

CONSUMER PROTECTION IN THE UNITED STATES AND EUROPEAN UNION: ARE PROTECTIONS MOST EFFECTIVE BEFORE OR AFTER A SALE?

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ABSTRACT

When a buyer makes a purchase, both parties to the transaction have a vested interest in the deal working out. The buyer hopes that the product is high quality and can accomplish its intended use. However, when transactions go wrong there has to be a way for people to find redress. In many cases, the merchant who sold the goods or services has a more sophisticated entity than the person purchasing them. This creates a situation where people are at risk to be taken advantage of by unscrupulous sellers.

Consumer protection aims to help consumers be more confident in their purchases because they have some form of government assurance that there is a way to handle any issues that could potentially arise during the transaction. Whether the protections allow consumers to take disputes to court or gain redress through some form of arbitration, consumer protections are designed to provide buyers with a way to make things right. While the United States offers its consumers better judicial protections, the European Union's network of government sponsored arbitration affords consumers a more economical and accessible system to address grievances.

INTRODUCTION

This article addresses the similarities and differences between consumer protections in the United States and those in the European Union. The United States uses attorney fee shifting statutes to provide redress for consumers in court while the European Union directs its consumers towards arbitration to solve disputes with merchants. This article specifically focuses on how attorney fee allocations shape the way that consumers access justice. While there were efforts in the United States to strengthen consumer protections in recent years, businesses also argue for limiting consumer protection regulations in order to compete globally. Consumer protection and access to legal remedies in the US is compared to that of the European Union and the efforts its member nations have taken in order to protect consumers. This paper places special emphasis on how the United States could improve its consumer protections by looking towards the system established in the European Union.

Consumer protections provide shoppers with a sense of security should something go wrong with a transaction. While in the past *caveat emptor* made the buyer responsible for their own security, international trade and faceless transactions make it impossible for buyers to completely understand the exact nature of a purchase. When purchasing a new vehicle, a buyer cannot decide that they do not agree with the second paragraph of the warranty and strike it from the deal. Because of the consumer's lack of bargaining power, governments stepped in to set basic protections for their citizens.

Consumer protections in the United States prohibit sellers from taking advantage of customers in ways that the buyer does not realize before consummating a deal. Federal laws like the Fair Debt Collection

Practices Act, Truth in Lending Act, and the Fair Credit Reporting Act all provide certain protections to US consumers. Individual states also provide additional protections, like the Wisconsin Consumer Act. Many of these consumer protection laws include provisions that allow a prevailing consumer to have their attorney's fees covered by the opposing party. These attorney fee provisions allow for consumers to find attorneys willing to take action against even the largest corporations on a contingency fee basis because the attorneys know that they will be paid for their efforts at the end of a successful trial. However, recent economic difficulties in the United States brought these fee-shifting provisions under fire in many states.

European Union consumer protections arose as a way to promote economic activity across individual borders by assuring consumers that they had governmental protections available if a deal went bad. Most European nations operate under a "loser pays" system, where the prevailing party in an action has to pay the other party's attorney fees. This system seemingly protects businesses from a large portion of legal actions against them, as the average consumer would likely be put off by the prospect of paying a company's attorney fees if they did not prevail.

Part II of this paper discusses the current state of consumer protection laws in the United States, focusing on fee shifting statutes and their role in providing access to justice for consumers. Part III analyzes the consumer protection laws of the European Union, where a loser pays attorney fee system pushes consumers to seek redress through arbitration. Part IV looks at the importance of fee shifting statutes and how they affect consumer protection laws and where they are used. Part V then compares the protections offered in the United States to those offered to European Union consumers, and shows how the EU has a preferable system that allows consumers better access to justice.

I. THE CURRENT STATE OF CONSUMER PROTECTION LAWS IN THE UNITED STATES

Consumer protections existed in the United States for over a century.¹ The passing of the Pure Food and Drug Act in 1906 served to protect consumers from using tainted or misidentified foods and

¹ Spencer Weber Waller et al., *Consumer Protection in the United States: An Overview*, EUR. J. CONSUMER L., May 2011, at 1.

medication.² In short order, the United States government established other agencies with consumer protection responsibilities, such as the Federal Trade Commission in 1914.³ The FTC consolidated antitrust activities within the government and provided an independent agency to investigate and enforce consumer protection laws.⁴

A. FEDERAL CONSUMER PROTECTION

United States federal law offers a wide variety of consumer protections. Four of the most important pieces of legislation are the Fair Debt Collection Practices Act (FDCPA), Truth in Lending Act (TILA), Fair Credit Reporting Act, and Gramm-Leach-Bliley Act.⁵ These four pieces of legislation protect consumers from unfair debt collection, predatory lending, false credit reporting, and banking irregularities.⁶

The Fair Debt Collection Practices Act passed into law in 1978, as Title VII of the Consumer Credit Protection Act.⁷ This act is designed to, “eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.”⁸

As a result of the FDCPA, debt collectors are required to follow specific rules when collecting debts.⁹ Debt collectors are prohibited from communicating with someone other than the consumer in attempting to collect the debt.¹⁰ Additionally, debt collectors are prohibited from communicating with a consumer between 8 PM and 9 AM¹¹ and cannot continue contacting consumers if they know the consumer is represented

² U.S. Food and Drug Administration, *About FDA: History*, FDA.GOV (Aug. 25, 2014), <http://www.fda.gov/AboutFDA/WhatWeDo/History/default.htm>.

³ U.S. Federal Trade Commission, *Federal Trade Commission: A History*, FTC.GOV (Oct. 4, 2012), <http://ftc.gov/opa/history/>.

⁴ U.S. Federal Trade Commission, *FTC's History Timeline*, FTC.GOV, (Nov. 2, 2012), <http://ftc.gov/opa/history/timelines.htm>.

⁵ 15 U.S.C. § 1692 (2012); 15 U.S.C. § 1601 (2012); 15 U.S.C. § 1681 (2012); 15 U.S.C. § 6801 (2012).

⁶ *Id.*

⁷ 15 U.S.C. § 1692 (2012).

⁸ *Id.* § 1692(e).

⁹ *Id.* § 1692.

¹⁰ *Id.* § 1692b.

¹¹ *Id.* § 1692c(a)(1).

by an attorney.¹² One of the most important protections offered by the FDCPA is that debt collectors are not allowed to communicate with the consumer at the consumer's place of employment.¹³ This allows consumers to have work environments free from disruptions by telephone calls, messages, and written communications

The FDCPA also prohibits a myriad of other conduct by debt collectors. Outlawed conduct includes a prohibition on profane language,¹⁴ causing a telephone to ring constantly,¹⁵ misrepresent the amount owed on a debt,¹⁶ and a number of other things.

