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2012

The Dodd-Frank Act and the Future of State Commercial Transactions Law

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By Alvin C. Harrell

INTRODUCTION

The 2010 enactment of the Dodd-Frank Act¹ has injected a whole new world (or several worlds, as noted below) of federal administrative law into many routine economic transactions.² While this is a trend that has been underway for decades,³ the Dodd-Frank Act represents another leap in that direction, with implications for state law, lawyers, businesses and consumers.

Despite obvious similarities between our state and federal systems of law, there are also significant differences, and those differences have widened over the past 100 years. Among other things, much of state law is either common law or common law-based,⁴ including basic elements of our traditional social compact as embodied in civil procedure and the substantive law of contracts, property and torts. This system of laws and doctrines protects party autonomy, property and personal rights, and private remedies. In combination with constitutional concepts of federalism, due process, individual rights and limited government,⁵ this has provided Americans with a nearly unique state law environment for private commercial and consumer transactions, including, *e.g.*, an emphasis on custom, usage, private agreements, and judicial remedies.⁶

In contrast, federal law (at least for commercial and consumer transactions) is largely and increasingly administrative law, typically involving a detailed and comprehensive normative structure with extensive public mandates administered by an authoritative regulatory agency.⁷

For at least 100 years, in fits and starts but seldom receding, this federal administrative state has been expanding at the expense of state and local law.⁸ In the area of consumer financial services, this trend has accelerated since the late 1960s,⁹ with a major expansion since 2006,¹⁰ and took another quantum leap forward with the Dodd-Frank Act¹¹ and creation of the Bureau of Consumer Financial Protection (CFPB).¹² These 2010 changes (generally effective July 21, 2011¹³) are likely to have significant, practical implications, not only for consumer and commercial transactions law, the industry, and consumers, but also for the legal profession and the future of state laws, agencies and courts.

DIFFERENT LAWS, DIFFERENT WORLDS

The New Non-Uniformity

Increasingly, private parties, issues, and transactions in the United States are subject to significantly different systems of rules, depending on whether they are operating primarily under state law or within the direct jurisdiction of a federal administrative agency. As the latter jurisdiction has expanded it has become more

difficult to avoid, but lawyers and other private parties whose daily activities traditionally have fallen outside its borders may be slow to react or even unaware of these changes.¹⁴ As noted here, the Dodd-Frank Act accelerates this trend. As a consequence, as discussed below (and despite the nationwide uniformity that is achieved by federal law), lawyers, consumers, creditors, merchants and other market participants may find themselves in very different legal worlds, depending on how their transaction is structured.¹⁵

Door Number One – CFPB Supervision

Behind this door lies the new legal world for non-depository “covered persons,” *i.e.*, consumer financial services providers (and their customers), that engage in certain types of activities and therefore fall within the direct supervisory and examination authority of the CFPB.¹⁶ For some of these service providers (*e.g.*, non-depository home mortgage loan originators), this is a significant reversal of fortune as compared to prior law, taking them from a primarily state-regulated legal environment directly to the world of comprehensive federal supervision, regulation and examination.¹⁷

This reinforces (and codifies) recent, significant changes in the home lending markets, with consolidation and federalization of the residential mortgage industry being among the most obvious. Already, a handful of federally-regulated financial institutions plays a dominant role in originating home mortgage loans (supported by federal funding sources), and this has been accompanied by an exodus of private risk-capital and independent, local mortgage lenders, leaving the mortgage markets largely dependent on federal agencies and federally-supervised (and subsidized) funding sources.¹⁸ This is a very different world (for lenders and borrowers alike) as compared to traditional American home mortgage markets and lending transactions.¹⁹

Door Number Two – Enumerated Federal Laws

Behind this second door lies a CFPB regulatory authority that is broader (covering a wider and seemingly comprehensive set of enumerated federal laws²⁰), yet can be considered to have less depth in the sense that CFPB examination authority may be limited (*e.g.*, as regards small banks²¹) and the regulatory authority may be limited by the scope of the enumerated consumer laws (*see, e.g.*, the scope provisions of the Truth in Lending Act (TILA)²²). Moreover,

while the resulting CFPB jurisdiction is clearly broad, it is not unlimited, and this may allow transactions to be structured in ways that account for that jurisdictional reach.

