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#### IV. Other Aberrant Contract Concerns



## LEGAL UNCERTAINTY AND ABERRANT CONTRACTS: THE CHOICE OF LAW CLAUSE

WILLIAM J. WOODWARD, JR.\*

### INTRODUCTION

“Legal uncertainty.” When speakers and writers use this term, most often they are describing an undesirable state of affairs that ought to be corrected. Legal uncertainty, it is said, makes it difficult to plan, to resolve disputes, or at the extremes, to proceed with capitalist enterprises.<sup>1</sup> The most obvious activity threatened by legal uncertainty is planning, an activity that requires at least some ability to predict the future consequences of today’s actions. Virtually all business and investment requires sound planning. Increased accuracy in predicting future consequences of their actions results in improved performance of a business or investment.

When legal uncertainty gets in the way of predicting future business or investment outcomes, the problem is felt largely within the communities that actually engage in legal planning. Call them the “legal sophisticates,” relatively educated and wealthy individuals (who plan their investments, retirements, and estates based on legal predictions) as well as organizations that conduct business. Those who do not regularly engage in legal planning—those who lack the resources necessary to make regular use of lawyers, those who lack amassed wealth that requires regular planning and management, and those who do not engage in business ventures—have little or no need for legal certainty for planning purposes. This latter group includes most people we would label as “consumers,” and they are the target beneficiaries for what we commonly refer to as “consumer protection.”<sup>2</sup> They are also the targets of those who promulgate aberrant contracts.

While consumers do not do much legal planning, they do have a need for legal certainty—as do legal sophisticates—when confronted with legal

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1. See Anthony D’Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1, 5 (1983).

2. While, obviously, there is overlap between members of the sophisticates and consumer groups, the overlap matters little to the points to be made here.

disputes. Legal uncertainty makes dispute resolution more expensive; essentially, as hard issues are resolved, the disputants transfer more wealth to their lawyers. Though consumers and legal sophisticates share the need for legal certainty in this context, the impact of legal uncertainty on these two groups is very different, so different that it is not merely a difference in degree but a difference in kind.

Legal uncertainty can destroy a consumer's claim or defense; however, this is not the case for legal sophisticates. Legal sophisticates involved in a dispute often have claims that can bear the cost of resolving the legal uncertainty that accompanies them, or the resources to press their positions even when they are not cost effective. When small claims are concerned, as is the case in many business-consumer disputes,<sup>3</sup> businesses can spread those disputing costs across other transactions, thereby absorbing them in those cases for which the businesses deem it worthwhile to do battle.<sup>4</sup> Legal sophisticates' claims or defenses may be deterred, but they are seldom foreclosed by the costs of resolving them.

For consumers it is different. Amounts in controversy are rarely large enough to carry the costs of resolving legal uncertainty. And consumers, unlike businesses, have no other transactions across which to spread those costs, or a surplus of wealth to tap in order to dispute "on principle." This means that in many cases, a business can litigate a problem that does not bear its legal costs, while its consumer adversary simply cannot. In law, as in life, failing (or being unable) to fight is to lose, whatever may be the merits of the underlying dispute. In consumer law, this means that legal uncertainty, by increasing dispute resolution costs, increases the odds that the consumer will lose, by default, the rights that a legislature or court at one time granted and thought important as a matter of policy.<sup>5</sup>

Small claims courts and, some might argue, mandatory arbitration programs, have attempted to mitigate legal costs, offering simplified processes that are more affordable largely because they do not require consumer lawyers. But these largely summary dispute resolution processes are

3. The Supreme Court has made the consumer class action unavailable to any consumer who has adhered to a form contract containing a class action waiver presented within an arbitration clause. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1767, 1753 (2011). This now probably includes any consumer product or service accompanied by a contract.

4. *Williams v. Walker Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) involved a collection of replevin actions to recover used personal property, likely worth no more than \$5,000. Walker Thomas's legal fees for litigating the case through the D.C. Circuit eclipsed the values at issue many times over. In my own practice, one large client had a "no settlement" policy with respect to consumer claims of whatever size. Even though many of those cases were personal injury cases, the legal fees also likely exceeded the values at issue in the individual cases.

5. A patchwork of free legal services, help from pro bono lawyers, and fee-shifting statutes tend to mitigate these problems somewhat.

not the procedural or substantive equivalents of ordinary judicial dispute resolution. The tradeoffs for simplicity and lowered cost are processes that cannot easily accommodate either legal uncertainty or complexity. In the context of aberrant contracts, what is worse is that these summary processes may offer only very simple-yet-wrong answers to what are, in fact, subtle and sophisticated legal problems.

If a correct-but-complex legal analysis resolves a problem in favor of the consumer, but an unsophisticated summary analysis resolves the analysis in favor of the business, the summary dispute resolution processes will have produced a substantive outcome, in the presence of legal uncertainty, that is at odds with the design of the underlying consumer protection or the rights that in fact (but, post dispute, only in theory) existed.

In consumer mass contract settings, one easy answer to many problems results from a focus on the text of the form contract: “You agreed to it, so you’re bound by it.” This common sense—but often wrong—analysis is reinforced in our popular media with the recurring advice: “Read your contract.” For anyone without a great deal of time to waste, this popular advice is wrong-headed.

Consumers do not read their contracts very often and are not “irrational” when they do not. Few, if any, mass contracts are negotiable and most come with terms that are present in contracts of other vendors in the industry. Of course, one is not entitled to buy a cell phone, obtain medical care, have a bank account, or get a job; it may still be possible to drop out and survive without the accouterments of modern life. But if one wants to participate in contemporary culture, she will be stuck with the document that comes with the goods or services, or a document from a “competitor” substantially similar to it. Since the document cannot be changed and the product or service is unavailable without it, reading the document serves no meaningful instrumental purpose, unless of course, it is read for pleasure or for some academic pursuit.

Doctrines that might avoid what the document says, such as misrepresentation, duress, undue influence, violations of public policy, or unconscionability, require sophisticated, nuanced analysis. And when those doctrines undercut the “clear language” of a written form contract, they are at odds with simple, cheap analysis and the popular perception that if something is in a document called a “contract,” the adherent is stuck with its terms.

This is the state of affairs that faces most individuals who will challenge aberrant contracts: If they can afford the contest at all, their challenge will occur in a cheap and fast proceeding that will not accommodate legal

uncertainty and may tend toward the easy “you signed it, you’re bound” answer to what may be a far more complicated problem. The tendency of this simple and cheap approach will be to resolve disputes the way the document dictates, in favor of those who drafted it.<sup>6</sup>

Marginal improvement to this state of affairs<sup>7</sup> may be possible without a wholesale rethinking of the entire form contract culture.<sup>8</sup> Consumer protection needs to be clear and stripped of legal uncertainty if consumers are to have a chance of vindicating their rights in the summary dispute resolution processes to which they are now limited. Even marginally trained arbitrators will have trouble ignoring a consumer protection rule that is clear in its application to the case at hand.

This essay will offer one suggestion for improvement: legislation to resolve the extraordinarily complex legal problem that confronts a consumer when the vendor has replaced her local consumer protection through a

6. It is well known that courts construe contracts against their drafters. But this idea takes hold only when there are two potential meanings for a given provision. See Edwin Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 854 (1964). The mass-market contract, often applicable to millions of transactions, will be unlikely to have very much ambiguity in its mandates.

7. “Marginal” because the other problems with this lopsided dispute resolution system may overwhelm whatever benefits improved legal certainty might yield. Here are some examples of the tilted playing field in arbitration:

1. There will be few consumer lawyers within this process, whereas the business will have a repeat player (lawyer or non-lawyer) on its side, familiar with the arbitration forum’s rules.
2. Arbitration’s reduced cost likely means less-experienced decision makers and “docket pressure” coming from “per-case” fees.
3. The substantive information asymmetry will be considerable, since the repeat player will have access to unreported past decisions involving her employer whereas the consumer will not.
4. And, of course, private arbitrators will naturally be concerned about getting future business, and, since the repeat player will play a major role in arbitrator selection (at least to veto the undesirable ones), the economically rational arbitrator may shape her decisions in a way that makes them more pleasing to the future “customer.”

In this context, reducing legal uncertainty may be like offering a boat bailer to a tsunami victim. But there may be few other tools available. And even if the Supreme Court majority changes or the Consumer Financial Protection Bureau becomes inclined to intervene, both may encounter an entrenched private arbitration system that is “too big to fail” and, therefore, with us forever.