With the passage of the Dodd-Frank Act, the Consumer Financial Protection Bureau has concurrent jurisdiction over the FDCPA along with the Federal Trade Commission.¹⁷ This continued enforcement is critical, as the FTC received over 140,000 complaints about debt collection in 2010.¹⁸ The majority of these complaints are related to third-party debt collectors where the original lender sold the debt off to a collections specialist; however complaints over in-house debt collections are still a concern.¹⁹

The Truth in Lending Act (TILA) is another piece of federal legislation designed to protect consumers.²⁰ First introduced by Senator Paul Douglas of Illinois in 1960, the bill finally passed and was signed to President Johnson to become law in 1968.²¹ This act regulates both open ended credit agreements like credit cards, and close ended credits like home or automobile loans.²² TILA provides required disclosures that must be provided along with credit agreements, along with special provisions for mortgage disclosures.²³ These disclosures insure that a

¹² *Id.* § 1692c(a)(2).

¹³ *Id.* § 1692c(a)(3).

¹⁴ *Id.* § 1692d(2).

¹⁵ *Id.* § 1692d(5).

¹⁶ *Id.* § 1692e(2)(A).

¹⁷ *Id.* § 1692l(b)(6).

¹⁸ *Annual Report 2011: Fair Debt Collection Practices Act*, FEDERAL TRADE COMMISSION, 4-5 (2011), <http://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-annual-report-2011-fair-debt-collection-practices-act/110321fairdebtcollectreport.pdf>.

¹⁹ *Id.* at 5. (The FTC received almost 109,000 complaints about third party debt collectors and almost 32,000 complaints about in-house debt collectors in 2010).

²⁰ 15 U.S.C. § 1601.

²¹ Law Librarian's Society of Washington, D.C., *Truth in Lending Act, Legislative History to the 1968 Act*, LLSDC, <http://www.llsdc.org/TILA-LH> (last visited Nov. 2, 2012).

²² 15 U.S.C. §§ 1637–38.

²³ *Id.* § 1639.

consumer understands exactly what agreements they are entering into with a financial company.

A third major federal regulation, the Fair Credit Reporting Act, also provides important consumer protections to United States consumers.²⁴ This act, passed in 1970, regulates how consumer credit information can be collected, used, or released to third parties.²⁵ As access to housing, banking services, employment, and many other life staples are increasingly based on a person's credit score, it is imperative that consumers portray an accurate record of themselves through credit reporting agencies like Experian, Equifax, and TransUnion.²⁶

The Fair Credit Reporting Act provides specific procedures that credit reporting agencies must follow if a consumer disputes the accuracy of an item contained in their report.²⁷ After a consumer disputes an item on their credit report, reporting agencies are required under the act to provide that consumer with notice if the item is ever reinserted into their report in the future.²⁸ Perhaps the most important consumer protection found in the Fair Credit Reporting Act is the limits the act places on the length of time that negative information remains on a consumer's credit report.²⁹ In general, the act requires the removal of most negative items placed on a consumer's credit report after seven years.³⁰ The most notable exception to this is that bankruptcies stay on a credit report for ten years.³¹

In addition to these dispute resolution regulations, the Fair Credit Reporting Act regulates specialty credit reporting agencies and provides consumers with other rights relating to their credit information.³² Specialty credit reports are used for insurance purposes or obtaining housing, and often contain medical history information as well.³³ Under this act, consumers have a right to access their credit score, consumers

²⁴ *Id.* § 1681.

²⁵ *Id.*

²⁶ See, e.g., Consumer Financial Protection Bureau, *When Should I Review My Credit Report?*, CFPB (Sept. 3, 2014), <http://www.consumerfinance.gov/askcfpb/312/when-should-i-review-my-credit-report.html>.

²⁷ 15 U.S.C. § 1681i.

²⁸ *Id.* § 1681i(a)(5)(B).

²⁹ *Id.* § 1681c(a).

³⁰ *Id.*

³¹ *Id.* § 1681c(a)(1).

³² *Id.* § 1681.

³³ U.S. Federal Trade Commission, *A summary of Your Rights Under the Fair Credit Reporting Act*, FTC, available at <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre35.pdf>.

must provide consent for their credit information to be provided to an employer, and consumers can seek damages from violators under the act.³⁴

The final major consumer protection law available to consumers from the federal government is the Gramm-Leach-Bliley Act.³⁵ Signed into law in 1999 by President Clinton, this act is designed to “enhance competition in the financial services industry by providing a prudential framework for the affiliation of banks, securities firms, insurance companies, and other financial service providers.”³⁶

While the Gramm-Leach-Bliley Act has a multitude of impacts on the financial services industry, it has important implications for consumer protection.³⁷ The act requires financial institutions to protect and provide notice to consumers regarding how their confidential information will be kept secure.³⁸ This act also requires banks to provide consumers with notice before they release or sell any personal information to third parties.³⁹ As a part of these disclosures, consumers have the ability to opt out of having their information shared with nonaffiliated third parties.⁴⁰

B. STATE CONSUMER PROTECTIONS

In addition to the protections provided by the federal government, various states provide supplemental consumer protections to their residents. These protections often fall under the Uniform Deceptive Trade Practices Act, which serves as model legislation and was adopted by many states.⁴¹ This act serves to provide further context to exactly what constitutes a “deceptive trade practice.”⁴²

An excellent example of strong consumer protections in the United States at the state level is the Wisconsin Consumer Act.⁴³

³⁴ *Id.* at 1–2.

³⁵ Financial Services Modernization Act of 1999, 15 U.S.C. § 6801 (2012).

³⁶ *Id.*

³⁷ See Federal Deposit Insurance Corporation, *Privacy Act Issues under Gramm-Leach-Bliley*, FDIC.GOV, <http://www.fdic.gov/consumers/consumer/alerts/glbsa.html> (last updated Jan. 29, 2009).

³⁸ 15 U.S.C. § 6801.

³⁹ *Id.* § 6802.

⁴⁰ *Id.* § 6802(b)(1).

⁴¹ See, e.g., 815 Ill. Comp. Stat. 510/1-7 (West 2012).

⁴² *Id.* at 510/2.

⁴³ WIS. STAT. §§ 421-27 (1973).

