Commentary: The Surprising Decline (and Fall?) of Consumer Mortgage Law and Litigation

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I. Introduction

Among the modern legal trends in America, that may come as a surprise to some observers (given the modern emphasis on consumer protection law, often at the expense of traditional common law, e.g., contracts and property law, principles), is this: Private consumer protection rights, remedies and litigation are becoming less important to mortgagees and consumers. While trial lawyers and others concerned with the preservation of consumers’ litigation rights may be inclined to focus on arbitration as the paramount enemy of these rights, it is possible that the biggest legal risk to private consumer litigation in mortgage transactions is coming from an entirely different direction.

Partly this reflects the more obvious corollary that the focus of American law has shifted dramatically, from a common law structure based on private litigation to an administrative law system based on public enforcement. But the decline in the importance of traditional consumer law remedies and litigation in mortgage lending has roots and implications that go beyond the expanding reach of administrative law, with potential consequences for businesses, consumers, and the legal profession. In contemplating this point, consider the examples and developments noted below.

II. Impact of the Electoral Cycle on Housing Finance

Much has been said about the housing, lending and foreclosure crisis (and resulting “Great Recession”) that began in late 2006, hit the front pages in 2008, and to a degree (particularly for subprime borrowers) continues to this day as partly reflected in the subsequent (and continuing) subpar worldwide economic recovery. While it can be expected that such issues will generate disagreement among various observers (with, of course, the usual influence of political partisans...
regarding such matters), the basic history should be clear: Subprime mortgage credit began to dry up in 2006, so that by 2007 subprime borrowers could no longer buy, sell or refinance their homes; quite predictably this led to a collapse of housing values in many areas, and ultimately a spike in foreclosures. This coincided with a regulatory crackdown on subprime mortgage lending, partly in response to vocal pressure from Congress. By 2008 these trends had begun to permeate the public consciousness, and investment capital fled the markets that funded mortgage-backed securities, creating a liquidity crisis and daunting entities such as Bear Stearns (which was rescued) and Lehman Brothers (which was not).1

Undoubtedly the severity of the resulting downturn was exacerbated by the massive size of the housing “bubble” created during the 1993 – 2006 housing boom, facilitated by an expansive Federal Reserve Board (FRB) monetary policy.2 Nonetheless, the immediate cause of the crisis (arguably the precipitating factor) was not too much subprime credit (as is commonly posited), but too little, i.e., the sudden reversal of the widespread availability of subprime mortgage credit.

This basic point should not be overlooked in discussion of the factors (including federal monetary and regulatory policies and affordable housing programs) that contributed so much to the preceding housing boom (which after the crash became widely known as a “bubble”): instead, all of these factors should be viewed as part of the overall history of this period. Thus, an important issue is this: Why did financial market conditions change so rapidly and dramatically, with subprime mortgage credit going from being so readily available in 1993 – 2005 to becoming so scarce beginning in late 2006?

One answer lies in the rising chorus of complaints about “predatory” mortgage lending that was building, as reflected in Congressional, media, legal and regulatory reports that reached a crescendo in 2006, in conjunction with an important midterm election season. These events had a predictable impact on subprime mortgage lending and investments.3

An important factor was the election in the 2006 Congressional elections of strong legislative majorities heavily focused on attacking predatory lending. By mid-2006 it was increasingly clear that a public policy focus adverse to subprime mortgage lending was in the offing. The November 2006 Congressional elections dramatically confirmed this point. Investors and lenders reacted just as one would expect, by cutting back on investments and loans to subprime borrowers. By mid-2007 there could be no remaining doubts about this. Subsequent election cycles in 2008 and 2010, including of course enactment of the Dodd-Frank Act, solidified (indeed, codified) this policy shift. Not surprisingly, as discussed below at Part III, federal regulatory policy embraced and reinforced this trend. The die was cast for the future of American housing and mortgage finance (and the impact on the broader U.S. and world economy).4