Some have attempted to show empirically that the system is lopsided, but interpretations of the empirical data are in conflict. Compare Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN ST. L. REV. 1051 (2009), with John O’Donnell, *The Arbitration Trap: How Credit Card Companies Ensnare Consumers*, PUBLIC CITIZEN (September 2007), [http://www.citizen.org/documents/Final\\_wcover.pdf](http://www.citizen.org/documents/Final_wcover.pdf). But those who interpret the data and suggest that arbitration produces outcomes that are “just as good” as litigation fail to address how private arbitration can possibly overcome the deficiencies that result from the perverse incentives built into the private system. Put differently, what in this system allows or encourages arbitrators to regularly resist the considerable pro-business incentives inherent in the system?

8. Margaret Jane Radin has substantially advanced our rethinking of the issues in MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013).

contractual choice of law provision. Choice of law provisions are sufficiently complex in their own right to merit a brief description here.

Choice of law provisions purport to show “agreement” as to what law the parties wish a dispute resolution system to use in deciding rights under the contract. That they are ubiquitous in mass consumer contracts makes good sense: vendors seek to systematize their operations and to have the form contract produce the same economic effects for the vendors no matter where the customers reside. And, of course, any rational business with a national operation will be motivated to choose the law for its mass contract that it believes offers the best advantages, whether the advantage be desirable precedents,<sup>9</sup> a good judicial system,<sup>10</sup> or favorable regulation.<sup>11</sup> While useful for planning, how do choice of law provisions operate on the substantive rights of consumers,<sup>12</sup> particularly when they appear in “aberrant contracts”? The answer to that question, under the current state of the law, is both uncertain and legally complex.

I contend that these choice of law provisions, while functional in other respects, bring uncertainty to a consumer’s rights, and that with uncertainty comes a diminution or elimination of those rights. This may well be the case even in the judicial litigation context. But the problem that uncertainty brings is substantially exacerbated in the consumer arbitration proceedings consumers are now required to use.<sup>13</sup>

To demonstrate the problems that choice of law uncertainty brings to consumer protection, this essay will focus on a fee-shifting provision found

9. See, e.g., Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 956 (2010).

10. Incorporating in Delaware gets a corporation Delaware law and its Chancery Court, both widely regarded as excellent, at least from a corporate perspective.

11. Delaware and South Dakota are the jurisdictions of choice for credit card companies, as those states have no restrictions on rates of interest that might be charged on consumer loans.

12. Optimally predictable planning would have the same contract provisions operate everywhere, even where the local customer’s law differed from the law the vendor chose in the contract; in other words, if optimal planning were the sole objective, there would be no exceptions in choice of law doctrine for local consumer law, local public policy, or anything else. The conflict between optimal planning on the one hand and important local prerogatives and lawmaking on the other is what makes choice of law questions difficult both at the doctrinal and policy levels.

13. In 2006, I argued that businesses were using choice of law provisions strategically in order to avoid undesirable regulation imposed by the state law that would otherwise apply to their transactions. William J. Woodward, Jr., *Constraining Opt-Outs: Shielding Local Law and Those It Protects From Adhesive Choice of Law*, 40 LOY. L.A. L. REV. 9, 12-14 (2006). Of course, the best example of this is a physical selection of favorable law, the finance industry’s successful deregulation of credit card interest rates by prevailing in *Marquette Natl. Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 313-14 (1978), and then moving operations to states such as South Dakota and Delaware, states that imposed no limits on credit card interest rates. *Id.* That article suggested that states could protect their local rules by enacting statutory provisions to combat this business strategy. The new world of individual arbitration as the near-exclusive method of addressing consumer-business disputes that arise from a contract has made the problems much worse.

in the statutes of California and a handful of other states. These statutes convert one-way attorneys' fee-shifting contract clauses—widely found in contracts promulgated by the finance industry<sup>14</sup>—into two-way fee-shifting provisions. If widely known and well understood, these statutes have the potential to neutralize the enormous risks that one-sided fee-shifting provisions pose for those who would contest a business's claim,<sup>15</sup> and perhaps encourage some consumer lawyers to take meritorious cases brought to them by consumers. When uncomplicated by contractual choice of law provisions, these statutes help to level the uneven playing field created by the drafter and thereby restore value to a consumer's claims or defenses. A choice of law provision, by creating uncertainty about the application of these statutes, can undercut—or even eliminate—the value such statutes can bring to victims of aberrant contracts.<sup>16</sup>

Part I of this essay will examine the statutory provisions themselves and their implications for consumers with legally and factually valid claims or defenses. Part II will then show the uncertainty that choice of law provisions bring even to statutes such as these that seem relatively certain in their application. Part III will suggest that these effects are exacerbated in an environment of individual arbitration of consumer claims and defenses. Part IV will outline the parameters for legislative solutions to this uncertainty problem, and will be followed by a short conclusion. Finally, an Appendix will offer sample statutes that might achieve a legislative solution.

14. An example of a fee-shifting provision found in an ordinary bank's customer agreement reads: "If your account is in default, you also agree to pay our collection costs, attorney's fees, and court costs incurred in enforcing our rights under this Agreement." *Consumer Credit Card Customer Agreement & Disclosure Statement*, WELLS FARGO, ¶22 (2012), [https://www.wellsfargo.com/downloads/pdf/credit\\_cards/agreements/wf\\_secured\\_card.pdf](https://www.wellsfargo.com/downloads/pdf/credit_cards/agreements/wf_secured_card.pdf) [hereinafter *Wells Fargo Account Agreement*].

15. Under a one-way fee-shifting provision, if the consumer wins, she pays her own lawyer (and probably still comes out in the negative); if she loses, she pays her own lawyer, the judgment, and her opponent's lawyer. This means there is virtually no upside and tremendous downside to contesting the drafter's claim. What is worse, the harder she fights, the larger the business's attorneys' fees become her downside risk of losing becomes larger as the litigation progresses.

16. See *Wells Fargo Account Agreement*, *supra* note 14, at ¶ 30. The governing law provision reads:

**Governing Law.** This Agreement and your Account, [sic] is [sic] governed by federal law and, to the extent applicable, the laws of the State of South Dakota, no matter where you live or use your Account.

Since South Dakota does not have a fee-shifting statute like California's, this contract provision begs the question of whether the California consumer gets the protection of the California statute or the lack of protection provided by South Dakota law. The answer, as will be seen in the text, requires the legal-analysis equivalent of very heavy lifting.

## I. TWO-WAY FEE-SHIFTING STATUTES

Absent a contractual fee-shifting term, the default rule on attorneys' fees in the United States is the so-called "American Rule,"<sup>17</sup> requiring each litigant to pay her own lawyer, win or lose. One-way fee-shifting provisions found in consumer form contracts change only one side of the ledger, purporting to show the customer's agreement to pay the business's attorneys' fees if the vendor wins, but not the other way around.<sup>18</sup> By inserting such a term into its form, the vendor converts the even-handed American Rule into a lopsided one. Statutes like California's change the contractual fee-shifting provision into the "English Rule," requiring the loser to pay the winner's attorney's fees, and thereby changing the lopsided term into an even-handed one.<sup>19</sup>

California Civil Code section 1717, for example, provides:

(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.<sup>20</sup>

The statute goes on to plug the obvious loophole that would likely occur to any first-year associate seeking to avoid the impact of the section, "Why not just insert a contractual waiver of the fee-shifting protection into our form?" It provides:

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract which is entered into after the effective date of this section. Any provision in any such contract, which provides for a waiver of attorney's fees is void.<sup>21</sup>

17. The "American Rule" and the "English Rule" are terms commonly used to describe the two dominant approaches to attorneys' fees. *See generally* Theodore Eisenberg & Geoffrey Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327 (2013).

18. *See, e.g., Wells Fargo Account Agreement, supra* note 14.

19. *See, e.g., Capital One Bank v. Fort*, 255 P.3d 508, 511 (Or. App. 2011) (citations omitted). The Court went on to say:

[The statute] was enacted to overcome one-sided attorney-fee provisions in contracts by making reciprocal the right to recover prevailing party attorney fees in cases involving such provisions. . . . The drafters of [the statute] were principally concerned with protecting Oregon consumers who enter into contracts with sellers of goods and services that give the sellers the unilateral right to an award of prevailing party attorney fees.