Enacted in 1973, the Act is considered one of the most comprehensive state consumer protection laws in the United States.⁴⁴ In general, the Wisconsin Consumer Act controls debt collection practices and consumer credit transaction in the state.⁴⁵ For the purposes of the act, a consumer credit transaction is an exchange between a merchant and a customer where something is acquired and then paid for “in installments.”⁴⁶ This definition is designed to encompass “loans, credit cards, credit sales, second mortgages, and leases.”⁴⁷ As a part of this law, sellers are required to provide specific disclosures about credit contracts and advertising materials, limit interest charges, and allow a three day right-to-cancel for certain goods.⁴⁸ The Wisconsin Consumer Act also requires judicial intervention in repossessions and prohibits certain collection practices.⁴⁹

The Wisconsin Consumer Act is a powerful piece of legislation within the state. The language of the act specifically provides that should be “liberally construed” in order to promote its four main purposes.⁵⁰ These four main purposes and policies are:

(a) to simplify, clarify, and modernize the laws governing consumer transactions; (b) to protect customers against unfair, deceptive, false, misleading and unconscionable practices by merchants; (c) to permit and encourage the development of fair and economically sound consumer practice in consumer transactions; and (d) to coordinate the regulation of consumer credit transactions with the policies of the federal consumer credit protection act.⁵¹

These goals provide direction for the entire Wisconsin Consumer Act. Subsequent case law also provides support for the strength of the act, with the state Supreme Court stating that “Wisconsin legislature clearly intended the Wisconsin Consumer Act to assist consumers, *particularly those of limited means*, in combating unfair business practices.”⁵²

⁴⁴ *What is the Consumer Act?*, WIS. DEP’T FIN. INST. (Nov. 30, 2012), http://www.wdfi.org/wca/consumer_credit/what_is_wca.htm.

⁴⁵ *Id.*

⁴⁶ WIS. STAT. § 421.301(10).

⁴⁷ *What is the Consumer Act?*, *supra* note 44.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ WIS. STAT. § 421.102.

⁵¹ *Id.* § 421.102(2).

⁵² *Kett v. Cmty. Credit Plan, Inc.*, 228 Wis. 2d 1, 18 (1999).

II. THE CURRENT STATE OF CONSUMER PROTECTION LAWS IN THE EUROPEAN UNION

While the European Union has its roots as an organization designed to foster trade, it also has a tradition of consumer protections. In 1958, a variety of European nations gathered together to foster increased trade relations between individual countries across the continent.⁵³ As a result of the collaboration, the Netherlands, Luxembourg, Italy, Germany, France, and Belgium established the European Economic Council (EEC).⁵⁴ In 1993, the Maastricht Treaty officially changed the EEC into the European Union (EU) and established the euro as the official currency of the member nations.⁵⁵ Over time, the EU evolved from a collaboration purely based on economic growth to encompass many areas of activity.⁵⁶

The European Union was established to foster economic activity across national boundaries;⁵⁷ therefore consumer protection in the EU appears to focus on increasing consumer confidence in making purchases from other member states. Some of the most common issues that European consumers face arise out of online shopping, purchasing goods, air travel, timeshare clubs, and vehicle rentals.⁵⁸

A. EVOLUTION OF EUROPEAN CONSUMER PROTECTIONS

While the Treaty of Rome did not include any consumer protection provisions, European Community nations quickly realized the importance of the issue.⁵⁹ Early EU consumer protection directives included food price labeling in 1979, misleading advertising in 1984, and the protection of consumers negotiating contracts away from a business's

⁵³ *Basic information on the European Union*, EUR. UNION, http://europa.eu/about-eu/basic-information/index_en.htm.

⁵⁴ *Id.*

⁵⁵ Treaty of Maastricht on the European Union, Feb. 7 1992, O.J. (C 325) 5.

⁵⁶ *Basic information on the European Union*, *supra* note 53.

⁵⁷ *European Consumer Centres Network*, EUR. COMM'N, http://ec.europa.eu/consumers/ecc/get_help_en.htm (last visited Dec. 1, 2012).

⁵⁸ *European Consumer Centres Network, Popular consumer topics*, EUR. COMM'N, http://ec.europa.eu/consumers/ecc/popular_topics_en.htm.

⁵⁹ Treaty Establishing the European Economic Community art. 85, Mar. 25, 1957, 298 U.N.T.S. 3.

principal location in 1985.⁶⁰ With the acceptance of the Single European Act in 1986, all activities undertaken by the European Community were required to support a high level of consumer protection for European consumers.⁶¹ Subsequent legislation focused on misleading vacation tour packages in 1990 and unfair consumer contract terms in 1993.⁶² In 2001, the Treaty Establishing the European Community codified additional consumer protections into European law.⁶³ This law mandates that “Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.”⁶⁴

Additional consumer protections for EU citizens are outlined in Article 153 of the Consolidated Treaty on the Functioning of the European Union.⁶⁵ This legislation states that the EU is to “contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves.”⁶⁶ While individual EU member states can craft more stringent consumer protections than those outlined by the EU itself, they must not fall below the established baseline of protections.⁶⁷ Therefore, this legislation appears to create a baseline of protection for all European consumers, while allowing individual states to provide additional protections.

The European Consumer Centres Network is one of the ways the European Union aims to protect consumers. This collaboration, referred to as the ECC-NET, between the European Union and individual member-states funds consumer centers in each EU country, Norway, and Iceland.⁶⁸ These consumer centers provide EU consumers with information on “cross-border shopping” and in the resolution of consumer complaints.⁶⁹ The ECC-NET works with consumers to resolve

⁶⁰ *Consumer Protection*, EUROPA, http://europa.eu/legislation_summaries/institutional_affairs/treaties/amsterdam_treaty/a17000_en.htm (last visited November 29, 2012).

⁶¹ Single European Act, art. 18, 1987 O.J. (L 169) 1, 25 I.L.M. 506.

⁶² *Consumer Protection*, *supra* note 60.

⁶³ See Consolidated Version of the Treaty Establishing the European Community art. 153, 2002 O.J. (C 325/33).

⁶⁴ *Id.*

⁶⁵ See *id.* art 153.

⁶⁶ *Id.* art 153.

⁶⁷ *Id.* art. 153

⁶⁸ *European Consumer Centres Network*, EUROPEAN COMMISSION, 1, available at http://www.ukecc.net/read_write/image/ECC%20Net%20brochure.pdf (2008).

⁶⁹ *Id.*

complaints, investigate problem industries, share consumer information online, and implement EU consumer protection laws.⁷⁰

B. PRINCIPALS OF EUROPEAN CONSUMER PROTECTION

A primary focus of European Union consumer protections is the principal that consumers have a right to information about the products that they purchase.⁷¹ This right to know is only satisfied if information is presented in easy to understand language. The ECJ stated that “information which traders are obliged to communicate to the purchasers . . . is of no practical use unless it is given in a language which can be understood by the persons for whom it is intended.”⁷² This right to information aims to inform European consumers about the products they wish to purchase.

