

4-10-2015

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Marty Gould

IIT Chicago-Kent College of Law

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Recommended Citation

Marty Gould, *The Conflict Between Forum-Selection Clauses and State Consumer Protection Laws: Why Illinois Got It Right in Jane Doe v. Match.com*, 90 Chi.-Kent L. Rev. 671 (2015).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol90/iss2/11>

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THE CONFLICT BETWEEN FORUM-SELECTION CLAUSES
AND STATE CONSUMER PROTECTION LAWS: WHY ILLINOIS
GOT IT RIGHT IN *JANE DOE V. MATCH.COM*

MARTY GOULD*

INTRODUCTION

Jane Doe, a young woman from Chicago, Illinois, signed up for Match.com, the well-known Internet dating website.¹ Like tens of thousands of other Chicago-area Match.com subscribers, Jane was looking to meet a nice young man—a Chicago guy who had similar interests and values. Match.com “matched” Jane Doe with Ryan Logan.² In December 2009, Jane and Ryan went on a date in Chicago, and during that date, Jane was sexually abused and raped.³

According to the allegations in Jane Doe’s complaint, prior to “matching” Jane Doe and Ryan Logan, Match.com received a written notice from another of its Chicago-area female subscribers, J.N., alerting Match.com that Ryan Logan raped J.N after the two were introduced to one another on the site and met for a social encounter.⁴ Despite receiving this written

* The author is an attorney at Romanucci & Blandin, LLC. He graduated from Chicago-Kent College of Law in 2014 and received his bachelor’s degree from Northwestern University. The author would like to thank Daniel S. Kirschner and Professor Henry H. Perritt, Jr. for their invaluable guidance and comments.

1. *Jane Doe v. Match.com, L.L.C.*, No. 11 L 3249, slip op. at 1 (Ill. Cir. Ct. Oct. 25, 2012) (order granting plaintiff’s motion for partial summary judgment, denying motion to dismiss, and transferring case for further proceedings).

2. *Id.*

3. *Id.* In November 2010, Ryan Logan was found guilty of the criminal sexual assault against Jane Doe. See Marc Karlinsky, *Match.com Must Face Dispute over User*, CHI. DAILY L. BULL. (Dec. 18, 2013),

http://www.corboydemetrio.com/media/publication/58_15454%20Corboy%20reprint%20Dec18-2013.pdf. The Cook County judge later vacated the conviction and found Ryan Logan guilty of unlawful restraint and criminal sexual abuse, a lesser charge, instead. Jason Meisner, *Man Gets 90 Days in Jail for Sex Abuse, Restraint*, CHI. TRIB., Feb. 25, 2011,

http://articles.chicagotribune.com/2011-02-25/news/ct-met-date-rape-sentence-20110225_1_judge-vacates-assault-charges-restraint.

4. *Jane Doe*, No. 11 L 3249, slip op. at 1; Karlinsky, *supra* note 3. While convicted of raping Jane Doe, Ryan Logan was acquitted of sexual assault for the J.N. incident that allegedly occurred two years earlier. See Matthew Walberg, *Man Who Used Online Dating Site Convicted of Assault: Judge Acquits Him in Second Case*, CHI. TRIB., Nov. 9, 2010,

http://articles.chicagotribune.com/2010-11-09/news/ct-met-match-com-rape-20101109_1_sexual-assault-judge-acquits-match-com.

warning concerning Ryan Logan, Match.com failed to remove Ryan from its service, failed to contact the Chicago Police Department, and failed to warn other customers, like Jane Doe, who interacted online with Ryan.⁵

In 2011, Jane Doe filed a civil suit against Match.com and Ryan Logan in an Illinois state court asserting, *inter alia*, claims of negligence, willful and wanton misconduct, and violation of the Illinois Dating Referral Services Act against Match.com,⁶ and claims of battery and intentional infliction of emotional distress against Ryan Logan.⁷ Generally, the plaintiff in a civil case has the right to choose the forum in which her dispute will be heard, so long as the forum chosen is one that has subject matter jurisdiction over the controversy and personal jurisdiction over the defendant.⁸ Because Jane was a resident of Illinois, Match.com advertised its services to Illinois consumers, Jane used Match.com's services while in Illinois, and the rape occurred in Illinois by another Illinois resident—one would naturally assume that Illinois would be the proper venue to decide Jane's case.

However, there was one problem: Match.com's Terms of Use Agreement contained a choice of law and forum selection clause that required any disputes arising out of a subscriber's use of its website or service to be resolved under Texas law in a Dallas, Texas courtroom.⁹ A forum selection clause is a provision in a contract designating a particular forum—such as a specific state, county, or court—as the only proper venue in which the parties to an agreement *must* litigate any future disputes.¹⁰ To complicate matters further, Illinois has a consumer protection statute, called the Illinois Dating Referral Services Act (IDRSA)¹¹ which applies to any contract between a dating enterprise and an Illinois consumer for dating services. Match.com's Terms of Use Agreement, including the choice of law and forum selection clause, is *directly in conflict* with several provisions of the IDRSA—particularly the IDRSA's "anti-waiver" provision.¹²

5. Second Amended Complaint at Law at 2–5, *Jane Doe v. Match.com, L.L.C.*, No. 11 L 3249 (Ill. Cir. Ct. Dec. 23, 2011).

6. *See generally id.*

7. *Id.* at 14.

8. *See, e.g., Dawdy v. Union Pac. R.R. Co.*, 797 N.E.2d 687, 694 (Ill. 2003) (holding that “[a] plaintiff’s right to select the forum is substantial . . . [and] should rarely be disturbed”).

9. Defendant Match.com, L.L.C.’s Section 2-619 Motion to Dismiss Plaintiff’s First Amended Complaint at Law at exhibit 1, at cl. 23, *Jane Doe v. Match.com, L.L.C.*, No. 11 L 3249 (Ill. Cir. Ct. July 6, 2011) [hereinafter *Match.com Motion to Dismiss*].

10. 17A AM. JUR. 2D Contracts § 259 (2014).

11. 815 ILL. COMP. STAT. ANN. 615/1 to -55 (West 2008).

12. *See infra* Parts I.A. & B.

The issue here is, what is the stronger, more significant interest—the forum state’s laws or forum selection clauses that abrogate the forum state’s laws? In that vein, should Match.com’s forum selection clause be enforceable despite being in conflict with the IDRSA? In other words, to what extent can companies contract out of state consumer protection statutes (such as the IDRSA) through the use of choice of law and forum selection clauses in standard form adhesion contracts?

The only court in Illinois to rule on the issue held that the IDRSA voids forum-selection clauses opposing the stated Illinois public policy, as declared by Illinois statutes.¹³ Outside of Illinois, however, federal courts have held that *the exact same* Match.com forum-selection clause was valid and enforceable despite being in direct conflict with similar statutes in other states.¹⁴ While the Illinois court permitted the plaintiff to pursue her claims in Illinois,¹⁵ other federal courts considering the same issue held that, pursuant to Match.com’s forum selection clause, the claims against Match.com must be pursued in a Dallas, Texas court.¹⁶ These cases represent a split in decision and analysis—pitting the values of individual autonomy against federalism and a state’s right to choose how it protects its citizens. This Article takes the position that the Illinois court arrived at the correct result.

Part I of this Article discusses *Jane Doe v. Match.com*¹⁷—the relevant Illinois case. Part II discusses *Brodsky v. Match.com*,¹⁸ one of the main Match.com cases at odds with the Illinois decision. Part III discusses why the Illinois case is correct, highlighting the legal reasons under both Illinois and federal law. Finally, Part IV discusses why public policy reasons justify and support the conclusion reached by the Illinois court.

13. *Jane Doe v. Match.com, L.L.C.*, No. 11 L 3249, slip op. at 7 (Ill. Cir. Ct. Oct. 25, 2012).

14. *See Gamayo v. Match.com L.L.C.*, No. C 11-00762 SBA, 2011 WL 3739542, at *1 (N.D. Cal. Aug. 24, 2011) (Match.com’s terms of use agreement directly conflicted with certain provisions of the California Consumer Legal Remedies Act); *Brodsky v. Match.com L.L.C.*, No. 09 Civ. 5328(NRB), 2009 WL 3490277, at *4 (S.D.N.Y. Oct. 28, 2009) (Match.com’s terms of use agreement directly conflicted with certain provisions of the New York Dating Referral Services Law).

15. *Jane Doe*, No. 11 L 3249, slip op. at 7.

16. *See supra* note 14 and accompanying text.

17. *See Jane Doe*, No. 11 L 3249, slip op. at 1.

18. *Brodsky*, 2009 WL 3490277.

I. THE ILLINOIS CASE: *JANE DOE V. MATCH.COM**A. The Illinois Dating Referral Services Act*

In 1991, the Illinois state legislature enacted the IDRSA.¹⁹ The IDRSA was enacted to protect Illinois citizens using dating referral services.²⁰ As Illinois Attorney General Lisa Madigan stated, “Online dating and similar services are just like any other business. . . . Consumers who try them and use them have certain rights under the Illinois consumer protection laws.”²¹

The language in the IDRSA is straightforward. To be valid and enforceable, a contract between a dating referral services company and an Illinois consumer has to meet a number of requirements, including:

1. The contract must be in writing;²²
2. The contract contains “all provisions, requirements, and prohibitions that are mandated by [the] Act . . . *before* it is signed by the customer”;²³
3. A copy of the written contract is provided to the customer “*at the time* the customer signs the contract”;²⁴ and
4. The company must “maintain original copies of all contracts for services for as long as the contracts are in effect and for a period of 3 years thereafter.”²⁵

In addition to these technical requirements, the IDRSA also contains a remedies provision.²⁶ Section 45 of the Act grants injured Illinois consumers the right to recover an amount equal to three times actual damages, plus costs and attorney fees.²⁷ To further protect Illinois consumers—and as particularly relevant here—the IDRSA mandates that “[a]ny waiver by the customer of the provisions of this Act shall be void and unenforceable.”²⁸ The IDRSA’s “anti-waiver” provision is of particular importance because it represents the Illinois legislature’s intention to explicitly forbid Illinois consumers from “contracting out” or “waiving” the very laws designed to

19. 815 ILL. COMP. STAT. ANN. 615/1 to -55 (West 2008).