The obvious example is a business plan designed to avoid consumer financial services transactions. While not all of the enumerated consumer laws are limited to consumer transactions,²³ many are; this means that a business plan limited to commercial credit transactions should be largely outside the scope of the CFPB and the CFPB, and perhaps governed primarily by traditional state laws. Similarly, the focus of the enumerated consumer laws (and therefore the CFPB and the CFPB) is financial services transactions (with a focus on credit); cash sales transactions (by a seller not affiliated with or referring customers to a creditor²⁴) also should be significantly outside the scope of the CFPB and the CFPB.²⁵

For those parties and transactions within the scope of the enumerated consumer laws (and the CFPB’s authority to curb unfair, deceptive and abusive practices²⁶), there is considerable uncertainty, due to the broad, discretionary (and in some ways unprecedented) authority of the CFPB.²⁷ At the time of this writing probably no one (at least outside the CFPB) can say for sure how this authority will be interpreted and used.²⁸ Obviously, some traditional practices, state laws and legal standards are newly at risk.²⁹ Participants in this world of enumerated federal laws and other consumer transactions are likely to find at least some of their precepts challenged, and may find themselves in a legal environment that is different from the past in important ways.

Door Number Three – State Law

Here, perhaps, is a surprise — both for those who may be unaware they are entering doors number one and two, and for those eager that everyone else do so: Despite the quantum leaps forward in the scope of federal administrative law in recent decades (culminating, to date, in the Dodd-Frank Act), a significant range of transactions remains subject to traditional state law legal principles.³⁰

Partly this is because the legal “marketplace” has spoken, and often favors traditional private transactions, state law, and judicial remedies, to the extent they remain available. Two illustrations should suffice. First, despite the extensive public and private statutory remedies available under federal consumer finan-

cial laws, such as the TILA, much consumer-related litigation is still conducted in state court under traditional state laws (including contract, property, and tort law, state consumer protection laws such as the Uniform Consumer Credit Code (U3C), and the UCC³¹). In some of these cases, federal law is a mere adjunct to the underlying state causes of action.³² Partly this may reflect plaintiffs' preference for a favorable judicial forum (*i.e.*, forum shopping). But partly it is also a reflection of the fact that state legal norms and remedies often are more user-friendly, on both sides of the transaction.³³

Another example can be found in the context of check deposits and collections, involving the relationship between Federal Reserve Board (FRB) Regulation CC³⁴ and UCC Articles 3 and 4.³⁵ The scope of Regulation CC is broad as to aspects of the check collection process,³⁶ and it clearly preempts state law such as the UCC as to any inconsistency.³⁷ Yet, the overwhelming majority of the checking system case law is governed by the UCC,³⁸ and this case law is extensive despite the diminishing role of such transactions.³⁹ While all of this ultimately may change, as federal administrative law increasingly preempts the UCC,⁴⁰ for now it demonstrates a preference for state law, transactions and remedies on the part of many lawyers, merchants, creditors and consumers.

So, it is quite possible that such parties will desire to continue having their legal relations governed primarily by state law, rather than federal regulation. While this may not always be possible, especially for consumers, to the extent that it is possible private transactions may be increasingly differentiated by whether they are subject primarily to state or federal law — *e.g.*, according to the strata noted here: Some transactions (*e.g.*, residential home mortgage loans), possibly aided by federal subsidies or constrained by federal regulation, will go through door number one and be limited to transactions with large entities pursuant to comprehensive federal supervision;⁴¹ other transactions (*e.g.*, vehicle loans) may be conducted with consumers by a broader range of entities, pursuant to federal consumer financial laws with a limited scope, such as TILA, and

“A remaining important legal issue for all concerned is: how to determine which door the parties are entering.”

therefore will pass through door number two;⁴² still other transactions will pass through door number three and be covered primarily by traditional state laws and legal principles. Each of these transaction categories will be subject to a very different legal environment.

A remaining important legal issue for all concerned is: how to determine which door the parties are entering. This is likely to be a significant issue for practitioners, businesses and consumers in the years ahead, even more so than in the past. For example, the scope of TILA has seemed to diminish in importance in recent years, as creditors came to appreciate the litigation benefits of the TILA disclosures and embraced them almost across the board.⁴³ That may now change, if TILA under the CFPB is perceived to carry with it an increasingly onerous compliance burden.⁴⁴ Thus, where possible, it may become more important to conduct transactions (*e.g.*, cash transactions and commercial loans) outside the scope of TILA, in order to avoid unnecessary legal and compliance costs, risks, liabilities and other burdens. The implications of this are discussed below.