20. CAL. CIV. CODE § 1717(a) (2013).

21. *Id.* Perhaps the easiest way to avoid the consumer empowerment implicit in these statutes is simply not to shift fees by agreement at all. US Bank has taken this to a different level. *Your Deposit Account Agreement*, US BANK (July 26, 2013), <https://www.usbank.com/pdf/Deposit-Account-Agreement.pdf> [hereinafter *US Bank Account Agreement*]. Like the Wells Fargo agreement, its standard customer agreement provides for the consumer to pay the bank's attorneys' fees but not the opposite. It then goes on to state:

Montana, Oregon, Utah, and Washington have similar statutes;<sup>22</sup> Connecticut's version is limited to contractual disputes between commercial and consumer parties.<sup>23</sup>

Apart from redressing the imbalance created by these terms, the statutes may actually improve the delivery of legal services to consumers who have viable claims or defenses in even modest consumer-related cases.<sup>24</sup> A debt buyer that cannot establish either that it owns the debt it is suing on, or that the debt was actually incurred by the defendant, will likely pay the consumer's lawyer for defending the case, since virtually all consumer finance contracts contain provisions requiring the consumer to pay the debt collector's attorneys' fees.<sup>25</sup> Similarly, the consumer plaintiff with a valid, but unresolved, small claim of overcharge against a bank or other business has a chance of obtaining legal representation and redress if the other party will have to pay her lawyer. Under the California statute and others like it, this will happen if the vendor has a contractual fee-shifting provision in its contract.<sup>26</sup>

#### ATTORNEY'S FEES

Where used, "attorney's fees" includes our attorney's fees, court costs, collection costs, and all related costs and expenses. *Notwithstanding any provision in this Agreement to the contrary, any provision for attorney's fees in this Agreement shall not be enforceable in any dispute governed by the laws of California or Oregon.*

*Id.* at p. 13 (emphasis added).

This permits US Bank to recover one-way attorneys' fees in other jurisdictions but to leave the American Rule in place in California and Oregon. It is a testament to the legal ingenuity of US Bank's lawyers, to US Bank's preference for a lopsided system, and to the consumer protection potential of these statutes.

But US Bank may get its one-way provision even in California and Oregon if, that is, its choice of Ohio law, also in this same contract, prevails. If the provision is enforceable, the contract would then *not* be "governed by the laws of California and Oregon."

22. Montana, Oregon, Utah, and Washington all have similar statutes. MONT. CODE ANN. § 28-3-704 (2013); OR. REV. STAT. § 20.096 (2011); UTAH CODE ANN. § 78B-5-826 (2008); WASH. REV. CODE ANN. § 4.84.440 (2011).

23. CONN. GEN. STAT. ANN. § 42-150bb (2013).

24. They have only *some* potential because it is so easy for the form drafter to avoid their impact by remaining silent about attorneys' fees in the agreement. Without a one-way fee-shifting provision, the American Rule usually governs disputes with the drafter. The enormous attorneys' fees normally charged by non-legal services litigators will exceed the value of most consumer claims and defenses and usually make retaining a lawyer economically irrational under the American Rule. *See also US Bank Account Agreement, supra* note 21, regarding the US Bank choice of law provisions that allow form drafters to evade consumer friendly statutes in states like California.

25. *But see US Bank Account Agreement, supra* note 21.

26. It is unclear how common such one-way provisions are. One-way fee-shifting has been common in finance agreements where the vendor may have to recover an obligation owed by the consumer but at least some banks have attempted to thwart the delivery-of-legal-services potential of these statutes. *See US Bank Account Agreement, supra* note 21. If a non-finance service vendor has an ongoing relationship with a customer, termination of the service may be the vendor's remedy of choice and there may be no practical need for collection provisions. While I have done no systematic study of consumer form contracts, a casual search revealed such agreements with no fee-shifting provisions. *See, e.g., Comcast Wifi Agreement, COMCAST* (2013), <http://www.comcast.com/wifi/comcastwifiterms.html>;

The statutes are easy enough to find and interpret in given cases. But while the statutes themselves restrict a vendor's effort to write the statute out of the contract by inserting a contractual waiver into its form,<sup>27</sup> the statutes do not address a vendor's accomplishing exactly the same result by inserting a choice of (other) law term into its form and then seeking its enforcement "as agreed to." This means that a "waiver" through a choice of law provision is possible and depends on the application of common law conflict of laws principles, an area not known for clarity or lack of complexity.

## II. THE LEGAL COMPLICATIONS BROUGHT BY CONFLICT OF LAWS PRINCIPLES

Conflict of laws principles govern the law that a forum court will apply to a case. By default and tradition, these principles are state law principles and can be prescribed by the legislature<sup>28</sup> or developed by the courts themselves. In most cases, they have been developed by the state courts and are found within the common law of each state. Since the question "what law should govern the dispute before this court?" is present in every civil case, even generalist courts must have at least a passing familiarity, if not expertise, in conflict of laws questions.

One can view the principles governing the law a forum court ought to apply to a dispute as central attributes of the judicial function, and part of a state's own sovereignty. State courts are parts of a state's governing apparatus and, absent overriding federal rules, are charged to resolve disputes using the law specified either by state common law principles or state legislation.

Until relatively recently, there was only passing recognition of party power to choose the law to govern their contracts.<sup>29</sup> This changed in the mid-1950s when U.C.C. Section 1-105, widely enacted after 1956, explicitly authorized the parties to a U.C.C. contract to choose the law to govern

*Verizon Online Terms of Service*, VERIZON (2013), [http://www.verizon.net/policies/vzcom/tos\\_popup.asp](http://www.verizon.net/policies/vzcom/tos_popup.asp).

27. See CAL. CIV. CODE § 1717(a) (2013). A perverse-but-direct example might be: "For good and valuable consideration, we agree that statutes requiring [vendor] to pay customer's attorney's fees do not apply in any dispute arising or in any way related to this contract under any circumstances."

28. Probably the most widely-applied legislative conflict of laws rule is found in the Uniform Commercial Code, U.C.C. section 1-301, formerly U.C.C. section 1-105, requiring a court in an enacting state to enforce an agreement to apply the law of "this state" "when a transaction bears a reasonable relation to this state and also to another state or nation." The revision, as enacted in U.C.C. section 1-301, left the law essentially unchanged albeit renumbered.

29. See William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum, and Arbitration*, 2 HASTINGS BUS. L. J. 1, 10 (2006).

their own contracts, provided that their transaction was “related” to the law chosen.<sup>30</sup>

That early provision (still substantially in effect as U.C.C. section 1-301) had nothing to say about other limits (beyond ‘relatedness’) that might apply to the party-choice principle. In particular, the current statute has nothing to contribute to the question here, the extent to which a choice of law provision in a consumer form contract can displace otherwise-applicable consumer protection law. There are no other general state statutory provisions that limit the effectiveness of choice of law provisions in consumers’ contracts.<sup>31</sup>

Instead, this particular problem has been relegated to the common law: whether contractual choice of law provisions are enforceable or not in consumer protection settings generally depends on local common law principles governing conflict of laws.<sup>32</sup>

Despite the potential for state-to-state variation of governing principles, the overarching ideas underlying conflict of laws rules press powerfully towards uniformity, or at least consensus among state courts.<sup>33</sup> The closest thing to a general statement of governing common law principles is the Restatement (Second) of Conflict of Laws, section 187(2), recognized in most states.<sup>34</sup> It provides:

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

30. See U.C.C. § 1-105 (1962) (current version at UCC § 1-301 (2008)).

31. Some scattered statutes limit the effectiveness of choice of law in far narrower settings. See Woodward, *supra* note 13, at 84.

While it seems self-evident that a business ought not be able to unilaterally choose its way out of otherwise applicable consumer protection provisions, stranger things have happened. Just this past term, the Supreme Court-permitted businesses to use arbitration provisions to effectively contract out of otherwise applicable antitrust laws. See *American Express Co. et al. v. Italian Colors*, 570 U.S. 1, 3-10(2013) (Kagan, J., dissenting); see also, Paul Bland, *The Worst Supreme Court Arbitration Decision Ever*, PUBLIC JUSTICE (Sept. 14, 2013), <http://publicjustice.net/blog/worst-supreme-court-arbitration-decision-ever>.

32. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97 (1941).

33. Conflict of laws principles that vary with the chosen forum can obviously undercut the goal of having the same rules apply to a given dispute wherever it is brought. While an obvious solution is federal legislation to set out a uniform rule, cf. Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 310-11 (1992), the situation itself may push divergent state courts in a uniform direction. The 1980 Rome Convention made conflict of laws principles uniform by treaty for the then-developing European Union. Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 1980 O.J. (L 266) 5 [hereinafter 1980 Rome Convention].

34. Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 AM. J. COMP. L. 217, 243 (2013).