20. *Jane Doe*, No. 11 L 3249, slip op. at 6.

21. Christine des Garenes, *Breaking Dating Service Contract Not Hard to Do*, NEWS GAZETTE, Feb. 15, 2005, available at 2005 WLNR 2195754.

22. 815 ILL. COMP. STAT. ANN. 615/15.

23. *Id.* (emphasis added).

24. *Id.* (emphasis added).

25. *Id.*

26. *Id.* § 45.

27. *Id.*

28. *Id.* § 35(b).

protect them.²⁹ Anti-waiver provisions are quite common in Illinois consumer protection statutes³⁰ and in consumer protection statutes in many other states.³¹

The provisions and requirements of the IDRSA apply to *every* contract for dating referral services.³² If a contract for dating referral services does not comply with *any* of the provisions of the IDRSA, the contract is *void and unenforceable*.³³

B. Match.com's Terms of Use Agreement Violates the IDRSA

Match.com's Terms of Use Agreement failed to comply with the IDRSA in several ways. On its face, the Terms of Use Agreement failed to meet a number of the above-listed requirements. For example, Match.com's contract contained exculpatory and limitation of damages provisions in direct contradiction to the IDRSA's remedies provision, which allows injured Illinois customers to recover an amount equal to three times actual damages, plus costs and attorney fees.³⁴ Given that Match.com's Terms of Use Agreement was "designed to apply to users in all 50 states,"³⁵ it is not surprising that the contract failed to comply with a number of the requirements set forth in the IDRSA. Moreover, Match.com's failure to meet the requirements under the IDRSA was also likely of no surprise to Match.com, as another Illinois court in 2003 approved a settlement agreement in which Match.com agreed to correct the alleged contractual violations in its future subscription agreements.³⁶

In *Jane Doe v. Match.com*, the Illinois court held that Match.com's Terms of Use Agreement was void and unenforceable in its entirety because it was in conflict with the IDRSA and "the strong public policy un-

29. See also William J. Woodward, Jr., *Constraining Opt-Outs: Shielding Local Law and Those It Protects from Adhesive Choice of Law Clauses*, 40 LOY. L.A. L. REV. 9, 12-13 (2006) [hereinafter Woodward, *Constraining Opt-Outs*].

30. See, e.g., Illinois Credit Services Organizations Act, 815 ILL. COMP. STAT. ANN. 605/8 (West 2008) ("Any waiver by a buyer of the provisions of this Act shall be deemed void and unenforceable by a credit services organization as contrary to public policy"); Illinois Pre-Need Cemetery Sales Act, 815 ILL. COMP. STAT. ANN. 390/25 (West 2008) ("Any provision of any contract which purports to waive any provision of this Act shall be null and void").

31. Woodward, *Constraining Opt-Outs*, *supra* note 29, at 13 n.8 (citing numerous state consumer protection statutes that forbid the waiver of the protections they provide).

32. 815 ILL. COMP. STAT. ANN. 615/15.

33. *Id.* § 35(e).

34. *Match.com Motion to Dismiss*, *supra* note 9, at exhibit 1, at cl. 7, 8(b) & 21.

35. *Jane Doe v. Match.com*, L.L.C., No. 11 L 3249, slip op. at 5 (Ill. Cir. Ct. Oct. 25, 2012).

36. *Fertelmeyster v. Match.com*, L.P., No. 02 CH 11534, slip op. at 4-5 (Ill. Cir. Ct. June 18, 2003).

derlying [the] statute.”³⁷ While there were several violations of the Act, the Illinois court paid particular attention to Match.com’s violation of the IDRSA’s anti-waiver provision.³⁸ The court found that by designating Texas as the exclusive forum and imposing Texas law on Illinois consumers, Match.com’s forum selection and choice of law clauses constituted an impermissible waiver by the customer of all the provisions of the IDRSA.³⁹ The court reasoned that if it enforced the forum selection and choice of law clauses, “Match.com users in Illinois would lose protections that the Illinois legislature created for them through enacting [the] IDRSA.”⁴⁰

C. Complicating the Decision with Conflicts of Law Issues

Although the Illinois court’s decision seems straightforward, it is far from it. Complications arise from the use of both forum selection and choice of law clauses in a contract.⁴¹ A typical forum selection clause may read: “If there is any dispute concerning this Agreement, suit must be brought [exclusively] in a state or federal court in Texas.”⁴² Forum selection clauses designate which forum a dispute between the parties must be heard, but not the law that must be applied. Therefore, Match.com argued that if Illinois transfers Jane’s case to Texas, Illinois public policy as declared by the IDRSA would not necessarily be violated because Texas courts could still apply Illinois law and find the contract void.⁴³

Complications also arise when a choice of law clause enters into the mix. While Match.com’s Terms of Use Agreement did not contain an actual “waiver” of the provisions of the IDRSA (i.e., the contract did not require Jane to forgo any protections provided under Illinois law), it did include a choice of law clause stating that all disputes arising between the parties would be governed by the laws of Texas.⁴⁴ In these situations, choice of law clauses combined with forum selection clauses, can serve as the “functional equivalent of [a] waiver without the use of the term.”⁴⁵ Be-

37. *Jane Doe*, No. 11 L 3249, slip op. at 4.

38. *Id.*

39. *Id.*

40. *Id.*

41. See Woodward, *Constraining Opt-Outs*, *supra* note 29, at 13.

42. See, e.g., *Match.com Motion to Dismiss*, *supra* note 9, at exhibit 1, at cl. 23.

43. See *Gamayo v. Match.com L.L.C.*, No. C 11-00762 SBA, 2011 WL 3739542, at *6 (N.D. Cal. Aug. 24, 2011).

44. *Match.com Motion to Dismiss*, *supra* note 9, at exhibit 1, at cl. 23.

45. Woodward, *Constraining Opt-Outs*, *supra* note 29, at 13.

cause Match.com's "waiver" of the IDRSA's provisions came in the form of a choice of law clause, conflicts of law issues arose.⁴⁶

Conflicts of law issues concern the relationship states have with one another. Each state has its own protections and rules governing those within their jurisdiction.⁴⁷ Therefore, in *Jane Doe v. Match.com*, the Illinois court could not simply decide the contracts issue of whether Match.com's Terms of Use Agreement was valid. Rather, the court first had to determine the conflicts of law issue, asking whether Illinois law (the law of the forum) or Texas law (the law designated by the choice of law clause) governed the validity of the contract between the parties.⁴⁸ Accordingly, in *Jane Doe v. Match.com*, the Illinois court first held that the validity of the contract should be determined by Illinois law and not Texas law.⁴⁹ Only after it determined whether the Match.com contract was valid as a whole, would the court then consider the validity of the specific forum selection and choice of law clauses.⁵⁰

Conversely, some federal courts have taken an entirely different approach to the same choice of law issues, leading to different results for the plaintiffs involved. For example, one California federal court (dealing with the same Match.com contract at issue in the Jane Doe case) transferred the plaintiff's case to Texas before it determined whether the contract was even valid.⁵¹ By focusing on just the forum selection clause, Match.com can argue that if the forum state transfers Jane's case to Texas, Illinois public policy as declared by the IDRSA would not necessarily be violated because Texas courts could still apply Illinois law and find the contract void.⁵² The court in *Gamayo v. Match.com* relied, in part, on this argument when it transferred the plaintiff's case from California to Texas.⁵³ Relying on federal precedent, the court presumed the enforcement of forum selection clauses and completely sidestepped any choice of law considerations or determinations.⁵⁴ The court held that it was for Texas to determine "which state's laws apply . . ."⁵⁵ In rejecting the contention that the enforcement of Match.com's forum selection clause would contravene California's pub-

46. *Id.* at 13–15.

47. *Id.* at 14.

48. *Jane Doe v. Match.com*, L.L.C., No. 11 L 3249, slip op. at 4 (Ill. Cir. Ct. Oct. 25, 2012).

49. *Id.* at 3.

50. *Id.*

51. *Gamayo v. Match.com L.L.C.*, No. C 11-00762 SBA, 2011 WL 3739542, at *6 (N.D. Cal. Aug. 24, 2011).

52. *See id.* (Match.com makes this argument).

53. *Id.*

54. *See id.* at *3.

55. *Id.* at *6.

lic policy as declared by its consumer protection statutes, the court reasoned that such an argument “required speculation as to which law the transferee would ultimately apply.”⁵⁶ “[O]nce in the proper venue, the [p]laintiff is free to argue for the application of California law.”⁵⁷ In theory, this argument has some merit.