IMPLICATIONS FOR STATE LAW

A long-standing benefit of our common law-based federalist system has been the ability of private parties to structure transactions in creative ways so as to fit within (or outside of) applicable legal mandates.⁴⁵ This task has become increasingly difficult, and at the same time increasingly important, as federal administrative law has expanded these mandates in recent years. This requires consideration of the extent to which state laws (such as the UCC and related laws) still apply in an age of seemingly comprehensive federal administrative law and regulation.⁴⁶

The UCC remains the foundational state commercial law governing personal property transactions⁴⁷ and, of course, it has long been subject to extensive federal preemption⁴⁸ (or incorporation⁴⁹). But, as noted, and despite this preemption, UCC law and issues have continued to play a predominant role in private transactions (and litigation⁵⁰). Thus, an important question is: How and to what extent will

this continue to be the case in our emerging 21st century legal environment?

At this point, of course, the larger part of any answer is necessarily limited to speculation (or worse, pure guesswork), but that does not mean the exercise is irrelevant or useless. So, the following observations are offered.

As noted, the focus of the CFPA and CFPB is consumer protection,⁵¹ while the UCC governs commercial as well as many consumer transactions. Therefore, assuming Congress does not decide to wholly preempt state commercial laws, and assuming the CFPB does not branch too far in that direction,⁵² many commercial transactions and issues should continue to be governed largely by state law including the UCC. This should include, *e.g.*: commercial sales of goods (UCC Article 2); commercial equipment leases (Article 2A); negotiable instruments in commercial transactions (including promissory notes and drafts) (Articles 3 and 4);⁵³ letters of credit (Article 5);⁵⁴ documents of title (Article 7);⁵⁵ investment securities (Article 8);⁵⁶ and commercial personal property secured transactions (and related: consignments; sales of accounts, chattel paper, payment intangibles and promissory notes; agricultural lien priorities, etc.) (Article 9).⁵⁷

Thus, parties limiting themselves to commercial-purpose transactions may have legal relationships largely outside the scope of CFPB jurisdiction and rules,⁵⁸ thereby remaining within the scope of state laws including the UCC and traditional federal agencies such as the FRB and the Securities Exchange Commission (SEC) (and/or their state government counterparts).⁵⁹ Of course, this may be subject to change as to individual issues or UCC Articles. For example, in 2008 the sponsors of the UCC⁶⁰ formed a Study Committee on Financial Institution Regulation and Payment Issues⁶¹ to consider the need for possible revisions to UCC Articles 3 and 4.⁶² This committee included participation by a variety of federal agencies, including the FRB. While this project has now been postponed, it is possible that the results of such a project ultimately may include significant changes to UCC Article 3, perhaps affecting commercial as well as consumer transactions and reflecting an increased role for federal regulatory agencies.⁶³

Another possible example of an increased federal role in the UCC involves UCC Article 9. The rules in Article 9 Part 6 govern enforce-

ment of both commercial and consumer security interests (although in some instances there are separate provisions for each⁶⁴). If federal agencies, such as the CFPB or the FTC,⁶⁵ decide to preempt parts of Article 9 Part 6 as to consumer transactions (or even more broadly), *e.g.*, by issuing rules that designate certain prevailing practices as unfair, deceptive or abusive,⁶⁶ the spillover effects could affect commercial transactions as well. The same can be said for aspects of UCC Article 2 (governing sales of goods), even though the scope of the CFPB is directed at financial transactions.

Broadly speaking, then, personal property transactions governed by the UCC Articles or state laws directed at largely commercial transactions, and especially those that already operate in conjunction with existing federal agency law (*e.g.*, UCC Articles 4A, 5, 7 and 8),⁶⁷ should be mostly unaffected by the CFPA and related activities of the CFPB. The same should be true of commercial real estate transactions. Non-credit consumer transactions (*e.g.*, sales of goods under UCC Article 2) may be similarly unaffected, subject always, however, to the possible designation of a practice as posing risks to consumers or being unfair, deceptive or abusive.⁶⁸ Commercial transactions under UCC Article 9 should continue to be governed by that law, again subject to the designation of a practice as posing risks to consumers or being unfair, deceptive or abusive (and other potential spillover effects of federal rules directed at, *e.g.*, Article 9 Part 6). But interested parties relying on these distinctions will need to be aware of the respective and evolving parameters of state and federal laws, an increasing challenge given that these issues are in such a dramatic state of flux.

