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312.263.3830, Fax 312.263.3846
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About This Issue

Since the passage of the 1996 welfare law, many recipients of Temporary Assistance for Needy Families have joined the ranks of low-wage workers. Like the rest of Americans conducting business to support their families and pay for everyday expenses, low-wage workers are entitled to the consumer protection of federal and state laws and regulations.

The Federal Trade Commission (FTC) is the nation's consumer protection agency, charged with protecting consumers from unfair or deceptive acts or practices in or affecting commerce. Many state laws also prohibit unfair and deceptive practices in business.

In 2009 the FTC launched its Legal Services Collaboration. With a common goal of protecting consumers, FTC staff, on the one hand, and legal aid attorneys around the country, on the other hand, seek to support each other's work. The two groups develop ways to serve consumers more efficiently at periodic, regional "Common Ground" conferences; local law enforcement officials contribute to the discussion.

In this theme issue on consumer law, articles discuss a selection of consumer-rights problems of significance to low-income workers and suggest preventive practices and remedies for violations of applicable law. One article identifies educating low-literacy consumers about financial concerns as the best way to prevent fraudulent practices against such consumers. The article describes community consumer education programs developed with the tools offered by the FTC and the Legal Services Collaboration.

Consumer education programs may be good practice for advocates assisting immigrants on questions about the Patient Protection and Affordable Care Act. The Act is fertile ground, according to another article, for scammers preying on immigrants who are vulnerable due to language, culture, and other barriers. The article proposes preventive strategies and remedies.

Purchasing a car, paying for credit, and even receiving a payroll check appear to be straightforward business transactions for the average consumer. This may not be the case for the low-wage worker; three articles analyze why. One article describes car financing and dealer scams, such as interest-rate markups and yo-yo scams. A second article delves into the fallacies of the arguments supporting payday loans—the common source of credit for many low-income workers. Many payday-loan users may believe, as Bob Hope was said to have quipped, that "a bank is a place that will lend you money if you can prove you don't need it." The article offers policy changes for new sources of small amounts of credit. A third article, on the use of payroll cards to pay employee wages, urges advocates to know about payroll-card risks and the applicable Electronic Fund Transfer Act and Regulation E.

This issue's last article describes empowerment-driven legal practice, a framework that requires the client to be engaged in the legal process and releases the attorney from the expectation to "save" a client. The authors—an attorney and a social worker—discuss the benefits of this framework for lawyers and clients.

Ilze Sprudzs Hirsh

Listen to the editor's audio commentary on this issue.

Issues in Car Financing

Interest Rate Markups and Yo-Yo Scams

BY CHRISTOPHER KUKLA

A car, second only to a home, is one of the most expensive purchases most Americans make. Financing such a purchase is one of the least transparent financial transactions—a landmine of lending abuses, especially by car dealers who handle financing. Although some highly questionable business practices in the auto industry are now legal, federal regulators are considering new rules that would make car loans more fair and affordable.

Most consumers today can access information on car prices, but determining whether the cost of a car loan is fair is much more difficult for consumers, especially if the consumer has a low income and an impaired credit. When financing through an auto dealer, consumers must evaluate a web of loan terms and consider sales pitches for add-on products, such as extended warranties and optional insurance. Car buyers are asked to choose from a dizzying array, and the wrong choice can have a significant financial impact.

Because the Internet has made information on car pricing readily available, dealer profit margins on their main product—the car itself—are declining. According to a recent report, "new car sales account for less than 20 percent of dealer margin in the [United States] and often even have negative returns, but financing and warranties are becoming even more important as sources of dealer income."[1] Car dealers now rely more heavily on the finance and insurance office to generate profits than in the past.[2]

The complexity of car buying combined with changing dealer incentives has created an environment ripe for consumer abuses. In recent years federal regulators have focused increasing attention on auto financing—in particular, the practices of car dealer interest rate markups and "yo-yo" scams.[3] These practices drive up the cost of car loans significantly, yet most consumers drive away with no knowledge about interest rate markups and yo-yo scams, both of which put a buyer at greater risk of defaulting on an expensive loan.

The complexity of car buying combined with changing dealer incentives has created an environment ripe for consumer abuses.

The Center for Responsible Lending found that consumers who financed their cars through dealerships in 2009 paid $25.8 billion in hidden dealer interest rate markups over the lives of their car loans.[4] Here I describe car dealer interest rate markups and yo-yo scams, the legal issues surrounding them, and regulatory actions that could strengthen legal protections for car buyers.

The Mechanics of Buying a Car

There are different types of car dealers. Franchise dealers are affiliated with a manufacturer to sell new cars and often operate a used-car lot in the same facility. Independent used-car dealers, by contrast, sell only used cars and have no affiliation with a particular manufacturer. Independent used-car dealers finance cars and sell their auto loan contracts to financial institutions unaffiliated with the dealer.[5] Another class of dealer is the buy-here/pay-here dealer, retaining and servicing the finance contract. Here I exclude buy-here/pay-here dealers.

The first person a consumer meets at a dealership is usually a salesperson, who helps the buyer select a car. At some point the salesperson may ask whether the consumer is interested in financing

1 McKinsey & Company, Advanced Industries: Innovating Automotive Retail: Journey Towards a Customer-Centric, Multiformat Sales and Service Network 2 (Feb. 2014).

2 NADA Data 2014, Annual Financial Profile of America's Franchised New-Car Dealerships 10 (2014).

3 As discussed below, car dealers may in most cases add to the interest rate on a car loan for compensation. Note also, in a yo-yo scam, the consumer leaves the dealership with the car and believes that the financing is final or close to final. The dealer then pulls the consumer back into the dealership (like a yo-yo on a string) and requires the consumer to sign a new contract, almost always with terms unfavorable to the borrower. Below is a fuller discussion of this problem.

4 Delvin Davis & Joshua M. Frank, Center for Responsible Lending, Under the Hood: Auto Loan Interest Rate Hikes Inflate Consumer Costs and Loan Losses 2 (April 19, 2011).

5 Car manufacturers operate a captive finance arm, but the dealers themselves have no financial control over those finance companies.

with the dealer and offers to speed up the loan process if the consumer gives information that allows the dealer to assess financing options. To collect the information, the salesperson uses a form with a section authorizing the dealer to access the consumer's credit report if the consumer signs the form.

While gathering the information, the salesperson negotiates the price for the car, how much the dealer will pay for a vehicle the consumer may wish to trade in, the amount of a down payment, and any options and features the consumer may wish to purchase.

The consumer chooses loan terms and whether to buy insurance and protection products and signs documents related to the sale or financing or both of a car in the finance office.[6] The agreement to purchase the car is called the "buyer's order." Car financing contracts are retail installment sales contracts and should follow the requirements as set forth in the Retail Installment Sales Act of the state where the car is sold.

The retail installment contract lists the dealer as the creditor, and the finance agreement is between the dealer and the consumer. The dealer then arranges to sell the contract to a bank, finance company, or credit union. Most dealers finance the inventory they hold and in most cases must pay off the financing with each car sold. If the floor-plan financing is not paid off, then the dealer may not have the cash available to purchase new inventory. Thus the dealer wants to sell the finance contract quickly.

6 Insurance and protection products vary widely and may include extended warranties, vehicle service contracts, credit insurance products, guaranteed asset protection insurance or waivers, paint protection, upholstery protection, wheel and tire protection, roadside assistance programs, security systems, window "etch" protection, rustproofing, undercoating, appearance packages, and environmental packages.

Even if the consumer asks the dealer whether the loan includes an interest rate markup, the dealer has a legal shield that allows the dealer to conceal that information.

After collecting the financing information from the consumer, the salesperson forwards the information to the dealer's finance and insurance office. While the consumer negotiates the terms of the sale, the finance manager (or business manager) solicits offers from financial institutions interested in purchasing the finance contract from the dealer. Most finance sources operate electronically, and offers to purchase the contract usually arrive quickly when the financing is relatively straightforward.

Car Dealer Interest Rate Markups

Financial institutions interested in purchasing a car loan contract send the dealer a bid to purchase the contract, which includes the terms and conditions the financial institution will accept. The terms and conditions include the interest rate—also known as the buy rate—at which the financial institution will purchase the contract. Many financial institutions let the dealer decide whether to add to the interest rate and keep as compensation some or all of the net present value of the difference in interest collected. Dealer interest rate markup is known as "dealer reserve" or "dealer participation."

For example, Bank A states that after a review of the consumer's credit score and other available data, it is willing to purchase the installment contract for 6 percent interest. Bank A also specifies that the dealer may include dealer participation of up to 2.5 percent. Under this arrangement, Bank A will allow the dealer to charge the buyer up to an 8.5 percent interest rate.[7]

As mentioned, the Center for Responsible Lending estimates that dealer markups cost consumers nearly $26 billion in additional interest.[8] This does not mean that the compensation is unjustified; however, this figure shows that markups are a significant source of auto dealer income. Advocates should understand that the interest rate markup system as currently practiced creates an incentive for a dealer to sell a consumer the most expensive loan instead of a loan that best meets the consumer's needs.

THE INTEREST RATE MARKUP OPERATES AS A HIDDEN FEE

As soon as the consumer accepts a loan offer from the dealer, the consumer is presented with a retail installment contract that sets out the terms of the loan. This contract does not disclose the portion of the interest rate that will be given to the dealer as compensation for making the loan. Instead the retail installment contract is a long sheet with fine print on both sides detailing all the terms of the contract. That the dealer might be receiving compensation in exchange for selling the contract to a financial institution is generally explained in a vague disclosure.

7 The finance manager may receive several offers from financial institutions to buy the contract but will not show all the offers to the consumer. While the decision about which offer to present may be based on factors such as speed of finalizing and whether the offer allows flexibility to include additional insurance or other add-on products, profit is a key driver. E.g., an advertisement from a lender stated that when a dealer used the lender's system, "[t]he results are arranged in order of potential profit, thereby minimizing the time spent, and maximizing the profit made, on every … deal" (*Westlake Financial Advertisement*, Subprime Auto Finance News, March 20, 2012, at 20).

8 Davis & Frank, *supra* note 4, at 2.

Some states mandate the form and wording of the disclosure. For instance, North Carolina requires that

> [t]he dealer shall disclose conspicuously on the purchase order or buyer's order, or on a separate form provided to the purchaser at or prior to the closing on the sale of the vehicle, that the dealer may receive a fee, commission, or other compensation for providing, procuring, or arranging financing for the retail purchase or lease of a motor vehicle, for which the customer may be responsible.[9]

Some dealers use contracts that make the consumer aware that the interest rate may be negotiable. The consumer cannot possibly know from this disclosure whether the dealer received compensation for the loan, and, if so, what portion of the interest rate reflects the risk the consumer presents versus the portion of the interest rate the consumer is paying for the dealer's services.

On this point the North Carolina law protects the dealer from having to disclose that information:

> Nothing contained in this section or elsewhere under the law of this State shall be deemed to require that a motor vehicle dealer disclose to any actual or potential purchaser the dealer's contractual arrangements with any finance company, bank, leasing company, or other lender or financial institution, or the amount of markup, profit, or compensation that the dealer will receive in any particular transaction or series of transactions from the charging of such fees.[10]

As such, even if the consumer asks the dealer whether the loan includes an interest rate markup, the dealer has a legal shield that allows the dealer to conceal that information.

INTEREST RATE MARKUPS HAVE A LONG HISTORY OF DISCRIMINATORY IMPACT

Starting in the late 1990s, attorneys filed a series of class action lawsuits against the largest auto finance companies in the country; they alleged violations of the Equal Credit Opportunity Act.[11] In particular, the suits alleged that African American and Latino car buyers were more likely to have the interest rate on their car loans marked up and to pay higher markups than their similarly situated white buyers.

Data from some of those cases indicated that the allegations had merit.[12] All the cases settled, but the settlements did not eliminate dealer interest rate markups. Rather, the cases imposed caps of 2 percent to 2.5 percent—meaning that those finance companies could not permit car dealers to add more than 2 percent to 2.5 percent to the interest rate on a car loan.

The Consumer Financial Protection Bureau's guidance to its supervised lenders, who purchase auto loan contracts from auto dealers, reminded lenders that, under the Equal Credit Opportunity Act, financial institutions buying auto loan contracts from dealers could be held liable for any Act violations, including disparate impact on protected classes.[13] The bureau would examine an institution for potential violations not only within the loans purchased from a particular dealer but also across the institution's full portfolio of loans.[14]

According to the Consumer Financial Protection Bureau, "[b]ecause of the incentives these policies create, and the discretion they permit, there is a significant risk that they will result in pricing disparities on the basis of race, national origin, and potentially other prohibited bases."[15] For that reason, the bureau cautioned lenders to take steps to prevent disparities both in the loans purchased from individual dealers and in loans held across the lender's portfolio. Otherwise those lenders could be held liable for discriminatory impact under the Equal Credit Opportunity Act.[16]

According to a Consumer Financial Protection Bureau and U.S. Department of Justice consent order with Ally Financial Incorporated over allegations of disparate impact among borrowers of color represented in Ally Financial's auto lending portfolio, African American, Latino, and Asian/Pacific Islander consumers paid between 20 and 29 basis points more in interest than their similarly situated white peers.[17] Recent Center for Responsible Lending research indicates that active negotiation between a nonwhite consumer and a dealer may not affect the interest rate a buyer receives.[18] In a recent survey of 960 consumers who recently purchased cars, the center found that even though African American and Latino consumers were more likely to report their attempts to negotiate the interest rates, interest rate disparities persisted.[19] Further, those consumers were more likely to report that the dealer misled them that the interest rates quoted were the best they would receive.[20]

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9 N.C. Gen. Stat. § 20-101.2(a)(2) (2001).

10 *Id*. § 20-101.2(b).

11 See National Consumer Law Center, Case Index—Closed Cases (n.d.) (list of cases and supporting documents).

12 Mark A. Cohen, *Preliminary Report on the Racial Impact of FMCC's Finance Charge Markup Policy* 2–5 (Jan. 9, 2004).

13 Consumer Financial Protection Bureau, Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act (March 21, 2013).

14 *Id*. at 3.

15 *Id*. at 2.

16 *Id*.

17 Consent Order at 6, *In re Ally Financial Incorporated*, No. 2013-CFPB-0010 (Consumer Financial Protection Bureau Dec. 20, 2013).

18 Delvin Davis, Center for Responsible Lending, Non-Negotiable: Negotiation Doesn't Help African Americans and Latinos on Dealer-Financed Car Loans (Jan. 2014).

19 *Id*. at 9.

20 *Id*.