However, the notion that the Texas court will apply the forum court’s laws is a fallacy in practice, underscoring the accuracy of the Illinois court’s decision in *Jane Doe v. Match.com* when determining whether the contract was valid under Illinois law rather than Texas law. More often than not, when cases are transferred to a new forum, the transferee court’s laws are applied, particularly when there is a choice of law provision involved.⁵⁸ In *Gamayo*, when the plaintiffs’ case was transferred, it was unsurprising that the Texas federal court applied Texas law instead of California law, even though many of the plaintiffs’ claims were based primarily on protections afforded by California consumer protection statutes.⁵⁹ The applicability of state law can lead to different results for the plaintiffs involved. In *Gamayo*, Texas law applied, which generally affords fewer consumer protections than California laws,⁶⁰ and the plaintiffs’ claims were dismissed with prejudice.⁶¹ A similar outcome resulted in several other cases against Match.com, which were originally filed in more consumer friendly states, such as New York, and later transferred to Texas.⁶²

The Illinois court’s choice of law decision in *Jane Doe v. Match.com* was correct for two additional reasons. First, enforcing a forum selection

56. *Id.* (citing *Besag v. Customer Decorators, Inc.*, No. C 08–05463 JSW, 2009 WL 330934, at *14 (N.D. Cal. Feb.10, 2009)).

57. *Id.* (quoting *Mazzola v. Roomster Corp.*, No. CV 10–5954 AHM (JCGx), 2010 WL 4916610, at *3 (C.D. Cal. Nov. 30, 2010) (quotation marks omitted)).

58. *See, e.g., id.* at *2 (discussing *Brodsky v. Match.com, L.L.C.*, No. 3-09-CV-2066-F-BD., 2010 WL 3895513, at *1 (N.D. Tex. Sept. 30, 2010), where a Texas federal court applied Texas law to plaintiffs’ claims against Match.com, even though the case was originally filed in New York under New York consumer protection and contract laws and later transferred to Texas by the New York federal court).

59. *Robinson v. Match.com, L.L.C.*, 3:10-CV-2651-L, 2012 WL 3263992, at *1 n.1 (N.D. Tex. Aug. 10, 2012).

60. The American Tort Reform Association (ATRA), an organization dedicated to criticizing laws favorable to plaintiff’s personal injury firms and the consumers they represent, argues that California is the worst “judicial hellhole” for businesses in part because of its “plaintiff-friendly consumer laws.” AMER. TORT REFORM FOUND., JUDICIAL HELLHOLES (2013–2014), available at <http://www.judicialhellholes.org/wp-content/uploads/2013/12/JudicialHellholes-2013.pdf>; *see also* Erin Coe, *Calif.’s ‘Judicial Hellhole’ Ranking Doesn’t Tell Full Story*, LAW360 (Dec. 19, 2013), <http://www.law360.com/articles/497438/calif-s-judicial-hellhole-ranking-doesn-t-tell-full-story>.

61. *Robinson*, 2012 WL 3263992, at *19, *aff’d*, *Malsom v. Match.com, L.L.C.*, 540 F. App’x. 412 (5th Cir. 2013) (applying Texas law).

62. *See, e.g., Brodsky*, 2010 WL 3895513, at *3 (dismissing plaintiffs’ claims for fraud, fraudulent inducements, negligent misrepresentation, and violations of the Texas Deceptive Trade Practices Act, which were all initially filed in New York federal court under New York law).

clause before determining whether that contract was even valid in the first place puts the “cart before the horse.” Second, and most notably, the Illinois decision followed clear Illinois precedent and choice of law rules.⁶³ This holding can be better understood through the lens of basic conflict of law and choice of law principles.

Under conflict of law principles, when there is a dispute regarding which state’s laws to apply and *no forum selection clause exists*, the forum court determines the governing law by using its own choice of law approach.⁶⁴ Generally speaking, in most contract cases, Illinois courts follow the Restatement (Second) of Conflict of Laws and apply the “most significant relationship rule,” where the law of the state that is most significantly related to the outcome of the litigation applies.⁶⁵ In “the most significant relationship” analysis, Illinois courts will also consider the state’s public policy principles and how those policies impact the litigation.⁶⁶

However, when there is a forum selection clause, as there was in the *Jane Doe v. Match.com* case, Illinois courts have refused to apply the law of the forum selected when the contract or provision is at odds with Illinois public policy. As the Illinois Supreme Court held in *First National Bank v. Malpractice Research*,⁶⁷ Illinois courts are prohibited from “rely[ing] on foreign law to enforce a contract that is illegal in the forum, and Illinois has the stronger interest in the outcome of the controversy.”⁶⁸ Illinois’s reasoning is drawn in part from the Restatement (Second) of Conflict of Laws § 187(2), which states:

The law of the state chosen by the parties to govern their contractual rights and duties will be applied . . . *unless* . . . 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.⁶⁹

Nevertheless, while there is much to be said about the best order in which courts should decide these conflicts of law disputes (and the different conflicts of law approaches used by various state and federal courts),

63. See, e.g., *Scentura Creations, Inc. v. Long*, 756 N.E.2d 451, 456–57 (Ill. App. Ct. 2001).

64. *Soc’y of Mount Carmel v. Nat’l Ben Franklin Ins. Co. of Ill.*, 643 N.E.2d 1280, 1286 (Ill. App. Ct. 1994) (emphasis added).

65. See, e.g., *Townsend v. Sears, Roebuck & Co.*, 879 N.E.2d 893, 905 (Ill. 2007).

66. See *Morris B. Chapman & Assocs., Ltd. v. Kitzman*, 739 N.E.2d 1263, 1269–71 (Ill. 2000).

67. *First Nat’l Bank of Springfield v. Malpractice Research, Inc.*, 688 N.E.2d 1179, 1182 (Ill. 1997).

68. *Id.*

69. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(b) (1971) (emphasis added).

this Article will only focus on the policy arguments made in support of and against the enforcement of choice of law clauses. The policy arguments in favor of enforcing choice of law clauses closely mirror those in support of forum selection clauses, where, as indicated at the outset of this Article, courts have pitted the values of individual autonomy and economic efficiency against federalism and a state's right to choose how it protects its consumers.

II. THE NEW YORK FEDERAL CASE: *BRODSKY V. MATCH.COM*

Brodsky v. Match.com is one of the primary Match.com cases at odds with the Illinois decision, *Jane Doe*.⁷⁰ In *Brodsky*, former Match.com subscribers filed a class action lawsuit in 2009 against Match.com in a New York federal court alleging various causes of action arising from their experiences with the online dating website and service.⁷¹ In response, Match.com filed a motion to transfer the case to the Northern District of Texas pursuant to the forum selection clause in Match.com's Terms of Use Agreement.⁷² Like in the Illinois case, Match.com's contract with its New York subscribers failed to comply with several requirements of New York's Dating Services Law.⁷³

Despite this failure to comply with the Dating Services Law, the *Brodsky* court held that the forum selection clause was valid and enforceable—advancing both legal and public policy justifications.⁷⁴ From the legal standpoint, the *Brodsky* court stated that, pursuant to federal precedent, there is a strong presumption in favor of enforcing forum selection clauses.⁷⁵ Under federal law, this presumption can be rebutted only if the plaintiff establishes that the enforcement of the forum selection clause would be “unreasonable or unjust.”⁷⁶ Instances where the enforcement of a forum selection clause would be unreasonable include: (1) if the clause was incorporated into the agreement because of fraud or overreaching; (2) if for all practical purposes the plaintiff would be “deprived of his day in court, due to the grave inconvenience or unfairness of the selected forum”; (3) if the plaintiff would be deprived of a remedy; and (4) “if the clauses contravene

70. See *Brodsky v. Match.com L.L.C.*, No. 09 Civ. 5328(NRB), 2009 WL 3490277, at *4 (S.D.N.Y. Oct. 28, 2009).

71. *Id.* at *1.

72. *Id.*

73. *Id.* at *4.

74. *Id.* at *3–5.

75. *Id.* at *2–3.

76. *Id.* at *2.

a strong public policy of the forum state.”⁷⁷ Any exceptions to the presumption of enforceability are to be narrowly construed.⁷⁸

In enforcing Match.com’s forum selection clause, the *Brodsky* court analyzed and then rejected each of the exceptions that could rebut the presumption in favor of enforcement.⁷⁹ When the New York federal court considered the public policy exception, it acknowledged that “[t]he State of New York no doubt has a great interest in protecting its consumers and in seeing its laws enforced.”⁸⁰ However, after weighing the interests for and against enforcement, the court concluded that “New York’s interest in protecting its consumers and businesses *does not override* its policy of enforcing forum selection clauses.”⁸¹ This is where the *Brodsky* court’s legal justification for enforcing Match.com’s forum selection clause (i.e., the federal presumption in favor of enforcement) intertwined with its public policy justifications.

The *Brodsky* court relied on two familiar public policy arguments—individual autonomy and economic efficiency—in concluding that the presumption in favor of enforcement outweighed New York’s interest in protecting its consumers and enforcing its laws.⁸² The first policy argument was essentially that individuals have the right to contract and negotiate the terms of their commercial relationships with one another, freely exchanging one benefit (requiring parties to sue in a specific state) for another benefit (lower prices for consumers).⁸³ In that regard, once parties reach an agreement, they cannot then change the terms of the agreement when they merely find it convenient to do so; such behavior is not only unfair to the contracting parties and their expectations, but goes against basic contract law principles holding parties to the terms of their agreements.⁸⁴ In the court’s words: “plaintiffs cannot avoid compliance with the forum selection clause to which they *validly assented* simply by invoking a statute peculiar to the forum in which they filed suit (expressly in defiance of the forum selection clause).”⁸⁵ Permitting such behavior “defies reason,” as a plaintiff “may circumvent forum selection . . . clauses merely by stating claims un-

77. *Id.* (emphasis added) (quoting *Roby v. Corporation of Lloyds*, 996 F.2d 1353, 1361 (2d Cir. 1993)).