The EU commits a significant portion of its budget to consumer protection initiatives, with 156.8 million euro designated to such programs in the 2007-2013 budget.⁷³ This program aims to create a data exchange for consumer access, provide information about product safety, support scientific risk evaluation of consumer goods, foster legislative action, provide funding for European consumer organizations, increase collaboration between consumer organizations, enforce consumer rules, improve current enforcement, analyze the impacts of enforcing consumer rules, monitor alternative dispute resolution programs, and provide outreach and education to vulnerable populations.⁷⁴

The 2007 to 2013 consumer protection initiatives by the European Union focus specifically on providing a high level of consumer protection and enforcing consumer protection rules more effectively.⁷⁵ The European Union focuses on enforcement of its consumer protection rules in order to allow consumers to get the relief they are seeking.⁷⁶ To avoid the high costs associated with the court system, the European

⁷⁰ *Id.* at 2.

⁷¹ MICKLITZ ET AL., UNDERSTANDING EU CONSUMER LAW 21 (2009).

⁷³ Case C-33-97, *Colim v. Bigg's Continent Noord*, 1999 E.C.R. I-3202.

⁷³ *Your rights as a consumer: How the European Union protects your interests*, EUROPEAN COMMUNITIES, 4 (2007), available at <http://ec.europa.eu/publications/booklets/move/64/en.pdf>.

⁷⁴ *Amended Proposal for a Decision of the European Parliament and of the Council Establishing a Programme of Community Action in the Field of Health and Consumer Protection Policy*, COM (2006) 235 final (May 17, 2006).

⁷⁵ *EU consumer policy strategy 2007-2013*, EUR-LEX, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1411865420815&uri=URISERV:l32054> (last updated Aug. 6, 2007).

⁷⁶ *Id.*

Consumer Centres Network offers low and no-cost ways to settle consumer disputes.⁷⁷

III. CONSUMER ACCESS TO JUSTICE AND ATTORNEY FEE SHIFTING

Attorney fees are an important aspect of consumer protection litigation that directly affects a consumer's access to the legal system. Attorney fees are awarded differently in the United States than in Europe.⁷⁸ Under United States consumer protection statutes, consumers can recover attorney fees in addition to any damages.⁷⁹ If a consumer does not prevail in the United States, they would be responsible for their own legal fees.⁸⁰ However, if a consumer does not prevail in a European Union nation following the English Rule on attorney's fees, they may be required to pay the opposing party's attorney fees in addition to their own.⁸¹ The prospect of losing a case and then facing massive attorney fees from a corporate adversary almost certainly pushes European consumers to utilize alternative dispute resolution mechanisms to find redress.

A. ACCESS TO CONSUMER PROTECTIONS IN THE UNITED STATES

In the United States, courts generally follow the "American rule" where both litigating parties pay for their own legal representation.⁸² While many consumer protection statutes may provide a method for consumers to recover their own attorney costs, the American Rule ensures that consumers do not have to worry about paying the legal fees of the business they are engaged in litigation with. Statutes where consumers are able to recover their attorney fees are referred to as "fee shifting."⁸³ As a result of fee shifting statutes, attorneys are willing to

⁷⁷ *Our Services*, ECC-NET, http://ec.europa.eu/consumers/ecc/services_en.htm (last updated Mar. 19, 2013).

⁷⁸ Herbert Kritzer, *The English Rule*, 78 A.B.A. J. 54 (1992).

⁷⁹ See, e.g., WIS. STAT. § 100.20(5); KAN. STAT. ANN. § 50-634(e) (2013); Ariz. Rev. Stat. § 44-1265 (2014).

⁸⁰ See Kritzer, *supra* note 78, at 55.

⁸¹ *Id.*

⁸² *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 448 (2007).

⁸³ David Dudley & Frances Reynolds Colbert, *Determining Reasonable Attorney Fees*, 85 WISCONSIN LAWYER, No. 10, October 2012.

take consumers' cases on a contingency fee basis because of the prospect of being rewarded for their time.⁸⁴

Foreign observers have recognized the appeal of the "American rule" fee allocation scheme for years.⁸⁵ In fact, one prominent British justice Lord Denning said:

As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side.⁸⁶

American litigants are free to bring legal action with the concrete knowledge that they will only be responsible for their own costs and fees. This economic certainty seems to create a system where consumers are undeterred in seeking redress for unlawful behaviors.

Increasingly in the United States, many businesses believe that fee shifting statutes significantly harm their industry, as businesses are often faced with legal bills from opposing parties that far outweigh the actual damages from a case.⁸⁷ As a result, states enacted attorney fee caps, often capping the total amount that an attorney can recover from a case at two or three times the amount of the actual damages in a case.⁸⁸ These caps effectively curtail consumer protection litigation, as many attorneys are only willing to take on the largest consumer protection cases because of the lack of compensation.⁸⁹

The state of Wisconsin recently altered its attorney fee allocation system as a response to the belief that attorney fees harm economic activity.⁹⁰ During a special legislation session designed to put Wisconsin citizens back to work, the legislature enacted a law that places a presumptive cap on attorney fees.⁹¹ This law established a presumption

⁸⁴ See, e.g., *Contingency Fees*, CONSUMER ATTORNEYS FOR CALIFORNIA, <https://www.caoc.org/index.cfm?pg=contingencyfees> (last visited September 3, 2014).

⁸⁵ *Smith Kline & French Laboratories Ltd v. Bloch*, [1983] 1 W.L.R. 730, 733.

⁸⁶ *Id.*

⁸⁷ Bruce Vielmetti, *Lawmaker in attorney fee cap debate has lawyer bill pending*, J. SENTINEL (Nov. 2, 2011), available at <http://www.jsonline.com/news/statepolitics/lawmaker-in-attorney-fee-cap-debate-has-lawyer-bill-pending-133116863.html>.

⁸⁸ *Id.*

⁸⁹ See Dudley & Colbert, *supra* note 83 (Consumer Protection Law Office LLC shuts down after enactment of attorney fee caps).

⁹⁰ *Id.*

⁹¹ *Id.*

that attorney fees in a case should be no more than three times the amount of compensatory damages awarded.⁹²

At the time, the Governor of Wisconsin stated that the attorney fee cap was an important piece of legislation because “Protecting job creators from excessive attorney fees will improve our business climate and ultimately help create jobs in the private sector.”⁹³ The legislation gained support from elected officials after several high profile cases in the state took place where the attorney fee awards far exceeded the amount of actual damages awarded to the consumer.⁹⁴

However, this bill was not without its opposition. Because of the more stringent cap on fees, the bill effectively prevented some attorneys from continuing their consumer law litigation practices.⁹⁵ As many consumers rely on attorneys taking their consumer law case on a contingency fee basis, a limitation on damages prevents an attorney from taking smaller cases where the compensatory damages amount is not high enough to make their efforts worthwhile.⁹⁶ Another consumer law group argued that an attorney fee cap will “encourage companies to engage in practices that the legislature has declared unacceptable . . . and prevent consumers from enforcing their rights.”⁹⁷

The aftermath of the decision to limit attorney fees in Wisconsin is not yet fully understood. While one prominent lemon law attorney in the state categorized the decision to limit damages “destroyed 200 consumer laws” by creating a situation where consumers are not able to retain counsel to represent them in an action, this is not yet a consensus among practitioners in the state.⁹⁸ However, the statutory presumption

⁹² WIS. STAT. § 814.045(2)(a).