THE INTEREST RATE MARKUP IS LIKE THE NOW PROHIBITED MORTGAGE BROKER COMPENSATION

Dealer interest rate markups are similar to a compensation system in mortgage lending until the system was prohibited by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[21] Mortgage brokers had been compensated, in part, through the interest rate, called a yield spread premium.[22] Under this system a broker earned additional compensation for selling a higher interest rate. In some cases the increase in interest rate was used to pay for up-front charges related to the mortgage. In many other cases, however, the compensation was an incentive for the mortgage broker to sell the consumer a loan with worse terms than those for which the consumer would ordinarily qualify.[23]

The markup on car loans operates similarly. The customer is unaware that the dealer will benefit financially if the customer pays a higher interest rate or that the loan has a higher interest rate than the rate for which the borrower actually qualified.[24] And, like mortgage brokers, dealers routinely represent that they use several sources to find credit for consumers.[25] Such representations give consumers the false impression that dealers are shopping on the consumer's behalf rather than maximizing the dealer's own compensation.

In some cases, particularly when a consumer has a credit offer at a lower interest rate than the dealer is prepared to offer, the dealer forgoes some or all of the dealer's compensation to make the interest rate equal or slightly less. In order to make up for the lost profit, however, the dealer raises the price on the car, lowers the amount for the trade-in, or pushes harder to sell add-on products. For the consumer, there is often a trade-off in accepting the dealer's lower interest rate, but usually the consumer cannot know where the trade-off is.

Yo-Yo Scams

A second abusive practice is the yo-yo scam. This scam occurs when a dealer allows the consumer to leave the dealership with the car before the financing is final—a practice more common than most people realize. The dealer contacts the buyer days, weeks, or months later and asks or demands that the buyer bring the car back to the dealership; the buyer is told that executing another financing contract is necessary. The new contract may have a higher interest rate or down payment or other changes that require the consumer to pay more. The consumer is reeled back into the dealership like a yo-yo on a string.

CONDITIONAL DELIVERY IS USED TO INTRODUCE A LESS FAVORABLE CONTRACT LATER

Financial institutions routinely purchase car loan contracts from dealers. Before the advent of computers, dealers seeking to sell their contracts had to talk with a representative of a finance source or communicate via fax with the lenders with whom the dealer did business. Many times, however, those finance sources were closed after hours or on weekends. Often the consumer's own financial institution would be closed when the consumer sought to purchase the car, and the consumer could not secure financing that day.

Car dealers know that the more time a consumer thinks about the purchase of a car, the less likely the deal will be closed. For that reason, dealers allow the consumer to leave with a car on a conditional-delivery agreement, also called a "spot" delivery. Under this agreement, if the dealer is unable to secure financing or the consumer cannot secure financing or both, then the consumer must return the car.

Today most communications between dealer and financial institutions are electronic, and credit decisions can be made any time of day.[26] In most cases dealers have an agreement with a lender to sell the credit contract before the consumer leaves with the car, although there may be some legitimate reasons why the credit contract sale may not be final. For instance, a financial institution may condition the purchase of the credit contract on proof of income or verification of employment status. But such stipulations are transmitted with the offer to purchase the contract, and the dealer is well aware of them. Relatively rare is an offer to purchase

Today most communications between dealer and financial institutions are electronic, and credit decisions can be made any time of day.

21 Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 15 U.S.C. § 1639b.

22 For a full discussion of yield spread premiums and their impact on the mortgage market, see Loan Originator Compensation Requirements Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 11280 (Feb. 15, 2013).

23 *Id.*

24 Davis, *supra* note 18, at 11 ("Over two-thirds of respondents (68.3%) were not aware that this practice exists …").

25 National Automobile Dealers Association's Comments on Federal Trade Commission's Public Roundtables: Protecting Consumers in the Sale and Leasing of Motor Vehicles 9 (April 11, 2011) ("One of these benefits is the access that most dealers have to multiple finance sources from which the dealer can seek competitive and affordable financing for consumers. Dealers' access to captive and independent finance companies, banks, and credit unions frequently results in dealers being able to offer more competitive credit terms to consumers than consumers can secure on their own.").

26 National Automotive Finance Association, 2014 Non-Prime Automotive Financing Survey 12 (2014).

the contract that cannot be secured the same day, and that is usually because the consumer's credit profile is such that a credit analysis takes longer to complete.

Notwithstanding that many deals can be finalized the same day, most dealers make dealer-financed transactions conditional-delivery agreements.[27] Most dealers include a disclosure either in or attached to the finance contract that if the dealer cannot sell the credit contract on terms acceptable to the dealer, then the dealer can void the contract and require that the car be returned. In some cases the contract clause stipulates that the dealer may charge the consumer a rental fee for the use of the car and charge for additional wear and tear on the vehicle.[28] In some cases the dealer does not include the clause at all and still asserts the right to cancel.

Only one-third of states have statutory requirements for conditional-delivery agreements. For example, North Carolina requires that the car remain on the dealer's insurance policy and that the consumer be given dealer license plates rather than temporary license plates.[29] Such requirements ensure that the conditional delivery is temporary and that ownership of the car is not transferred to the consumer. Frequently dealers disregard these requirements, and this leads consumers to believe that the financing agreements are final.

Rental or wear-and-tear fees, along with other tactics, are leverage that a dealer uses to convince the consumer to sign a new, less favorable credit contract. Many yo-yo cases involve the dealer refusing to return a vehicle that the consumer traded in or any down payment the consumer made or both. In more extreme cases consumers who refuse to return the vehicle to the dealer find their car repossessed or are threatened with prosecution.[30]

Most finance sources operate electronically, and offers to purchase the contract usually arrive quickly when the financing is relatively straightforward.

LEGAL ISSUES SURROUND YO-YO SCAMS

Conditional delivery allows any car loan to be a potential yo-yo transaction. Either the dealer fails to take steps showing that the dealer retains ownership until certain conditions are met, or the dealer adds clauses to the contract delaying transfer of ownership until the dealer decides that the transfer is final. Both "methods" used by dealers violate common requirements for a contract to be fulfilled: conditions precedent and conditions subsequent.

In a condition-precedent transaction, a car remains in the car dealer's ownership under a bailment agreement. The consumer does not take ownership of the vehicle until the condition precedent is met, in this case when the dealer agrees to accept an offer to purchase the finance contract.[31] The aforementioned North Carolina statute contemplates this structure—the car must remain on the dealer's insurance policy, and dealer tags must be used to make clear that the consumer does not yet own the car. However, a dealer representative for a prominent car dealer in North Carolina admitted that none of the conditional-delivery transactions the dealer entered into complies with this North Carolina law.[32]

In a condition-subsequent transaction the dealer transfers ownership to the consumer, but the contract states that the financing contract may be rescinded if the dealer decides not to sell the contract to a finance source. However, many dealers also include language that allows the dealer to charge a rental or usage fee for the consumer's use of the car, and this implies that the dealer still has an ownership interest in the car while the consumer is in possession of it. In other situations the dealer does not

27 *Id.* at 14 (for loans requiring a manual decision, 72 percent of credit decisions were made in 45 minutes or less).

28 Contract language in retail installment contracts is in my files.

29 N.C. Gen. Stat. §§ 20-75.1 (1993), 20-79.1 (2000).

30 Delvin Davis, Center for Responsible Lending, Deal or No Deal: How Yo-Yo Scams Rig the Game Against Car Buyers 4 (April 2012).

31 See *Peak v. Ted Russell Enterprises*, 2000 Tenn. App. LEXIS 120, at 2* (Tenn. Ct. App. Feb. 28, 2000).

32 Deposition of Gary Rhodes at 143, *Jones v. Deacon Jones Nissan Limited Liability Company*, No. 11-CVS-519 (N.C. Super. Ct. Wilson Cnty. Oct. 4, 2011) (in my files).

begin transferring the title of the car to the consumer until the contract is final.

Conditional-delivery agreements also evade the intent of the Truth in Lending Act, which allows consumers to compare the costs of credit.[33] The key to the Act is that the offer the consumer receives is a firm offer of credit, the terms of which do not change once the offer is made. In the current auto lending environment, virtually no credit offer is a firm offer. Moreover, the dealer reserves the right to cancel the contract days, weeks, or months *after* the consumer takes possession of the car.

The rampant use of conditional-delivery clauses has shifted the profit risk from the dealer to the consumer.

CONDITIONAL DELIVERY SHIFTS RISK TO THE CONSUMER

The rampant use of conditional-delivery clauses has shifted the profit risk from the dealer to the consumer. A dealer completes more transactions in a day than most consumers will undertake in their lifetimes; this means that dealers have the past experience and information to know whether a particular consumer's loan will be easily sold to a third party. Remember that most conditional sales are predicated on the dealer's decision on whether the agreement to sell the contract is to the dealer's liking. Whether the dealer accepts the deal before the first payment is made or the dealer calls on the consumer to sign a new contract is impossible for a consumer to know.

Furthermore, the dealer has significant leverage over the consumer. The dealer holds the consumer's down payment and trade-in vehicle and in many cases will refuse to return them. Some dealers also insist on charging a rental fee or usage fees, which can total hundreds, if not thousands, of dollars. If the consumer has a lower credit score, the dealer tells the consumer that the "lender" turned the consumer down even though the dealer decided not to sell the contract.

Despite this asymmetry of information and bargaining power, regulators have allowed and courts have upheld the car dealer's requiring consumers to pay more in financing costs. The frequent use of conditional-delivery agreements in effect creates an insurance policy for the dealer. When a dealer finds itself with a credit contract that it cannot sell at a favorable level, the dealer simply voids the contract rather than take a loss on the transaction and demands that the consumer sign a new contract. In any other retail context the retailer, unsatisfied with the terms of the deal, is not allowed to call upon the customer to pay more for the item after the customer takes the item home.

Policy Considerations for Regulators

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, supervision of automobile finance transactions is split between the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau.[34] Under the Act the FTC retains direct authority over car dealers and can pursue regulatory changes through the Administrative Procedure Act rather than the more cumbersome Magnusson-Moss rulemaking.[35] The franchise car dealers—those affiliated with a manufacturer and given the franchise right to sell new cars—lobbied for and received an exemption from direct bureau oversight and supervision, as did larger used-car dealers with service departments. The bureau, however, currently has jurisdiction over large lenders buying auto contracts from dealers. The bureau has yet to issue a "larger participant" rule, and afterward the bureau will likely have jurisdiction over the largest nonbank lenders as well.

REGULATORS SHOULD PROHIBIT DEALER COMPENSATION BASED ON INTEREST RATES

The Consumer Financial Protection Bureau and the FTC should issue regulations that prohibit car dealers from receiving compensation or that prohibit financial institutions from providing compensation to car dealers or that prohibit both in which the compensation varies with the interest rate of the loan. Car dealers already receive compensation in many ways other than the discretion to add to the interest rate. For instance, when a manufacturer gives a below-market interest-rate incentive, the dealer is paid through a flat-fee structure. Most credit unions pay flat-fee compensation. Commercially reasonable methods of compensation without the incentive for the dealer to sell the most expensive loan possible are already being used.

THE FTC SHOULD PROHIBIT DEALERS FROM DECIDING IF CONDITIONS ARE MET

To combat the problem of yo-yo scams, the FTC should prohibit the use of conditions in car financing agreements in which meeting the conditions is at the sole discretion of the dealer. If a car dealer decides to send a consumer home with the car before the financing is final, then the dealer should retain the risk of the financing transaction ultimately not being to the dealer's liking. The dealer is in a far better position to assess the potential risk that there may be a problem with assigning the financing. As

33 Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.*; 12 C.F.R. § 1026 (2014).

34 12 U.S.C. § 5519.

35 *Id.* § 5519(d).

such, the dealer should be charged with deciding whether to allow the consumer to leave with the car once terms are agreed upon, rather than placing the onus on the consumer to determine the risk of having to return to sign another contract.

MANDATORY ARBITRATION AND CLASS ACTION WAIVERS SHOULD BE EXAMINED

The issue of mandatory, binding arbitration and class action waivers should also be resolved. Virtually all car financing contracts include mandatory arbitration clauses that prevent consumers from litigating in court and prohibit the consumer from participating in a class action suit. These clauses often prevent consumers from seeking redress and, since arbitration findings are not required to be made public, prevent other consumers from knowing about a dealer's conduct.[36]

Attorneys who encounter a potential auto fraud case should understand that an auto finance transaction is complex and has many variables. To understand fully the state of the law and what precedents may be helpful, attorneys new to auto finance cases should connect with attorneys who regularly take these cases.[37] Seasoned attorneys also regularly look beyond the issue that brought the client to them in the first place. Often the potential client is unaware of other violations of law or other abuses. Many sources of information can be accessed during discovery, and an attorney taking an auto fraud case should take the time to learn what information to seek.

36 For a discussion about the problems of mandatory arbitration, including the impact on car lending, see Public Justice, Public Justice Comments to Bureau of Consumer Financial Protection in Response to Request for Information for Study of Pre-Dispute Arbitration Agreements, Docket No. CFPB-2012-0017 (June 23, 2012).

37 The National Association of Consumer Advocates and the National Consumer Law Center both have networks of attorneys who regularly pursue auto fraud cases and can help connect attorneys with practitioners in their area.

The purchase of a car being one of the largest decisions a consumer makes in a lifetime, there should be attorneys willing and able to help consumers who have been victims of interest rate markups, yo-yo scams, and other practices that can cost consumers thousands of dollars in damages.

CHRISTOPHER KUKLA
Senior Vice President

Center for Responsible Lending
302 W. Main St.
Durham, NC 27701

919.313.8520
chris.kukla@responsiblelending.org

The Verdict Is in

Payday Lending Is Guilty as Charged

BY RON ELWOOD

The payday loan has long been at the epicenter of an incendiary national debate.[1] Payday lenders argue that they provide a necessary source of credit for borrowers with nowhere else to turn.[2] Consumer advocates consider payday lending to be a form of legal loan sharking that traps borrowers into a downward spiral of debt.[3] Who is right?

Convincing evidence supports the consumer advocates.[4] An increasing number of states limit, expressly prohibit, or in effect prohibit payday lending.[5] Federal financial regulators require underwriting and limit payday loans offered by national banks, which are not subject to state payday-lending laws.[6] The U.S. Department of Justice, state banking commissioners, and state attorneys general are cracking down on illegal Internet payday lending.[7] And the new federal regulatory cop on the beat—the Consumer Financial Protection Bureau—held its first hearing on the subject in 2012.[8] The bureau conducted research that, according to a *New York Times* editorial, "discredits once and for all the industry's portrayal of these loans as a convenient option for people who can easily repay the debt on the next payday."[9] *Bloomberg News* reports that the bureau is formulating new rules to bring needed reforms to this market.[10]

The payday-lending industry continues to fend off attacks by resorting to well-worn but fraying defenses such as:

- Payday loans are a bridge for credit-challenged customers to get them through a temporary financial emergency;
- The use of an annual percentage rate (APR) to signal the cost of credit for a payday loan is inapplicable;
- The risks the lenders take justify the rates; and
- A payday loan helps the unbanked, is a straightforward deal, and relieves financial stress.[11]

The facts argue against these defenses. Consumer advocates have long argued that the debt trap is the business plan and that the payday-loan product is intentionally designed to ensnare borrowers in an end-

1 Steven M. Graves & Christopher L. Peterson, *Usury Law and the Christian Right: Faith-Based Political Power and the Geography of American Payday Loan Regulation*, 57 Catholic University Law Review 637, 646 (2008).