CONCLUSION

This analysis suggests that a significant (though diminished) swath of private transactions (primarily commercial and non-financial transactions) will remain largely subject to the UCC and other state laws.⁶⁹ This may be important, *e.g.*, to lawyers, businesses and their customers that rely on the intuitive, user-friendly nature of state contracts, tort and property laws (and the UCC) and cannot afford the costs and burdens of monitoring and compliance with the complex and ever-changing world of federal administrative law.⁷⁰

For many businesses, the alternative to state law is to go out of business, or at least to dis-

continue the lines of business subject to comprehensive federal laws and regulations.⁷¹ The result is likely to be a continuing trend toward consolidation (and concentration) in those industries (such as banking and home mortgage lending) that cannot escape the comprehensive federal regulatory umbrella.⁷² In some sectors of these markets, the results may be an economic concentration that will leave segments of society unserved by the private economy, and dependent on other sources such as the federal government.⁷³

But for those lawyers, businesses and customers who are able to fit their transactions into categories that are at least partly outside the scope of a seemingly comprehensive federal administrative law system — barring unforeseen developments — the UCC and other state common law-based legal structures will still exist⁷⁴ to provide a foundation for consensual private transactions. It is likely that identifying and understanding the boundaries and relationships of these strictures, transactions and issues will be an increasingly important part of the lawyer's role.

1. The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

2. See, e.g., *infra* notes 16 & 17.

3. See, e.g., Barkley Clark, "Secured Transactions," 42 *Bus. Law.* 1333, 1333-34 (1987) (FORWARD: GROWING FEDERAL PRESENCE IN THE LAW OF SECURED TRANSACTIONS).

4. Including codifications such as the Uniform Commercial Code (UCC).

5. For a recent discourse on these issues in a case on otherwise unrelated (criminal law) issues, see, e.g., *Bond v. United States*, 564 U.S. ___, 131 S.Ct. 2355, 2011 U.S. LEXIS 4558, 79 USLW 4490 (U.S. S.Ct. June 16, 2011) (illustrating the uniqueness of our federalist system). For another case, although the decision in the case is largely of only historical interest, at another point in the chronological spectrum, see also *Erie R.R.V.E. Tompkins*, 304 U.S. 64, 78 (1938) ("There is no federal general common law."). These issues are an important part of what is sometimes called "American exceptionalism." See, e.g., Victor Davis Hanson, Commentary, "a toast to American exceptionalism," *Oklahoman*, July 1, 2011, at 10A.

6. Of course, this emphasis has never been total; but it has been significant. See, e.g., UCC §1-103(a)(3).

7. Again, this is not a total emphasis, as illustrated by the extensive private litigation under the federal Truth in Lending Act. See, e.g., ROHNER & MILLER, *infra* note 22, Chs. 1 & 12. But this is correct as a generalization.

8. See, e.g., Clark, *supra* note 3.

9. A notable prior leap in this direction occurred with enactment of the federal Consumer Credit Protection Act, Pub. No. 90-321 (1968), but there have been many other examples since. See, e.g., ROHNER & MILLER, *infra* note 22, Ch. 1. Regarding federal regulation of the housing and mortgage markets, see also, e.g., Alvin C. Harrell, "The Great Credit Contraction: Who, What, When, Where and Why," 26 *Ga. St. Univ. L. Rev.* 1209 (2010).

10. See Harrell, *supra* note 9; *infra* notes 18-19.

11. See *supra* note 1.

12. *Id.*, Title X, §§1001-1067 (The Consumer Financial Protection Act, or CFPB).

13. See 75 Fed. Reg. 57252 (Sept. 20, 2010) (establishing the "designated transfer date" for transfer of regulatory functions to the CFPB).