III. Impact of the Regulatory Environment

Just as (it has been said) the Supreme Court reads the election results, so also it is apparent (and understandable) that federal regulatory agencies do so. One such occasion was 2006, when the FRB responded to increasing media and political pressure by using its discretionary authority under the Truth in Lending Act (TILA) to issue new regulatory restraints on subprime mortgage lending, including fundamental legal changes in the FRB “ability-to-repay” (ATR) rule.5

There is no need to repeat all of the details here, as that information is readily available elsewhere.6 Suffice it to say that the FRB ATR rule created significant new legal and regulatory risks for anyone engaged in extending or funding subprime mortgage loans. This reflected a major shift in federal policy, designed to address (or even reverse) the widespread availability of subprime mortgage credit. In this regard the policy was wildly successful. The subprime real estate and lending markets promptly collapsed in many areas of the country.7

But, of course, the worst was yet to come. The Dodd-Frank Act converted the ATR rule from a regulatory policy, with some hope of timely reconsideration and potential reform, into part of a larger, comprehensive statutory package that essentially serves as a permanent bar to broad-based private subprime mortgage

4. Notably, it was a legal and mortgage lending crisis that led to the liquidity crisis, rather than the other way around as is sometimes supposed. See, e.g., infra note 8.

5. See supra note 8.

6. In all of the commentary on the Great Recession, there has been surprisingly little discussion of this salient point, with all of its implications for future policy choices. Your author would venture at this time, from more than a decade of the crash and subprime lending, but there was no indication it would have an adverse impact on credit availability. The issue had been largely disregarded from public discussion.


8. See supra, Note Light, Administration Takes Heat on Mortgages, Wall St. J. July 16, 2015, at A1; Banks, advocacy groups say over 300,000 have lost money, many kept losing money, see supra, Note 7. See also supra, Note 7.

9. The observation about the Supreme Court comes from, e.g., Peter J. Grant, V. M. DODD AND THE LAW OF THE PEOPLE (1993). Interestingly, the structure of the Bureau of Consumer Financial Protection appears to be designed to prevent such influence in the future, e.g., by providing the agency with funding that is independent of Congressional appropriations. See, e.g., supra note 7.


12. See supra, Note Light at 11. Subsequent regulatory policy has reinforced the trend. See, e.g., supra, Note 2, and David H. Stigler, President of the Cato Institute, Remarks at the D.C. League of American Credit Unions, Oct. 27, 2015, at A2; see infra Part V, and this text at notes 18-20.
lending. Combined with the aggressive enforcement authority of federal regulators and some uncertainty with respect to the future agenda of the Bureau of Consumer Financial Protection (CFPB), this legal environment meant the end of traditional private subprime mortgage finance (see Part V, below) and doomed large swaths of the American housing market to permanent status as economically distressed areas. This created new opportunities for an expansion of rental housing (and higher rents), along with expanded federal programs to help some of the poor and moderate-income consumers now shut out of the housing and mortgage markets. But none of this has been sufficient to fill the void left by the collapse of private subprime lending; and along the way federal policy-makers needed to clean up the residue of the crisis that began in 2006–2008, as noted below.

IV. Role of the Holder-in-Due-Course Doctrine in Housing Finance

Given that these matters are commonly viewed as relating primarily to housing and real estate mortgage law, some observers may not be fully aware of the impact on all of this of the Uniform Commercial Code (UCC) and in particular the UCC Article 3 holder-in-due-course (HDC) doctrine. Of course, the HDC doctrine did not originate with the UCC, but currently it mostly resides there, e.g., at sections 3-302, 3-305 and 3-306. While state consumer laws such as the Uniform Consumer Credit Code (UCC) and the Federal Trade Commission (FTC) anti-holder-in-due-course rule have limited the HDC doctrine in consumer credit sales of goods and services, the HDC doctrine as codified in the UCC remains largely intact for home mortgage notes, despite vocal opposition by some consumer advocates and scholars. Moreover, the credit industry has not always been vigorous in defending the HDC doctrine (perhaps because it supports alternative sources of funding from small investors).