2 Benjamin D. Faller, *Payday Loan Solutions: Slaying the Hydra (and Keeping It Dead)*, 59 Case Western Reserve Law Review 125, 146 (2008) ("[p]ayday lenders and their supporters often argue that bans on payday lending will leave borrowers who cannot access mainstream credit with nowhere to turn").

3 Lauren K. Saunders, National Consumer Law Center, Why 36%? The History, Use, and Purpose of the 36% Interest Cap 4 (April 2013); Lynn Drysdale & Kathleen E. Keest, *The Two-Tiered Consumer Financial Services Marketplace: The Fringe Banking System and Its Challenge to Current Thinking About the Role of Usury Laws in Today's Society*, 51 South Carolina Law Review 589, 599 (2000) ("cycle of renewals can create a 'debt treadmill' or downward spiral effect").

4 See, e.g., Pew Charitable Trusts, Payday Lending in America: Report 2: How Borrowers Choose and Repay Payday Loans 53 (Feb. 2013) (promised benefits do not materialize and borrowers are not better off after taking out payday loans); Editorial, *Cracking Down on Predatory Payday Lenders*, New York Times (Aug. 29, 2013) (payday-lending industry is predatory, traps borrowers into long-term debt, and gouges borrowers with "impossible interest rates").

5 These states include those that (1) have never authorized payday lending; (2) ban payday lending; (3) have revoked authorization for payday lending; (4) have instituted rate caps at or below a 36 percent annual percentage rate (APR); or (5) limit the number of loans per year a borrower may take or use another mechanism to prevent payday-loan churning (see Susanna Montezemolo, *Payday Lending Abuses and Predatory Practices*, in State of Lending in America and Its Impact on U.S. Households 159, 191 (Center for Responsible Lending 2013) (22 states with "significant reforms that eliminate or limit the payday debt trap")).

6 Federal Deposit Insurance Corporation, Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 Fed. Reg. 70552 (Nov. 26, 2013); Office of the Comptroller of the Currency, Department of the Treasury, Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 Fed. Reg. 70624 (Nov. 26, 2013) (requiring covered banks to determine ability to repay loans and effectively limiting deposit advances to six per customer per year).

7 See, e.g., Jessica Silver-Greenberg, *Justice Department Inquiry Takes Aim at Banks' Business with Payday Lenders*, New York Times (Jan. 26, 2014) (U.S. Department of Justice enforcement effort to prevent processing of payments of illegal Internet payday loans by financial institutions' third-party payment processing systems); Jessica Silver-Greenberg & Ben Protess, *New York Tells Online Lenders to Abide by State's Interest Rate Cap*, New York Times (Aug. 5, 2013) (state banking commissioner ordered 35 online lenders to halt loan offerings that violate New York's usury law); Press Release, Minnesota Department of Commerce, Attorney General Swanson and Commissioner Rothman Sue California Outfit over Scheme to Deprive Consumers of State Legal Protections (July 11, 2013) (lawsuit against Internet payday lender for making loans violating Minnesota law).

8 Press Release, Consumer Financial Protection Bureau, CFPB Examines Payday Lending (Jan. 19, 2012).

9 Editorial, *What Lending Rules Should Look Like*, New York Times (March 30, 2014).

10 Carter Dougherty, *Payday-Lending Rules Near as U.S. Agency Sees Debt Traps*, Bloomberg News (March 24, 2014).

11 See, e.g., Chad A. Cicconi, *A Role for Payday Lenders*, 123 Banking Law Journal 235, 245 (2006) (payday lending is a "necessary tool for moderate income families who need emergency cash"); Faller, *supra* note 2, at 136–37 (payday-lending industry claims that APR is an inappropriate measure of cost of payday credit and that payday-loan rates justify risk); Jim Hawkins, *The Federal Government in the Fringe Economy*, 15 Chapman Law Review 23 (2011) ("people who are unbanked ... turn to payday lenders" and other fringe lenders); Aaron Huckstep, *Payday Lending: Do Outrageous Prices Necessarily Mean Outrageous Profits*, 12 Fordham Journal of Corporate and Financial Law 203, 206 (2007) ("basic payday lending transaction is fairly straightforward"); Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 Arizona Law Review 563, 577 (2010) (payday-lending industry claims that its products "help people make ends meet").

less cycle of debt.[12] As a result, advocates assert, precious assets are drained from both borrowers and the economy, and this leads to more, not less, financial strain.[13]

After offering a brief historical perspective, I identify and refute the arguments advanced by payday-lending proponents. I conclude that, in the short term, policymakers should act to eliminate the debt cycle endemic to payday lending and, in the long term, foster—with the participation of all sectors—a systemic solution to provide access to credit without the predation inherent in and the financial adversity caused by the traditional payday-lending product. Fostering a systemic solution would strengthen the economy by strengthening family financial stability and security.

Small-Amount, Short-Term Lending at Exorbitant Rates Is Not New

Today's payday-lending industry can be traced to James Eaton, a former credit bureau employee, who reportedly offered the first modern payday loan when he opened Check Cashing Inc. on December 2, 1991, in Johnson City, Tennessee.[14] Two years later W. Allan Jones, Eaton's colleague, opened Check Into Cash, which is described as the first of the national payday-lending chains.[15] These events gave rise to what is now a multibillion dollar industry.[16]

Small-amount, short-term lending at exorbitant rates is not a new phenomenon in America.

But small-amount, short-term lending at exorbitant rates is not a new phenomenon in America. Eaton and Jones are merely links in a chain dating back to the late 1880s, when for-profit lenders began making such loans "at rates often well above the statutory limits."[17] Around the turn of the 20th century came the so-called salary lenders, who offered short-term loans against workers' next paychecks at interest rates ranging from 270 percent to 955 percent.[18] Then, as now, users of these loans sank into financial quicksand and were unable to satisfy the original debt and were thus forced to take out loans perpetually.[19]

Public outrage at these practices ultimately led to the adoption by many states of the Uniform Small Loan Law.[20] The uniform law, which was drafted in 1916, was adopted only after the lending industry, with its formidable resources, blocked consumer protection legislation in state after state, year after year.[21] The new law mandated manageable installment repayments and capped interest rates at between 36 percent and 42 percent APR.[22] Soon after, however, unscrupulous competitors tweaked the loan product design or combed for loopholes to evade the law.[23]

The More Things Change, the More They Stay the Same

The salary lenders of old would more than likely recognize the modern payday-lending model. Payday-loan transactions still require a lump-sum repayment of principal and interest on payday.[24] Borrowers still cannot escape the financial trap that keeps them in continual debt.[25] The industry still possesses seemingly unlimited financial and political resources

12 Martin, *supra* note 11. See also Uriah King & Leslie Parrish, Center for Responsible Lending, Springing the Debt Trap: Rate Caps Are Only Proven Payday Lending Reform 1 (2007) (chief operating officer of large payday-lender Cash America explains that "business theory" of payday lending is to "get the customer in and work to turn him into a repetitive customer, long-term customer"); see, e.g., Robert Mayer, *Loan Sharks, Interest-Rate Caps, and Deregulation*, 69 Washington and Lee Law Review 807, 815 (2012) (high rates and short repayment period associated with payday loans as creating debt trap). See also Creola Johnson, *America's First Consumer Financial Watchdog Is on a Leash: Can the CFPB Use Its Authority to Declare Payday-Loan Practices Unfair, Abusive, and Deceptive?*, 61 Catholic University Law Review 381, 392 (2012) (repeat borrowers are source of most of industry's revenues).

13 See, e.g., Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 Minnesota Law Review 1, 97 (2002) (lending can lead to "even greater financial stress"); Carmen M. Butler & Niloufar A. Park, *Mayday Payday: Can Corporate Social Responsibility Save Payday Lenders?* 3 Rutgers University Journal of Law and Urban Policy 119 (2005) (linking payday lending to broader and adverse economic impact).

14 Daniel Brook, *Usury Country: Welcome to the Birthplace of Payday Lending*, Harper's Magazine, April 2009, at 41–42.

15 *Id.* at 42.

16 Mayer, *supra* note 12, at 837 (since its inception, "payday lending grew from nothing into a $50 billion business").

17 Lendol Calder, Financing the American Dream: A Cultural History of Consumer Credit 50 (1999).

18 Jackson R. Collins, *Evasion and Avoidance of Usury Laws*, 8 Law and Contemporary Problems 54, 55 ([1941]).

19 See Pew Charitable Trusts, *supra* note 4, at 6. See also F.B. Hubachek, *The Development of Regulatory Small Loan Laws*, 8 Law and Contemporary Problems 108, 121 ([1941]) (turn-of-century borrowers were "seldom able to repay the full amount from one pay check" and needed to take new loans, thus repeating process "indefinitely").

20 Jessie Lundberg, *Big Interest Rates Under the Big Sky: The Case for Payday and Title Lending Reform in Montana*, 68 Montana Law Review 181, 184 (2007).

21 John Kilgore, *Legislative Tactics of Unregulated Lenders*, 8 Law and Contemporary Problems 173 ([1941]) (efforts of "loan sharks" to prevent passage of Uniform Small Loan Act).

22 Drysdale & Keest, *supra* note 3, at 619–20. See also Hubachek, *supra* note 19, at 119.

23 See, e.g., Huckstep, *supra* note 11, at 204–5 (salary lenders claimed new practice of "salary buying" was not covered under Uniform Small Loan Act); Rolf Nugent, *The Loan-Shark Problem*, 8 Law and Contemporary Problems 3 ([1941]) (example of misuse of Georgia Building and Loan Act to evade Uniform Small Loan Law).

24 Federal Trade Commission, Consumer Information: Payday Loans (March 2008) (how payday-loan transaction works).

25 See, e.g., Press Release, Consumer Financial Protection Bureau, The CFPB Finds Payday and Deposit Advance Loans Can Trap Consumers in Debt (April 24, 2013) (payday and deposit advance loans being "debt traps" for many).

to combat federal and state reform.[26] And where strong consumer protection laws exist, lenders troll for loopholes and develop other circumvention schemes.[27]

However, more jurisdictions are enacting reform because accumulating evidence calls into question the industry's rationale for the way it does business.[28] Payday loans are not constructive credit options because they do not build or repair credit.[29] Rather, they drain vital assets from borrowers and communities, impede progress toward family financial stability, prevent upward mobility, and hinder macroeconomic growth.[30] In the following section I detail and rebut the industry arguments in defense of the payday loan.

The Arguments in Defense of Payday Lending Fail

In defense of its product, the payday-lending industry has typically relied on a series of arguments. Following are six assertions most often used to defend payday lending along with evidence that calls them into question.

A PAYDAY LOAN IS A BRIDGE LOAN

For the vast majority of borrowers, a payday loan is a lure into a debt trap.[31] The industry contends that payday loans serve as "financial taxis," which are meant to handle emergencies and to get borrowers from one payday to another.[32] The facts, however, do not bear out these assertions and, in fact, show the opposite is true. Borrowers often find themselves worse off after getting involved with payday lenders.[33]

Most payday borrowers do *not* use payday loans as they are advertised (i.e., for unexpected, temporary financial emergencies).[34] In fact, the onetime use of a payday loan is the exception because profitability depends on repeat, long-term use.[35] The average payday borrower is indebted to a payday lender for nearly seven months out of the year. Fully 25 percent of borrowers have loans outstanding for more than ten months of the year.[36]

That payday lending results in long-term indebtedness should come as no surprise. Borrowing a significant percentage of income against the next paycheck unavoidably creates a cash-flow problem for the next pay period—and the one after that, and the one after that.[37] The resulting predicament leaves borrowers little alternative but to roll over the existing loan, take a new one, or borrow from one payday lender to pay off another.[38] There is evidence that

26 See, e.g., Lise Olsen, *Payday Lenders Spent Big in Election 2012*, San Antonio Express-News, Dec. 27, 2012 (generous campaign contributions to legislators who will be "reviewing proposed reforms"); Cary Spivak & Patrick Marley, *Payday Lenders Giving Lobbyists Big Paydays to Stop Interest Cap*, Milwaukee-Wisconsin Journal Sentinel, Aug. 2, 2009 (attempt to regulate Wisconsin payday-lending industry is "a bonanza for the Madison lobbying corps," with 27 lobbyists registering for industry to fight reform). See also Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 Minnesota Law Review 1110, 1111, 1151–52 (2008) ("well-funding payday industry lobby" spends "millions on lobbying").

27 See, e.g., Allison S. Woolston, *Neither Borrower Nor Lender Be: The Future of Payday Lending in Arizona*, 52 Arizona Law Review 853, 869 (2010) (prevalent use of loopholes to evade state rate caps on payday loans). The most recent circumvention scheme involves payday lenders partnering with Indian tribes to claim sovereign immunity in the attempt to evade state and federal consumer protection laws (see, e.g., Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 Washington and Lee Law Review 751, 787 (2012)). Regulators and advocates continue to seek to close the loopholes as they arise (see, e.g., *Ohio Neighborhood Financial Incorporated v. Scott*, No. 11CA010030, 2012 WL 5994934, at *14 (Ohio Ct. App. Dec. 3, 2012), appeal allowed, 2013-Ohio-1622, 986 N.E.2d 29 (2013) (finding that payday lender had illegally circumvented Ohio Short-Term Lender Law); *Federal Trade Commission v. Payday Financial LLC*, 935 F. Supp. 2d 926 (D.S.D. 2013) (denying payday lender's claim that payday lender's purported affiliation of tribe relieves federal agency of jurisdiction to prosecute unfair and deceptive practices against lender)).

28 See, e.g., Karen K. Harris, Payday Loans Harm the Economy, Not Just People, Shriver Brief (June 3, 2013).

29 Michael Kenneth, *Payday Lending: Can "Reputable" Banks End Cycles of Debt?*, 42 University of San Francisco Law Review 659, 668 (2008) (payday lending is "dead-end credit" because it does not improve or repair credit ratings).

30 See, e.g., Graham McCaulley & Brenda Procter, University of Missouri Extension, Show-Me Predatory Lending: Where Does the Money Go? (Jan. 2012) (payday lending "undermines a family's financial stability [leading to] greater difficulty in meeting other basic expenses"); Tim Lohrentz, Insight Center for Community Economic Development, The Net Economic Impact of Payday Lending in the U.S. 3 (March 2013) ("payday lending industry caused *a net loss* in economic activity").

31 Pew Charitable Trusts, *supra* note 4, at 6 ("Only 14 percent of borrowers can afford enough out of their monthly budgets to repay an average payday loan").

32 Community Financial Services Association of America, Is a Payday Advance Appropriate for You? (n.d.).

33 See, e.g., Brian Meltzer, *The Real Costs of Credit Access: Evidence from the Payday Lending Market*, 126 Quarterly Journal of Economics 517, 519 (2011) (use of payday loans actually "increases the likelihood of financial distress").