⁹³ *Governor Walker to Sign 21 Bills This Afternoon*, OFFICE OF THE GOVERNOR, (Dec. 7, 2011), <http://www.wisgov.state.wi.us/Default.aspx?Page=0a04cd21-dc96-4252-9d45-2d24ec207e32> (last visited December 1, 2012).

⁹⁴ See Patrick Marley, *Wisconsin Assembly bill would limit attorney fee judgments*, J. SENTINEL (Oct. 24, 2011) <http://www.jsonline.com/news/statepolitics/wisconsin-assembly-bill-would-limit-attorney-fee-judgments-132506923.html> (discussing attorney fees in excess of \$150,000 awarded on a case where a dealership refused to make about \$5,000 in repairs to a customer’s newly purchased truck). See also *Kaskin v. John Lynch Chevrolet-Pontiac Sales Inc.*, 2009 WI App 65.

⁹⁵ See Dudley & Colbert, *supra* note 83, at sidebar (authors shut down their consumer law practice as a result of Wis. Stats. § 814.045).

⁹⁶ *Id.*

⁹⁷ Sarah J. Orr, Comments to the Senate Committee on Judiciary, Utilities, Commerce and Government Operations, October 19, 2011 (on file with author).

⁹⁸ *Vince Megna says Gov. Scott Walker destroyed 200 consumer laws with Act 92*, POLITIFACT, <http://www.politifact.com/wisconsin/statements/2013/jan/14/vince-megna/vince-megna-says-gov-scott-walker-destroyed-200-co/> (last visited January 17, 2013).

that attorney fees should not be more than three times the amount of actual damages has not been seen in enough cases to truly understand its lasting effects.⁹⁹

While an attorney fee cap may serve to provide United States businesses with the stability that they seek, it also serves as a barrier for consumers with all but the largest problems from being able to obtain counsel and seek justice in court.¹⁰⁰ In the aftermath of the credit crisis in 2008, attorney fees may have been an easy scapegoat for companies to blame economic issues on, however there does not seem to be any real information available about the effects of attorney fee shifting provisions on businesses.¹⁰¹ As a result, the people who can least afford to be taken advantage of by nefarious business practices may find it even more difficult to retain an attorney to advocate on their behalf.¹⁰²

B. ACCESS TO CONSUMER PROTECTIONS IN THE EUROPEAN UNION

The “English Rule” on attorney fees essentially amounts to a system where the losing party pays the opposing party’s costs. In this system, the prevailing party has its attorney fees paid for by the opposing party.¹⁰³ While proponents of this system advocate that it creates an environment hostile to frivolous lawsuits, it also serves to scare individuals from bringing an action for fear of being saddled with a large legal bill for their opposing party.¹⁰⁴

Perhaps in order to bypass the legal system and its fee barriers, the EU has an extensive alternative dispute resolution system for consumers to engage businesses in.¹⁰⁵ The EU promotes this system as being a “low cost, fast and easy” method of settling consumer disputes.¹⁰⁶ The EU maintains an extensive website covering the myriad of alternative dispute resolution and online dispute resolution systems

⁹⁹ *Id.*

¹⁰⁰ *See generally id.* (noting that less cases are likely to be taken by attorneys on a contingency fee basis).

¹⁰¹ Dudley & Colbert, *supra* note 83.

¹⁰² *See id.*

¹⁰³ Kritzer, *supra* note 78, at 55.

¹⁰⁴ *Id.*

¹⁰⁵ *Alternative Dispute Resolution (ADR)*, EUROPEAN COMMISSION, http://ec.europa.eu/consumers/redress_cons/adr_en.htm (last visited November 2, 2012).

¹⁰⁶ *Id.*

available to consumers in various countries.¹⁰⁷ When all of the various dispute resolution schemes available are totaled together, there are over 750 different choices available to European consumers.¹⁰⁸ The EU represents these ADR systems as being free or less than 50 euros to access, with an average dispute resolution time of 90 days.¹⁰⁹

To supplement the current system of alternative dispute resolution, the European Union recently proposed new regulation to establish a European online dispute resolution system which would be free of charge to all EU consumers.¹¹⁰ This system will allow consumers and traders to submit complaints online in any of the official EU languages, with a goal of processing claims within 30 days of their submittal.¹¹¹

In the event that an EU consumer cannot reach an agreement with a merchant through the ADR process, the European Small Claims Procedure is a small claims court specifically designed to resolve cross-border disputes.¹¹² The ECC-NET represents that going to court “should always be the last resort and every effort should be made in trying to resolve a complaint yourself before starting your claim.”¹¹³ European small claims court is available to consumers where the dispute is less than 2,000 euro.¹¹⁴ If a consumer wins in small claims court, they receive a judgment that is enforceable in all other member states.¹¹⁵

IV. COMPARISON OF EU AND US CONSUMER PROTECTIONS

While the United States and the European Union both aim to provide a high level of consumer protection to their citizens, each government seems to have a different approach on how to make

¹⁰⁷ ADR in your country, EUROPEAN COMMISSION, http://ec.europa.eu/consumers/redress_cons/schemes_en.htm, (last visited November 29, 2012).

¹⁰⁸ ADR and ODR in the EU today, EUROPEAN COMMISSION, http://ec.europa.eu/consumers/redress_cons/adr_odr_eu_en.htm (last visited November 29, 2012).

¹⁰⁹ *Id.*

¹¹⁰ *Proposal on online dispute resolution for consumer disputes*, COM (2011) 794 final 1, 4 (Nov. 29, 2011).

¹¹¹ *Id.*

¹¹² *Your guide to the European Small Claims Court*, ECC-NET, <http://www.ukecc.net/templates/asset-relay.cfm?fmAssetFileID=425> (last visited December 2, 2012).