Thus, the politics of it all have disfavored the HDC doctrine for years, and with the intensified attacks on predatory lending, the subsequent foreclosure crisis generating new pressures for measures to allow more consumers to save their homes, and ultimately the awesome powers that were assumed by the CFPB as provided in the Dodd-Frank Act, it may have seemed that the stars were aligning firmly against continuation of the HDC doctrine, and that its days were numbered.

And yet it hasn’t happened, at least not so far. Exploring the possible reasons for this involves some speculation, but that does not preclude the possibility that others have been coded in during a panel discussion on the housing and mortgage crisis, as reprinted in this journal. Essential to this point is a recognition that (by any measure) a very large part of the subprime mortgage loans extended in the years leading up to the 2006–2008 bursting of the housing bubble were sold to the federal government-sponsored enterprises (GSEs), Fannie Mac and Freddie Mac. To some extent these GSEs are on the hook for any resulting losses, and already were massively insolvent, even without the additional losses that may have been if the GSEs lost
the benefits of the HDC doctrine. And, of course, if the losses became so great that taxpayers (and the voting public) objected to a bail-out, the losses would extend to the GSE bondholders (which included sizeable investors affiliated with and funded by large domestic banks and foreign governments including the government of China). If not for the creditor protections provided to the GSEs by the HDC doctrine, it is possible that the housing and mortgage crisis could have spread further into international financial and possibly even diplomatic circles, with potentially far-reaching consequences. So perhaps it is least partly and indirectly, the HDC doctrine was saved by the government of China, with the U.S. government as its champion. But what of the issue going forward? This is where these issues get really interesting, in terms of current and future public policy.

V. The Dodd-Frank Act and CFPB ATR Rule

As noted above, the FRB ATR rule was revised and codified in the Dodd-Frank Act and this was implemented by the CFPB. Essentially, in conjunction with the qualified mortgage (QM) rule, the CFPB ATR rule creates three classes or tiers of home mortgage loans: (1) non-QM loans; (2) QM loans with a lower-priced loan interest rate; and (3) QM loans that are not higher-priced loans.

The first tier (non-QM loans) essentially includes all nonprime (i.e., subprime) mortgage loans; as others have noted, "it does not appear that there will be a market for loans that do not meet the "qualified mortgage" standard." The obvious reason is that a mortgage loan that is not a "qualified mortgage" and that does not meet the ability-to-repay requirement will subject the creditor and subsequent assignees to, among other things, civil liability under TILA and provide the borrower with a defense to foreclosure. In addition to actual damages, statutory damages in an individual or class action, and court costs and attorney fees, the Dodd-Frank Act also amended TILA to include special statutory damages for a violation of the ability-to-repay requirement...

This effectively doomed private subprime lending, excluding an enormous segment of society from access to mortgage credit for the purchase of a home.

But even the second tier (QM loans with a "higher-priced" interest rate) is not entirely safe. Given the relatively high interest rate that is required in order to avoid the "higher-priced" designation, it is likely that some borrowers not previously considered to represent a subprime credit risk will find that they qualify only for a "higher-priced" loan. And they may find mortgage credit to be less readily available (or more costly) because of the new legal risks associated with a "higher-priced" home mortgage loan, even if it is a QM. A QM loan that is "higher-priced" is entitled to a "reasonable presumption" that the ATR requirement is met, and the CFPB ATR rule limits the grounds on which the presumption can be rebutted, but still, a rebuttable presumption is (by definition) one that can be rebutted. A judge who is inclined to help a consumer "save his home" by interfering with the foreclosure process may be open to rebuttal arguments, turning an already money-losing loan default and foreclosure into protracted litigation over amorphous legal standards such as the lender's good faith and reasonableness in making the ATR determination.

These risks may give lenders pause in extending this type of credit; moreover, once the buyer qualifies for a "higher-priced" loan, so that the above-noted risks are present, the lender that is proceeding with the transaction has every incentive to raise the interest rate to compensate for these risks. Given that relatively few lenders are likely to take these risks, the borrower may have very limited options, leaving him or her no viable choice but to pay the higher rate. Thus, borrowers outside the top tier of the low-rate QMs are likely to pay more for their mortgage credit, even assuming it is available.