34 Pew Charitable Trusts, Payday Lending in America: Who Borrows, Where They Borrow, and Why 4–5 (July 2012).

35 See, e.g., Robert DeYoung & Ronnie J. Phillips, Federal Reserve Bank of Kansas City, No. RWP-09-07, Payday Loan Pricing 7 (Feb. 2009) ("The profitability of payday lenders depends on repeat borrowing"); and Leslie Parrish & Uriah King, Center for Responsible Lending, Phantom Demand: Short-Term Due Date Generates Need for Repeat Payday Loans, Accounting for 76% of Total Volume 5 (July 9, 2009) (borrowers taking out a single loan accounted for just 2 percent of total payday-loan activity).

36 Consumer Financial Protection Bureau, Payday Loans and Deposit Advance Products: A White Paper of Initial Data Findings 23 (April 24, 2013).

37 Pew Charitable Trusts, *supra* note 34.

38 See, e.g., Zoë Elizabeth Lees, *Payday Peonage: Thirteenth Amendment Implications in Payday Lending*, 15 The Scholar: St. Mary's Law Review on Race and Social Justice 63, 88 (2012) (borrowers must take out next payday loan to repay previous payday loan); Johnson, *supra* note 12, at 10–11 (borrowers unable to pay loan when due must roll it over); Paul Chessin, *Borrowing from Peter to Pay Paul: A Statistical Analysis of Colorado's Deferred Deposit Loan Act*, 83 Denver University Law Review 387, 411 (2005) (borrowers often "obtain a payday loan from one lender in order to pay off an outstanding payday loan due another lender").

That payday lending results in long-term indebtedness should come as no surprise.

the debt cycle is fed by lenders who train and incent their employees to keep the customers borrowing indefinitely.[39] It is this characteristic especially that led the Center for Responsible Lending to call the payday loan "a defective product."[40] Some suggest it is not the product itself but rather consumer misuse of the product that causes financial harm.[41] However, advocates decry blaming the victim for falling deeper into debt; they argue that the product design forces borrowers to take out repeated loans because the repayment of prior loans leaves them with inadequate funds.[42]

YOU MAY NOT APPLY AN APR TO A TWO-WEEK LOAN

You most certainly may apply an APR to a two-week loan—and should—when the vast majority of payday borrowers are in debt for a substantial portion of the year, as conclusive evidence shows to be the case.[43] The industry argues that use of the APR inappropriately inflates and unfairly creates a misperception of the true cost of the loan.[44] The argument would have merit if borrowers were indebted to payday lenders for just a small portion of the year. Because borrowers are indebted for a substantial portion of the year, the industry's argument fails.

THE RISK JUSTIFIES THE RATES

No, in fact the risk does not justify the rates. The Consumer Financial Protection Bureau defines risk-based pricing as offering "different consumers different interest rates or other loan terms, based on the estimated risk that the consumers will fail to pay back their loans."[45] First, payday lenders do not differentiate among consumers because they do not alter rates based on a borrower's ability to pay.[46] Second, payday loans, though high-cost, are not high-risk.[47] Even as some industry defenders continue to claim that the risk justifies the rate, other industry supporters concede that most payday loans do not end in default because repayment is virtually guaranteed through automatic debit agreements.[48] Default rates on payday loans are low.[49] In sum, there is simply no quantifiable, risk-based justification for the excessively high rates payday lenders charge.[50]

A PAYDAY LOAN IS A PRODUCT TO HELP THE UNBANKED

In actuality the unbanked are typically ineligible for a payday loan. A bank account and an automatic debit authorization are prerequisites to obtaining payday loan credit.[51] The payday lender, with such authorization, is often the first in line to drain the account when the employer directly deposits the paycheck.[52] Payday lenders suggest that taking payday loans is a cheaper alternative to bouncing checks.[53] However, evidence strongly suggests that payday loans cause borrowers to bounce checks and to incur overdraft and other bank fees.[54] Payday loans do not serve the unbanked but are likely to cause banked borrowers to incur additional costs.

A PAYDAY LOAN IS A STRAIGHTFORWARD TRANSACTION THAT BORROWERS CLEARLY UNDERSTAND

The mechanical simplicity of the payday transaction masks its hidden complexities, while its casual nature belies its dangers. There is significant informational asymmetry between payday lenders and payday borrowers. This asymmetry results in the inability of consumers to predict accurately the

39 See, e.g., Jim Siegel, *Are Blacks Main Target of Payday Lenders?*, Columbus Dispatch, Sept. 13, 2007 (Michael Donavan, former district director of operations of large national payday-loan chain, Check 'n' Go, describes how company trained salespeople "'to keep customers dependent, to make sure they keep re-borrowing—forever, if possible'"); see also Graves & Peterson, *supra* note 1, at 643 ("Investigations by federal banking regulators and statements of former payday lending employees confirm that payday lenders create compensation incentives encouraging employees to manipulate borrowers into long-term borrowing").

40 Press Release, Center for Responsible Lending, Momentum Builds Against All Types of Payday Loans: States, CFPB, Others Have Clear Authority to Act (Oct. 4, 2013).

41 See, e.g., Marty Schladen, *Payday-Lending Official: Borrowers Responsible for Their Decisions*, El Paso Times, Dec. 29, 2013 (Texas finance commissioner and vice president of major national payday lender Cash America asserted that borrowers themselves were to blame for falling into cycle of debt).

42 Martin, *supra* note 11, at 570–78.

43 See, e.g., Consumer Financial Protection Bureau, *supra* note 36; Pew Charitable Trusts, *supra* note 34, at 4. See also Uriah King & Leslie Parrish, Center for Responsible Lending, Payday Loans, Inc.: Short on Credit, Long on Debt 1 (March 31, 2011) (in their first year, borrowers are indebted to payday lenders for average of 212 days).

44 William M. Webster IV, *Payday Loan Prohibitions: Protecting Financially Challenged Consumers or Pushing Them over the Edge?*, 69 Washington and Lee Law Review 1051, 1081 (2012) (use of APR distorts true cost of payday loan").

45 Consumer Financial Protection Bureau, What Is Risk-Based Pricing (June 13, 2013).

46 Michael Bertics, *Fixing Payday Lending: The Potential of Greater Bank Involvement*, 9 North Carolina Banking Institute Journal 133, 138 (2005) (survey results of Ohio payday lenders "revealed that payday lenders are quite willing to allow individuals to obtain multiple loans simultaneously without any determination of the individual's ability to repay the loans").

47 Kenneth, *supra* note 29, at 688.

48 See, e.g., Aimee A. Minnich, *Rational Regulation of Payday Lending*, 16 Kansas Journal of Law and Public Policy 84 (2006) (payday loans "are riskier" than other forms of credit); Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 University of California Los Angeles Law Review 855, 885 (2007) (low default rates); Jim Hawkins, *Regulating on the Fringe: Reexamining the Link Between Fringe Banking and Financial Distress*, 86 Indiana Law Journal 1361 (2011) (high likelihood of repayment).

49 Pew Charitable Trusts, *supra* note 4, at 18 ("Loss rates at the larger payday lenders are about 3 percent" of total funds loaned).

50 Charles A. Bruch, *Taking the Pay out of Payday Loans: Putting an End to the Usurious and Unconscionable Interest Rates Charged by Payday Lenders*, 69 University of Cincinnati Law Review 1257, 1280 (2001).

51 Faller, *supra* note 2, at 152.

52 Johnson, *supra* note 12, at 389 ("[T]he majority of payday lenders now have consumers sign contracts that allow electronic debits to their bank accounts to facilitate payment of the entire loan").

53 Thomas A. Wilson, *The Availability of Statutory Damages Under TILA to Remedy the Sharp Practice of Payday Lenders*, 7 North Carolina Banking Institute Journal 339, 342 (2003).

54 Alan M. White, *Behavior and Contract*, 27 Law and Inequality 135, 159 (2009) (activation of automatic withdrawal feature of loan leads to greater insufficient fund fees upon default).

The mechanical simplicity of the payday transaction masks its hidden complexities.

length of indebtedness they will experience or assess the financial jeopardy into which they are placed by using payday loans. Sociologists, economists, and financial analysts have all identified the "difficulty [consumers have] in accurately estimating the costs" of a payday loan."[55] Even industry supporters admit that payday-lending transactions tax the cognitive capabilities of the typical customer.[56] In truth, the vast majority of payday borrowers are imperfectly informed and imperfectly rational.[57]

Consumers of course know the dollar amount of the fee charged on a payday loan.[58] However, they suffer from a deep misunderstanding … of the true cost of the loans.[59] Consumer confusion stems from, among other sources:

- math innumeracy,[60]
- limitations in analytical ability leading to miscalculations about fees and renewals,[61]
- a lack of understanding of Truth in Lending Act disclosures,[62] and
- an aspirational belief that the use of the product will indeed be short-term.[63]

Further, payday lenders often intentionally withhold or manipulate disclosures to the detriment of full borrower awareness of the costs of the transaction.[64] And borrowers often do not anticipate or factor in the costs of repeated rollovers, leading to a significant misbelief of what the loan will actually cost.[65]

In sum, many borrowers clearly are not acting in an informed and economically rational manner when taking payday loans. As two of the most frequently cited defenders of the industry acknowledge, "[i]t is simply not plausible … that a person of ordinary capacity would sensibly decide to borrow money at a rate of 400 percent, using a loan that, in most cases, is likely to remain outstanding for months, if not years."[66]

PAYDAY LENDING DOES NOT LEAD TO FURTHER FINANCIAL DISTRESS

Payday lending does not relieve financial stress; it exacerbates financial problems.[67] Payday borrowers are more likely to end up in bankruptcy.[68] Borrowers also often find themselves buried under a cascade of defaults regarding other expenses, such as mortgage, rent, utility bills, medical bills, and credit card bills.[69] Payday lending has been linked to the destruction of military families.[70] Such lending is associated with negative effects on societal externalities that have an adverse impact on state and local economies.[71]

Ensure Short-Term, Small-Amount Credit at Reasonable Terms

Even payday lending's most strident critics would agree that, for a segment of financially struggling consumers, there is a significant demand for short-term, small-dollar loans. The industry continues to benefit from the perception that the provision of its product must be tolerated because there is no alternative for many borrowers to obtain this necessary credit.[72]

55 Rhys Bollen, *"There Is No Alpha": Bounded Rationality in the Mutual Funds Market*, 28 Banking and Finance Law Review 225, 236 (2013).

56 Mann & Hawkins, *supra* note 48, at 881.

57 Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 University of Pennsylvania Law Review 1, 10 (2008).

58 Mann & Hawkins, *supra* note 48, at 881 (customers "might well understand the specific fees" associated with first payday-loan transaction).

59 Martin, *supra* note 11, at 563.

60 *Id.* at 616.

61 Neil Bhutta, Divisions of Research and Statistics and Monetary Affairs, Federal Reserve Board, Payday Loans and Consumer Financial Health 5 (Sept. 2013).

62 Diane Hellwig, *Exposing the Loansharks in Sheep's Clothing: Why Re-Regulating the Consumer Credit Market Makes Economic Sense*, 80 Notre Dame Law Review 1567, 1595 (2005). See also Stephanie Ben-Ishai, *Regulating Payday Lenders in Canada: Drawing on American Lessons*, 23 Banking and Finance Law Review 323, 353 (2008) (1992 study finds that "50 per cent of Americans [including those with a university degree] were unable to understand the terms under [the Truth in Lending Act], or even know where to look for these terms").

63 Pew Charitable Trusts, *supra* note 4, at 19.

64 Ben-Ishai, *supra* note 62, at 326, 353 ("Many payday lenders hide basic information about their loans from consumers" and exploit consumers with "English-language difficulties").

65 Karen E. Francis, *Rollover, Rollover: A Behavioral Law and Economics Analysis of the Payday-Loan Industry*, 88 Texas Law Review 611, 614 (2010) ("[B]orrowers systematically underestimate their future borrowing, leading to unexpected rollover loans and imposing substantial and unnecessary costs on these borrowers").

66 Mann & Hawkins, *supra* note 48, at 884.

67 See, e.g., Brian Meltzer, *The Real Costs of Credit Access: Evidence from the Payday Lending Market*, 126 Quarterly Journal of Economics 517, 541 (2011) (use of payday loans actually "increases the likelihood of financial distress").

68 See, e.g., Paige Marta Skiba & Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy* 1, 8 (Vanderbilt Law and Economics Research Paper No. 11-13, Nov. 9, 2009); Jacqueline S. Akins, *Lending to the Military*, 64 Consumer Finance Law Quarterly Report 145 (2010); Michael S. Barr, *Financial Services, Saving, and Borrowing Among Low- and Moderate-Income Households: Evidence from the Detroit Area Household Financial Services Survey*, in Insufficient Funds: Savings, Assets, Credit, and Banking Among Low- and Moderate-Income Households 66–69 (Michael S. Barr & Rebecca M. Blank eds., 2009); Kelly J. Noyes, Comment, *Get Cash Until Payday! The Payday-Loan Problem in Wisconsin*, 2006 Wisconsin Law Review 1627, 1634 (2006); and Robert Mayer, *Payday Lending and Personal Bankruptcy*, 50 Consumer Interests Annual 76, 81 (2004).

69 See, e.g., Graves & Peterson, *supra* note 1, at 646 (citing Rick Jurgens, National Consumer Law Center, Utilities and Payday Lenders: Convenient Payments, Killer Loans 26–28 (June 2007) (linking payday lending to other credit defaults)).

70 U.S. Department of Defense, Report on Predatory Lending Practices Directed at Members of the Armed Forces and Their Dependents 39 (Aug. 9, 2006).

71 See, e.g., Butler & Park, *supra* note 13.

72 See, e.g., William Isaac, *Why Payday Loans Are Good for Millions of People*, American Banker (Aug. 13, 2013) (consumers are unable to obtain short-term loans from banks).

But there are alternatives. Credit unions and Community Development Financial Institutions (or CDFIs as they are often known) around the country have established models, providing small-amount loans at reasonable interest rates, payable within a brief term, often through an installment repayment plan.[73] New ideas, such as lending circles, are emerging to deal with access-to-short-term-credit problems that build credit scores.[74] The problem is that these alternatives, however successful, are typically isolated and serve limited numbers of borrowers.

The long-term solution to ensuring access to desperately needed credit is to scale these successful alternatives and develop a nationwide system of suppliers of short-term credit whose goal is not to foster perpetual indebtedness but rather to facilitate individual and family financial stability and macroeconomic growth by offering access to needed credit under reasonable terms. Such an effort is ambitious but never more timely. Cooperation among the public, private, nonprofit, and philanthropic sectors, along with the communities affected, will be critical.