78. *Id.*

79. *Id.* at *2–4.

80. *Id.* at *4.

81. *Id.* (emphasis added).

82. *See id.*

83. *Id.* at *4.

84. *Id.*

85. *Id.*

der laws not recognized by the forum selected in the agreement.”⁸⁶ This behavior ultimately amounts to forum shopping by the plaintiff.⁸⁷

The second policy argument involved economic efficiency and practicality. The *Brodsky* court explained that it was “reasonable and legitimate” for Match.com, which operates a website and service available “to users anywhere in the country,” to require that disputes arising from its service be resolved in Texas, where the company is headquartered.⁸⁸ Further, the court stated that Match.com had “no practical alternative than to include a forum selection and choice of law clause in its User Agreement, since otherwise Match[.com] could potentially be subject to suit in any of the fifty states arising from its website or service.”⁸⁹

But *Brodsky* misinterprets the existing federal law and the broad application of the public policy exception by state courts. Moreover, while the public policy reasons justifying the enforcement of forum selection clauses certainly have merit, particularly as the world economy continues to innovate and globalize, they fail to respect the well-established principles of federalism.

III. WHY ILLINOIS GOT IT RIGHT: LEGAL REASONS

A. There is a “Public Policy” Exception to the Presumption in Favor of Forum Selection Clauses

A number of federal courts have enforced forum selection clauses in conflict with state consumer protection laws on the grounds that forum selection clauses are presumptively valid and enforceable pursuant to federal and state common law.⁹⁰ Federal and state courts, including those in Illinois, have held that forum selection clauses are presumptively valid and enforceable “unless unreasonable under the circumstances.”⁹¹ However, these same courts have also repeatedly held that the presumption is not absolute; there is a public policy exception.⁹² The public policy exception appears to be designed to acknowledge concerns of federalism.⁹³ Understanding the historical development of forum selection clauses at both the

86. *Id.* (quoting *Roby v. Corp. of Lloyd’s*, 996 F.2d 1353, 1360 (2d Cir. 1993)).

87. *See infra* Part IV.A.

88. *Brodsky*, 2009 WL 3490277, at *4.

89. *Id.*

90. *See infra* Part III.A.1.i-iii.

91. *Roby*, 996 F.2d at 1363.

92. *See infra* Part III.A.1.iii.

93. *See infra* Part III.B.

federal and state level and the current state of the law today can shed light on why the holding and reasoning in *Brodsky* is misguided.

1. Historical Development of Forum Selection Clauses

Historically, most federal and state courts viewed forum selection clauses with hostility, often refusing to enforce them because they were “contrary to public policy.”⁹⁴ The theory underlying this view was that forum selection clauses permitted private parties to impermissibly “oust” the constitutionally or statutorily established jurisdiction of a court through contractual agreement.⁹⁵ However, the judicial hostility toward forum selection clauses began to fade in the 1950s, as some courts embraced the notion of freedom of contract.⁹⁶ This change in attitude is reflected in the landmark case of *M/S Bremen v. Zapata Off-Shore*.⁹⁷

a. Presumption in Favor of Forum Selection Clauses in Federal Courts

In 1972, the United States Supreme Court addressed the validity of forum selection clauses.⁹⁸ In *M/S Bremen v. Zapata Off-Shore*, a German ship towing company entered into a contract with an American company to tow an ocean-moving drilling rig from Louisiana to Italy.⁹⁹ The contract between the parties included a forum selection clause mandating that all litigation arising from the agreement take place in London, a supposed neutral forum with an expertise in admiralty disputes.¹⁰⁰ During transport, the American company’s rig was damaged off the coast of Florida. The American company disregarded the forum selection clause and brought suit in a Florida federal court.¹⁰¹

The Court declined to follow the traditional attitude regarding forum selection clauses, instead holding that such clauses are “*prima facie* valid

94. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972); see also Francis M. Dougherty, Annotation, *Validity of Contractual Provision Limiting Place or Court in Which Action May Be Brought*, 31 A.L.R. 4TH 404, 409–14 (1984) (citing numerous state court cases pre-1972 that invalidated forum selection clauses on the grounds that they were contrary to public policy).

95. See, e.g., *Carbon Black Export, Inc. v. S.S. Monrosa*, 254 F.2d 297, 300–01 (5th Cir. 1958) (“agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.”).

96. See Young Lee, Note, *Forum Selection Clauses: Problems of Enforcement in Diversity Cases and State Courts*, 35 COLUM. J. TRANSNAT’L. L. 663, 666 (1997) (discussing why the judicial view of forum selection clauses began to change in the mid-twentieth century).

97. 407 U.S. at 1, 9–10.

98. *Id.* at 2.

99. *Id.*

100. *Id.* at 4, 13, 17.

101. *Id.* at 3–4.

and should be enforced” unless enforcement is deemed to be “unreasonable under the circumstances.”¹⁰² The Court reasoned that the “oust[er]” argument was a “vestigial legal fiction” and had “little place” in a world where courts are overloaded and where many local businesses now operate on a global scale.¹⁰³ Following the Supreme Court decision in *Bremen*, federal courts adopted a strong presumption across the federal courts that forum selection clauses are valid absent several limited exceptions,¹⁰⁴ discussed above in Part II.

b. Presumption in Favor of Forum Selection Clauses in State Courts

Although the *Bremen* decision arose under the federal courts’ admiralty jurisdiction in the context of international commercial contracts and thus has had no binding effect on state courts,¹⁰⁵ its analysis has had an enormous impact on subsequent state court litigation.¹⁰⁶ Most state courts, including those in Illinois,¹⁰⁷ have followed the Supreme Court’s lead declaring forum selection clauses presumptively valid.¹⁰⁸ Only a handful of jurisdictions still hold that forum selection clauses are *per se* invalid and unenforceable.¹⁰⁹

102. *Id.* at 10 (emphasis added).

103. *Id.* at 12.

104. See Michael Mousa Karayanni, *The Public Policy Exception to the Enforcement of Forum Selection Clauses*, 34 DUQ. L. REV. 1009, 1013 (1996).

105. See Michael D. Moberly & Carolyn F. Burr, *Enforcing Forum Selection Clauses in State Court*, 39 SW. U. L. REV. 265, 269 (2009); see also *Prof'l Ins. Corp. v. Sutherland*, 700 So. 2d 347, 350 (Ala. 1997) (“*Bremen* does not mandate that state courts enforce forum selection provisions outside of an admiralty context.”).

106. Moberly & Burr, *supra* note 105, at 276.

107. See, e.g., *Scentura Creations, Inc. v. Long*, 756 N.E.2d 451, 456 (Ill. App. Ct. 2001) (“An express choice-of-law provision contained in a contract will be given effect subject to certain limitations.”).

108. See *Sutherland*, 700 So. 2d at 350 (“[T]he courts of almost all . . . jurisdictions . . . now find the Supreme Court’s reasoning in *M/S Bremen* on this issue to be persuasive.”); Walter W. Heiser, *Forum Selection Clauses in State Courts: Limitations on Enforcement After Stewart and Carnival Cruise*, 45 FLA. L. REV. 361, 371 (1993) (“the vast majority of state courts have held that contractual forum selection clauses are valid and enforceable”).

109. See Lee, *supra* note 96, at 680; see also *High Life Sales Co. v. Brown-Forman Corp.*, 823 S.W.2d 493, 496 (Mo. 1992) (holding that Missouri conclude “no longer treat[s] outbound forum selection clauses as per se violations of public policy”); Michael E. Solimine, *Forum-Selection Clauses and the Privatization of Procedure*, 25 CORNELL INT’L L.J. 51, 72 (1992) (stating that only “[a] handful of states either hold [forum selection] clauses unenforceable per se or seem to apply a presumption against their validity”).

c. The Public Policy Exception

As both federal and state courts have acknowledged, the presumption in favor of forum selection clauses is not absolute.¹¹⁰ In *Bremen*, the Supreme Court provided a broad outline of the circumstances in which courts may refuse to enforce forum selection clauses.¹¹¹ The Court deemed that such clauses may be void if they were obtained by fraud, undue influence or unconscionable means,¹¹² or if the designated forum was so substantially inconvenient or unfair that it would deprive the plaintiff of his or her “day in court.”¹¹³ The Court also held that such clauses may be void and unenforceable “if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or judicial decision.”¹¹⁴ The majority of federal and state jurisdictions agree that a public policy exception to the enforcement of forum selection clauses exists.¹¹⁵

Illinois is no different. In *First National Bank of Springfield v. Malpractice Research, Inc.*,¹¹⁶ the Illinois Supreme Court made clear that contracts are void and unenforceable if they are “clearly contrary” to Illinois public policy as declared by its constitution, statutes, and the decisions of its courts.¹¹⁷ When holding that Match.com’s forum selection clause was void and unenforceable, the Illinois court in *Jane Doe* was simply applying the public policy exception—an exception recognized by both Illinois and federal courts. Given the almost universal recognition of the public policy exception to the enforcement of forum selection clauses, why did the two Match.com cases reach different results?

110. See Karayanni, *supra* note 104, at 1017–20 (explaining that “[t]he presumption in favor of enforcement of forum selection clauses . . . was not absolute, as the *Bremen* Court “noted that public policy was one of the exceptions set by the Court to the enforcement of forum [selection] clauses).

111. Karayanni, *supra* note 104, at 1010–12.

112. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13–15 (1972); *Phillips v. Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007).