¹¹³ *Id.* at 3.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 10, 14.

consumer protections most effective. In the United States, the American rule of attorney fees and ability of consumers to retain an attorney on a contingency fee basis encourages consumers to redress problems through the court system. In the European Union, stronger regulations focus on providing consumers with information before they make choices in an attempt to prevent consumer issues from arising in the first place. However, once a consumer is wronged, the loser pays system of attorney fee allocations almost certainly makes a consumer less likely to seek review in a court. In recognition of the increased risk associated with European courts, the EU has extensive network of low cost or free alternative dispute resolution solutions allows consumers to attempt to resolve conflicts in a different way.¹¹⁶

Providing consumer protection information to consumers before they are taken advantage of would seem to be the most efficient way to keep consumers safe. The European Union accomplishes this through their extensive informational efforts and the ECC-NET established in every member country.¹¹⁷ In the United States, the recently established Consumer Financial Protection Bureau may be able to handle many of these same tasks.¹¹⁸ The CFPB, established by congress in 2010, may ultimately serve a similar purpose to the ECC-NET of educating and protecting consumer interests but as of now the organization is too young for many tangible effects of its operations to be felt by the general public.¹¹⁹

The speed of each process may be the most tangible area where the European Union's alternative dispute resolution scheme really stands out. In the EU, the average amount of time it takes to process a consumer protection dispute through ADR is 90 days.¹²⁰ This stands in stark contrast to the United States, where 1/3 of civil suits take more than one year to resolve.¹²¹

¹¹⁶ *About European Consumer Centres Network (ECC-Net)*, EUR. COMMISSION, http://ec.europa.eu/consumers/ecc/about_ecc_en.htm (last updated Mar. 19, 2013).

¹¹⁷ *Id.*

¹¹⁸ *About us*, CONSUMER FIN. PROTECTION BUREAU, <http://www.consumerfinance.gov/the-bureau/> (last updated Aug. 26, 2014).

¹¹⁹ *Creating the Consumer Bureau*, CONSUMER FIN. PROTECTION BUREAU, <http://www.consumerfinance.gov/the-bureau/creatingthebureau/> (last visited Sept. 3, 2014).

¹²⁰ *ADR and ODR in the EU today*, *supra* note 108.

¹²¹ INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. OF DENVER, CIVIL CASE PROCESSING IN THE FEDERAL DISTRICT COURTS: A 21ST CENTURY ANALYSIS 4 (2009), available at http://iaals.du.edu/images/wygwam/documents/publications/PACER_FINAL_1-21-09.pdf.

While many American companies may prefer the relative speed and ease of alternative dispute resolution systems, the ADR system in the US seems much less favorable to consumers compared with the system in the European Union. In the US, alternative dispute resolutions are often mediated by someone hired by the company in dispute with a consumer.¹²² This creates incentives for mediators to rule in favor of the business, with arbitration providers actively soliciting businesses to require arbitration of consumer disputes.¹²³ In addition, while ADR in the United States is oftentimes less expensive than a full court trial, there are still substantial costs associated with paying the mediator and other process fees.¹²⁴ This is also starkly contrasted with the free and low cost ADR schemes available to European consumers.¹²⁵

V. CONSUMER PROTECTION CASE EXAMPLES

In order to see the differences in consumer protection litigation between the United State and European Union, it is useful to look towards example cases to discern differences between the systems. This section looks at both small claims and large claims consumer protection cases in the US and EU.

A. SMALL CLAIMS PROCEEDINGS IN THE UNITED STATES

US legal districts with enough case volume generally elect to set up small claims courts to deal with cases under a certain monetary threshold. In the state of Wisconsin, counties with more than 500,000 residents are required to have at least one court commissioner position devoted to small claims matters.¹²⁶ In order for a case to be eligible for

<http://www.U.S.C.courts.gov/U.S.C.courts/RulesAndPolicies/rules/Duke%20Materials/Library/IALS,%20Civil%20Case%20Processing%20in%20the%20Federal%20District%20Courts.pdf> (last visited December 2, 2012).

¹²² Kathy Chu & Taylor McGraw, *Minnesota lawsuit claims credit card arbitration firm has ties to industry*, USA TODAY (July 15, 2009, 8:59 AM), http://usatoday30.usatoday.com/money/perfi/credit/2009-07-14-credit-card-arbitration-firm-lawsuit_N.htm.

¹²³ *Id.*

¹²⁴ See, e.g., *Commercial Arbitration Rules: Administrative Fee Schedules (Standard and Flexible Fee)*, AM. ARB. ASS'N (June 1, 2010), https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004102.

¹²⁵ *Alternative Dispute Resolution (ADR)*, *supra* note 105.

¹²⁶ WIS. STAT. § 757.68(5m) (2011-12).

small claims, the amount in controversy must not exceed \$10,000.¹²⁷ Small claims courts tend to be utilized mainly for parties seeking money judgments, replevin actions, eviction of tenants, arbitration confirmation, or the return of earnest monies.¹²⁸ The rules of evidence do not apply in some small claims courts, with Wisconsin allowing any evidence be admitted unless it is based solely on oral hearsay.¹²⁹

In observing various small claims proceedings in Dane County, Wisconsin, the vast majority of parties in these proceedings represent themselves *pro se*.¹³⁰ In fact, one study of legal representation in the Utah State Courts found that 98% of small claims cases move forward without formal legal assistance from an attorney.¹³¹ The fact that so many of the participants involved in actions in US small claims courts are representing themselves creates an interesting dynamic between parties and the court commissioner. This dynamic was especially evident during one observed small claims proceeding in Dane County in 2012.¹³² In this proceeding, a young woman brought a small claims action against a local auto dealer that she had purchased a vehicle from.¹³³ The woman alleged that she purchased the vehicle with a contract that the seller was responsible to pay for a few repairs the vehicle needed.¹³⁴ However, the seller never paid for the required repairs and the young lady was out of pocket \$1,400 for the repair bills.¹³⁵ In this case, the seller never appeared during the hearing, and the court commissioner gave the woman a default judgment for the amount of the repairs.¹³⁶ However, the commissioner told the young woman that it was unlikely that she would ever be able to collect her judgment from the vehicle seller because of the seller's lack of assets.¹³⁷

¹²⁷ WIS. STAT. § 799.01(1)(d) (2011-12).

¹²⁸ Clerk of Courts, *Abbreviated Guide to Small Claims*, DANE COUNTY WIS., <http://www.countyofdane.com/court/prepare/smallClaim.aspx> (last visited Sept. 13, 2014).

¹²⁹ WIS. STAT. § 799.209(2).

¹³⁰ Jon Fischer, *Dane County Small Claims Observations*, June 12, 2012 (unpublished notes) (on file with author).

¹³¹ COMM. ON RES. FOR SELF-REPRESENTED PARTIES, UTAH JUDICIAL COUNCIL, STRATEGIC PLANNING INITIATIVE: REPORT TO THE JUDICIAL COUNCIL 5 (2006), *available at* http://www.utcourts.gov/resources/reports/docs/ProSe_Strategic_Plan-2006.pdf.