In the meantime, policymakers should look to states that have achieved needed reform to correct the fundamental flaw in the payday-lending model: the debt trap. Delaware and Washington State, for example, have limited to five and eight, respectively, the number of loans a borrower may take per year.[75] Evidence suggests these policies have been effective in reducing the debt cycle that is so destructive to borrowers.[76]

Create a New System

For most borrowers, payday loans do not, as the industry insists, provide a financial bridge over temporarily troubled financial waters. On the contrary, because the norm is a long-term slide deeper and deeper into debt, more often than not, such loans push borrowers to the financial brink. Without question, there is a void in the financial markets for responsible short-term credit. But the payday-lending business model that emerged to fill the void exploits financially desperate consumers by charging unconscionable and unjustifiable interest rates, and, worst of all, trapping the most financially vulnerable in unending debt.

Policymakers often are paralyzed when the debate about payday lending ensues. They are disturbed about the propensity of borrowers to fall into the debt trap, but they are reluctant to shut off access to payday credit, despite its high costs and questionable impact. However, the same characteristics that define the subprime payday loan—the willful absence of underwriting, unaffordable balloon payments, loan churning, excessive interest, unsustainable loan terms and conditions—defined the subprime mortgages whose proliferation precipitated the economic collapse in the mid-2000s and have now been thoroughly discredited.

Payday lending erodes assets and creates financial insecurity among borrowers. Financially healthy families undergird a financially stable economy. The payday loan is symptomatic of the collective and systemic failure to provide access to reasonably priced, short-term, small-amount credit.

Policymakers must first reform laws to limit the likelihood that payday loan borrowers will fall into the debt trap. They should then facilitate the creation of a new system that offers the necessary credit to move families forward and not push them farther behind. Success will by no means be easy, but the status quo is unacceptable. If the will is there, the way will inevitably follow.

RON ELWOOD
Supervising Attorney

Legal Services Advocacy Project
Mid-Minnesota Legal Aid
2324 University Ave. Suite 101
St. Paul, MN 55114

651.842.6909
relwood@mnlsap.org

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73 See Laura Choi, *From Cashing Checks to Building Assets: A Case Study of the Check Cashing/Credit Union Hybrid Service Model* (Federal Reserve Bank of San Francisco, Working Paper No. 2013-01, Jan. 2013); Richard Piersol, *Credit Unions Launch Alternative to Payday Loans*, Lincoln Journal Star (Oct. 19, 2011) (Nebraska credit union loans of up to $500 at 18 percent APR, payable within 60 days); Lauren K. Saunders et al., National Consumer Law Center, Stopping the Payday Loan Trap 19–21 (June 2010) (alternative payday-loan products offered by credit unions in Connecticut, Florida, Iowa, Maryland, New York, New Jersey, North Carolina, Virginia, and Washington, and Community Development Financial Institution lender offering small dollar loans in California and Texas).

74 See Mission Asset Fund, Lending Circles (2014).

75 See Del. Code Ann. tit. 5, § 2235A (2013); Wash. Rev. Code Ann. § 31.45.073 (2013). At present, 15 states and the District of Columbia confront the debt-cycle problem by capping interest rates. Some states have never authorized payday lending; they subject any payday loan to the state's usury cap. Others have eliminated the high-interest payday loan; they subject—through legislation or ballot initiative—any such offering to an APR cap of not more than 36 percent (Montezemolo, *supra* note 5, at 33).

76 Montezemolo, *supra* note 5, at 14 (borrowing patterns before and after enactment of Washington State law show that law "appears to have been successful in greatly lowering the level of payday lending debt trap and associated fees").

Pay Me How? What You Should Know About Payroll Cards

BY SUZANNE MARTINDALE AND CHRISTINA TETREAULT

As businesses and government agencies seek to go paperless, millions of workers are now receiving their wages electronically. For full-time workers with bank accounts, direct deposit is a popular choice. However, for part-time or seasonal workers, or those without bank accounts, the default option is more and more likely to be a "payroll card."

Payroll cards are debit cards that can be used much like a debit card linked to a personal bank account. They have network logos (e.g., VISA or MasterCard) and can be used to make purchases or get cash at an automatic teller machine (ATM). The main difference is that the money linked to the card does not sit in an individual bank account in the employee's name. Instead the employer arranges a program with a third-party vendor to provide payroll card services, and that vendor sets up a pooled account with a bank to hold the funds and issue payroll cards to employees.

Some workers may find payroll cards a convenient noncash option for receiving wages. However, payroll cards can come with usage fees that eat into the funds—possibly in violation of relevant labor laws. Some employees may be given payroll cards as the default option for receiving wages instead of being presented with different choices for how to be paid. These restrictions on employee choice could run afoul of consumer protection laws.

Here we cover trends in the payroll-card market, benefits and risks of using the cards, applicable state and federal laws, and tips for advocates assisting workers on payroll cards.

Payroll-Card Market

Payroll cards continue to rise in popularity. According to the market research firm Aite Group, the total dollar volume loaded onto payroll cards will reach over $51 million in 2014—and rise by 19.9 percent each year into 2016.[1] These increases are not surprising since many large employers have adopted payroll cards as a method of disbursing funds.[2]

Increased use of payroll cards has paralleled the decline of other traditional financial products such as checking accounts.

Increased use of payroll cards has paralleled the decline of other traditional financial products such as checking accounts.[3] About one-in-twelve U.S. households are "unbanked," meaning that no one in the household has a bank account, and about one-in-five are "underbanked," meaning that they have a bank account but also use alternative financial services such as check cashers.[4]

There are many reasons why some consumers may not have bank accounts. Some younger Americans are eschewing banks because they find alternative financial services more convenient.[5] For low- to moderate-income consumers, there may be barriers to opening an account. Checking accounts may require a minimum deposit that is hard to meet.[6] Others may find it onerous to wait for check deposits to clear before being able

1 Madeline K. Aufseeser, Aite Group, The Contenders: Prepaid Debit and Payroll Cards Reach Ubiquity (Nov. 14, 2012).

2 See, e.g., Walmart, Money Network, A Better Payday for You (2014); Citi, What Do You Get with Your Payroll Card? (2012); Costco, Employee Website: Pay Card (2014).

3 Press Release, Javelin Strategy and Research, Prepaid Cards Lure Underbanked and Gen Y Consumers (April 11, 2012) (key findings of report, Prepaid Cards and Products in 2012).

4 Federal Deposit Insurance Corporation, 2011 FDIC National Survey of Unbanked and Underbanked Households 10 (Sept. 2012).

5 See, e.g., Luke Landes, Young Americans Likely to Be Unbanked Regardless of Income Level, Consumerism Commentary (May 17, 2012).

6 Federal Deposit Insurance Corporation, *supra* note 4, at 26 ("Do not have enough money" was most common reason cited for not having bank account).

Employees may be charged fees that undercut their wages; or they may be forced or steered into using the cards, limiting their choice in how to be paid.

to access funds.[7] Some may lack the necessary identification for opening an account.[8] Others may have "bounced out" of the banking system due to repeated overdrafts, which can lead to involuntary account closures and negative entries in Chexsystems, a consumer reporting agency with a database many banks consult to avoid offering accounts to "risky" consumers.[9] These factors—along with the recent financial crisis—may partly explain why the number of unbanked and underbanked households in the United States rose from 30.8 million in 2009 to 34.1 million in 2011.[10]

Unbanked and underbanked households in particular are increasingly using payroll cards. In 2011 about 3 percent of all U.S. households received wages on a payroll card, similar to the number of households that used payroll cards in 2009.[11] However, among unbanked and underbanked households, payroll cards are used by 5.5 percent and 5.3 percent of households, respectively, up from 3.2 percent and 4.2 percent in 2009.[12]

7 Christopher Berry, To Bank or Not to Bank? A Survey of Low-Income Households 7 (Joint Center for Housing Studies, Harvard University, Working Paper No. BABC 04-3, Feb. 2004). Existing federal law requires the first $200 of a check deposit to be made available on the first business day after the deposit was made; additional funds may take longer (see 12 U.S.C. § 4002(a)(2)(D) (2012 & Supp. I) (next-day availability of first $200); *id*. § 4002(b) (most other funds available on second business day after deposit); *id*. § 4003 (exceptions allowing for further delays in certain circumstances).

8 See Federal Deposit Insurance Corporation, *supra* note 4, at 26.

9 Dennis Campbell et al., Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures 1–2 (Harvard Business School, Working Paper, June 6, 2008).

10 Federal Deposit Insurance Corporation, *supra* note 4, at 10.

11 *Id*. at 35.

12 *Id*. at 36.

Benefits and Risks of Using Payroll Cards

For some workers, a payroll card may offer benefits over other options. If a worker cannot qualify for a bank account, or simply does not want one, a payroll card can provide quick and convenient access to wages without needing to open up a bank account or pay fees to cash a check. A payroll card can be used to make purchases, get cash, and conduct transactions online. Furthermore, payroll cards have federal protections that limit the cardholder's liability for fraud, theft, and errors, as discussed in the next section.

Note that, for workers in some low-income and immigrant communities, cash is still common, and criminals may target them under the assumption that they are more likely to carry cash.[13] Getting wages via a payroll card can reduce the risk of losing funds to theft or violent crime.[14]

However, using payroll cards can come with serious downsides. Employees may be charged fees that undercut their wages; or they may be forced or steered into using the cards, limiting their choice in how to be paid. Using payroll cards also may inhibit access to pay stub information.

13 E.g., in a 2010 survey of migrant workers living in Memphis, Tennessee, more than half of undocumented male migrant workers living in the United States for less than five years reported being victims of theft (Jacob Bucher et al., Undocumented Victims: An Examination of Crimes Against Undocumented Male Migrant Workers, 7 Southwest Journal of Criminal Justice 159, 168 (2010)).

14 There is some evidence that in neighborhoods where there is less cash, there is less crime. A recent study found that the introduction of electronic benefits transfer led to a drop in predatory street crime (see Richard Wright et al., Less Cash, Less Crime: Evidence from the Electronic Benefit Transfer Program 1 (National Bureau of Economic Research, Working Paper No. w19996, March 2014).

FEES

Some cards can come with usage fees that eat into a worker's wages, such as ATM or swipe fees. For example, the Wells Fargo payroll card charges $1.50 for each cash withdrawal after the first free withdrawal per pay cycle, and charges $1.00 for a PIN (personal identification number) transaction at the point of sale.[15] ATM fees can add up for workers, especially if they use the card primarily to access cash.[16] Almost one-in-five payroll cards are used like a check-cashing substitute, with 80 percent or more of the value taken off the card via cash withdrawal.[17]

If workers cannot withdraw their pay in full without fees, they are essentially getting discounted wages. Some workers pay such high payroll-card fees that they end up receiving less than minimum wage.[18] This may violate state wage and hour laws, as plaintiffs argued in a class action lawsuit filed in June 2013 against a McDonald's franchisee in Pennsylvania.[19] In the complaint, employee Natalie Gunshannon alleges that the Chase Payroll card she and other employees were given required them to incur fees to access wages and resulted in their receiving below minimum wage.[20]

15 See Wells Fargo PayCard (2014) (click link to "Terms & Conditions," then scroll down to "Fees and Charges for Use of the Wells Fargo PayCard"). Some employers who use the Wells Fargo PayCard may choose to pay these fees on behalf of employees (*id*.).

16 Stephanie M. Wilshusen et al., Federal Reserve Bank of Philadelphia, Consumers' Use of Prepaid Cards: A Transaction-Based Analysis 22 (Aug. 2012) (according to Federal Reserve, automatic teller machine (ATM) withdrawals account for 85 percent of cash withdrawals using debit/ATM cards). Meanwhile, most fee revenues (54 percent) for payroll-card issuers come from ATM fees (*id*. at 32).

17 *Id*. at 22.

18 See Jessica Silver-Greenberg & Stephanie Clifford, *Paid via Card, Workers Feel Sting of Fees*, New York Times, June 30, 2013.

19 Complaint at 4, *Gunshannon v. Albert/Carol Mueller T-A McDonalds*, No. 7010-2013 (Pa. Ct. Com. Pl. Luzerne Cnty. filed June 13, 2013).

20 *Id*. at 2.

Shortly after the lawsuit was filed, Senate Democrats sent a letter to the Consumer Financial Protection Bureau (CFPB) and Department of Labor, urging them to investigate payroll-card fees for possible violations of consumer protection and labor laws.[21]

If workers cannot withdraw their pay in full without fees, they are essentially getting discounted wages. Some workers pay such high payroll-card fees that they end up receiving less than minimum wage.

CHOICE

Employers may also require or effectively steer employees into using payroll cards. Plaintiff's suit in *Gunshannon v. Albert/Carol Mueller T-A McDonalds* also alleges that plaintiff was forced to use a payroll card: her requests to be paid via direct deposit or paper check were denied, and she was told that if she wanted to get paid, she had to use the card.[22] Some employers may not explicitly require their employees to accept payroll cards but nonetheless steer employees onto payroll cards instead of presenting all available options. This can leave workers feeling pressured to use the card in order to avoid delays in getting paid. According to Deyanira Del Rio of the New Economy Project, "We hear virtually every week from employees who never knew there were other options, and employers certainly don't disabuse workers of that idea."[23]

Steering employees onto payroll cards has also gotten regulators' attention. In September 2013 the Consumer Financial Protection Bureau issued a bulletin stating that employees cannot be compelled to use payroll cards under federal law.[24]

Once an employee is using the payroll card, choosing a different payment method for future wage payments can be hard because payroll cards, like other banking services, can be "sticky." If an employee wants to move direct deposits to a different account, getting the transfer completed can take several weeks, and this could cause delays in pay and other disruptions.[25]

ACCESS TO WAGE INFORMATION

Some employers may not provide employees using payroll cards with ready access to pay stubs showing hours worked, expense reimbursement details, or information about tax withholdings. A recent lawsuit against a Jimmy John's franchisee alleges that employees paid via payroll card were not given access to the details of their pay; instead they had to ask a manager for a printout.[26] The complaint alleges that this kept employees from understanding how pay and reimbursement were calculated and that employees may not have realized they were being paid less than minimum wage in violation of both federal and Kansas law.[27] As of this writing, the presiding judge has not ruled on defendant's motion to dismiss.[28]

Legal Framework for Payroll Cards

Under federal law, payroll cards receive consumer protections. Unlike some other prepaid debit cards, payroll cards are explicitly covered by federal laws that provide a right to disclosures, limited liability for unauthorized transactions or errors, and protection against unwanted overdraft fees. Yet consumers can easily confuse payroll cards with general-purpose reloadable (GPR) prepaid cards that have no federal protections.

Unlike payroll cards, GPR prepaid cards fall through the definitional cracks of Regulation E because funds sitting in pooled accounts and managed by third

21 Letter from Richard Blumenthal, U.S. Senator, et al. to Richard Cordray, Director, Consumer Financial Protection Bureau, and Seth Harris, Acting Secretary, U.S. Department of Labor (July 11, 2013).

22 Complaint at 8, *Gunshannon*, No. 7010-2013.

23 Silver-Greenberg & Clifford, *supra* note 18 (quoting Deyanira Del Rio as associate director of Neighborhood Economic Development Advocacy Project; organization recently changed its name to New Economy Project).