113. See, e.g., *Gamayo v. Match.com L.L.C.*, Nos. C 11-00762 SBA, C 11-1076 SBA, C 11-1206 SBA, 2011 WL 3739542, at *3 (N.D. Cal. Aug. 24, 2011); *Brodsky v. Match.com L.L.C.*, No. 09 Civ. 5328(NRB), 2009 WL 3490277, at *2 (S.D.N.Y. Oct. 28, 2009).

114. *Bremen*, 407 U.S. at 15 (emphasis added).

115. See, e.g., *Scentura Creations, Inc. v. Long*, 756 N.E.2d 451, 456–57 (Ill. App. Ct. 2001) (citing *McAllister v. Smith*, 17 Ill. 328, 334 (1856)) (noting that the Illinois Supreme Court has held that forum selection clauses are invalid and unenforceable if they are deemed to be “contrary to the public policy of the local government”).

116. *First Nat. Bank of Springfield v. Malpractice Research, Inc.*, 688 N.E.2d 1179, 1182 (Ill. 1997) (quoting *Schuman-Heink v. Folsom*, 159 N.E. 250 (1927)).

117. *Id.*

2. Statutory Preemption: A Split Between the Courts

Despite the almost universal recognition of the public policy exception to the enforcement of forum selection clauses, courts differ as to the scope and application of the exception.¹¹⁸ Some state courts have interpreted the scope and application of the public policy exception more broadly than their federal counterparts.¹¹⁹ Analyzing the difference in how some federal and state courts have decided the fate of forum selection clauses at odds with state “anti-waiver” provisions is illustrative of the point.¹²⁰

In the federal case *Luv2bfit, Inc. v. Curves International, Inc.*,¹²¹ the plaintiffs, thirty-five current or former owners of a New York fitness franchise, filed suit in a New York federal court against a Texas-based franchiser.¹²² The franchiser moved to dismiss or, in the alternative, transfer the case to a Texas court pursuant to two forum selection clauses contained in the contract between the parties.¹²³ The New York federal court enforced the forum selection clause and transferred the case to Texas, despite the existence of an anti-waiver provision in New York’s business protection statute.¹²⁴ The court reasoned that to interpret the “anti-waiver provision to mean that [the plaintiffs] cannot be required to contractually consent to litigating this case in a forum other than New York . . . is too broad a reading of the [New York Franchise Sales Act (NYFSA)].”¹²⁵ The court suggested that to be held unenforceable, the language of the NYFSA had to “implicitly or explicitly” prohibit a New York franchisee from agreeing to resolve their disputes in other forums.¹²⁶ Other federal courts have reiterated the same narrow interpretation—that a statute must expressly prohibit the parties from agreeing to litigate their disputes in another forum.¹²⁷

118. See, e.g., *Moberly & Burr*, *supra* note 105, at 306–07.

119. See also *id.* at 301, 304.

120. *Compare Pong v. Am. Capital Holdings, Inc.*, No. CIV. S-06-2527 LKK/DAD, 2007 WL 657790, at *5–7 (E.D. Cal. Feb. 28, 2007) (holding that a forum selection clause did not violate the anti-waiver statute in securities fraud actions), with *Hall v. Super. Ct.*, 197 Cal. Rptr. 757, 761–63 (Cal. Ct. App. 1983) (holding forum selection clause void because it was in conflict with the anti-waiver provision in California’s Corporate Securities Law).

121. *Luv2bfit, Inc. v. Curves Int’l Inc.*, No. 06 CV 15415(CSH), 2008 WL 4443961 (S.D.N.Y. Sept. 29, 2008).

122. *Id.* at *1–2.

123. *Id.*

124. *Id.* at *3, *6.

125. *Id.* at *3.

126. *Id.*

127. See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595–97 (1991) (concluding that the forum selection clause was enforceable because there was no prohibition against forum selection clauses in the language of the Limitation of Vessel Owner’s Liability Act or its legislative history); *Long John Silver’s Inc. v. Nickleson*, 923 F. Supp. 2d 1004 (W.D. Ky. 2013) (holding that “[t]he

By contrast, in *Morris v. Towers Financial Corp.*,¹²⁸ a Colorado state court held the opposite, deciding that the anti-waiver provision in the Colorado Wage Claim Act (CWCA) was sufficient to invalidate an employer's forum selection clause.¹²⁹ In that case, the employer attempted to dismiss the employee's wage claim, arguing that New York was the exclusive jurisdiction pursuant to their employment contract.¹³⁰ Relying on the public policy exception outlined in *Bremen*, the Colorado court held that the employer's forum selection clause was void because it violated the strong public policy of Colorado embodied in the CWCA and was directly in conflict with the CWCA's anti-waiver provision.¹³¹

Like the Illinois court in *Jane Doe* and the numerous Illinois courts before that, the Colorado court did the simple math. Under *Bremen* and its progeny, forum selection clauses are presumptively enforceable unless enforcement would "contravene a strong public policy of the forum in which suit is brought, whether declared by *statute* or by judicial decision."¹³² The public policy of the forum, here Colorado, was embodied in its statutes, such as the CWCA.¹³³ As explained by the *Morris* court, the CWCA "provides a clear, comprehensive statutory scheme designed to require employers to pay wages earned by their employees in a timely manner."¹³⁴ The CWCA also includes an anti-waiver provision, declaring that "any agreement, written or oral, by an employee purporting to waive or to modify his rights" under the CWCA is void and unenforceable.¹³⁵ Accordingly, the forum selection clause could not be enforced.¹³⁶ However, had there been no express anti-waiver provision prohibiting employers and employees from attempting to waive compliance with the CWCA, the Colorado court may have reached a different result.¹³⁷

Illinois and Colorado courts are not alone in their decisions. Other state courts, such as those in California, have similarly held that anti-waiver

[Minnesota Franchise Act's (MFA)] anti-waiver provision voids anything in a franchise agreement or contract that explicitly waives . . . the MFA").

128. *Morris v. Towers Fin. Corp.*, 916 P.2d 678 (Colo. App. 1996).

129. *Id.* at 679.

130. *Id.*

131. *Id.*

132. *Id.* at 679 (emphasis added) (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).

133. *Id.*

134. *Id.* (citing *Lambdin v. Dist. Ct.*, 903 P.2d 1126 (Colo. 1995)).

135. *Id.* (quoting COLO. REV. STAT. ANN. § 8-4-125 (West 2003)).

136. *Id.*

137. *Cf. Adams Reload Co. v. Int'l Profit Assoc.*, 143 P.3d 1056, 1059 (Colo. App. 2005) (holding that because there was no anti-waiver provision in the Colorado Consumer Protection Act, the forum selection clause did not necessarily violate Colorado public policy and would be enforced).

provisions in state statutes invalidate forum selection clauses.¹³⁸ The trend of state courts interpreting the *Bremen* public policy exception more broadly can be partially explained by provincial attitudes and federalism.¹³⁹ That is, “state courts are likely to be more familiar with, and therefore more protective of,” their own state’s policies and laws.¹⁴⁰ State courts are also more distrusting of courts in foreign jurisdictions and, therefore, may be hesitant to permit foreign jurisdictions to decide whether to enforce their state’s laws.¹⁴¹ It is also important to note that the “presence of a strong state policy disfavoring forum selection clause[s]” is not binding on federal courts as it is on state courts; indeed, such state policies are just “one of many factors” which federal courts must consider.¹⁴²

In sum, the Illinois court in *Jane Doe v. Match.com* had the authority to refuse to enforce Match.com’s forum selection clause pursuant to the public policy exception outlined in *Bremen*. For Illinois state courts, as well as other state courts across the country, it is immaterial whether there is a split amongst the courts as to the scope and application of the public policy exception. The fact remains that the exception exists. If Congress wants to create a hard rule requiring states to enforce forum selection clauses, even if they conflict with state laws, it needs to pass legislation to that end and clarify the existing uncertainty in the law.¹⁴³ Without Congress stepping in, states will (and should) continue to have the right to decide how they want to protect their consumers. An examination into the principles of federalism provides insight into why states have this right.

138. See, e.g., *Hall v. Super. Ct.*, 197 Cal. Rptr. 757, 762 (Cal. Ct. App. 1983) (“California’s policy to protect securities investors, without more, would probably justify denial of enforcement of the choice of forum provision . . . but section 25701, which renders void any provision purporting to waive or evade the Corporate Securities Law, removes that discretion and compels denial of enforcement.”); *Rose v. Etling*, 467 P.2d 633, 634–35 (Or. 1970) (Oregon Supreme Court held that Oregon retail buyers entering retail installment contracts could not waive, even by agreement, any remedies granted to the retail buyer under Oregon law).

139. See *infra* Part III.B.

140. See *Moberly & Burr*, *supra* note 105, at 306–07.

141. See *id.* at 304–07.

142. *Elite Physicians Serv., L.L.C. v. Citicorp Payment Serv., Inc.*, No. 1:05-CV-344, 2006 WL 752536, at *5 (E.D. Tenn. Mar. 17, 2006).

143. *Lee*, *supra* note 96, at 681 (explaining that “[w]ith no federal statute that preempts state law on forum selection clauses,” defendants have “no recourse” despite any agreements they made with the plaintiffs to resolve their disputes in a specific forum).

B. Federalism Gives States the Right to Decide for Themselves How to Protect Their Consumers

Under the existing legal system, there is no legal authority for federal courts to preempt state consumer protection laws, regardless of how persuasive the policy arguments in favor of enforcement are.