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.<sup>35</sup>

The provision is devilishly difficult to apply because it initially recognizes that a choice of law provision *can* override some otherwise-applicable rules that cannot be altered directly by contract.<sup>36</sup> To deploy these complex principles in consumer settings, one has to establish under Paragraph (2)(b) that enforcement of the choice of law term would violate “fundamental policy,” that the consumer resident’s jurisdiction “has a materially greater interest than the chosen state” on the question, and that the resident’s jurisdiction would supply the applicable law in the absence of the “effective choice of law by the parties.”<sup>37</sup>

How might the Restatement principles operate on a contract between a person living and litigating in a jurisdiction with a two-way fee-shifting statute and her vendor, when the vendor’s form contract with its one-way fee-shifting term has also purported to choose the law of a jurisdiction without a two-way statute?<sup>38</sup> Among other things, application requires a decision maker to determine whether, under general conflicts principles, the law of the consumer’s jurisdiction would apply to the contract absent the choice of law provision.

Even this threshold question is not easy, as it requires at least a passing familiarity with conflict of laws principles. The analysis gets particularly hard if the vendor has chosen the law of the jurisdiction where it has its principal place of business. Beyond its likely rhetoric of “freedom of contract” (or “you agreed to it, so you’re bound”),<sup>39</sup> the vendor’s argument would be that the dominant nexus of the contract is the vendor’s location, the center for all of its contracts with customers. These arguments are viable in any case involving an interstate vendor, and they prevailed in some

35. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 187(2) (1971) (emphasis added).

36. “Mandatory law” is law in European states that is not modifiable by choice of law provisions; it includes consumer protection in the mandatory principles. See Hans Christophe Grigoleit, *Mandatory Law: Fundamental Principles*, THE MAX PLANCK ENCYCLOPEDIA OF EUROPEAN PRIVATE LAW 1126-1131 (2012); see also *infra* note 70.

37. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 187(2) (1971).

38. See, e.g., *Wells Fargo Account Agreement*, *supra* note 14.

39. See, e.g., *Capital One Bank v. Fort*, 255 P.3d 508, 510 (Or. App. 2011) (“[P]laintiff argues that Oregon’s public policy encourages freedom of contract and that there is no policy reason to interfere with the parties’ freedom to choose to apply Virginia law to the agreement’s provisions.”).

early cases when the question was whether a consumer could bring a class action despite (1) a contract term that purported to waive a right to bring or participate in a class action and (2) a choice of law provision that (inevitably) specified the governing law of a jurisdiction that recognized such waivers as effective.<sup>40</sup>

However, more recent cases have overridden the choice of law provision, but not without complex legal reasoning. Perhaps the most elaborate analysis of the extent to which a choice of law provision can override local policy is the California Supreme Court's decision in *Washington Mutual Bank v. Superior Court*.<sup>41</sup> This is the prescribed analysis:

If the trial court finds that the class claims fall within the scope of a choice-of-law clause, it must next evaluate the clause's enforceability pursuant to the analytical approach reflected in section 187, subdivision (2) of the Restatement Second of Conflict of Laws (Restatement). Under that approach, the court must first determine: "(1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the court need not enforce the parties' choice of law. If, however, either test is met, the court must next determine whether the chosen state's law is contrary to a *fundamental* policy of California. If there is no such conflict, the court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the court must then determine whether California has a "materially greater interest than the chosen state in the determination of the particular issue . . ." If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy.<sup>42</sup>

Imagine the reception a busy arbitrator or small claims court judge would give to this analysis in a \$500 (or, indeed, \$5000) consumer dispute!

How might a local two-way fee-shifting statute stand up to a contractual choice of law provision purporting to choose other law? Inasmuch as the claims involved are likely to be small,<sup>43</sup> it will be difficult to find defin-

40. *E.g.*, Order on Pending Motions, *Scheifley v. Discover Bank*, No. CV 03-2801RBL (W.D. Wash. June 25, 2004), at \*3.; *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001).

41. 15 P.3d 1071 (Cal. 2001).

42. *Id.* at 1078 (citations omitted).

43. Large consumer claims arising out of contracts have almost always been class actions. The Supreme Court has effectively ended consumer class actions against any vendor that chooses to shroud a class action waiver in an arbitration clause within the form contract. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747, 1753 (2011). It will be increasingly hard to find a competently-drafted mass market contract that does not do this.

itive precedent on the question<sup>44</sup> and the *Washington Mutual Bank* analysis elaborated above is fact-based and hopelessly uncertain.<sup>45</sup>

Only one case has been found that addresses the question head-on. In *Capitol One Bank v. Fort*,<sup>46</sup> the bank brought an action against an Oregon cardholder; the contract specified the application of Virginia law to the contract<sup>47</sup> The trial court referred the case to court-annexed arbitration and, when the arbitrator ruled against the bank under the Virginia statute of limitations, the consumer applied to the court for attorneys' fees under Oregon's two-way fee-shifting statute<sup>48</sup> The Oregon court held that (notwithstanding the application of Virginia's statute of limitations) the consumer was entitled to attorney fees because: (a) Oregon law would have been applicable in the absence of the choice-of-Virginia-law clause; (b) the two-way fee-shifting statute embodied a fundamental public policy of Oregon; and c) Oregon had a materially greater interest in applying its law than did Virginia.<sup>49</sup>

Most of the recent consumer cases involving a conflict between a purported choice of a non-resident's law and the public policy of the forum state have involved class action waivers, usually wrapped up in arbitration clauses. In those situations, many courts struck down the choice of (other) law provisions as being inconsistent with the forum's public policy to protect consumers (through the class action mechanism) from predatory business practices. Until the Supreme Court's decision in *AT&T Mobility v. Concepcion*,<sup>50</sup> courts routinely applied the Restatement's section 187(2) rubric in this context and found that local public policy trumped the choice of law provision.<sup>51</sup>

44. Professor Knapp has observed that pervasive arbitration is depriving the contract system of valuable precedent since arbitration decisions are not reported. Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 784-85 (2002).

45. *AT&T Mobility LLC*, 131 S. Ct. at 1747, 1753. This case probably implies 1) that there will be few claims large enough to support the kind of legal analysis described in the text and 2) that, even if actually litigated, any resulting arbitration decision on the particular question will not be reported in any form easily accessible by consumers or their lawyers.

46. *Capital One Bank v. Fort*, 255 P.3d 508, 509 (Or. App. 2011).

47. *Id.* at 510.

48. *Id.*

49. *Id.* at 513.

50. *AT&T Mobility LLC*, 131 S. Ct. at 1747, 1753 effectively put class action waivers beyond the reach of local legal rules that might trump a choice of law provision. Judicial precedent on this question is likely frozen where it was when this case was decided.

51. See, e.g., *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1086 (9th Cir. 2010) (California law defeats choice of Texas law); *Homa v. American Express Co.*, 558 F.3d 225, 233 (3rd Cir. 2009) (New Jersey law defeats choice of Utah law); *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1084 (9th Cir. 2009) (California law defeats choice of Virginia law); *Schnuerle v. Insight Communications Co., L.P.*, 376 S.W.3d 561, 567 (Ky. 2012) (Kentucky law defeats choice of New York law); *Feeney v. Dell Inc.*, 908 N.E.2d 753, 766 (Mass. 2009) (Massachusetts law defeats choice of Texas law); *McKee v. AT & T Corp.*, 191 P.3d

California's and Oregon's two-way fee-shifting statutes explicitly provide that any purported waiver of the provision is void; but, as indicated earlier, the statutes say nothing about "waiver" through a choice of law provision.<sup>52</sup> The anti-waiver provisions themselves may establish that such statutes constitute "fundamental policy" of the forum and thereby contribute fuel to a conflict of laws analysis under section 187(2).<sup>53</sup> Given that the consumer will usually be located in the forum and that the product or services will have been delivered and consumed in the forum,<sup>54</sup> establishing the other essential component of the section 187(2) analysis, that local law would apply in the absence of the contractual provision should not be unusually difficult, at least to someone with a passing familiarity of conflict of laws rules.<sup>55</sup> But, as with the "fundamental policy" prong of the analysis, establishing this will be anything but certain. Indeed, establishing that section 187(2) is the correct starting point for a conflict of laws analysis on the question is itself uncertain in any forum that has not explicitly embraced the analysis in its case law

This state of affairs weakens, or eliminates, whatever protection the two-way fee-shifting statutes are designed to deliver. A choice of (other) law term in the contract confronts the intended beneficiaries of the statutes with a substantial legal obstacle at the threshold, the resolution of which is complex, uncertain, and therefore expensive to overcome. This legal uncertainty problem likely works its way backwards to the consumer's initial consultation with a consumer lawyer, who might have—but for the choice of law provision—represented the consumer in her contest with the busi-

845, 852 (Wash. 2008) (Washington law defeats choice of New York law); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1222 (N.M. 2008) (New Mexico law defeats choice of Texas law). There is also a straight contract analysis available. See William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum, and Arbitration*, 2 HASTINGS BUS. L. J. 1 (2006).

52. *Supra* notes 20-22 and accompanying text.

