rome I-type rule, to rely on the protections afforded by its home jurisdiction, and would instead be bound by the protections afforded to its customer under that customer's native laws. Including a more specific stipulation that only a consumer can rely on these laws or a more

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130. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 563-65 (1996). This case, decided by the United States Supreme Court, was a civil fraud action undertaken by a consumer against BMW for failing to disclose an instance of pre-sale repairs made to a new car. The Supreme Court's decision focused on the propriety of punitive damages in such a case and what constituted a reasonable amount. In their defense at trial and on appeal, BMW described how they had reviewed the laws of each state and decided to set their policy to comply with the most stringent set of requirements, thereby ensuring compliance with all state laws applicable to their American operations.

131. *Id.* at 565.

132. *See* Fair Electronic Commerce, *supra* note 128 (worrying that, under U.C.C. § 1-301, a consumer might "be forced to have the least favorable law in America apply" to the contract).

specific definition of consumer would address remaining fears or misunderstandings about such a provision.

In conclusion, the criticisms that arose regarding Section 1-301 would not constitute an obstacle to a Rome I-type regulation because they are not systemic problems with the American legal system. In fact, twenty-one state legislatures at the very least considered adopting this approach[133] before it was withdrawn. This framework would not impose an unreasonable burden on commercial actors, since they already confront the issues of fifty-state compliance in other areas of their businesses, including state administrative and statutory consumer protection laws. And while business interests presumably would not be in favor of a consumer-friendly change in the law, a national-level proposal, resembling Rome I, that addresses some concerns about the application of the seller's home-state laws may receive more support. Thus, the failure to adopt Section 1-301 should not be viewed as an American indictment of any and all mandatory norms. Rather, the specific proposal simply failed to gain traction in a national debate about the merits of the undertaking. A rule that strikes to the heart of the Rome I regulation—ensuring consumers are protected by the benefits of their home law—would offer an improvement to the consistency and the substance of the U.S. choice-of-law approach to consumer contracts.

CONCLUSION

A consistent and reliable approach to consumer protection choice of law is essential in an increasingly mobile and interconnected society. Whatever the merits of the current system, consistency is clearly not among them.[134] By adopting an approach similar to that of Europe, as embodied in Rome I, the United States could take an important step toward not only protecting consumers and increasing consumer confidence, but also toward developing a more consistent application of choice-of-law analysis.

Under Restatement § 187, American courts currently examine whether the application of a chosen law would violate a fundamental public policy.[135] But American courts have applied this standard inconsistently, with only some courts offering consumers the

133. *See* Graves, *supra* note 123, at 59-60.

134. *See supra* Part I.

135. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

protection of the laws of their home jurisdiction.[136] Europe's approach under Rome I allows consumers the freedom to select an applicable law, provided that such choice would not constitute a derogation from the laws that protect them in their home states.[137] Though the failed proposal to amend the U.C.C. in America has influenced some scholars to counsel against a mandatory norms approach in the United States, a European type of proposal would not face the same criticism if it incorporated the lessons of Rome I.[138] Looking to Rome I for guidance on this subject would help the United States simplify and solidify a more consistent approach to choice-of-law, thereby encouraging consumer confidence in a rapidly expanding and ever-changing global marketplace.

136. *See supra* Part I.

137. Rome I Regulation, *supra* note 3, art. 5.

138. *See supra* Part II.C.