14. In your author's experience, lawyers accustomed to the state law world of private contracts, negotiations, and judicial remedies sometimes are ill-prepared for representing clients in the very different world of federal administrative agencies.

15. This nonuniformity is more commonly recognized in the context of payment transactions (where this nonuniformity is sometimes cited as evidencing a need for a further expansion of federal law, to eliminate the disparities). See, e.g., Mark E. Budnitz, "Payment Systems Update 2005: Substitute Checks, Remotely-Created Items, Payroll Cards and Other New-Fangled Products," 59 *Consumer Fin. L.Q. Rep.* 3, at 9 (2005) (raising this issue). See also *infra* this text and notes 31-37. However, as discussed below, such nonuniformity is a far more prevalent phenomenon than this narrow example suggests. Ironically, then, the result of increasing federalization is sometimes more rather than less nonuniformity, although it is a nonuniformity based on parties and transactions rather than state borders.

16. Section 1002(b) of the Dodd-Frank Act, *supra* note 1, defines the term "covered person" to include any provider of consumer financial products or services (as defined at *id.* §1002(5)). Section 1002(15) denotes 30 activities that are deemed to be financial products or services subject to CFPB authority. Covered persons are subject to regulations issued by the CFPB pursuant to 18 "enumerated consumer laws" (see *id.* §1002(12)) or other "federal consumer financial law[s]" (as defined at *id.* §1002(14)), but are not necessarily subject to regular reporting requirements and examinations by the CFPB unless the covered person is also within the scope of Dodd-Frank Act §1024. The latter include covered persons who: originate, broker or service residential mortgage loans; provide mortgage loan modification or foreclosure relief services; are "larger participants" (to be defined by regulation); are found by the CFPB to be involved "in conduct that poses risks to consumers..."; make "private education loans[s]"; or make "payday loan[s]." See *id.* §1024(a). The inclusion of "conduct that poses risks to consumers" apparently gives the CFPB considerable leeway to expand its own jurisdiction. There is also a list of parties excluded from the CFPB, including lawyers while engaged in the practice of law. See *id.* §§1027-1029.

17. In some ways, the scope of this CFPB authority is relatively narrow (see *supra* note 16), but within that scope the authority is very deep. See, e.g., John L. Ropiequet, Christopher S. Naveja & Jason B. Hirsh, "The Dodd-Frank Act Changes the Consumer Finance Landscape," 64 *Consumer Fin. L.Q. Rep.* 284 (2010); Richard P. Hackett & Frank H. Bishop Jr., *Summary of the Consumer Financial Protection Act of 2010, id.*, at 295. It is sometimes said that home mortgage lenders were previously "unregulated." In your author's experience, this is a misnomer, as mortgage lending has long been one of the most heavily-regulated activities, at both state and federal levels. See also Niall Ferguson & Ted Forstmann, Opinion, "Back to Basics on Financial Reform," *Wall Str. J.*, April 23, 2010, at A19 ("[T]he crisis of 2007-2009 originated in one of the most highly regulated sectors of the financial system: the U.S. residential mortgage market."). See also Harrell, *supra* note 9. But there can be little doubt that the new world of CFPB supervision and examination is an entirely different matter.

18. See, e.g., Alvin C. Harrell, Commentary, "The Perils of Public Finance," 64 *Consumer Fin. L.Q. Rep.* 253, 254-56 (2010).

19. *Id.*, at 256-58; see also Nick Timiraos & Maurice Tamman, "Tighter Lending Crimps Housing," *Wall Str. J.*, June 25-26, 2011, at A1.

20. See *supra* note 16.

21. Compare, e.g., the direct and exclusive examination authority, with respect to federal consumer financial laws, as to insured depository institutions with total assets over \$10 billion (Dodd-Frank Act, *supra* note 1, §1025) with the CFPB's limited examination authority over smaller depository institutions (*id.* §1026).

22. 15 U.S.C. §§1601-1666j. See, e.g., RALPH J. ROHNER & FRED H. MILLER, *TRUTH IN LENDING* Ch. 2 (2000 & 2009 Suppl.). But see *supra* note 16 (referencing CFPB jurisdiction over other "conduct that poses risks to consumers"); *infra* notes 25 & 65.

23. See, e.g., the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§1691-1691f, designated an enumerated consumer law at Dodd-Frank Act, *supra* note 1, §1002(12)(D).