The third (or top) tier of borrowers, who qualify for a low-rate QM, probably are feeling pretty good about all of this. With interest rates on government loans and securities at near-zero levels, and amply-funded GSEs eager to pump-up mortgage lending, the times have never been so good for prime mortgage borrowers. The good news in the mortgage markets reflects this, and is
reinforced by the barrage of advertisements from mortgage lenders eager to earn fees by accessing federal mortgage funding programs on behalf of prime borrowers (which may suggest to casual viewers that cheap loans are more widely available than is actually the case). 40

But the reality is that this is a "Tale of Two Cities," or at least in most cases a divided city, in which one market segment has all that one could ever ask for in terms of cheap mortgage credit, while many of those in other segments can't get it at all. 41 Quite aside from the implications for housing policy, consider the impact on consumer credit law and litigation. For the first time since the Great Depression of the 1930s, many in the mid-to-lower economic echelons of society have no access to mainstream private mortgage credit; as a result these consumers don't need and likely will not use or benefit from mortgage-related consumer protection laws and regulations; in turn, most in the upper echelon don't need these protections either, because these borrowers likely won't default, and even if there is a default, any resulting litigation would mean (in essence) suing the government agency that approved, funded and/or purchased the loan. This is a very different thing from suing a purely private creditor, and frequently will be a losing proposition. One result is likely to be a greatly diminished future role for mortgage-related consumer protection law and litigation.

VI. Result: The Decline and Fall of Consumer Protection Law in Mortgage Lending

So, what prospects does this offer, for the future of consumer law in the context of residential mortgage finance? As noted, today an overriding theme in mortgage finance, since the housing and mortgage crisis that began in 2006 — 2008, is that nearly all mortgage loan funding for mainstream borrowers (that is, excluding loans for the very rich) comes from or through the federal government (mainly through the FRB and GSEs, along with some HUD/FHA and VA programs). Traditional private subprime mortgage lending has all but disappeared, by reason of an impractical legal and regulatory environment designed essentially for that purpose, including theQM and ATR rules (in conjunction with the enforcement authority of the CFPB). 42

As noted, this has significant implications for consumer protection law and lawyers. For example, the GSEs are heavily insulated from private litigation such as foreclosure defense efforts. First, the UCC Article 3 HDC rule remains intact for real estate mortgage loans. 43 This protects the GSEs (and any qualifying assignees essentially backed by the GSEs) from liability and borrower defenses based on most forms of wrongdoing in the loan origination process (an obvious source of such cases).

In addition (although the political considerations are always subject to change), at this writing it seems unlikely the GSEs will purchase or fund significant numbers of mortgage loans that are not QM loans (or inside the "higher-priced" tier). This will provide the GSEs and their originators and assignees with at least a rebuttable presumption (and in many cases a conclusive one) that the ATR requirements have been met. 44 This provides further significant immunity against foreclosure defense litigation. And, of course, the HECM equivalent in TILA continues to protect the GSEs as assignees for liability from most TILA violations. 45 In the meantime, the likelihood of a borrower reducing the loan principal of a first mortgage home loan in bankruptcy has been reduced from slim to almost none. 46 All of this means that future foreclosure defense litigation is likely to be greatly diminished.

This result will continue to be heralded in the media as a great success. In interviews extolling the virtues of the Dodd-Frank Act on its fifth anniversary, former Senator Dodd and former Representative Frank emphasized (as the greatest achievement of the Dodd-Frank Act) the resulting reduction of risks in the