24 Consumer Financial Protection Bureau, CFPB Bulletin 2013-10, Payroll Card Accounts (Regulation E) (Sept. 12, 2013).

25 For more information on the obstacles to switching between different account providers, see Suzanne Martindale et al., Consumers Union, Trapped at the Bank: Removing Obstacles to Consumer Choice in Banking 5–7 (May 30, 2012) (delays in rerouting automated transactions such as direct deposit and bill payments).

26 Complaint at 5, *Lewis v. Bushwood Investments Limited Liability Company*, No. 13-cv-2610-JAR/JPO (D. Kan. filed Nov. 27, 2013).

27 *Id.* at 2, 5.

28 Defendant's Motion to Dismiss, *Lewis v. Bushwood Investments Limited Liability Company*, No. 13-cv-2610-JAR/JPO (D. Kan. filed Feb. 13, 2014).

parties are generally considered examples of "trust agreements" exempt from the definition of a "consumer asset account."[29] As a result, GPR prepaid cards linked to funds sitting in pooled accounts are technically exempt from the regulation.

This gap is worrying because many GPR prepaid card companies encourage consumers to have their wages direct-deposited onto their cards. However, that does not make them "payroll cards" for the purpose of Regulation E, and as a result they do not currently receive the same protections.

FEDERAL LAW

The Electronic Fund Transfer Act is the applicable federal law.[30] The Act regulates electronic fund transfers in and out of checking, savings, or "other asset accounts" used for personal, household, or family purposes.[31] The term "account" is further defined by regulation.[32] The Act's implementing Regulation E refines which types of accounts are granted protections.[33] The regulation was amended in 2006 to add employer-arranged payroll-card accounts to the definition of an "account" subject to the regulation.[34]

Consumers who use payroll cards receive several legal protections. First, financial institutions must, at account opening, disclose fees and other key terms and conditions.[35] Payroll-card users must also be notified of any fee increases at least 21 days before they take effect.[36]

The Electronic Fund Transfer Act and Regulation E prohibit employers and financial institutions from requiring employees to establish an account at a particular institution as a condition of employment.

Second, payroll-card accounts are protected from unauthorized transactions or errors. If there is fraud on the account due to a lost or stolen debit card, the consumer has limited liability so long as the incident is promptly reported.[37] If an error shows up in the account's transaction history, the consumer has 120 days from the date of the transaction to dispute it.[38] Once a consumer disputes the transaction, the financial institution must resolve the issue or provisionally credit any missing funds back to the account within 10 business days.[39]

Furthermore, consumers may not be assessed overdraft fees for point-of-sale or ATM debit transactions unless consumers affirmatively opt into an overdraft service offered by their financial institution.[40]

Payroll-card accounts receive almost all of the same protections that apply to individual bank accounts. However, there are two differences. First, unlike consumers with bank accounts, financial institutions are not required to send monthly statements to payroll-card account holders. Instead consumers can be given access to balance information by telephone, Web-based electronic transaction history of the past 60 days, and a written transaction history upon request.[41] Second, a consumer using a payroll card has 120 days to dispute a transaction from the date of the transaction itself, regardless of when (or whether) the consumer discovers it. By contrast, a consumer with a bank account has up to 60 days after *discovering* the transaction to make a dispute.[42]

Federal law also states that employees cannot be forced to use payroll cards. The Electronic Fund Transfer Act and Regulation E prohibit employers and financial institutions from requiring employees to establish an account at a particular institution as a condition of employment.[43]

The Electronic Fund Transfer Act and Regulation E are largely silent on fees. The law requires disclosures at account opening and prior to a fee increase and limits overdraft fees as discussed above.[44] However, the Act and Regulation E do not otherwise restrict usage fees such as maintenance, ATM, or swipe fees.

29 See Federal Reserve Board, Official Staff Interpretation of 12 C.F.R. § 205 (Dec. 30, 2005) (Electronic Fund Transfer Act, Regulation E, was codified at 12 C.F.R. § 205 prior to passage of Dodd-Frank, which transferred Regulation E authority to Consumer Financial Protection Bureau; Regulation E has since been recodified at 12 C.F.R. § 1005).

30 Electronic Fund Transfer Act, 15 U.S.C. §§ 1693–1693r.

31 *Id.* § 1693a(2). A "financial institution" is broadly defined to include banks, credit unions, savings associations, or "any other persons" directly or indirectly holding the account (*id.* § 1693a(9)).

32 Account "means a demand deposit, savings deposit, or other asset account (other than an occasional or incidental credit balance in an open end credit plan as defined in section 1602(i) of this title), as described in regulations of the Bureau, established primarily for personal, family, or household purposes…" (*id.* § 1693a(2)).

33 12 C.F.R. § 1005 (2013).

34 Electronic Fund Transfers, 71 Fed. Reg. 51439 (Aug. 30, 2006) (codified at 12 C.F.R. pt. 205).

35 15 U.S.C. § 1693c(a); 12 C.F.R. § 1005.7.

36 15 U.S.C. § 1693c(b); 12 C.F.R. § 1005.8.

37 15 U.S.C. § 1693g(a); 12 C.F.R. § 1005.6(b)(2). Liability is limited to no more than $50 if the consumer reports the lost or stolen card within two business days, and no more than $500 if within 60 days (12 C.F.R. § 1005.6(b)(2)). However, in practice, card issuers typically waive all liability. In any case, delays in reporting the problem can be forgiven due to extenuating circumstances (12 C.F.R. § 1005.6(b)(4)).

38 12 C.F.R. § 1005.18(c) (2013).

39 15 U.S.C. § 1693f(c); 12 C.F.R. §§ 1005.11(c)(1)–(2).

40 12 C.F.R. § 1005.17(b)

41 *Id.* § 1005.18(c).

42 *Id.* § 1005.6(b)(3). Delays in reporting the problem can be forgiven due to extenuating circumstances (*id.* § 1005.6(b)(4)).

43 15 U.S.C. § 1693k(2) (2012 & Supp. I); 12 C.F.R. § 1005.10(e)(2).

44 The "opt-in" rule for overdraft fees does not apply, however, to preauthorized transactions (e.g., scheduled bill payments) or bounced checks that overdraw the account (see 12 C.F.R. § 1005.17(b)).

STATE LAWS

At present, 22 states explicitly regulate payroll cards by law.[45] Eight other states have issued guidance to clarify permissible uses of payroll cards under their laws.[46] These laws and guidance policies have varying consumer protections. Some have choice-of-payment requirements. Some limit or prohibit fees.[47] Furthermore, some states require oral or written consent from employees before they can be issued payroll cards.[48]

Payroll-card laws are pending in a number of states. For example, Wisconsin's Senate Bill 415 would allow payroll cards with the employee's written consent.[49] Meanwhile, New Hampshire's House Bill 1404 would require that employees first be offered direct deposit or a check before they could be enrolled in a payroll-card program; the bill also would limit fees, increase the fee-free withdrawals per pay period to three, provide a paper statement option, and prohibit linking a payroll card to any form of credit, including overdraft.[50]

More changes may be coming from within the industry as well. In December 2013 MasterCard issued payroll-card standards for its issuing banks.[51] While the standards reiterate legally required protections, they also require employers to provide employees educational materials and simple disclosures. These standards are effective for new employers in July 2014; present employers have until October 2014 to comply.[52]

Tips for Advocates

Advocates assisting workers in using payroll cards may be able to assert state-law claims against employers that enter into payroll-card contracts with problematic features, such as fees banned by a state's payroll-card law or fees that cause employees to be paid below a state's minimum wage. Employers may also be liable for forcing or steering employees to use payroll cards or for limiting employees' access to pay stubs under relevant state law. State wage and hour laws or even Unfair or Deceptive Acts or Practices laws may apply, depending on the state.[53]

Advocates can also help workers submit complaints to the Consumer Financial Protection Bureau if they are having problems with a national bank issuing a payroll card.[54] If an employer is forcing an employee to use a payroll card, the employer may be in violation of the Electronic Fund Transfer Act and Regulation E and subject to Consumer Financial Protection Bureau enforcement action.

SUZANNE MARTINDALE
Staff Attorney

CHRISTINA TETREAULT
Staff Attorney

Consumers Union
1535 Mission St.
San Francisco, CA 94103

415.431.6747 ext. 107
smartindale@consumer.org

415.431.6747 ext. 138
ctetreault@consumer.org

45 Ariz. Rev. Stat. § 23-351 (2013); Colo. Rev. Stat. § 8-4-102(2.5) (2013); 19-1000-1324 Del. Code Regs. (2013); Fla. Stat. § 532.01 (2013); Idaho Admin. Code r.16.03.13.305 (2013); Kan. Stat. Ann. § 44-314 (2013); Me. Rev. Stat. Ann. tit. 26, §§ 663(5), 665(1) (2013); Md. Code Ann., Lab. & Empl. § 3-502(e) (2013); Mich. Comp. Laws § 408.476 (2013); Minn. Stat. § 177.255 (2013); Nev. Admin. Code § 608.135(2) (2013); N.H. Rev. Stat. Ann. §§ 275:42-43 (2013); N.J. Admin. Code §§ 12:55-1.2, 2.4 (2013); N.D. Cent. Code § 34-14-02 (2013); Or. Rev. Stat. § 652.110 (2013); Tenn. Code Ann. § 50-2-103 (2013); Utah Admin. Code r. 610-3-22 (2013); Vt. Stat. Ann. tit. 21, § 342 (2013); Va. Code Ann. § 40.1-29 (2013); Wash. Rev. Code. Ann. § 41.04.240 (2013); W. Va. Code Ann. § 21-5-3 (2013); Wyo. Stat. Ann. § 9-1-403(b) (2013).

46 See Hawaii Department of Labor and Industrial Relations, Wage Standards Division, Direct Deposits, Debit Cards, Electronic Pay Statements ([April 3,] 2014). However, Hawaii is changing course. On April 3, 2014, Hawaii issued amended guidance suspending the use of payroll cards as of September 1, 2014 (see Hawaii Department of Labor and Industrial Relations, Amended Notice Re Department of Labor and Industrial Relations Guidelines on the Use of Payroll Debit Card (April 3, 2014)). This was done while payroll-card legislation was pending in the state legislature. In May, that legislation, H.B. 1814, passed. The bill allows for payroll cards with informed written consent and carries additional protections. It had not been signed by the governor as of June 25, 2014. (Updates on this legislation are available at Hawaii State Legislature, HB1814 HD2 SD2 CD1 (n.d.).) See also Illinois Department of Labor, Fair Labor Standards Division, Electronic Payroll Debit/Credit Cards for Payment of Wages ([April 17,] 2014); [Iowa Workforce Development, Labor Services Division,] Iowa Division of Labor Wage FAQs ([2014]); Montana Department of Labor and Industry, Employment Relations Division, Electronic Wage Payments FAQs ([June 19,] 2014); New York Department of Labor, Request for Opinion: Paycards/Debit Cards (Oct. 29, 2009); North Carolina Department of Labor, Wage and Hour Bureau, Debit/Payroll Card Payment (Aug. 30, 2005); Oklahoma Office of Attorney General, Attorney General Opinion 09-31 (Nov.17, 2009); Texas Department of Labor, Electronic Fund Transfer of Wages ([Dec 10, 2013]).

47 Kan. Stat. Ann. § 44-314(f)(2) (2013); Minn. Stat. § 177.255(12) (2013); Vt. Stat. Ann. tit. 21, § 342(2)(L) (2013); Wyo. Stat. Ann. § 9-1-403(b) (2013).

48 Three states go further by requiring an employee's voluntary written consent before issuing wages on a payroll card and stating that consent cannot be a condition of hire or continued employment (see Minn. Stat. § 177.255(6) (2013); N.J. Admin. Code. § 12:55-2.4(i)(2) (2013) ; Vt. Stat. Ann. tit. 21, § 342(2)(C) (2013)).

49 S.B. 415, 2013–2014 Reg. Sess. (Wis. 2013).

50 H.B. 1404, 2014 Reg. Sess. (N.H. 2014).

51 Press Release, MasterCard, MasterCard Introduces Payroll Card Standards (Dec. 13, 2013).

52 *Id.*

53 E.g., in California a business that violates state law may be additionally liable for engaging in "unfair practices" (see Cal. Bus. & Prof. Code § 17200 (2013)).

54 See Consumer Financial Protection Bureau, Submit a Complaint (n.d.) (click on "Bank account or service").

Consumer Resources for Clients with Limited Literacy

BY JENNIFER LEACH, DEBORAH KENNEDY, AND MIRIAM BURT

That the plain language consumer education materials of the Federal Trade Commission (FTC) did not adequately serve legal aid clients quickly became clear when the FTC launched its Legal Services Collaboration in 2009.[1] The FTC's Division of Consumer and Business Education set out to create resources appropriate to the topics and educational approach needed by low-income clients who are adult English language learners or have low literacy levels. FTC staff worked with the Center for Applied Linguistics to develop parallel websites in English and Spanish for these readers. These websites, Consumer.gov and Consumidor.gov, give much the same information on essential financial subjects as the main FTC website does, but the new sites use language and formats that are accessible to users who find complex English text challenging.

Here we describe how FTC staff learned from the Center for Applied Linguistics how to think, write, and design for this different audience, how they chose which topics to take up, and how the center's approach and the FTC resources could meet the needs of legal aid clients.[2]

An Unmet Need

The FTC is the nation's consumer protection agency, charged under Section 5 of the Federal Trade Commission Act with protecting consumers from unfair or deceptive acts or practices in or affecting commerce.[3] The Bureau of Consumer Protection uses law enforcement, policy initiatives, and consumer education to accomplish the agency's goals. To meet the FTC's education mission, the Division of Consumer and Business Education (a division within the Bureau of Consumer Protection) produces practical materials in English and Spanish to help consumers spot, stop, and report fraud. The goal is to help consumers understand their rights and how to protect themselves—and to help businesses understand their responsibilities.

Incorporating all three approaches, the FTC's Legal Services Collaboration was launched as the country faced mortgage foreclosures and record unemployment and as legal services offices saw increasing demand for services from people coping with the economic crisis. With the common goal of protecting consumers, FTC staff and legal aid attorneys across the country sought ways to support one another's work. Both groups have come together with local law enforcement officials at "Common Ground" conferences that are still being held across the country to discuss the local issues that legal aid clients are facing.[4] Those attending the conferences have developed ongoing relationships, shared information, opened investigations to stop predatory practices, and thus served consumers more efficiently.

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The value of the Legal Services Collaboration is difficult to overstate. Legal aid attorneys' on-the-ground presence and deep knowledge of the scams and abusive marketing practices affecting clients make the attorneys' experience and expertise vital to the FTC. Their input allows the FTC to serve better those segments of the population whose voices seldom reach it directly.[5] Through the Legal Services Collaboration the FTC offered the expertise of its attorneys and investigators, the resources required to bring large cases and engage in aggressive law enforcement, and consumer education, all free of charge.