24. See 16 CFR pt. 433 (2010) (FTC Holder in Due Course Regulations).

25. See *supra* note 16; Dodd-Frank Act, *supra* note 1, §1027 (excluding cash sales of goods and services not covered by a federal consumer financial law, among other things). However, this does not bind the Federal Trade Commission (FTC). See FTC Act, 15 U.S.C. §45; Dodd-Frank Act, *supra* note 1, §1061(b)(5)(C) (retained authority of the FTC). See also *infra* notes 26 & 66; see generally *infra* this text and notes 30-44 (Door Number Three – State Law) and 45-68 (Implications for State Law).

26. See Dodd-Frank Act, *supra* note 1, §1031. See also *id.* §1405 (abusive, unfair, deceptive and predatory mortgage practices); *supra* note 16 (referencing the CFPB authority to regulate "conduct that poses risks to consumers").

27. See *supra* notes 16-17.

28. But see *infra* note 51.

29. See *infra* Part III. Your author is aware that a salient feature of the Dodd-Frank Act is its new limitations on federal preemption of

state law by the bank regulatory agencies. *See, e.g.*, Roland E. Brandel & Jeremy R. Mandell, "Preemption under the Consumer Financial Protection Act of 2010," 64 *Consumer Fin. L.Q. Rep.* 307 (2010). However, the preemption authority inherent in the CFPB jurisdiction over enumerated consumer laws and federal consumer financial laws opens the door to increased federal preemption of a different kind.

30. *See supra* this text and notes 23-25; discussion below; and *infra* this text and notes 45-68 (Implications for State Law).

31. For a sampling of the latter, *see* "Uniform Commercial Code Issues and Developments," 64 *Consumer Fin. L.Q. Rep.* 316 (2010); "Survey-Uniform Commercial Code," 65 *Bus. Law.* 1205 (2010). The U3C has been enacted in Oklahoma and is codified at Tit. 14A Okla. Stat. §§1-101 – 9-101.

32. *E.g.*, alleging a TILA violation as the basis for a state-law fraud claim.

33. This includes but is not limited to requirements for documentation of the transaction. *Compare, e.g.*, the documentation required for a small commercial real estate loan, governed primarily by state law, with that of a consumer home mortgage loan, governed heavily by federal law. As another example, one impetus for the Dodd-Frank Act, *supra* note 1, at least among plaintiffs' lawyers, was a desire to limit preemption of state laws by federal banking agencies. *See, e.g.*, Brandel & Mandell, *supra* note 29. Partly, it should be emphasized, this preference for state law may arise because the state law issues are governed by widely-accepted and easily understood common law principles and well-written uniform laws such as the U3C and UCC. But this merely emphasizes the point made in the text. Sometimes, it should be noted, the pressure for federal preemption comes from large, nationwide creditors seeking to overcome the patchwork of unrealistic and nonuniform laws in some states. Thus, a failure of the states to update and rationalize their laws is an invitation to pressures for federal preemption.

34. 12 CFR pt. 229. *See also infra* note 35, and *infra* this text and notes 45-68 (Implications for State Law).

35. *See, e.g.*, FRED H. MILLER & ALVIN C. HARRELL, *THE LAW OF MODERN PAYMENT SYSTEMS AND NOTES* ¶ 8.04 (2002 & 2008 Suppl.); *supra* note 14.

36. *See* 12 CFR pt. 229, Subpart C, 12 CFR §§229.30 - 229.43; Miller & Harrell, *supra* note 35.

37. *See supra* note 35. This is not a new issue. *See, e.g.*, Alvin C. Harrell, "UCC Article 4 and Regulation CC: Can They Ever be Reconciled?," 54 *Consumer Fin. L.Q. Rep.* 236 (2000).

38. For an illustrative sampling, *see, e.g.*, Alvin C. Harrell & Robert T. Luttrell III, "Current Issues in Negotiable Instruments Law, Deposit Accounts and Payment Transactions," 64 *Consumer Fin. L.Q. Rep.* 316 (2010); *supra* note 31.

39. *See, e.g.*, Robert T. Luttrell III & Alvin C. Harrell, "Update on Deposit Account, Negotiable Instrument, and Payment System Issues and Developments," 65 *Consumer Fin. L.Q. Rep.* [in press] (2011).