40. Of course, the loans are readily available. If only your friends are in the top tier or otherwise qualify for a federal subsidy.
42. See supra notes 2, 2A, and Part V. (Note: this text and note 40 thus constitute part of a larger source of problems: See generally Charles Moeve, Revisiting the FederalISTS Society, Wall St. J., Sept. 26, 2015, at C1, and see commentary, supra note 2A. All of the resulting political dissatisfaction is apparent, if somewhat misdirected. See, e.g., id., Jay Cost, The Politics of Housing, Wall St. J., Oct. 17, 2015, at C1, and Chas Moeve, Amos, America, Wall St. J., Feb. 13, 14, 2016, at C1. Interestingly, non-traditional lending sources are helping to fill the gap: See, e.g., Karen E. Campbell, Private Lending Fills Gap Left by Banks, U.S. News, Wall St. J., May 13, 12, 2015, at C1. Unfortunately, it is far from clear that this is fully satisfactory for solution for the needs of subprime borrowers. See, e.g., and see Chris Wren, Affordable Mortgage Home Price Knife in Wall St. J., May 7, 10, 2016, at A11. "Adjusted housing standards in recent years have had the biggest impact on home buyers, effectively leaving them on the sidelines." Los Angeles Times, The Outlook, One Way to Make Home Lending Fairer in Wall St. J., Feb. 29, 2016, at A29. (The broader mortgage market, the U.S. government wants to revive the market that brought the economy to its knees, but years of effort haven't succeeded in rebuilding it." Mattie Gildenhorn, Alexander Nixxon, Atlanta Journal Constitution, "State imposes Loan Limits in Georgia," N.Y. Times, Feb. 21, 2016, at A1.
43. As well as being regulated in federal law: See supra Part IV, and note 48.
44. See supra Part V.
45. 15 U.S.C § 1811. See supra note 37.
46. As interestingly, the United States Supreme Court recently did its part to help ease TILA, mortgage defense litigation after by an expansive interpretation of the TILA rescission period in RESIDENTIAL COUNTRYWIDE HOME LOANS, Inc. v. S.C. 135 S.C. 254 (2015). This may offer some hope for TILA litigants, though it is not without its limits and complications. See, e.g., John E. Gordon, One Supreme Court Decision: Fairness, Justice, and the Right to a Rescission, N.Y. Times, Feb. 21, 2016, at A1.
financial system. On this narrow point at least, perhaps few would disagree.  

However, an obvious corollary is this: One way to reduce risk in the financial system is to eliminate risky customers from the system, by cutting-off their access to financial services, and reduce the legal rights of those who remain. The Dodd-Frank Act does precisely that: Subprime borrowers are largely excluded from the mainstream mortgage markets (except those who qualify for special subsidy programs), and the upper-cechelon borrowers who remain are unlikely to default and have few legal remedies if they do. Of course, there is a price to pay for this approach, in terms of consumers unable to buy homes, have bank accounts, obtain other credit, and perhaps get better jobs and create wealth. And in the future this price may extend to those who believe in private judicial remedies as a dispute resolution system.

All of this is a natural consequence of the federalization of mortgage finance; modern American law is heavily oriented toward federal administrative rules and public enforcement remedies that exclude many subprime borrowers from mainstream sources of private mortgage credit and reduce the importance of private remedies for the rest. It is probably an inevitable result of a federally-subsidized and administered mortgage system, because once the mortgage markets are largely underwritten by public programs and funds it is necessary to do everything possible to prevent politically embarrassing losses. In fundamental ways this phenomenon is different from the commonly-cited "moral hazard" of public risk coupled with incentives for private gain. Instead, it is a matter of reducing public risk, by excluding subprime borrowers from the federalized credit system and deemphasizing the private remedies of the prime borrowers who remain, instead relying on aggressive public enforcement efforts to provide consumer protection. Thus, the Dodd-Frank Act and related policies do everything possible to protect the GSEs (and other public funding mechanisms, including the FRB) from future losses due to credit defaults and consumer litigation. This represents a fundamental change in American public policy. The resulting legal environment (with its noted emphasis on public enforcement rather than private remedies) dramatically changes the role of traditional legal remedies and private litigation.

VII. Conclusion

So, this is an important legacy of the Great Recession to its root a housing and mortgage crisis, as codified in the Dodd-Frank Act. Many people are quite happy with this, including possibly consumers with high credit scores; advocates of an administrative law and public enforcement model; mortgage bankers with access to federal funding programs; and residential landlords. And observers can cheer the end of many "predatory lending" issues and the mortgage foreclosure crisis. But, as usual, others are paying a price. Almost certainly these include subprime borrowers who cheer efforts to punish the banks but are now unable to buy a home. But, perhaps more surprisingly, the results also may include a diminished stature for traditional consumer protection law and litigation, with its emphasis on private remedies; transparent statutory foundations and judicial interpretations; due process protections; and judicial review.