53. A decision maker could, of course, construe the choice of law clause as a prohibited "waiver" and refuse to enforce it on that basis. But since the statute does not mention choice-of-law-waivers, a consumer's prevailing here, particularly in an arbitration forum, is very uncertain.

54. Of course, some consumer contracts purport to defeat this idea by stating the consumer's purported agreement suggesting that everything important happened in the vendor's state. For example, Bank of America's Visa Signature/World MasterCard form reads:

WHAT LAW APPLIES

This Agreement is made in Delaware and we extend credit to you from Delaware. This Agreement is governed by the laws of the State of Delaware (without regard to its conflict of laws principles) and by any applicable federal laws.

*Example of Credit Card Agreement for Bank of American Visa Signature and World MasterCard accounts*, BANKOFAMERICAN.COM, <https://www.bankofamerica.com/content/documents/VISA%20SIGNATURE-WORLD%20MASTERCARD-ENGLISH.pdf> (last visited July 24, 2013).

55. Few, if any, consumers will have enough familiarity and one might guess that relatively few lawyers will have it either.

ness. Without a lawyer, the likelihood of mounting a successful challenge to a choice of law provision is remote.

### III. THE PARTICULARLY PRESSING NEED FOR CERTAINTY IN THE CONSUMER DISPUTE RESOLUTION ENVIRONMENT

Empirical research and common observation suggest that standardized credit agreements are likely to contain one-way fee-shifting provisions, which, under California law, will be converted to English Rule provisions.<sup>56</sup> One might expect that a California consumer with a strong defense in a debt action, or with a reasonably meritorious unresolved overcharge complaint, would be somewhat more likely to find litigation a viable option under the English Rule than under either the one-way fee-shifting term or the American Rule. Consequently, finding a lawyer to prosecute that defense or claim becomes easier as well.<sup>57</sup> But if we couple a (non-California) choice of law term with the mandatory consumer arbitration system, the benefits that might accrue from the California statute are very likely either to be seriously degraded or lost.

#### *A. Effect of a Choice of Law Provision on Access to Lawyers*

Some non-pro bono lawyers will take a consumer's small claim if a statute awards attorneys' fees to the prevailing party and the lawyer concludes that the consumer has a very strong claim. The California statute might have this effect, at least at the margins, when the vendor has purported to shift fees to itself in its form. But if the effect of the statute on the award of fees is uncertain, the prospective consumer lawyer will be more circumspect, or will want the consumer's agreement to pay the fees if the defendant does not.

It should be easy to see how a choice of ("other") law provision affects the lawyer's calculus in "good cases," those in which the lawyer concludes the client is very likely to win the underlying claim or defense. If the vendor has delivered both a one-way fee-shifting term and a term purporting to choose non-California law, whatever confidence in payment the consumer's prospective lawyer might otherwise have had is replaced with the new risk that the local fee-shifting statute will be found to be inapplica-

56. Eisenberg & Miller, *supra* note 17, at 369-70.

57. Of course, many of these claims will be resolved consensually; it is irrational for most vendors to permanently alienate a customer by refusing to compromise. Research suggests, however, that such "customer service" varies with the income level of the customers themselves. The studies are summarized in STEWART MACAULAY, et al., 1 CONTRACTS LAW IN ACTION 664-68 (Lexis-Nexis, 3d ed. 2010).

ble and, therefore, that she cannot count on payment of fees by her adversary when her client wins. This means either that the lawyer runs the risk of non-payment or that her client will have to pay her lawyer when she wins (and both lawyers if she loses). Many lawyers will forego representation altogether if there is a substantial risk of non-payment of fees, and many rational clients will forego using a lawyer in a small claim or defense if they risk paying their lawyer more (probably far more) than the claim or defense is worth.

Thus, if statutes like California's have any positive influence on consumers' access to lawyers, it is very likely that the influence is substantially eroded by the legal uncertainty that accompanies the choice of law provision the consumer will likely find in her mass consumer contract, perhaps right next to the one-way fee-shifting provision.

### *B. The Amplifying Effect of the Consumer Arbitration Forum*

If the law promises legal fees to the prevailing party, it should do so regardless of the procedure whereby the underlying dispute is resolved. Put differently, whether the dispute is resolved in court or in arbitration should not matter to the analysis.<sup>58</sup> So, at least in theory, under these statutes a consumer lawyer ought to have the same calculus about representing a client in a small claim matter in arbitration that she would in ordinary litigation. But as developed earlier, arbitration is *not* the same as litigation in its ability to entertain and correctly resolve complex legal questions. Its differences will tend to further reduce the odds that a consumer lawyer will take a consumer's small claim or defense.

Apart from the simple pressure of time on the consumer arbitration system's ability to entertain complex legal analysis,<sup>59</sup> there are several other problems that make it less likely that this quick and easy dispute resolution system can reach a correct result when a choice of law clause threatens to undercut local consumer protection. This combination of factors will reduce to nearly zero whatever relief the two-way fee-shifting statutes were designed to deliver.

First, if consumer law arbitrators have any legal training,<sup>60</sup> they will likely be lawyers, not judges. Whatever their level of expertise, they will

58. The underlying premise is that applicable law will govern the resolution of a dispute in consumer arbitration. It is extremely far-fetched to believe that besides being stuck with an arbitration process, the customer also "agreed to" resolution of its disputes with the business using some set of rules or standards other than ordinarily applicable law.

59. *See supra* pp. 198-201.

60. While the Supreme Court's arbitration decisions may assume that arbitrators are capable of deciding disputes using applicable law, nothing in its decisions require that arbitrators be legally

not have the same natural focus on “what law applies” in proceedings before them as do judges, who are state officials and implement the power of the state to resolve disputes. It is unlikely that non-professional arbitrators will be schooled in the subtleties of conflict of laws principles or, in particular, on the vague public policy limitations on contractual choice of law provisions. Indeed, as suggested earlier, arbitrators may well be biased in the opposite direction, towards a simple “you agreed to it, therefore you get it” point of view that unduly shelters a purported form agreement from overriding public policy.<sup>61</sup>

Second, even if an arbitrator found the two-way statute applicable, one can imagine the arbitrator concluding that there is *no* prevailing party in the proceeding and that, therefore, the American Rule, which governs under the statutes in the absence of a “prevailing party,” should apply. Depending on their frame of reference, many arbitrators may believe that a compromise resolution of the matter before them is best for all parties. Indeed, early support for arbitration maintained that its superiority over litigation was *because* arbitrators were not bound to law in the same way courts were, could consider evidence that was inadmissible under the rules of evidence in litigation, and could arrive at resolutions that could not as easily be achieved through regular litigation.<sup>62</sup> How modern individual arbitrators in consumer cases view their roles—as adjudicators or compromisers—will affect their conclusions of whether one party or the other “prevailed” in the matter before them. Given arbitration’s history, a

trained. Indeed, it is difficult to imagine a set of facts that could raise this question getting before the Supreme Court.

61. Many scholars reject any legal limitations on so-called “party autonomy” and one would expect a fair sampling of modern lawyers would reject them too. In addition, finding that vague “public policy” or other limitations override what appear to be explicit agreements (even when adhesive) is hard legal analysis. In the high-volume consumer arbitration context, it is hard to see what upside an individual arbitrator would have in engaging in such complex analysis.

62. For example, in *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960), Justice Douglas justified a very narrow scope of appellate review of arbitration as follows:

The labor arbitrator’s source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties’ confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations, which are not expressed in the contract as criteria for judgment.

The thrust of the Supreme Court’s recent embrace of arbitration has been in the opposite direction, that arbitration is (essentially) the same thing as litigation, with a different decision maker and a more efficient process. Indeed, if the Court viewed arbitration as materially different than regular litigation, it might well have imposed heightened requirements for the “agreement” that transported a consumer from a constitutionally-protected right to a jury trial to a private system with no juries, appeals, opinions, precedent, or state-sanctioned resolutions. *See also supra* note 58 and accompanying text.

“no prevailing party” result is more easily reached in an arbitration proceeding than in court litigation.

Third, one can wonder if an arbitrator would consider a statute like California’s inapplicable in arbitration. It is easy to imagine an arbitrator viewing the statute as applying only to judicial litigation—that the statute is a rule of local civil procedure, rather than a rule of substantive law—and simply inapplicable in this different forum with different procedural rules.<sup>63</sup>

Finally, as suggested above, increased uncertainty about the application of a fee-shifting statute such as California’s in the presence of a choice of law provision may mean that the consumer proceeds to arbitration without a lawyer. Even if she knows about the fee-shifting statute, the odds are remote that a pro se litigant can make a plausible argument that the fee-shifting statute, from the “unchosen state,” should prevail over the contrary choice of law provision printed in the contract. But even if she gets this far and makes a plausible argument for the applicability of the statute, the game is not over. It is easy to imagine an arbitrator concluding that an unrepresented consumer has *no* entitlement at all to attorneys’ fees since she is proceeding without a lawyer.