1. History of Federalism

Preempting state consumer protection laws violates the very core of the United States' federal system.¹⁴⁴ To understand America's federal system and how it relates to consumer protection laws, this Part will briefly discuss the origins and development of our federal system. The creation of the concept of federalism dates back to the American Revolution. In 1776, the thirteen colonies declared independence from Great Britain.¹⁴⁵ While the newly independent states shared the goal of independence; they also had strained relations, as they differed greatly in history, geography, population, economy, and politics.¹⁴⁶ Many of the states wanted to retain the powers of a sovereign nation (i.e., the ability to make treaties, receive ambassadors, and regulate commerce).¹⁴⁷ However, the states recognized that in order to win the war and survive on the world stage, they had to coordinate their military efforts and cooperate with one another on a number of important issues.¹⁴⁸

After the Americans won the Revolutionary War, there was a real danger that the emerging country would fall apart, as states pursued their own interests rather than the national interests of the United States.¹⁴⁹ In 1787, "George Washington, Alexander Hamilton, James Madison, and other [American] leaders" sought to strengthen the country and better define the relationship between the states and the national government.¹⁵⁰ Delegates from the states were summoned to Philadelphia, where they suc-

144. William J. Woodward, Jr., *Finding the Contract in Contracts for Law, Forum and Arbitration*, 2 HASTINGS BUS. L. J. 1, 45 n.152 (2006) [hereinafter Woodward, *Finding the Contract*].

145. Ellis Katz, *American Federalism: Past, Present and Future*, 2 ISSUES OF DEMOCRACY: REINVENTING AM. FEDERALISM 9 (1997), available at <http://usinfo.state.gov/journals/itdhr/0497/ijde/ijde0497.pdf>.

146. Linda R. Monk, *Federalism*, CONSTITUTION USA WITH PETER SAGAL, <http://www.pbs.org/tpt/constitution-usa-peter-sagal/federalism/> (last visited Feb. 6, 2015).

147. *Id.*

148. Katz, *supra* note 145, at 9.

149. *Id.*

150. *Id.* at 10.

cessfully drafted the Constitution and introduced the notion of “federalism.”¹⁵¹

In the United States’ federal system, “the people retain their basic sovereignty and they delegate some powers to the national government and reserve other powers for the states.”¹⁵² “Individuals are citizens of both the national government and their respective states.”¹⁵³ One of the goals of creating a federal system was to permit both levels of government—state and federal—to protect the rights of citizens in case either body of government became too powerful and tyrannical. As Alexander Hamilton explained in the *Federalist Papers*, “If [the peoples’] rights are invaded by either, they can make use of the other as the instrument of redress.”¹⁵⁴ Likewise, James Madison stated that the national and state governments “are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes.”¹⁵⁵ Another purpose of creating a federal system was to protect the local autonomy of the states.¹⁵⁶ “From these Constitutional origins, federal case law has developed a body of law giving deference to local rights,” including “the right of a state to enforce its own laws in its own courts”¹⁵⁷

The Constitution expressly outlines which powers the federal government possesses. These powers include the right to levy taxes, declare war, and regulate interstate and foreign commerce.¹⁵⁸ While the Constitution does not explicitly say which powers are allocated to the states, it makes clear through the Tenth Amendment that: “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁵⁹ Powers traditionally left to the states include the power to police citizens, run local schools, regulate public utilities and services, and establish rules governing contracts.¹⁶⁰

151. Monk, *supra* note 146.

152. Katz, *supra* note 145, at 10.

153. *Id.*

154. THE FEDERALIST NO. 28, at *3 (Alexander Hamilton), available at Westlaw 1787 WL 356.

155. THE FEDERALIST NO. 46, at *1 (James Madison), available at Westlaw 1788 WL 460.

156. Joseph C. Cove, *The Relationship between the Federal Government and Local Government*, 5 MASS. CONTINUING LEGAL EDUC. 1, § 5.1 (2012) (citing THE FEDERALIST NO. 32 (Alexander Hamilton)).

157. *Id.*

158. U.S. CONST. art. I, § 8.

159. U.S. CONST. amend. X; see also Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 564 (2007) (“The Tenth Amendment tells us that there [are] realms of respective state and federal authority, without squarely telling us what powers lie in which realm.”).

160. See Katz, *supra* note 145, at 13; Ryan, *supra* note 159, at 523.

There are many other powers traditionally exercised by the states which are actually powers shared by both the national and state governments.¹⁶¹ The Framers of the Constitution anticipated that there would be some overlap between state and federal powers, and consequently there could be conflict between their laws. To provide clarity in such situations, the Framers included a “Supremacy Clause,” declaring that if a state law conflicts with a federal law enacted pursuant to a constitutionally enumerated power, the federal law is controlling.¹⁶² The Supremacy Clause is particularly significant to this Article’s discussion because it gives the federal government the power to preempt state consumer protection laws through federal laws enacted pursuant to the Commerce Clause.¹⁶³ However, in situations where it is uncertain whether state law is preempted, “[c]onstitutional theory favors the absence of preemption on the rationale that it is better to presume local authority, and if such presumption causes difficulties Congress can always enforce its legislative purpose by remedial legislation rather than subordinating local authority to the federal interest.”¹⁶⁴

2. The Lack of Federal Legislation

To date, there is no federal legislation mandating the enforcement of forum selection and choice of law clauses. While the “Constitution does not [directly] address the authority of the federal government to protect consumers,” the federal government nonetheless possesses this power through its ability to regulate interstate domestic commerce.¹⁶⁵ Prior to 1900, the federal government rarely passed federal consumer protection laws.¹⁶⁶ Instead, the responsibility of protecting consumers rested with the states and local municipalities.¹⁶⁷ However, as the country became more industrialized and manufactured goods increasingly streamed across state borders, the federal government began to step in, passing legislation targeting specific categories of consumer products and unfair business practices (e.g., laws regulating trade, food, drugs, and banking).¹⁶⁸

161. See Ryan, *supra* note 159, at 541.

162. *Id.*

163. Karayanni, *supra* note 104, at 1032–33.

164. Cove, *supra* note 156, § 5.5.2.

165. Edward M. Crane, Nicholas J. Eichenseer & Emma S. Glazer, *U.S. Consumer Protection Law: A Federalist Patchwork*, 78 DEFENSE COUNS. J. 305, 306 (2011).

166. *Id.*

167. *Id.*

168. *Id.* at 306–07.

Congress can enact federal legislation stating that forum selection clauses preempt any state laws to the contrary, including any anti-waiver provisions. The Federal Arbitration Act (FAA)¹⁶⁹ is illustrative of this point. In 1925, Congress enacted the FAA “to overrule the existing common law that often invalidated arbitration agreements.”¹⁷⁰ “Section 2 of the FAA proclaims that in all contracts ‘involving commerce,’ an arbitration agreement ‘shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.’”¹⁷¹ The FAA defines “‘commerce’ to include [any] ‘commerce among the several States or with foreign nations,’” with the intent to interpret the term “involving commerce” broadly.¹⁷² As one court put it, by enacting Section 2 of the FAA, “Congress *withdrew the power of the states* to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”¹⁷³ Since the FAA’s enactment, both federal and state courts have upheld arbitration agreements regardless of state law.¹⁷⁴ Notably, when refusing to enforce forum selection clauses, many state courts have distinguished arbitration agreements from forum selection clauses by highlighting the lack of federal legislation requiring the enforcement of forum selection clauses.¹⁷⁵

There is an important policy reason why only federal legislation can require state courts to enforce forum selection clauses in conflict with state laws. When the federal government passes legislation, in theory, all fifty states have a voice through their representatives in the Senate and House. Moreover, the entire country may vote for the President of the United States, who can veto any federal bill. However, the same justification does not apply on the state level because state legislators have no say in the laws passed by legislators in other states. With the lack of any federal legislation mandating the enforcement of forum selection clauses and the resulting uncertainty in the federal and state courts as to when such clauses can be enforced, it is not surprising that Match.com has recently opted to include an arbitration clause in its Terms of Use Agreement.¹⁷⁶ Clause 19 of

169. 9 U.S.C.A. § 1 (West 2014).

170. James Zimmerman, *Restrictions on Forum-Selection Clauses in Franchise Agreements and the Federal Arbitration Act: Is State Law Preempted?*, 51 VAND. L. REV. 759, 763 (1998).

171. *Id.* (quoting 9 U.S.C.A. § 2).

172. *Grohn v. Sisters of Charity Health Servs.*, 960 P.2d 722, 725 (Colo. App. 1998) (quoting 9 U.S.C.A. § 1).

173. *Id.* at 728 (emphasis added).

174. Zimmerman, *supra* note 170, at 763–64.

175. See e.g., *Grohn*, 960 P.2d at 727–28.

176. *Match.com Terms of Use Agreement*, MATCH.COM cl. 19.

Match.com's 2014 Terms of Use Agreement states: "The exclusive means of resolving any dispute or claim arising out of or relating to this Agreement (including any alleged breach thereof), the Service, or the Website shall be **BINDING ARBITRATION** administered by the American Arbitration Association."¹⁷⁷

However, federal legislation is not the only solution for clarifying the uncertainty in the law. As exemplified by the creation of the Uniform Commercial Code, states can pass model codes similar to one another if they believe such model codes would be mutually beneficial to all the participant states. Given that this has not happened yet—at least not successfully—the states seem content with passing and enforcing their own consumer protection laws, which they deem best suited for their residents.