¹³² *See generally* Fischer, *supra* note 130.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

In practice, small claims proceedings seem to be much less intimidating to the average consumer than bringing a case in regular court. However, in exchange for a more informal environment, small claims courts seem to be much less predictable than district or appellate courts. While a small claims court often is able to move quicker than a regular court, many jurisdictions make their small claims decisions reviewable in the main court system.¹³⁸ This can create a situation where small claims procedure can actually add to the length of litigation if a party decides to appeal a decision to a higher court. In Wisconsin, the appeal of a small claims decision is heard at the appellate court level.¹³⁹

US small claims courts are useful to lessen the busy dockets of judges in certain populated areas, but the costs associated with bringing an action are still significant to the average consumer. As a Wisconsin consumer, bringing a small claims action against a business would require the payment of a \$94.50 filing fee, taking off of work to be present for the court hearing, and any costs associated with retaining legal counsel.¹⁴⁰

B. SMALL CLAIMS PROCEEDINGS IN THE EUROPEAN UNION

In Europe, small claims proceedings are handled differently than they would be in the United States. Because of the multi-national nature of many European Union consumer disputes, the EU implemented regulations establishing standard small claims procedures across its member states in 2009.¹⁴¹ EU small claims courts handle cases where the amount in controversy is less than 2,000 euros (about \$2,664 as of January 18, 2013).¹⁴² Similar to small claims court in the United States, no lawyer is necessary to take part in European small claims courts either.¹⁴³

¹³⁸ See, e.g., Clerk of Courts, *supra* note 128.

¹³⁹ WIS. STAT. § 799.30.

¹⁴⁰ *Wisconsin Circuit Court Fee, Forfeiture, Fine, and Surcharge Tables*, WIS. CT. SYS. (Jan. 1, 2014), <http://www.wicourts.gov/courts/circuit/docs/fees.pdf>.

¹⁴¹ Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 Establishing a European Small Claims Procedure, 2007 O.J. (L 199), *available at* <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007R0861&from=EN>.

¹⁴² *Summaries of EU legislation: European small claims procedure*, EUROPA, http://europa.eu/legislation_summaries/consumers/protection_of_consumers/116028_en.htm (last updated Aug. 27, 2007). As of January 18, 2013, 2000 euros is about \$2,665. *Currency Converter*, OANDA, <http://www.oanda.com/currency/converter/> (last visited Sept. 14, 2014).

¹⁴³ *Summaries of EU legislation: European small claims procedure*, *supra* note 142.

In order to file a small claims procedure, a consumer in the EU must fill out a form including information about their claim and the amount in controversy that is filed with a court in their own country of residence.¹⁴⁴ After it receives the form, the EU member nation court sends the defendant in the action a copy of the form along with an answer form to be filled out.¹⁴⁵ The defendant has 30 days to reply to the action, with the court forwarding a copy of the response to the plaintiff.¹⁴⁶ Next, the court has 30 days to decide the outcome of the case, and the party seeking to enforce the judgment provides a copy of the judgment translated into a language of the Member State that will enforce it.¹⁴⁷

EU small claims evidentiary requirements call for the gathering of evidence using the “simplest and least burdensome method” available.¹⁴⁸ Oral hearings are only utilized in EU small claims procedure if one of the parties requests that a hearing take place. Even if a party requests an oral hearing, the court may refuse the request if they deem a hearing to be unnecessary in the proceedings.¹⁴⁹ Like other European courts, EU small claims procedure calls for the losing party to bear the costs of the litigation.¹⁵⁰

While the European Union created a unified system for citizens of member states to bring disputes against businesses in their own country or across borders, the fact that it follows the traditional “English rule” of fee allocation would seem to limit its applicability. When faced with the choice between dispute resolution in a small claims court where a consumer could be responsible for the opposing party’s costs if unsuccessful and resolution through the various ODR or ADR systems established by the EU to help consumers,¹⁵¹ it would seem as though many more consumers would choose the out-of-court options. Perhaps this is one of the goals of small claims procedure in the EU, to create a system that consumers have access to while steering their disputes towards non-legal dispute resolution systems to limit the strain on court systems.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *See supra* Part IV.b.

C. LARGE CLAIMS PROCEEDINGS IN THE UNITED STATES

Contrary to the judicial systems of the European Union, American consumers may find courts to be a more appealing option when disputing consumer transactions. There are many examples of consumer litigation taking place throughout the United States court system. A simple search of any online research tool brings up thousands of cases relating to consumer litigation, but the decisions in *Gammon v. GC Services Limited Partnership* and *Wisconsin Auto Title Loans v. Jones* provide insight into how US courts deal with consumer cases.¹⁵²

In *Gammon v. GC Services* a debtor sued a debt collection agency for violating the FDCPA in an attempt to collect a debt.¹⁵³ The alleged violation arose when the debt collection agency sent a letter to plaintiff stating that the agency provides “the systems used by a major branch of the federal government and various state governments to collect delinquent taxes.”¹⁵⁴ The court in the 7th circuit decided that this could potentially amount to a violation of the FDCPA as debt collectors are prohibited from making “false, deceptive, or misleading representation or means in connection with the collection of any debt.”¹⁵⁵ This conclusion led the court to remand the case for further proceedings.¹⁵⁶

Another example of courts dealing with consumer litigation is found in *Wisconsin Auto Title Loans v. Jones*.¹⁵⁷ This case hinged on whether or not Wisconsin Auto Title Loans included an unconscionable arbitration agreement in its contract with a consumer.¹⁵⁸ If the arbitration agreement was found to be unconscionable, then it would be invalid and the court would not compel Jones to arbitration.¹⁵⁹ The court finds this particular arbitration clause to be unconscionable because of its overly “one-sidedness” protecting of the merchant’s interests.¹⁶⁰ While this case does not stand to make all arbitration agreements invalid in Wisconsin, it

¹⁵² See generally *Wis. Auto Title Loans, Inc. v. Jones*, 2006 WI53, 290 Wis.2d 514, 714 N.W.2d 155; *Gammon v. GC Servs. Ltd. P’ship*, 27 F.3d 1254 (7th Cir. 1994).

¹⁵³ *Gammon*, 27 F.3d at 1254.

¹⁵⁴ *Id.* at 1255.

¹⁵⁵ *Id.* at 1256.

¹⁵⁶ *Id.* at 1258.

¹⁵⁷ See *Jones*, 714 N.W.2d 155.