Of course, the logic behind the two-way fee-shifting statutes militate against this result, at least in cases where the arbitrator is prepared to award the business its attorney fees if it wins. Unfortunately, since decisions are not publicly reported, there is no way to determine whether arbitrators will follow the underlying logic behind the statutes or will succumb to a different logic, “no lawyer, no attorneys fees.” Statutes like California’s could thus be modestly improved by making explicit that they apply in *all* dispute resolution proceedings and that, where a consumer is not represented, she will nonetheless be entitled to a “reasonable attorneys fee” if she wins.<sup>64</sup>

63. In the only case found on this question, *Capital One Bank v. Fort*, 255 P.3d 508, 511 (Or. App. 2011), the court awarded the prevailing consumer its attorneys’ fees under the statute following arbitration despite a choice of law clause specifying the application of Virginia law. While the precise question was not before the court, the case implicitly stands for the proposition that these statutes apply in cases resolved by arbitrators.

64. Obviously, it takes much more legislative work to anticipate and explicitly reject likely arguments that might be asserted against consumer protection legislation. But, given the consumer arbitration environment, *any* source of statutory uncertainty degrades a consumer’s rights.

The obvious byproduct of widespread consumer arbitration is that courts are no longer available to issue precedent to resolve inevitable statutory uncertainty in consumer protection legislation. Whatever the statutory uncertainty, it will continue to exist and will be resolved in the consumer arbitration system only for the single case before the single arbitrator. And the recurring resolutions need not be consistent with one another because, of course, they are neither reported nor are they binding on later decision makers.

This combination of factors—increased time pressure, lack of conflict of laws expertise, a decision-making mission that historically includes compromise, questions about the statute’s applicability in arbitration, and the distinct possibility that a consumer with a high-probability substantive claim will proceed without a lawyer—mean that a fee-shifting statute like California’s will have very limited effectiveness in a consumer arbitration setting under current law. Outside of arbitration, reducing the uncertainty of the statute’s application will improve its effectiveness. In the consumer arbitration context, reducing the uncertainty of the statute’s application can effect some improvement, if only by making small arbitration disputes more attractive to consumer lawyers who might not otherwise consider them.

#### IV. STATUTORY SOLUTIONS TO IMPROVE CERTAINTY

The anticipated proceeds from consumer class actions once supported the legal work required to unravel complex legal questions involving consumers. Class actions also produced binding judicial precedent that could guide others through the legal morass that often characterizes consumer protection. We now live in a different era. The stakes involved in individual arbitration actions that characterize the post-*Concepcion* legal landscape neither support legal fees, nor produce any publicly available guiding legal precedents.<sup>65</sup>

Today, if legal complexity accompanies even a simple rule designed to protect consumers, that rule will lose much of its force in a world of simple, fast decisions that cannot easily address the complexity, and leave no public record even when they do. In this respect, the fee-shifting statutes from California and elsewhere are merely examples of rules that are likely to be diluted, or even eviscerated, in a simple, cheap dispute resolution process when their application is uncertain.<sup>66</sup>

Modest improvement in consumer protection is possible in this environment when one can identify and address a specific source of legal uncertainty. And as a source of legal uncertainty in consumer law, the now-

65. Those repeat players who regularly engage in arbitration will, of course, keep track of the individual decisions affecting them and of the arbitrators who made those decisions. This supplies important information advantages to the repeat players, whether or not they use this information in the actual selection of “favorable” arbitrators. Knowledge of an individual arbitrator’s record of decisions assists in predicting what the arbitrator will do with the case at hand and, therefore, assists in better gauging its settlement value.

66. Whether uncertainty *actually* has a negative effect on consumer protection in arbitration proceedings is an empirical question. If accessible at all, the private arbitration data will be far harder to assemble and analyze than is the case with public material about the judicial process, now widely available in various public databases.

ubiquitous choice of law clause has few equals. Thus, clarifying the extent to which a contractual choice of law term can displace locally-applicable consumer protection is a legislative task well worth pursuing; such an effort has the potential to return a state's consumer protection law to the level that was likely intended when they were developed.<sup>67</sup>

By slightly modifying the anti-waiver provisions in many consumer protection statutes, a jurisdiction could clarify the intended effect of a choice of law provision on a given consumer provision on a statute-by-statute basis.<sup>68</sup> But, since contractual choices of law have the capacity to displace practically *any* local protective rule, a global approach to the problem would be far more efficient and promising. Unfortunately, because the balance between consumer protection and business prerogatives varies so widely in different states, a uniform federal rule coming from Congress seems extremely unlikely.<sup>69</sup> Instead, there is a better chance for success at the individual state legislative level.

Two sources could provide the basis for such a state statute of general application: the international treaty known as the 1980 Rome Convention, and a choice of law provision that was to be included in Article 1 of the Uniform Commercial Code but was not enacted by any state legislature. Those formulations and the issues implicated by them are reviewed below. Several alternative approaches to creating an effective statute will follow in an Appendix.

### A. The Rome Convention

As an important early step in economic unification, the Rome Convention created a uniform choice of law rule for signatories that would later make up the European Union. The effort implicitly recognized that economic certainty required that the same law apply to a given dispute no matter where it was litigated.

67. The argument that a choice of law provision in a consumer contract can displace local consumer protection is a relatively new one. The earliest case I have found that addresses the issue head on (and resolves it for the business) is *Scheifley v. Capital One Bank*, Order on Pending Motions, No. CV 03-2801RBL (W.D. Wash. June 25, 2004).

68. For example, the California fee-shifting statute could itself limit waiver "including waiver effected through a choice of law provision in the contract." Of course, including such a provision in some consumer statutes but not others would open the others to the argument that the legislature *intended* choice of law provisions to override the consumer protection provisions in the statutes that remain silent on the question.

69. So, too, with a uniform state law such as the U.C.C. Indeed, this variation in state public policy may have contributed to the rejection of the draft U.C.C. section 1-301 (later revised as a result), which, as developed below, contained a robust provision addressing the extent to which a choice of law provision could trump local consumer protection rules.

The treaty recognized broad party autonomy to choose applicable law, but limited the extent to which party choices could override “mandatory law,” those provisions that applied regardless of party intent.<sup>70</sup> With respect to consumer law (for which we might expect at least as much diversity among European states as we have among the United States), the Rome Convention provides in part:

2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall 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:

- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
- if the other party or his agent received the consumer’s order in that country, or
- if the contract is for the sale of goods and the consumer traveled from that country to another country and there gave his order, provided that the consumer’s journey was arranged by the seller for the purpose of inducing the consumer to buy.<sup>71</sup>

One can infer from the Rome Convention’s provision that the States that established the European Union considered local consumer law to be too important to allow it to be displaced by contractual choice of law provisions or, alternatively, believed consumer protection represented important public policy to be extended in nearly all cases to a polity’s consumers regardless of what they found in their contracts. In place since 1980, the Rome Convention seems to have withstood the test of time and remains a robust resolution of the issues.

70. In Article 3, the Convention defines “mandatory rules” as:

The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of *rules of the law of that country which cannot be derogated from by contract, hereinafter called “mandatory rules.”*

1980 Rome Convention, *supra* note 33, at art. 3 (emphasis added).

71. *Id.* at art. 5. “Consumer” is defined in terms of lack of expertise, a person or entity that would be excluded from the term “merchant” in U.C.C. section 2-104, or, if we were using the U.C.C. lexicon, what we would define as a “non-merchant,” a broader category than “consumer” as defined in the U.C.C. The Convention provides:

This Article applies to a contract the object of which is the supply of goods or services to a person (‘the consumer’) for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.

1980 Rome Convention, *supra* note 33, at art. 5.

*B. Unenacted U.C.C. Article 1-301's Consumer Provision*

The culmination of a long revision process, the Uniform Law Commissioners and American Law Institute promulgated a revision to U.C.C. Article 1 in 2001. Proposed U.C.C. section 1-301 was one of its innovations, authorizing parties to choose law that had no relationship whatsoever with the parties, their transaction, or anything else. But while this expansion of “party autonomy” to choose law applied in most cases,<sup>72</sup> in consumer settings the drafters recognized and codified limitations. The entire provision proved too controversial for state enactment and was withdrawn in 2009 and replaced with the equivalent of former U.C.C. section 1-105.<sup>73</sup> But its consumer protection provision remains a potential model for a state wishing to reduce uncertainty in state law rules that are protective of consumers.