3. Making Trade-offs

The IDRSA is a consumer protection statute. Unlike many foreign jurisdictions, the United States does not have a single, comprehensive code outlining its consumer protection laws.¹⁷⁸ Rather, consumer protection laws in the United States are a "patchwork" of often interrelated and overlapping federal and state laws.¹⁷⁹ This patchwork is not by accident; it is the consequence of the United States' federal system.¹⁸⁰

While permitting each of the fifty states to create their own consumer protection laws can be burdensome for businesses engaged in interstate trade, it is the trade-off of our federal system.¹⁸¹ In fact, having differences amongst the states regarding what is the best trade-off is not only acceptable, but also encouraged.¹⁸² As the United States Supreme Court has emphasized, one of the biggest strengths of the "Nation-State relationship in our federal system" is the freedom provided to states to "serve as a laboratory; and try novel social and economic experiments."¹⁸³ In the online dating context, the states "as a laboratory" concept is illustrated by the increase in various online dating services laws across the country.¹⁸⁴ As

<http://www.match.com/registration/membagr.aspx> (last revised Feb. 5, 2014) [hereinafter *Match.com 2014 Terms of Use Agreement*].

177. *Id.* (emphasis in original).

178. Crane, Eichenseer & Glazer, *supra* note 165, at 305.

179. *Id.* at 305–06.

180. *Id.*

181. Woodward, *Constraining Opt-Outs*, *supra* note 29, at 11–14.

182. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973).

183. *Id.* at 50 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting)).

184. Eric Gwinn, *How do I catch a Valentine?*, CHI. TRIB., Feb. 5, 2008, http://articles.chicagotribune.com/2008-02-05/features/0802040358_1.

millions of Americans have begun to use online dating websites, and concerns for online safety have risen, states have experimented with differing levels of protection, with some states even requiring online dating services to disclose their criminal background screening practices.¹⁸⁵

Moreover, the Framers of the Constitution expected that states would be the principal lawmakers in the federal system when it came to domestic issues.¹⁸⁶ This theory was in recognition of the belief that “law arises out of the need to address distinctly local problems” and, in that vein, states were best suited for solving the problems in their own backyards, as they are most familiar with their own distinct geography, economy, and population.¹⁸⁷ Accordingly, without federal legislation mandating the enforcement of forum selection clauses, states can continue to make their own trade-offs and decide for themselves how they want to protect their consumers.

IV. WHY ILLINOIS GOT IT RIGHT: PUBLIC POLICY REASONS

The courts that have enforced forum selection clauses in conflict with state consumer protection laws have based their decision on primarily public policy grounds.¹⁸⁸ Lacking federal legislation, these courts simply engaged in a weighing of values, where individual autonomy and economic efficiency arguments outweighed any federalism concerns.¹⁸⁹ This Article takes the opposite position because: first, the public policy arguments cited in *Bremen* are less persuasive in personal injury cases involving contracts of adhesion; second, there is a risk of wholesale displacement of state consumer protections laws; and third, consumers are at an even greater disadvantage vis-à-vis big business.

A. The Public Policy Arguments Cited in Bremen are Less Persuasive in Personal Injury Cases Involving Contracts of Adhesion

The *Bremen* court and its progeny have highlighted numerous policy reasons for enforcing forum selection clauses, including economic efficiency, party autonomy, and practicality (in an era of increasing globalization).¹⁹⁰ As discussed above,¹⁹¹ the *Brodsky* court drew on many of the same policy arguments.

185. *Id.*

186. Katz, *supra* note 145, at 10.

187. Cove, *supra* note 156, § 5.1 (citing THE FEDERALIST NO. 32 (Alexander Hamilton)).

188. *See, e.g.*, Brodsky v. Match.com L.L.C., No. 09 Civ. 5328 (NRB), 2009 WL 3490277, at *4 (S.D.N.Y. Oct. 29, 2009).

189. *See supra* Part II.

190. *See, e.g.*, Roby v. Corp. of Lloyd's, 996 F.2d 1353, 1363 (2d Cir. 1993).

First, these proponents argue that forum selection clauses play an important role in providing predictability and certainty for parties in commercial relationships,¹⁹² leading to the smooth functioning and growth of interstate and international commerce.¹⁹³ In agreeing to litigate future disputes in a specific forum, parties are able to plan ahead and consider the risks and costs associated with a business transaction should unforeseen problems develop.¹⁹⁴ Parties are also able to choose a forum that is convenient, neutral, and possesses expertise in the related business.¹⁹⁵ As numerous courts have emphasized, providing predictability and certainty is particularly important in the international context,¹⁹⁶ where a potential defendant can face tremendous burdens if he is forced to litigate disputes under unexpectedly distant and/or hostile forums and laws.¹⁹⁷

Second, these proponents argue that forum selection clauses provide economic advantages to both businesses and the courts.¹⁹⁸ Simply put, predictability and certainty lead to reduced transaction costs.¹⁹⁹ For example, through the use of standard form contracts, businesses can mandate that all litigation related to a product or service take place in a specific state or county, allowing businesses to enhance efficiency and reduce costs by consolidating actions and retaining the same local counsel.²⁰⁰ Similarly, by enforcing forum selection clauses, litigants are also spared the time and expense of determining the correct forum through pretrial motions, thereby further conserving limited judicial resources.²⁰¹ The conservation of judicial resources is particularly beneficial in an era where many American courts are “overloaded,”²⁰² and where debt-ridden federal and state governments are continually trying to cut down on unnecessary spending.

Third, proponents argue that in addition to businesses and the courts, consumers benefit as well. This is because predictability and lower transac-

191. See *supra* Part II.

192. Lee, *supra* note 96, at 664.

193. See *Roby*, 996 F.2d at 1363.

194. Karayanni, *supra* note 104, at 1009.

195. *Id.*

196. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13–14 (1972) (“The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.”).

197. *Roby*, 996 F.2d at 1363.

198. Karayanni, *supra* note 104, at 1009.

199. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593–94 (1991).

200. Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 700 (1992).

201. *Carnival Cruise Lines*, 499 U.S. at 593–94.

202. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972).

tion costs often result in lower prices for consumers.²⁰³ For example, a \$1,000 ticket for a cruise would likely cost more if the cruise line had to consider the potential costs of litigating a suit anywhere in the United States, as such litigation could be expensive and would certainly impact the company's profits.²⁰⁴

Lastly, proponents argue that forum selection clauses should be enforced because notions of individual freedom to contract and individual autonomy are at the root of the American judicial system.²⁰⁵ They concede that a litigant's right to select a forum to bring suit is unquestionably a valuable right,²⁰⁶ but argue that individual parties should have the freedom to control the terms and expectations of their commercial relationships with one another,²⁰⁷ and bargain away certain rights when they deem it beneficial to do so.²⁰⁸ As one federal court put it, "One aspect of personal liberty is the entitlement to exchange statutory rights for something valued more highly."²⁰⁹ Accordingly, when forum selection clauses are included in contracts, proponents argue that they are often bargained for in consideration for some other benefits, such as a reduced cost in product or service, and thus accurately reflect the negotiated value of the contract as a whole.²¹⁰ By refusing to enforce forum selection clauses, courts would be permitting certain parties to receive better deals than either party intended or bargained for.

Undoubtedly, the policy arguments in *Bremen* and its progeny have some merit. As the world economy globalizes and competition among businesses increases, the United States and its legal system must adapt to ensure the country's continued growth and innovative edge. There is a legitimate concern that substantial increases in legal costs (and other associ-

203. *Carnival Cruise Lines*, 499 U.S. at 594 (explaining that passengers purchasing cruise tickets containing the forum selection clause likely got reduced prices "reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued.").

204. *Id.*

205. *M/S Bremen*, 407 U.S. at 11 (explaining that a favorable approach toward forum selection clauses "accords with ancient concepts of freedom of contract and reflects an appreciation of the expanding horizons of American contractors who seek business in all parts of the world").

206. *See Gen. Instrument Corp. v. Tie Mfg.*, 517 F. Supp. 1231, 1235 (S.D.N.Y. 1981) ("[t]he bench and bar has always regarded choice of forum as a significant right.").

207. *See Lee*, *supra* note 96, at 666.

208. *See M/S Bremen*, 407 U.S. at 12.

209. *Metro E. Ctr. for Conditioning & Health v. Qwest Commc'n Int'l, Inc.*, 294 F.3d 924, 929 (7th Cir. 2002).

210. *See also Omron Healthcare, Inc. v. Maclaren Exports Ltd.*, 28 F.3d 600, 604 (7th Cir. 1994) (presuming that a party who has agreed to litigate abroad has received some compensation for the risk); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993) (reasoning that forum agreements should principally be enforceable because the financial effect of a forum selection clause will be reflected in the value of the contract).

ated burdens) could negatively impact American businesses and, in turn, hamper the country's economic growth and entrepreneurial spirit. The increased burdens and costs described above could likely be swallowed by larger businesses, such as Match.com, who have teams of attorneys to ensure compliance with local laws and litigate in remote places; the same cannot be said about smaller businesses, which typically do not have the same resources. Still, technology is a two-way street. It has not only brought businesses and consumers from across the world together, thereby increasing interstate and international litigation, but it has also been a driving force in reducing the costs of litigation. For example, with digital technologies like Skype, depositions can be taken remotely, saving parties both time and money. Similarly, with the advent of the Internet and more sophisticated government websites and databases, court documents, such as pleadings and motions, can be filed online in many courtrooms across the country.²¹¹

While the policy arguments made in *Bremen* and its progeny certainly do raise important concerns, they should not be determinative to the issues at hand. Specifically, the economic efficiency and freedom of contract policy arguments are not equally persuasive in all circumstances. When determining whether to enforce forum selection clauses, courts must consider the type of parties involved in the contract, the circumstances in which the contract was agreed to, and the nature of the dispute.²¹² There is a stark difference between presuming the enforcement of forum selection clauses freely assented to and bargained for by sophisticated commercial entities, such as the contract between the parties in *Bremen*, and presuming the enforcement of forum selection clauses in personal injury cases involving contracts of adhesion, such as the contract at issue in the Match.com cases.