¹⁵⁸ *Id.* at 159.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 173.

does require that they are drafted in a way that does not force consumers to litigate claims in two forums at the same time.¹⁶¹

D. LARGE CLAIMS PROCEEDINGS IN THE EUROPEAN UNION

Unlike the vast proliferation of consumer protection case examples available to US consumers, there is a relative lack of large claims case decisions for EU consumers to learn from. While the above-mentioned search of US case records provides thousands of hits for a variety of consumer protection issues, there are far fewer EU cases available. EUR-Lex provides online access to the decisions of the Court of Justice, which acts as the high court for the European Union.¹⁶² An analysis of Eur-Lex for debt collections cases yields relatively few results.¹⁶³ This stands in stark contrast to a Westlaw search for the same terms which returns thousands of case results.¹⁶⁴

While there are relatively few examples of EU member nation courts dealing with consumer protection issues, the court in *Josef Probst v. mr.nexnet GmbH* does provide some insight into how the courts deal with consumer protection issues.¹⁶⁵ In this case, mr.nexnet was the assignee of a debt owed to Verizon for internet access services.¹⁶⁶ Probst challenged mr.nexnet's handling of his personal data, alleging that the company was in violation of several EU consumer protections regarding the protection of personal information and data.¹⁶⁷ In this decision, the court decided to provide a judgment without an opinion.¹⁶⁸ The court

¹⁶¹ *Id.* at 174.

¹⁶² *Types of documents in EUR-Lex*, EUR-LEX, http://eur-lex.europa.eu/content/tools/TableOfSectors/types_of_documents_in_eurlex.html (last visited Sept. 14, 2014); *Court of Justice: Presentation*, CURIA, http://curia.europa.eu/jcms/jcms/Jo2_7024/ (last visited Sept. 14, 2014).

¹⁶³ Search Results for EU Case Law Involving Debt Collection, EUR-LEX, <http://eur-lex.europa.eu/advanced-search-form.html> (under the "Domain" dropdown menu, choose "EU case law"; for the "Search language" dropdown menu, choose "English"; for the "Text search" box, enter "debt collection" and select the "Title and text" dropdown menu; and select "Order" under Document type, follow the "Search" hyperlink).

¹⁶⁴ Search Results for US Cases Involving Debt Collection, WESTLAWNEXT, <http://next.westlaw.com>, (in the search box, enter "debt collection"; select "All State & Federal"; follow the "Search" hyperlink; select "Cases" to narrow the search).

¹⁶⁵ See Case C-119/12, *Probst v. mr.nexnet GmbH*, 2012 EUR-Lex 62012CJ0119 (Nov. 22, 2012), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0119&qid=1410742759879&from=EN>.

¹⁶⁶ *Id.* at 2.

¹⁶⁷ *Id.* at 3–5.

¹⁶⁸ *Id.* at 1.

ultimately decided that any debt assignee of the contract must act under the authority of the internet service provider and must include in the debt purchasing agreement provisions that guarantee the lawful use of this data.¹⁶⁹

While the actual litigation procedure in both the US and EU seem to be substantially similar in terms of time and effort invested, there does seem to be a difference in the amount of consumer litigation found US and EU courts. It seems likely that this lack of large claims proceedings on consumer protection issues in the European Union is by design. The effort to funnel consumer disputes first to EU sponsored alternative dispute resolution schemes and then through the unified small claims procedure would likely weed out all but the largest consumer protection disputes.

VI. CONCLUSION

The consumer protection schemes of both the United State and the European Union are a product of each government's history. As a result of its beginnings as an organization to foster trade between nations, the European Union seems to be slightly behind the United States in its judicial protections for consumers. However, with the shifting focus of the EU to more of a total government solution, fast progress is being made towards protecting citizens across all of its member states.

Attorney fee allocations shape the ways by which a consumer is able to gain redress. While the "loser pays" system of attorney fee awards may serve to stifle some lawsuit activity on behalf of consumers, the alternative dispute resolution system offers an alternative to the courtroom. This seems to create a system where US citizens may have better protections for its consumers after they have been taken advantage of, while the EU seems to have better front-end protections for its citizens.

Arbitration is not as useful to consumers in the United States because of a perceived lack of impartiality. In the United States, consumer advocates often see arbitration as an ineffective tool for consumers to find redress.¹⁷⁰ While arbitration is set out to be a neutral

¹⁶⁹ *Id.* at 8.

¹⁷⁰ See, e.g., Herb Weisbaum, *Consumer groups rip mandatory arbitration ruling*, NBC NEWS (Jan. 20, 2012, 4:38 AM), http://business.nbcnews.com/_news/2012/01/20/10183640-consumer-groups-rip-mandatory-arbitration-ruling.

decision-making field for both parties in a dispute, many consumer advocacy groups feel that mandatory arbitration proceedings are a rubber-stamp for business interests.¹⁷¹ In the US, businesses often pay for the arbitration proceedings to take place, and are able to choose who the arbitrator is.¹⁷² This creates a system where the arbitrator is incentivized to rule in favor of the business in order to gain repeat business.

The arbitration system in the United States stands in contrast with the system that is promoted by the European Union. In the EU, there seems to be much less distrust of arbitration. Perhaps this stems from consumers being responsible for paying certain costs associated with the arbitration. Consumer faith could also stem from the perceived government involvement in the alternative dispute resolution process. Increased usage of alternative dispute resolution schemes could also be the result of the English rule on attorney fees employed by EU courts. The specter of being responsible for the attorney fees of any sort of business or merchant would undoubtedly serve as a deterrent from bringing a consumer case into the court system.

While neither of these systems is quantifiably better than the other, they do offer unique approaches to consumer protections for citizens of both governments. The traditional model of United States consumer protection where a consumer could settle a dispute in the court system seems to quickly be disappearing with increased limitations on attorney fee shifting. While the US system seems largely predicated on the ability of consumers to redress their disputes in the court system, without the ability to have their attorney fees covered many consumers will be left without options. The European Union's loser pays system of attorney fee shifting has made it so consumers have never solely focused on solving disputes in a court system. Instead, the EU provides its consumers with as much information as possible to allow them to make informed decisions on the front-end of a purchase. The EU also provides government sponsored alternative dispute resolution schemes to allow consumers an impartial and low cost way to deal with their concerns over transactions.

Arbitrations seems ideally suited to consumer disputes. With a less expensive and relatively informal nature, arbitration fits consumers and businesses alike. However, the perceived lack of impartiality in United States consumer arbitration is a real obstacle to overcome. Only

¹⁷¹ *Id.*

¹⁷² *Id.*

when consumers view arbitration as a neutral forum will it be utilized to its full extent as a forum.

If the United States wished to improve its consumer protections there are several lessons to be learned from the European Union. The United States could improve its consumer protections by creating some sort of improved arbitration or alternative dispute resolution scheme for consumers to use. While there may not be perfectly analogous language barriers and cross-border difficulties in the United States like there are in the European Union, consumers undoubtedly purchase goods from far away parts of the country. Instituting some sort of unified alternative dispute resolution scheme for consumers to use when they have a problem with a merchant could steer cases away from the court system. Arbitration has proven to be faster than the normal court process. The implementation of a truly impartial alternative dispute resolution system could both reduce the exceedingly crowded dockets of judges in the United States while providing quicker and lower cost decisions to consumers.