The UCC’s unenacted consumer protection provision read as follows:

(e) If one of the parties to a transaction is a consumer, the following rules apply:

(1) An agreement referred to in subsection (c) is not effective unless the transaction bears a reasonable relation to the State or country designated.

(2) Application of the law of the State or country determined pursuant to subsection (c) or (d) may not deprive the consumer of the protection of any rule of law governing a matter within the scope of this section, which both is protective of consumers and may not be varied by agreement:

(A) of the State or country in which the consumer principally resides, unless subparagraph (B) applies; or

(B) if the transaction is a sale of goods, of the State or country in which the consumer both makes the contract and takes delivery of those goods, if such State or country is not the State or country in which the consumer principally resides.<sup>74</sup>

While it offered less protection to local consumers than did the Rome Convention,<sup>75</sup> the U.C.C.’s consumer provision was the product of an

72. Pre-existing law limited parties’ choices to law “related” to them or their transaction. See former U.C.C. § 1-105. For critiques of the U.C.C. § 1-301 proposal’s rejection of the requirement that the law chosen be “related” to the parties or their contract, see Richard K. Greenstein, *Is the Proposed U.C.C. Choice of Law Provision Unconstitutional?*, 73 TEMP. L. REV. 1159 (2000); William J. Woodward, Jr., *Contractual Choice of Law: Legislative Choice in an Era of Party Autonomy*, 54 S.M.U. LAW REV. 697 (2001).

73. See Proposal to Amend Official Text of § 1-301 (Territorial Applicability; Parties’ Power to Choose Applicable Law) of Revised Article 1 of the U.C.C., ALI.ORG, <http://www.ali.org/doc/uccamendment.pdf> (last visited Oct. 16, 2013).

74. *Id.*

75. This is largely due to the U.C.C.’s far narrower definition of “consumer.” See discussion *infra* Part V.C.2.

American lawmaking process, and for that reason, it might be seen as more relevant to the issues at hand. As with the Rome Convention, an underlying premise is that local consumer protection is very important as a policy matter—“fundamental policy” in the language of conflict of laws doctrine—and sufficiently important as to overcome the asserted benefits of enforcing choice of law clauses “as written” in the same way in every state, with no exceptions.

*C. Drafting Issues Involved in Creating a Statute That Limits Contractual Choice of Law Clauses*

1. Courts and Proceedings Covered

Any statute affecting the law the courts should apply to a given contract is a statutory conflict of laws provision and is binding on a jurisdiction’s courts as agents of the enacting state’s government. Such provisions will, by definition, apply in the jurisdiction’s state courts and will also apply in federal courts within the state that are exercising diversity jurisdiction.<sup>76</sup> Insofar as applicable law is applied in consumer arbitration proceedings, a statutory conflicts principle should apply in those arbitrations that take place in the enacting state.

The extent to which a given choice of law statute applies in courts and arbitration proceedings outside the forum state is a far more difficult question since, of course, no state legislature has the power to require anything of the courts of another state. A strong legislative statement that the anti-choice-of-law provision represents the enacting state’s “fundamental public policy” may incline a non-enacting state court or arbitrator to defer to the policy reflected in the enacting state’s statute.<sup>77</sup>

2. Persons and Entities Protected

A threshold consideration in drafting a state statute to protect consumers is how broadly to extend the statutory protection.

The Uniform Commercial Code defines “consumer” in a relatively narrow way as “an individual who enters into a transaction primarily for personal, family, or household purposes.”<sup>78</sup> The unenacted U.C.C. provision discussed above would extend its protection only that far. The Rome Convention, by contrast, defines its “consumer” by subtraction, as someone who buys or obtains services for a purpose outside the purchaser’s trade or

76. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981).

77. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971).

78. U.C.C. § 1-201(b)(11) (2012).

profession.<sup>79</sup> The Rome Convention would thus extend its protection to a lawyer or dentist purchasing an office computer, whereas the U.C.C. would not. Some forms of state consumer protection are comparably broad in their coverage.<sup>80</sup>

The California fee-shifting provision is not limited to consumers and has an anti-waiver provision.<sup>81</sup> A general statute that prevented a choice of law clause from overriding only *consumer* protection (however defined) would invite the argument that a choice of law provision *would* override the protection that the broader California fee-shifting statute extends to businesses-to-business transactions. Defining “consumer” in the broadened way prescribed by the Rome Convention would ameliorate some, but not all, of this problem.<sup>82</sup> The broadest approach to limiting contractual choice of law provisions would be to extend the protection to any state protective statute that explicitly included an anti-waiver provision.<sup>83</sup> A slightly narrower version of the choice of law provision would explicitly leave the question of coverage in non-consumer cases to the courts.<sup>84</sup>

### 3. Transactions Covered

The drafters of both the Rome Convention and the unenacted U.C.C. provision recognized that some disputes will be litigated in the courts of a state where there is little (other than the lawsuit) to establish a connection between the forum’s law and the underlying transaction. Those may be appropriate cases in which to defer to the parties’ choice of law despite conflicts with the law of the forum.<sup>85</sup> Thus, if the underlying transaction is a wholly out-of-state contract that a consumer was litigating in the enacting

79. The Rome Convention’s broader definition of “consumer” is in Article 5, Paragraph 1. *See* 1980 Rome Convention, *supra* note 33.

80. *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 17.45(4) (2011). The statute defines “consumer” as an “individual, partnership, corporation, this state, or a subdivision or agency of this state . . . except that the term does not include a business consumer that has assets of \$25 million or more.”

81. CAL. CIV. CODE § 1717(a) (2013).

82. The Rome Convention’s broader definition would capture some transactions between businesses and counter-parties who were not buying for home use but, nonetheless, were non-experts with respect to the transaction at issue. *See* 1980 Rome Convention, *supra* note 33.

83. As an example, a drafter could develop statutory language such as “The protection extended by this statute also applies to any state statute that explicitly prohibits contractual waiver of its provisions.” One can easily view a statutory anti-waiver provision as implicitly underscoring the importance of the public policy reflected in the non-waivable statute.

84. For instance, a statute could provide “This statute leaves to the courts the question whether an anti-waiver provision of a statute of broader applicability also applies to waiver through a contractual choice of law provision.”

85. In adhesion contract settings where it is difficult to imagine any form of *informed* agreement by the consumer to the choice of law, the forum might, alternatively, apply local conflict of laws principles to determine the appropriate governing law. This might be particularly appropriate in cases where the law chosen in the form is less favorable than the law to which a conflict of laws analysis points.

state, to extend statutory protection to the consumer merely because the contract was being litigated in the enacting state might well violate the policies underlying conflict of laws principles. The U.C.C. provision would have excluded transactions where the resident consumer made the contract and took delivery in the non-enacting state.<sup>86</sup> The Rome Convention would reach even those transactions if “the consumer’s journey was arranged by the seller for the purpose of inducing the consumer to buy.”<sup>87</sup> A state might further limit contractual choices of law in any case where the non-consumer party had a place of business in the enacting state and therefore would clearly be subject to the enacting state’s legislation.<sup>88</sup>

#### 4. Extent of Avoidance

Both the Rome Convention and the unenacted U.C.C. provision implicitly voided the choice of law provision only to the extent it was in conflict with local protective rules. There are theoretical problems with changing only one term of a larger contract: voiding only one provision of a larger contract alters the exchange that the parties made. One could imagine a decision maker concluding that it was the parties’ intent to have the whole contract or nothing and that, therefore, if only one provision is voided, the entire contract should be at an end. The default rule in contract law is to the contrary.<sup>89</sup> Moreover, voiding the entire choice of law provision would make choice of law provisions dysfunctional in many cases, depriving the parties of the very substantial planning value that such provisions offer to businesses. In any event, nearly all competently-drafted mass consumer contracts have a “severability provision” that tracks common law and preserves the rest of the contract if one provision is found to be invalid. Thus, whatever theoretical problems there might be in narrowly limiting the choice of law provision only insofar as it conflicts with local consumer protection, those problems are not likely to be present in any actual case. A statute should make explicit that its effect is “only to the extent” that the choice of law provision is in conflict with local protection.<sup>90</sup>

86. Proposal to Amend Official Text of § 1-301, *supra* note 72.

87. 1980 Rome Convention, *supra* note 33, at art. 5.

88. An even broader coverage might legitimately extend its limitations against any non-consumer party “doing business” in the enacting state.

89. RESTATEMENT (SECOND) OF CONTRACTS § 184 (1981); *see* SCOTT J. BURNHAM, DRAFTING AND ANALYZING CONTRACTS § 4.6 (LexisNexis, 3d ed. 2003).