First, personal injury claims are distinguishable from contract disputes. As a matter of principle, courts have “recognized that the interests of protecting and preserving human life weigh heavily when compared with that of protecting the economic integrity of various entities.”²¹³ Accordingly, in situations “where one must decide whether to implement a certain norm aimed at protecting the physical integrity of humans or one aimed at protecting economic welfare, preference should be given to the former.”²¹⁴

211. PACER, <https://ecf.ilnd.uscourts.gov/cgi-bin/login.pl> (last visited Feb. 6, 2015).

212. The benefits associated with forum selection clauses are quite clear in cases involving freely negotiated contracts between sophisticated commercial entities. However, the same benefits may not apply in cases involving unsophisticated consumers who “agreed” to the terms of a forum selection clause through a click-wrap agreement (which they likely did not read).

213. Karayanni, *supra* note 104, at 1040.

214. *Id.*

In that vein, torts are inherently more personal and thus more local. For example, in *Jane Doe*, Jane was allegedly raped in Chicago, where the lawsuit was filed. All of the witnesses were in Chicago as well as the assailant, Ryan Logan. In Jane's personal injury lawsuit, where Ryan Logan was also named as a defendant, a Texas court would not have had subject matter jurisdiction over the suit or personal jurisdiction over Ryan. Ultimately, there would need to be two trials, one in Chicago, Illinois, and one in Dallas, Texas. By contrast, had Jane Doe sued Match.com over a payment dispute, there would have been a weaker personal connection to Chicago. While Match.com advertised in Chicago to Chicago-area residents, and the contract was entered into in Chicago, a contract dispute over payment does not strike the same inherently local and deeply personal nerve associated with sexual assault or rape. And from a fairness standpoint, it does not seem right that the victim of an assault, battery, or any other similar tort be forced to bear the burden of extra travel costs and related expenses.

Second, it is important to distinguish contracts of adhesion from those contracts that are freely negotiated. "Contracts of adhesion" are standard form contracts presented on a take-it-or-leave-it basis, "usually presented to a consumer by a business entity."²¹⁵ There typically is no contemplation or negotiation over any of the terms of the contract, which are generally drafted by the "stronger party to the transaction."²¹⁶ One familiar example of a contract of adhesion is the Google Terms of Service Agreement, which "govern[s] the use of Google's websites, such as Google search, Gmail, or YouTube."²¹⁷ In these types of contracts, the public policy justifications for enforcement are diminished because contracts of adhesion, like the click-wrap agreements used by Match.com, are often not "accepted knowingly and voluntarily (and for consideration)."²¹⁸ These types of contracts are often excessively long and contain legalese. The use of small print also makes them difficult to read and understand.²¹⁹ Unsurprisingly, most consumers do not read them.²²⁰

215. Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 YALE J. ON REG. 313, 346 (2011).

216. *Id.*

217. *Id.*

218. *Id.* at 347.

219. Lucille M. Ponte, *Getting a Bad Rap? Unconscionability in Clickwrap Dispute Resolution Clauses and a Proposal for Improving the Quality of These Online Consumer "Products"*, 26 OHIO ST. J. ON DISP. RESOL. 119, 160-61 (2011).

220. *Id.* at 160.

B. We Risk the Wholesale Displacement of State Consumer Protection Laws

In addition, by enforcing forum selection and choice of law clauses promulgated en masse across the country, regardless of whether they conflict with a forum state's own laws, we risk the wholesale displacement of state consumer protection laws.²²¹ Through the wide-scale use of forum selection and choice of law clauses in adhesion contracts, businesses can choose a state with favorable consumer protection laws and impose those laws on citizens of the other forty-nine states.²²² State legislatures ultimately lose their ability to protect consumers in their own state.

In the article "Finding the Contract in Contracts for Law, Forum and Arbitration," William J. Woodward highlights some of the serious problems with allowing businesses to impose a chosen state's laws on consumers of a different state.²²³ As Woodward explains, when state lawmakers determine how much consumer protection they will provide their residents, they engage in a complicated political process that balances the state's interest in protecting its residents with the state's interest in creating a favorable business environment.²²⁴ In theory, a favorable business environment can create more jobs and tax revenue, which can be redistributed to a state's residents in the form of lower taxes and other benefits.²²⁵ But the question is: at what cost? States have to make trade-offs, where they create or give up some level of consumer protection in exchange for a more or less favorable business environment.²²⁶

Under the U.S. federal system, each state can decide for itself the proper "mix" of consumer protection it provides vis-à-vis its businesses.²²⁷ While some states, like Delaware, have prided themselves on a more favorable business environment, other states, like California, have chosen a more consumer friendly balance, even if it makes the State's business environment less favorable.²²⁸ The system works the way it is designed and is fair so long as the citizens of a state receive the benefit of the actual "mix" their state provides.²²⁹

221. Woodward, Finding the Contract, *supra* note 144, at 45.

222. *Id.* at 39.

223. *Id.* at 45 n.152.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 40, 45.

228. *Id.* at 45.

229. *Id.*

If citizens do not receive the actual “mix” their state provides, and instead receive the “mix” of another state, then the federal balance is upset.²³⁰ For illustrative purposes, assume the truth of what many pro-business lobbyists assert—that there is a correlation between a state’s consumer protection laws and its tax level.²³¹ The people living in “high” consumer protection states have higher taxes (in exchange for more protections), and the people living in “low” consumer protection states have lower taxes (in exchange for fewer protections).²³² If citizens of a “high” consumer protection state are subjected to the laws of a “low” protection state (by forum selection and choice of law provisions), they receive an unintended, and often unfair, balance (i.e., high taxes and low consumer protection).²³³ “Low” regulation states have an incentive to encourage this result because it makes them even more attractive to businesses.²³⁴

C. We Put Consumers at an Even Greater Disadvantage Vis-à-Vis Big Business

Similarly, states risk putting their citizens at an even greater disadvantage vis-à-vis big business, which already dictates the terms of their interactions with consumers. Generally, businesses, as “repeat players” in the legal system, have huge advantages over consumers in dispute resolution.²³⁵ Businesses have superior economic power and resources, enjoy economies of scale, and, through repetitive interactions, can develop friendly and cooperative relationships with court officials and the courts.²³⁶ Unlike consumers, who are typically “one-shotters,” businesses engage in litigation with long-term considerations and try to shape the development of the law through court precedent.²³⁷ Repeat players do not just consider the immediate financial stakes of an individual dispute.²³⁸ Rather, they often play the odds in their favor by settling cases that would create adverse precedent and litigating cases that will likely create rules promoting their interests.²³⁹

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. Shaubin Talesh, *How the “Haves” Come Out Ahead in the Twenty-First Century*, 62 DEPAUL L. REV. 519, 519 (2013).

236. *Id.* at 523–24.

237. *Id.* at 523.

238. *Id.*

239. *Id.*

In addition to shaping the law through strategic gamesmanship, businesses also shape the law through legislation.²⁴⁰ Unlike consumers, businesses have the money and resources to hire lobbying groups to influence state and federal legislation. The influence large internet companies has had on state legislation regarding the behavioral marketing industry is illustrative of the point. As online privacy expert Lori Andrews explains, big data companies like Facebook and Google give immense sums of money to politicians to block or influence any legislation against their interests in collecting user information—and use lobbyists to “strong arm” politicians they cannot buy.²⁴¹ The death of several bills in the 1990s that attempted to protect consumers’ personal information, including an individual’s credit history, purchases, and travel patterns, supports this argument.²⁴²

Accordingly, when consumer protection statutes are passed, states should be provided the means to enforce those laws, absent federal legislation to the contrary, because it helps equalize the unequal playing field. As Shauhin Talesh explains in “How the “Haves” Come Out Ahead in the Twenty-First Century,” legislatures pass consumer protection and remedial statutes, in theory, to “bolster the position of one-shotters” and/or protect disadvantaged groups, such as consumers.²⁴³ Consumer protection statutes attempt to equalize the playing field, so to speak, by providing consumers with fee-shifting, punitive damages, and attainable benchmarks for establishing liability.²⁴⁴

CONCLUSION

The Illinois court in *Jane Doe v. Match.com* had the authority to, and did, refuse to enforce Match.com’s forum selection clause pursuant to the public policy exception outlined in *Bremen*. The *Brodsky* case and other cases that came to the same conclusion have missed the mark. For Illinois state courts, as well as other state courts across the country, it is immaterial whether there is a split amongst the courts as to the scope and application of the public policy exception. The fact is that the exception exists. To

240. Interview by Phawker.com with Lori Andrews, Director, Inst. for Sci., Law & Tech. at Ill. Inst. of Tech. (Jan. 12, 2013), available at <http://www.phawker.com/2012/01/12/qa-with-online-privacy-expert-lori-andrews/>.

241. *Id.*

242. William J. Fenrich, *Common Law Protection of Individuals’ Rights in Personal Information*, 65 *FORDHAM L. REV.* 951, 987–89 (1996) (explaining how the marketing lobby was able to derail attempts by the California, New Jersey, and New York legislatures to protect consumers’ personal information).

243. Talesh, *supra* note 235, at 526.

244. *Id.*

preempt state consumer protection laws and any associated anti-waiver provisions, Congress must pass legislation to that end and clarify the existing uncertainty in the law.²⁴⁵ However, without Congress stepping in, federal courts should respect the principles of federalism and not enforce forum selection clauses that are in conflict with state consumer protection laws— at least in personal injury cases involving contracts of adhesion.

245. *See supra* note 143 and accompanying text.