40. Potentially with a corresponding diminution in state law litigation, a trend that may impact the legal profession. *See, e.g., supra* notes 17, 29 & 33; *infra* this text and notes 45-68 (Implications for State Law).

41. *See, e.g.*, Robert A. Cook & Meghan Musselman, "Summary of the Mortgage Lending Provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act," 64 *Consumer Fin. L.Q. Rep.* 231 (2010); *supra* this text and notes 16-19 (Door Number One – CFPB Supervision). Obviously, this is a model followed in numerous other countries, but not (until recently) in the United States. *See, e.g.*, Harrell, *supra* note 18, at 256-257. Today, it is the new normal. *See, e.g., id.*; Timiraos & Tamman, *supra* note 19.

42. *See supra* this text and notes 20-29 (Door Number Two – Enumerated Federal Laws).

43. *See, e.g.*, ROHNER & MILLER, *supra* note 22, Ch. 2.

44. *See, e.g.*, sources cited *supra* at notes 16 & 17; *supra* this text at notes 29-30; *supra* note 37.

45. *See generally supra* note 5. Without suggesting a direct parallel, it can be noted that this phenomenon is not limited to the United States. *See, e.g.*, Andrew Collier, Opinion, "How China's Banks Break the Rules," *Wall Str. J.*, June 29, 2011, at A15. A significant difference, however, is that in the United States this has been possible within the law.

46. *See also supra* notes 26 – 29 and accompanying text.

47. *See, e.g.*, UCC §2-102 (Article 2 applies to "transactions in goods"); *id.* §9-109(a)(1) (Article 9 applies to "a transaction, regardless of form, that creates a security interest in personal property"). Other UCC Articles and scope provisions complete the almost comprehensive UCC coverage of personal property transactions, with the primary exception of sales, licenses and leases of general intangibles (some of which are covered by the Uniform Computer Information Act (UCITA), as applicable).

48. *See, e.g.*, the impact on UCC Articles 3 and 4 of: FRB Regulation CC (12 CFR pt. 229); and the Check Clearing for the 21st Century Act,

12 U.S.C. §§5001-5018 ("Check 21"). *See also supra* this text and notes 3, 15, 34-40.

49. *See, e.g.*, FRB Regulation J, 12 CFR pt. 210 (incorporating provisions of UCC Article 4A).

50. Again, the UCC Article 4/FRB Regulation CC example is instructive. *See, e.g., supra* this text and notes 34-40.

51. *See supra* note 16. However, as also noted, some of the enumerated consumer laws, *e.g.*, the ECOA, cover commercial as well as consumer transactions. *See supra* note 23. *See also supra* note 25, and *infra* note 65. As reported in the press, the CFPB has announced that it will focus initially on the following areas of law: "debt collection; consumer reporting; consumer credit and related activities; money transmitting; check cashing and related activities; prepaid cards; and debt-relief services... [plus] automobile loans and personal loans..." *See* Deborah Solomon & Maya Jackson Randall, "Agency Outlines Role," *Wall Str. J.*, June 24, 2011, at C3.

52. *See, e.g., supra* note 16 (CFPB authority over "conduct that poses risks to consumers").

53. *But see supra* this text and notes 34-40 and 48; discussion below at notes 60-63.

54. Subject, as now, to related laws such as: the Uniform Customs and Practice for Documentary Credits (UCP); the United Nations Convention on Independent Guaranties and Stand-by Letters of Credit; and Office of the Comptroller of the Currency (OCC) Interpretive Rulings, 12 C.F.R. §§7.1016 & 7.1017. *See generally* Alvin C. Harrell & Fred H. Miller, *Commercial Transactions, Documents of Title, Letters of Credit*, 15 WEST'S LEGAL FORMS Ch. 8 (4th ed. 2009).

55. Subject to related federal laws, such as: the United States Warehouse Act, 7 U.S.C.A. §§241 *et seq.*; the Federal Bills of Lading Act, 49 U.S.C.A. §§80101-80116; the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C.A. §§11706, 14706 & 15906; the Harter Act, 46 U.S.C.A. §§190-195; and the Carriage of Goods by Sea Act, 46 U.S.C.A. §§1300-1315. *See generally* the administrative regulations applicable to interstate bills of lading, 49 C.F.R. §§1035.1 *et seq.*; Alvin C. Harrell & Fred H. Miller, *Commercial Transactions, Documents of Title, Letters of Credit*, 15 WEST'S LEGAL FORMS Ch. 1 (4th ed. 2009).