48. See, e.g., Victoria McGrady & Andrew Ackerman, Dodd-Frank’s Costly Take-Back, Wall St. J., July 20, 2015, at C1 (quoting, e.g., former Representative Barney Frank on the most significant benefit of the Dodd-Frank Act: "substantially diminishing the number of homeowners that should not have been made..."); For a different perspective, compare, e.g., Jähnig & Hauser, Opinion. Your Final View: Dodd-Frank is a Failure, Wall St. J., July 20, 2015, at A15.


50. This requires high profile policies and enforcement actions to assure the public that its interests are being protected. It is seldom mentioned that these policies and enforcement actions further discourage the availability of private credit. See supra note 2, 12, and 18. As the same time, it is noted above in Part IV.A.4, there must be policies to protect the puppeteers of federally-sponsored loans. For discussion and examples, e.g., Joe Light, U.S. Scrutinizes Mortgage Originators, Wall St. J., Feb. 3, 2016, at C1. Thus, the GSEs are to be protected from losses, while the public is assured that there is no price to be paid for this protection. But the price is the elimination of private mortgage credit for many consumers who precisely could have purchased a home on reasonable terms. In contrast to a federalized system, in a private mortgage finance system the risks are undertaken entirely by private parties, and there is less need for public concern about legal rules to protect investors and mortgagees against potential losses, since private consumer protection laws and remedies can predominate. Our former private law system has now been largely replaced by the federal administrative framework and the state of private consumer protection laws and remedies has been proportionately reduced.

51. Though there is plenty of traditional moral hazard left in the system, as well, e.g., Federal Reserve, supra note 40, at 41 and supra note 49.

52. This is no small matter, given that, since the 2008 crisis, 65% of all failures in the U.S. financial system are now implicitly or explicitly guaranteed by the government, up from 45% in 1991. Robert H. Bougie & Jack J. Graeff, The Illusion of the Financially Intervened Markets, The Federal Reserve Bank of Richmond, Jan. 2016, at 11. Moreover, the problems are worldwide. "Ten years after the crisis caused by reckless banking, McKinsey estimates that even visible global debt has increased by $57 trillion, while in the U.S., Europe, Japan and China (the growth) needed to pay back these troubles has been showing no sign of abating. If these trends continue, the world’s ‘uncontrolled additional debt of $57 trillion for artificially assisted pension systems,” see supra note 25.

53. Along with the shift from traditional laws and judicial remedies to administrative rules and public enforcement comes some increased uncertainty as to applicable legal standards and the role of law for private parties. See, e.g., Kent Barnett, Opinon, The Process vs. Administrative Law, Wall St. J., Nov. 18, 2015, at A11 (noting questions about the interpretability of in-house administrative law judges; Kenneth S. Sovern, Innocent Bystander: Wall St. J., Aug. 3, 2016, at A9; Nigel Garrard, Opinion, The Regulatory State of America, Wall St. J., June 18, 2013, at A17; Alex de Jong, Liberalism, Democracy & America (2013) would not recognize America today. Indeed, as economists have the state grown, that he would be forced to conclude that "at some point between 1835 and 2014, France must have conquered the United States."); Paul Gramm, Opinion, Dodd-Frank’s Steady Double Whammy, Wall St. J., July 24, 2015, at A11. "Most criticism of Dodd-Frank focuses on its massive regulatory burden. But the most costly and dangerous effects are in uncertainty and the arbitrary power it has created by the delegation of the rule of law." supra note 13. Thus, private TILA, "predatory lending" and foreclosure defense litigation is unlikely in an environment where private subprime mortgage lending does not exist and the vast majority of mortgage loans are made by agencies of the federal government. No speculative borrowers, whose rights against the GSEs and their assignors are not even largely eliminated by TILA, the QRM SIV rules and for HFC; moreover, in a public law system that has largely replaced private legal remedies with discretionary administrative enforcement actions. See supra notes 25 & 49.