Because the audience for the FTC's educational materials is composed almost exclusively of consumers, the materials

1 See Monica Vaca & Thomas B. Carter, *How the Federal Trade Commission and Advocates Together Can Benefit Low-Income Consumers*, 45 Clearinghouse Review 457 (March–April 2012).

2 The views we express in this article are ours alone and not the views or opinions of the Federal Trade Commission (FTC) or any individual commissioner.

3 The FTC generally has jurisdiction over anyone that advertises, markets, or sells any goods or services in the United States except banks, common carriers (such as telephone companies), and the business of insurance (Federal Trade Commission Act, 15 U.S.C. § 45(a)(2); McCarran-Ferguson Act, 15 U.S.C. § 1012(b)).

4 Among recent conference locations were Las Vegas, St. Louis, and Albuquerque. For more information, see Consumer.gov, Common Ground Agenda (n.d.).

5 The FTC receives complaints directly from consumers and from other governmental and nongovernmental data contributors, all of which go into the FTC's Consumer Sentinel online database. The complaints help the FTC and other law enforcement agencies target bad actors and build law enforcement actions. Consumers can file complaints online or by phone (1-877-FTC-HELP); legal aid attorneys also can file complaints on behalf of their clients.

use a style accessible to the broadest possible audience.[6] With the Legal Services Collaboration, however, the audience narrowed and changed. This change required a new style, both in writing and design, to serve legal aid clients, and a focus on the topics most important to this audience. FTC staff turned to legal aid partners, the professional organization for teachers of English to speakers of other languages (TESOL International Association), adult education teachers, and others to identify the topics most critical to their constituents. Among these topics were general budgeting and money management, credit, debt, prepaid phone and debit cards, immigration scams, money wiring, identity theft, and other scams and frauds.

Advocates also helped highlight their clients' need for clear, straightforward advice about an issue and what to do about it; short messages; and simple language for people who struggle to read in English. Materials had to serve people with different needs—to be culturally neutral enough for English language learners but still relevant to people who had lower reading levels and whose first language was English. Materials also had to be available in English and Spanish. Simply rewriting existing materials would not suffice.

For guidance, FTC staff called on the Center for Applied Linguistics, a nonprofit educational research and consulting organization based in Washington, D.C. Since its founding in 1959, the center has conducted research and guided policy and implementation on a broad array of language learning and language use topics: immigrant and refugee integration; foreign language teaching at elementary, secondary, and university levels; and English as a second language instruction for adults and children. The center's adult education experts develop and offer programs and materials that enable adults at all levels of English language and literacy proficiency to acquire the linguistic and cultural skills they need to succeed in the workplace, in further education, in the community, and in family and personal life.

For the FTC Consumer.gov project the center's experts drew on their deep knowledge of how readers with limited English literacy approach and use both print and online material. The center developed a two-part training for FTC personnel on effective writing for readers with proficiency at or below the middle-school level. The first part of the training was a half-day workshop that introduced FTC staff to the nature of reading and reading comprehension at low proficiency levels. In one exercise trainers challenged FTC staff to read a 60-word passage in 60 seconds—that is, to read at the relatively slow pace characteristic of low-proficiency readers. This exercise gave FTC personnel direct experience with the challenges that these readers face in comprehending and retaining written information.

The workshop focused on how appropriate vocabulary, sentence structure, and mechanics could maximize comprehension for readers with lower proficiency.[7] Among the key points: use active verb forms, simple sentences, and consistent vocabulary; define potentially unfamiliar terms; and replace complex text with simple graphics. A related aspect of the training focused on website design, including structure and layout, to make navigation as intuitive as possible for readers with limited literacy skills. Among the key design points: use headings and subheads to organize text and guide the reader; place key information at the top of the page; balance text with graphics and white space; and maximize use of visuals.

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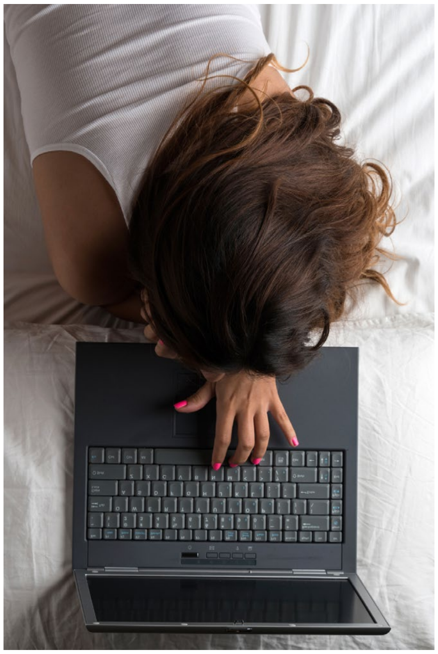
At a follow-up workshop Center for Applied Linguistics facilitators guided FTC staff in implementing their specific ideas for both the content and design of the website. This workshop motivated FTC personnel to continue to develop design and content material on their own, communicating with the center when questions arose, and sending materials electronically for comments and feedback. At the end of the year, the center conducted a refresher workshop to enable FTC staff to continue working on their own.

The training program enabled FTC writers and designers to meet the needs of adults with limited reading proficiency in English.

6 See Federal Trade Commission, Consumer Information (n.d.), or La Comisión Federal de Comercio, Información para Consumidores (n.d.).

7 The following resources were considered: AMC Cancer Research Center, Beyond the Brochure: Alternative Approaches to Effective Health Communication (1994); Miriam Burt et al., Center for Applied Linguistics, Reading and Adult English Language Learners: A Review of the Research (2003); John Kruidenier, National Institute for Literacy, Research-Based Principles for Adult Basic Education Reading Instruction (2002); Michael H. Long, *Methodological Principles for Language Teaching*, in The Handbook of Language Teaching 373–94 (Michael H. Long & Catherine J. Doughty eds., 2009); Justin Baer et al., U.S. Department of Education, Basic Reading Skills and the Literacy of America's Least Literate Adults (2009).



When reading on a computer screen, such readers often do not scroll because doing so breaks their visual concentration.

Within the United States, such readers of English fall into three broad categories:

- Native speakers who read below a high-school level,
- Nonnative speakers who have secondary or higher education in their native language but limited knowledge of English, and
- Nonnative speakers who have less than a secondary level of education in the native language and limited knowledge of English.[8]

Members of the second group, while they may encounter challenges when reading English text, are able to apply their existing (native language) knowledge about how reading works. Members of the first and third groups do not have this advantage. They do not scan text and cannot understand a text by glancing at it; rather they must read word for word. They "plow" the text, focusing on one word at a time and moving their eyes slowly across each line—in the process skipping over large amounts of material because of the time and effort involved in reading it. Instead they may accept a limited amount of information as "good enough" because digging deeper requires too much reading. When reading on a computer screen, such readers often do not scroll because doing so breaks their visual concentration, and they cannot use scanning to return to a previous location. Search functions create problems for these readers. They may have difficulty both spelling query terms and processing search results; as a result they may simply pick the first option on a list, regardless of how well that option fits their needs.[9]

People whose first language is English but whose reading proficiency is limited possess one major asset that those whose first language is other than English may not: their familiarity with the language in its oral form gives them some ability to predict what is coming next in written text because they know what "sounds right" or "makes sense" from the perspective of spoken language. Nonnative speakers may have much more difficulty with what "sounds right" or may be influenced by what would "sound right" in their native language.[10]

Creating Consumer.gov and Consumidor.gov

Development of Web-based resources for the intended audiences required careful analysis of the factors that promote or interfere with low-level readers' ability to absorb information from written material. One major goal was to make content approachable and memorable. A second goal was to use design features that help users concentrate on and understand content rather than distract from it.

CONTENT

In creating educational materials for legal aid clients, the worst thing to do is to rewrite something produced for a general audience. Instead the task requires *re-thinking* the piece: first the key messages and action steps, then the language.

In developing the content for Consumer.gov, FTC staff adhered to a set of basic guidelines:

1. Present only key information, and present it in small chunks.

2. Use simple sentences—straightforward subject-verb-object structure without subordinate clauses—and limit paragraphs to two or three sentences.

3. Eliminate or define technical terms, and avoid abbreviations whenever possible.

4. Choose active-verb rather than passive-verb structures, and use the simplest verb form.

5. Use the same word consistently for the same thing, and favor nouns over pronouns.[11]

6. Use examples, lists, tables, and other graphics to organize and present information.[12]

For example, the following text is on the FTC's site for a general audience:

> A payday loan—that is, a cash advance secured by a personal check or paid

8 Center for Adult English Language Acquisition Network, *Education for Adult English Language Learners in the United States: Trends, Research, and Promising Practices* (April 2010).

9 See Jakob Nielsen, Lower-Literacy Users: Writing for a Broad Consumer Audience (March 14, 2005).

10 Burt et al., *supra* note 7.

11 *Id.*; Kruidenier, *supra* note 7; Long, *supra* note 7.

12 AMC Cancer Research Center, *supra* note 7.

by electronic transfer is very expensive credit. How expensive? Say you need to borrow $100 for two weeks. You write a personal check for $115, with $15 the fee to borrow the money. The check casher or payday lender agrees to hold your check until your next payday. When that day comes around, either the lender deposits the check and you redeem it by paying the $115 in cash, or you roll-over the loan and are charged $15 more to extend the financing for 14 more days. If you agree to electronic payments instead of a check, here's what would happen on your next payday: the company would debit the full amount of the loan from your checking account electronically, or extend the loan for an additional $15. The cost of the initial $100 loan is a $15 finance charge and an annual percentage rate of 391 percent. If you roll-over the loan three times, the finance charge would climb to $60 to borrow the $100.[13]

On Consumer.gov the information appears this way:

A payday loan or cash advance loan can cost a lot. Even if you only borrow money for a week or two until you get your paycheck.

For example:

You borrow $500. The fee is $75

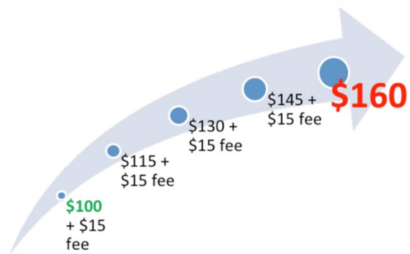
You give the lender a check for $575.

The lender keeps your check and gives you $500 in cash.

After two weeks, you give the lender $575 in cash and you get your check back. The bottom line: You paid $75 to borrow $500 for two weeks.[14]

For challenged readers, the reformulation can go even farther. It might look like figure 1.

FIGURE 1. PAYDAY LOANS AND FINANCE CHARGES



Source: Graphic developed by the Center for Applied Linguistics for use in training Federal Trade Commission staff.

The Center for Applied Linguistics' guidelines led to what was, for government agency staff, a notable change in approach. General audience educational materials necessarily cover many aspects of an issue. The materials serve in effect as policy statements for a government agency and thus convey what the agency needs to say—e.g., that the Fair Credit Reporting Act protects the privacy and accuracy of information in a credit report.[15] However, in creating materials for people with limited reading proficiency, the overriding question was not "what does the FTC need to say?" but rather "what do people need to know?" Following the example above, does the target audience need to know what the Fair Credit Reporting Act does? Or does the audience need to know what credit is, what a credit report does, and why information the report contains is important? This change in perspective was essential for creating educational materials that the very audience in need of the information—adults with low literacy in English—could read and understand.

Legal aid attorneys were instrumental in how content on the site is organized. FTC staff asked the attorneys to help categorize topics that would appear on the site according to where their clients might be most likely to look for them. Several dozen legal advocates, teachers, and nonprofit staff participated in an online "card sort," placing topics into one of several preselected categories or suggesting new categories. The result was the elegant three-category structure of Consumer.gov: Managing Your Money; Credit, Loans and Debt; and Scams and Identity Theft.

Consistent with other FTC educational materials, the site presents consumer education in a value-neutral way. The FTC's Division of Consumer and Business Education has long taken the position that the government's role is not to tell someone what to do but rather to convey what is likely to happen so that one's decision about what action to take is an informed decision. For example, while Consumer.gov does not advise against using payday lenders, the site does say that payday lenders are very expensive and the reader might first consider other ways to borrow.[16] Similarly the "Opening a Bank Account" page on the site does not encourage readers to open an account. Instead it discusses why someone might want to do so and explains the differences between banks and credit unions.[17]

As FTC staff worked on the site's content, the primary focus was on what end users—legal aid clients, English language learners, adult learners—needed to know. However, conversations with legal aid attorneys, teachers, and other groups also suggested that these intermediary groups could use some additional resources. To that end, FTC staff created a section called "Help

13 Federal Trade Commission, Consumer Information: Payday Loans (March 2008).

14 Consumer.gov, Payday Loans and Cash Advances (n.d.).

15 See Federal Trade Commission, Consumer Information: Employment Background Checks (Feb. 2013).

16 See Consumer.gov, *supra* note 14.

17 See Consumer.gov, Opening a Bank Account (n.d.).

When creating Web-based material for low-proficiency readers, design and layout are as important as the language used.

for You," with worksheets, presentations, quizzes, and links to other resources for anyone who might want to train others on the topics.[18] Information is also available on how to order the free materials, file a complaint, get an annual free credit report, and sign up for the Do Not Call Registry.[19]

DESIGN

When creating Web-based material for low-proficiency readers, design and layout are as important as the language used. While native and nonnative speakers of English differ in their degree of familiarity with the oral language, and therefore in the strategies they bring to decoding written text, they share a relatively slow reading rate. As a result, they can focus only on a limited amount of material at one time. Websites for these readers should present information in small, manageable chunks; keep lines of text as short as possible; and avoid complex designs that present different types of material in different parts of the webpage.

Because low-proficiency readers are not able to scan, they cannot quickly distinguish among multiple design elements to find the section of a page that meets their needs. A website designed for readers with limited literacy should have navigation that is simple and somewhat intuitive and should present content in ways that enable users to find relevant material easily and without scrolling down long pages of text.[20] The Center for Applied Linguistics supplied guidance on these and other design considerations: typeface and font size, ratio of text to graphics to white space, and location of headings and graphics in relation to text. The center also worked with FTC designers to establish for the site a culture-neutral color scheme that guided the user through the use of consistent color for each main topic area.

On Consumer.gov the structure of the site and the structure of the articles evolved simultaneously, resulting in the division of each article into three sections:

- What It Is (definitions of terms readers will meet);
- What to Know (the most important things to learn about the topic); and
- What to Do (the action steps to take).