56. Subject to federal securities laws. For illustrations of the continuing relevance of UCC Article 8, *see, e.g.*, Howard Darmstadter, "Investment Securities," 65 *Bus. Law.* 1283 (2010).

57. *See* UCC §9-109 (scope of Article 9).

58. This is not limited to personal property transactions under the UCC; much the same can be said for commercial real estate transactions, governed by state real property law rather than the UCC. *But see supra* notes 50 & 52.

59. For banks, this includes state and federal bank regulatory agencies.

60. The Uniform Law Commission (ULC) and American Law Institute (ALI).

61. The chair was Professor Fred H. Miller and the reporter was Professor Linda J. Rusch.

62. While the initial focus was payment issues, the scope was subsequently redirected to focus on mortgage notes and loans, in response to the foreclosure crisis.

63. *See, e.g.*, Committee memorandum of Oct. 6, 2009, available at www.mcusl.org; Fred H. Miller, "UCC Study Committee on Payment Systems Postponed," 65 *Consumer Fin. L.Q. Rep.* 437 (2011).

64. *See, e.g.*, UCC §§9-613 and 9-614.

65. The FTC has, and under the Dodd-Frank Act retains (either exclusively or in conjunction with the CFPB), enforcement authority regarding: Section 5 of the FTC Act, 15 U.S.C. §45; TILA, 15 U.S.C. §§1601-1666j; the Consumer Leasing Act, 15 U.S.C. §§1667-1667f; Regulation Z, 12 CFR pt. 226; the ECOA, 15 U.S.C. §§1691-1691f and Regulation B, 12 CFR pt. 202; the Electronic Fund Transfer Act, 15 U.S.C. §§1693-1693r and Regulation E, 12 CFR pt. 205; and the Gramm-Leach-Bliley Act, 15 U.S.C. §§6801-6809. *See, e.g.*, FTC Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles, 76 Fed. Reg. 14014, n. 2 (March 15, 2011) (notice announcing public roundtables). *See also supra* note 25.

66. *See id.*, and *supra* notes 16 and 26.

67. *See supra* notes 47-50.

68. *See supra* notes 16, 25, 26, 51 & 65.

69. Consumer transactions will also remain subject to some state laws, including consumer protection laws, but this will be subject to an increasingly complex (and perhaps restrictive) overlay of federal regulations and supervision. *See, e.g., supra* notes 16-17, 25-27, and 65.

70. *See, e.g.*, Opinion, Review & Outlook, "Not So Cool Rules," *Wall Str. J.*, May 28-29, 2011, at A14 (noting the cost and impact of the federal regulatory burden on American businesses).

71. *Id.* In some instances that may, in fact, be the intention.

72. *See supra* this text and notes 16-19 (Door Number One – CFPB Supervision).

73. Perhaps the experience with national Prohibition offers some relevant lessons. See, e.g., Opinion, Thomas Fleming, "Prohibition: A Cautionary Tale," *Wall Str. J.*, Jan. 4, 2010, at A17. See also: Alvin C. Harrell, "Commentary: Treasury/HUD Report on Reforming America's Housing Finance Market," 65 *Consumer Fin. L.Q. Rep.* 208 (2011); Fred H. Miller, "Prime Interest Rates for Subprime Borrowers?," 26 *Ga. St. Univ. L. Rev.* 1259 (2010); William M. Clark, "An Economic Analysis of the Oklahoma Installment Loan Industry," 60 *Consumer Fin. L.Q. Rep.* 487 (2006); Harrell, *supra* note 18.

74. At least in some states. Of course, states wishing to be in this category, so as to foster commercial transactions and economic growth, will need to update their commercial transaction laws by, e.g., enacting the 2010 amendments to the uniform text of UCC Article 9 and companion reforms such as the Uniform Certificate of Title Act (UCOTA). A state's failure to maintain updated commercial transaction laws will be an invitation to increasing irrelevance. See, e.g., *supra* note 33.

ABOUT THE AUTHOR



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