54. See, e.g., Federal Reserve, supra note 40. See also supra this text at notes 37-39.

55. See, e.g., sources cited supra notes 14 & 39-41.
No doubt there are many who will not mourn a decline in consumer litigation. But this does not mean that the decline is entirely beneficial, or negate the fact that important principles, protections and private rights are being lost. This is inherent in the shift from a common law and statutory system to a comprehensive administrative state, and is part of a long-standing historical and world-wide political dynamic that leaves the common law period as an exceptional (and now shrinking) outlier on the world stage. Thus, the economic effects noted above at Part II may continue, largely unabated.

For those of us involved in the fields of commercial and consumer protection law, the change from a common law to an administrative law structure may be significant for other reasons. Some of those inclined to cheer a reduction in the legal rights of private creditors, and others inclined to cheer a reduction in consumer litigation, may not be fully considering the impact on commercial and consumer law and transactions. Quite aside from the obvious consequences for consumers who have lost their access to mainstream financial services, the number of lawyers and judges needed to protect consumers may be in decline, and the number of law schools that provide course offerings on consumer law issues such as TILA, consumer protection and financial services law, mortgage foreclosure, and even bankruptcy and consumer litigation, also may decline, along with public education and scholarship in these fields. These fields of study may become even more unlikely to paths to academic tenure and scholarly success in the future, and in fact could largely disappear from academia. The impact on law practice may be similar. If so, and ironically in view of America’s reputation as a litigious society, American consumer law may become even more “European,” with an increasing emphasis on public enforcement of administrative rules and a declining role for private remedies and traditional substantive law. Litigators may need to look elsewhere for business, even if specialized regulatory counsel are in high demand.

The future is difficult to predict, but it appears that consumer law, litigation and remedies is in the throes of dramatic change, with consumer mortgage law leading the way. If the trends affecting mortgage lending are emblematic of changes spreading through-out the consumer law universe, as appears possible, our economy and legal structure may look very different in the near future, as may become more apparent over the course of just a few more years. While the full range of implications is difficult to measure, they may include a greatly reduced role for traditional legal issues and practitioners in the fields of mortgage credit, consumer law and litigation.

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56. President John Kennedy’s staunch rhetoric notwithstanding, voters considering political candidates apparently want to know what the government will do for them. In this environment a candidate’s promise to protect the rule of law, e.g., to enforce constitutional obligations (e.g., “We will not pay punitively!”) would not be likely to garner many votes. Still, the decline of private legal rights and remedies is a reversal of trends spanning hundreds of years of human progress. See e.g., David Horowitz, Review, Eight Centuries of Liberties, Wall St. J., Mar. 29–31, 2015, at C1; and C1 noting the 800th anniversary of Magna Carta and its impact on private rights and the rule of law. I should not escape notice that this modern decline in the rule of law has been accompanied by a reduced economic status for middle class citizens. See, e.g., Charles Moore, Reprieve, The Middle Class Squeeze, Wall St. J., Sept. 29, 2015, at C1; and see note 59–61.

57. It is even possible that the general public will come to sense this, although it is another matter whether this will be translated into a realistic appreciation for the regime. See, e.g., Charles Murray, Review, Fanny’s America, Aug. 13–14, 2016, at C1.

58. Your author will admit that some may consider the latter to be a small loss.

59. On the other hand, the European model is not without its problems and defects. See, e.g., Holman W. Jenkins Jr., Opus Brief, Business Week, Twilight of the Gene Worship, Wall St. J., July 8, 2015, at A9.

60. Even more so when we come to expect in recent, tumultuous decades. Perhaps, in fact, it is all part of an even more fundamental shifting of economic societal plans that promises changes to make the issues noted here look small in comparison. See, e.g., Mike Danieli, Borrowing, The Week, June 15, 2015, at A17; and see note 59–61.

61. See, e.g., John Plender, Money—the Money, Money Times, July 18–19, 2015, at A7 (triggering some implications are caused by the Financial Crisis).