90. Appendix A to this article contains sample drafts of statutory wording that addresses local protections when faced with choice of law provisions. These sample statutes are based on student draft statutes created in the author’s Legal Drafting class in Spring 2013.

## CONCLUSION

Legal uncertainty is a problem that will be with us forever, a problem that has engaged law reformers at least since the first commercial law codification efforts in the early twentieth century. Historically, much of the effort to reduce legal uncertainty has been prompted by a need, among the legal sophisticates, to more accurately forecast risk and therefore enable more effective planning. There has been considerably less focus on clarifying statutes in order to make consumer protection more effective, despite the fact that uncertainty can drive up the costs and risks of dispute resolution, and thereby make the consumer's meaningful engagement in that process cost prohibitive. Perhaps this state of affairs was more acceptable in the past because courts could offer precedential guidance on vague statutes and doctrines, making litigation outcomes somewhat more predictable.

Times have now changed. Few courts issue opinions in consumer cases; the action nowadays takes place in private arbitration where precedent is neither created nor (so far as anyone knows) followed. A vague legal rule created either by a legislature or a court will remain that way, requiring consumers to sustain the costs of clarification in each and every case, over and over.

Furthermore, in the arbitration context, if not elsewhere, legal uncertainty may prompt decision makers to issue simple answers to complex questions. In the contract setting this almost always will give preference to the written contract, therefore to the drafter, and concomitantly to the business. The tendency, in the face of legal uncertainty, will be to enforce aberrant contracts "as written," rather than to police them with the legally complex contract avoidance doctrines that contract law supplies.

There may be no better place to focus a contemporary effort to reduce uncertainty in consumer law than with the choice of law clause one will find in almost all consumer form contracts. When choice of law provisions in those contracts are taken "as written," they effectively replace the consumer's local consumer protection with that of the chosen state. Competent drafters are economically motivated to ensure that the law chosen supplies less robust consumer protection than that offered by the consumer's own elected legislature and her jurisdiction's courts. This will be the case generally, and in particular, with two-way fee-shifting statutes considered here that offer protection from lopsided, one-way fee-shifting clauses found in many consumer forms. This potentially effective statutory protection against these lopsided contract terms can be wiped out by the drafter's

choice of law provision together with an argument that should apply as written because “it was agreed to.”<sup>91</sup>

A challenge to any choice of law provision “as written” is a complex and difficult endeavor in any case, one that requires knowledge of conflict of laws rules and proof of several elements that the present conflict of laws doctrine requires. Consumer arbitration and small claims procedures are scarcely designed to accommodate this complex argument, even if the consumer or her lawyer were prepared to present it, and her arbitrator were prepared to consider it. Clarifying the extent to which a choice of law clause can override local consumer protection is a worthy legislative task that will make the legal system more effective at policing aberrant contracts.

91. *See* *Capital One Bank v. Fort*, 255 P.3d 508, 510 (Ore. App. 2011) (noting, but rejecting, the plaintiff’s argument that “Oregon’s public policy encourages freedom of contract and there is no policy reason to interfere with the parties’ freedom to apply Virginia law to the agreement’s provisions”).

## APPENDIX A: DRAFT STATUTES

**Example 1:**  
Parties' Choice of Law<sup>92</sup>**(A) Definitions**

1. A "consumer contract" is an agreement between a seller and buyer for the seller to supply goods or services to the buyer, where the goods or services may be regarded as being outside of the buyer's trade or profession.<sup>93</sup>

2. A "consumer" is a buyer who receives goods or services from a seller.

3. A "seller" supplies goods or services to a buyer.

**(B) Application**

This Section applies to all consumer contract disputes litigated in California, which involve a choice-of law provision.

**(C) Governing Law**

1. In any consumer contract where the parties agree to a choice-of-law provision, the law of the chosen state will govern the parties' contractual rights and duties, unless:

a) The transaction does not bear a reasonable relation to the chosen state,

b) The law of the chosen state conflicts with California public policy, or

c) California has a materially greater interest in the case's outcome.

2. California has a materially greater interest in the case's outcome if California is where:

a) The parties contracted,

b) The parties' agreement was negotiated,

c) The services took place or the goods were delivered,

d) The subject matter of the contract was located, or

92. . This was built on the work of Amy Quan, Santa Clara Law, Class of 2013.

93. . This version uses the Rome Convention approach to coverage of "consumers." See Rome Convention, *supra* note 33, at art. 5.

e) The parties reside, the Seller's business is incorporated, or the Seller's business is conducted.

**(D) Conflict of Laws**

Where a choice of law made by the parties to a contract conflicts with California's consumer protection statutes, regulations, or case law, the California consumer protection laws supersede and, to that extent, will govern the contract.

**(E) Absence of a Choice-of-Law Provision**

If a consumer contract does not contain a choice-of-law provision, California's consumer protection laws will supersede the law determined by application of California conflict of laws principles unless there is no connection between California and the contract, its subject matter, or the parties.

**Example 2:**  
Choice Of Law In Contracts Involving Consumers<sup>94</sup>

**§ 1000. Definitions**

(a) “consumer” means an individual who is purchasing, licensing, or leasing goods or services for a purpose that is outside his or her trade or profession.<sup>95</sup>

(b) “principal residence” means the primary place where an individual actually lives.

(c) “rule of law” means California law as expressed in statutes, regulations, or case law.

**§ 1001. Choice of Law**

(a) Where one party to the transaction is a consumer, whose principal residence is California, the portion of any choice-of-law provision that conflicts with a California rule of law that is both non-waivable and protective of consumers will be superseded by that rule of law.

(b) These provisions represent the fundamental public policy of California.<sup>96</sup>

**§ 1002. Application**

(a) The provisions of this statute apply in all proceedings to resolve legal disputes involving consumers, regardless whether these proceedings are judicial proceedings or private arbitration proceedings.

(b) The provisions of this statute are non-waivable. Any purported waiver of these provisions is void.

94. This version is based on a draft by Alice Chang, Santa Clara Law, Class of 2013.

95. This is the Rome Convention formulation. *See* 1980 Rome Convention, *supra* note 33, at art. 5.

96. This will improve the odds that a non-California court will defer to this statute.

**Example 3:**SECTION 2.01.2 CONSUMER PROTECTION IN CHOICE-OF-LAW<sup>97</sup>

(1) **Purpose** - The purpose of this statute is to protect California consumers from unfair and unreasonable contractual choice-of-law provisions.

(2) **Definitions**

a. “Consumer” means any person who, in a personal capacity, purchases or contracts for goods or services.<sup>98</sup> “Consumer” excludes legal entities such as partnerships, limited liability companies, and corporations.

b. “Vendor” means any person or entity who provides, sells, or supplies goods or services within the scope of a contract.

(3) **Application**

a. California consumer law will supersede any choice-of-law provision in a consumer-vendor contract to the extent that the choice-of-law provision limits or contradicts non-waivable consumer protections in California consumer law.

b. This statute will apply to:

i. Any transaction arising within the state of California (including electronic transactions in which one party was located in California at the time of execution);

ii. Any transaction in which the consumer is a resident of California at the time of the transaction; or

iii. Any transaction in which the vendor is incorporated or has a primary place of business in California.

c. If the choice-of-law provision contradicts or limits California consumer protection law, only those portions of the contract will be void. The choice-of-law provision will continue to govern the contract in all other aspects or where otherwise specified by subsequent legislation.

97. This version is based on a draft by Benjamin Broadmeadow, Santa Clara Law Class of 2013.

98. This definition is broader than the UCC definition because there is no requirement that the purchase be *for* personal use. Indeed, it may actually be broader than the Rome Convention’s definition in that it appears to protect individuals, whether or not they are purchasing as professionals.

**Example 4:**  
CHOICE OF LAW IN CONSUMER CONTRACTS<sup>99</sup>

**Sec. 1 Definitions**

(a) A “**party**” includes both natural persons and legal persons.<sup>100</sup>

(b) A party is “**sophisticated**” in a business, industry, trade, or profession, if the party transacts annual business in goods or services in an amount that exceeds \$500,000;

**Sec. 2 Application of Choice of Law**

A choice of law provision may not deprive a party of the protections of California law that is not waivable by contract<sup>101</sup> unless:

(a) the agreement is among parties all of whom are sophisticated;

(b) all parties who are not sophisticated were represented by independent counsel in the negotiation and execution of the agreement; or

(c) the agreement is physically negotiated and executed entirely outside of the State of California.

99. This is based on a very unconventional draft by Josiah Prendergast, Santa Clara Law, Class of 2013.

100. This statute has the potential of extending its protection to non-consumers.

101. This extends protection beyond consumer protection rules to any rules that are not waivable.