Experience dictated that, for this audience, some materials needed to be in print. The one-page "What to Do" section became the print pieces, allowing legal aid clients, language students, and other adult learners to use a hard copy of the information they might need.[21]

The design guidance also clarified how to use graphics, audio, and video to reinforce the messages in the text. Educational researchers note that people remember 10 percent of what they read, 20 percent of what they hear, 30 percent of what they see, and 50 percent of what they both hear and see.[22] For those for whom reading is difficult, text reinforcement with sound and pictures can greatly enhance understanding. FTC staff included audio, video, and graphics on Consumer.gov and Consumidor.gov. Audio is indicated by a megaphone icon; a reader who clicks on the icon will hear the text read aloud. Certain concepts (such as identity theft) that can be difficult to explain with just a definition are reinforced with short videos narrated in clear language.

With regard to graphics, the site consistently uses a few selected simple, iconic drawings: a dollar bill for budgets; a calculator for credit, debts, and loans; and a caution sign for identity theft. Website designers adhered to these other guidelines:

- Use visuals that are meaningful to and appropriate for the intended readers.
- Use visuals that are simple and free of background clutter.
- Convey only one concept in each visual.
- Use cues such as arrows or circles to identify key information.

The Outcome

On Consumer.gov and Consumidor.gov, FTC staff took seriously the idea of presenting

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18 See Consumer.gov, Help for You (n.d.).

19 See Federal Trade Commission, Order Free Publications (n.d.); *id.*, FTC Complaint Assistant (n.d.); *id.*, National Do Not Call Registry (n.d.); Experian et al., AnnualCreditReport.com (2014).

20 Nielsen, *supra* note 9.

21 Consumer.gov and Consumidor.gov materials are free and can be ordered in bulk as either a folder with one copy of each topic (in English and Spanish) or a pad of 50 sheets on any individual topic—including a worksheet to help people make a budget (see Federal Trade Commission, Order Free Publications (n.d.)).

22 Jon Saphier et al., The Skillful Teachers: Building Your Teaching Skills (2008).

information in different ways for people who learn differently. As simple and direct as the text is, there are sometimes opportunities to elaborate on a point or seek to explain it in different ways. "For Example" headers appear throughout the site to alert the reader of a vignette that illustrates a point just made. Sometimes the example is presented in writing, sometimes through a graphic, and in many cases through a simple animated video.[23] The videos last no more than 90 seconds and purposely depict neither branding nor people. In the latter case, FTC staff sought to be as culturally neutral as possible to enable all viewers to see themselves represented and not be put off if they do not recognize themselves. FTC staff hopes that other organizations will copy and display the videos on their own websites to spread the consumer education message.

Additional conversations with legal aid attorneys, teachers, and others, including librarians and military groups, taught FTC staff several useful lessons in talking about these resources. For teachers of less proficient readers or for legal aid attorneys, describing the materials as being for readers who struggle with written English can be helpful in making the intended audience clear. However, for most groups, presenting the materials in a different way is more productive. For example, for librarians and servicemember groups, describing Consumer.gov and Consumidor.gov as offering basic consumer protection information plainly and simply, in a way that does not require too much time from the reader, has been helpful.

Lessons for Legal Aid Attorneys

As FTC staff members travel around the country and hold "Common Ground" conferences with local advocates and law enforcement, the power of consumer education for legal aid clients is always discussed. Many attorneys have made the point that keeping clients out of trouble in the first place often is easier than extricating them from a difficult situation later. In fact, many legal aid offices have excellent local and state consumer education materials. In those cases, Consumer.gov usefully supplements resources.

Other advocates have noted that their workload does not allow them the time to engage in consumer education. Still others have said that they struggle at times to explain complex issues to their clients. In both of these cases, Consumer.gov resources have been particularly welcomed. Attorneys who have computers available for client use can direct clients to a relevant section of Consumer.gov and can have a supply of printed materials on hand so that clients have something to take away. The information comes in a folder that includes all the topics in both English and Spanish and in pads of 50 copies on an individual topic.[24]

Everything the FTC produces is in the public domain, and thus programs and individuals may reuse and repurpose any part of Consumer.gov or Consumidor.gov with or without attribution. To explain debt collection to clients, for example, attorneys may cut and paste any useful part of "Managing Debt" and may copy the articles, in full or in part, to post on their programs' websites or elsewhere. The same is true for the videos; in fact, each video has a button that allows the user to grab the video. Advocates may cite the source if doing so is helpful, but no attribution is necessary. The FTC's main goal is broad dissemination of the information.

The Center for Applied Linguistics welcomes inquiries about writing and providing services for readers with limited literacy in English.[25] FTC staff members welcome suggestions for additional resources and topics on which material is needed, particularly from those who deal with these issues every day.[26] Reaching diverse, often underserved audiences is a priority of the FTC. Additional educational work continues to be important, but FTC staff members hope to focus more on law enforcement and advocacy on behalf of vulnerable groups—older adults, servicemembers and veterans, immigrant communities, and low-income consumers. Building upon the relationships created with legal advocates is vital to our common mission to serve these communities.

JENNIFER LEACH
Consumer Education Specialist

Division of Consumer and Business Education
Federal Trade Commission
600 Pennsylvania Ave. NW
Washington, DC 20580

202.326.3203
jleach@ftc.gov

DEBORAH KENNEDY
Associate Vice President,
Adult English Language Education

Center for Applied Linguistics
4646 40th St. NW
Washington, DC 20016

202.355.1572
dkennedy@cal.org

MIRIAM BURT
Adult ESL Content Specialist

Center for Applied Linguistics
4646 40th St. NW
Washington, DC 20016

202.355.1556
mburt@cal.org

23 See Consumer.gov, Using Debit Cards (n.d.); *id.*, Sending Money Overseas (n.d.); and *id.*, Videos (n.d.).

24 See Federal Trade Commission, Order Free Publications (n.d.).

25 For further information and assistance on projects and materials for this audience, visit the Center for Applied Linguistics website, or contact Miriam Burt or Deborah Kennedy.

26 Please contact Jennifer Leach about suggestions.

Health Care Scams on Immigrants in the Age of the Affordable Care Act

BY DANIEL SEOKHWAN CHOI

The Patient Protection and Affordable Care Act offers many benefits and protections to consumers of health care services.[1] Coverage, however, is limited to U.S. citizens and foreign-born individuals with certain immigration status.[2] Some immigrant consumers cannot take advantage of the Act's benefits due to language, culture, and other barriers. Worse, unscrupulous agents may use these barriers to scam naive immigrant consumers. Here I discuss some of the health care scams found in immigrant communities—specifically how the Act may affect immigrant consumers as it relates to deceptive practices.

Although the Affordable Care Act is expected to result in many consumer protections and benefits, it presents many opportunities for scams on immigrant consumers.

Immigrant Consumers in the United States

The United States is often referred to as a "nation of immigrants."[3] Currently about 40 million foreign-born individuals are in residence.[4] One in eight Americans, and one in six American workers, are foreign-born.[5] Immigrants are a large and significant subset of our population.

ORIGIN AND DIVERSITY

Today's immigrants come from all over the world and are very diverse. Recent U.S. immigration has been dominated by individuals from Latin America and Asia.[6] Of the total foreign-born population, 53 percent originate from Latin America, and 29 percent from Asia.[7] Latinos have become the largest minority group.[8] Asian Americans are the fastest growing racial group.[9] And 12 percent of foreign-born individuals originate from Europe, and 4 percent from Africa.[10]

There is great diversity within each continent of origin. For example, Korean-born immigrants and Indian-born immigrants are both categorized as "Asian" despite significant differences in culture, language, and physical appearance. This diversity makes for both richness and difficulty in working with immigrant consumers.

LEGAL STATUS

Immigrants have varying status. They enter and reside in the United States through multiple channels. Ultimately some are given the opportunity to naturalize and become U.S. citizens. However, currently only 45 percent of total foreign-born residents are naturalized U.S. citizens.[11] Because they are either unable or unwilling to become U.S. citizens, a majority of foreign-born individuals hold another form of immigrant legal status (e.g., legal permanent resident, refugee, asylee) or no authorized legal status at all.[12] In fact, as of 2012, an estimated 11.7 million foreign-born residents were

1 See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). Some of the benefits are discussed in Kathleen Sebelius, *Affordable Care Act at 3: Consumer Protections*, White House Blog (March 18, 2013).

2 Affordable Care Act § 1312(f)(3) (codified at 42 U.S.C. § 18032(f)(3)).

3 See, e.g., John F. Kennedy, A Nation of Immigrants (1964).

4 U.S. Census Bureau, American FactFinder (n.d.) (Table S0201, Selected Population Profile in the United States: 2010–2012 American Community Survey 3-Year Estimates).

5 Immigration Policy Center, Strength in Diversity: The Economic and Political Clout of Immigrants, Latinos, and Asians in the United States 1 (May 2013).

6 This modern trend results in part from the Immigration and Nationality Act Amendments of 1965, which abolished national-origin quotas heavily favoring Europeans (Pub. L. No. 89-236 (1965), 79 Stat. 911 (1968)).

7 See U.S. Census Bureau, *supra* note 4.

8 *Id.* (Table DP05—ACS Demographic and Housing Estimates: 2010–2012 American Community Survey 3-Year Estimates).

9 Pew Research Center, The Rise of Asian Americans 1 (April 4, 2013).

10 See U.S. Census Bureau, *supra* note 4.

11 *Id.*

12 Although the term "unauthorized" is used here, the terms "undocumented" and "illegal" to describe immigrants are also common.

unauthorized and did not have legal status to reside and work in the United States.[13] Because noncitizens have fewer legal rights than their U.S. citizen counterparts, a majority of immigrants live under greater scrutiny or hidden in the shadows of our informal economy.[14] Confusion and fear related to immigration status contribute to the difficulty of reaching out to immigrant consumers.[15]

ASSIMILATION

Many immigrant consumers are not fully assimilated and operate outside the mainstream. They have greater affinity to languages and cultures from their countries of origin. This is because 63 percent of the foreign-born population entered the United States after 1990.[16] Not surprisingly, 50.9 percent of foreign-born individuals speak English less than "very well," and 84.6 percent speak a language other than English in their homes.[17] Immigrants obtain information differently from English-speaking mainstream audiences. Of Hispanic immigrants, 31 percent report that they get news exclusively in Spanish.[18] Asian-language media are also growing.[19] Immigrants use media differently. For example, Latino immigrants face a digital divide, evidenced by their lower computer and Internet usage.[20] Language, culture, and technology present barriers for many immigrants—barriers to receiving vital information for avoiding and reporting fraud.

ECONOMIC STABILITY

Overall the foreign-born have lower educational attainment and household income compared to their native-born counterparts. The foreign-born population has lower rates of educational attainment at virtually every level.[21] In fact, 31.3 percent of foreign-born individuals do not have a high school diploma.[22] This is nearly three times the rate of nonattainment by the native-born population (10.6 percent).[23] The foreign-born population lags behind the native-born population in household income. The average household income of the foreign-born ($47,420) is $5,000 lower than that of their native-born counterparts ($52,428).[24] Lower levels of education and income put immigrants at a higher risk of becoming victims of consumer fraud.

Confusion and fear related to immigration status contribute to the difficulty of reaching out to immigrant consumers.

HEALTH CARE INSURANCE COVERAGE

Of the foreign-born population, 72.1 percent are between the ages of 25 and 64 (80.4 percent are between 18 and 64).[25] Although healthy working-age individuals are often sought for enrollment by health insurance companies, many immigrants do not have any insurance coverage. According to 2012 U.S. census estimates, 33.5 percent of foreign-born individuals had no health insurance coverage.[26] The percentage of uninsured is as high as 48.2 percent for foreign-born individuals from Latin America.[27] By comparison, only 12.3 percent of native-born individuals had no health insurance coverage.[28] Immigrants are a large subset with a significant number of potential and desired health insurance consumers.

Health Care Options

Relatively new, complicated, and controversial, the Affordable Care Act attempts to reform our broken health care system. Among other ways, reform entails Medicaid expansion to cover low-income individuals in states opting for such expansion.[29] Reform subsidizes health insurance for low-income individuals who do not qualify for Medicaid.[30] Reform established marketplace exchanges where consumers can purchase health insurance at competitive rates.[31] And reform penalizes covered

13 Jeffrey Passel et al., Pew Research Hispanic Trends Project, Population Decline of Unauthorized Immigrants Stalls, May Have Reversed (Sept. 23, 2013).

14 Unauthorized immigrants are subject to deportation. Even authorized immigrants may lose the right to reside in the United States if they fail to maintain their immigration paperwork or are convicted of a crime.

15 Many immigrants come from countries where law enforcement is corrupt or ineffective. This fear carries over to the United States where many immigrants, especially those who face possible deportation, are reluctant to interact with law enforcement.

16 See U.S. Census Bureau, *supra* note 4 (Table B05005—Year of Entry by Nativity and Citizenship Status in the United States: Universe: Population Born Outside the United States: 2010–2012 American Community Survey 3-Year Estimates).

17 U.S. Census Bureau, *supra* note 4.

18 Mark Hugo Lopez & Ana Gonzalez-Barrera, Pew Hispanic Center, A Growing Share of Latinos Get Their News in English 11 (July 23, 2013).

19 Asian media outlets grew 1,115 percent between 1999 and 2010 in the United States (Nielsen, State of the Asian American Consumer: Growing Market, Growing Impact 8 (2012)).

20 While the digital divide between Latinos and whites is shrinking, foreign-born Latinos still make up a majority of Latinos who are not using computers and the Internet (see Mark Hugo Lopez et al., Pew Hispanic Center, Closing the Digital Divide: Latinos and Technology Adoption 9, 11 (March 7, 2013)).

21 More foreign-born residents have graduate degrees than their native-born counterparts. However, native-born residents have a higher percentage in every other category of educational attainment (see U.S. Census Bureau, *supra* note 4).

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 Virtually all U.S. citizens under 65 with family income up to 133 percent of the federal poverty level now qualify for Medicaid in states that decide to expand the program. Childless adults and low-income parents used to be excluded from Medicaid coverage in most states (see Affordable Care Act § 2001 (codified as amended at 42 U.S.C. §§ 1396a, 1396b, 1396d, 1396r-1, 1396u-7); American Public Health Association, ACA Frequently Asked Questions (2014)).

30 See HealthCare.gov, Income Levels that Qualify for Lower Health Coverage Costs (n.d.).

31 Affordable Care Act § 1311 (codified at 42 U.S.C. § 18301). See HealthCare.gov, A One-Page Guide to the Health Insurance Marketplace (n.d.).

consumers who fail to obtain health care insurance.[32] Through subsidies and penalties, reform sets out to get every American covered with some form of basic health care insurance.[33] The Affordable Care Act is now nearly fully in effect. Millions have enrolled and have health insurance for the first time. However, coverage under the Act is not universal and excludes many immigrants. Some implementation problems have affected immigrant enrollment.

COVERAGE AND IMMIGRATION STATUS

Coverage under the Affordable Care Act is limited to U.S. citizens and lawfully present residents.[34] Covered immigrants are generally eligible for subsidies and may be penalized for nonparticipation.[35] The 11.7 million unauthorized immigrants are not covered and not eligible for subsidies or subject to penalties.[36]

The Affordable Care Act does nothing to improve health care options for unauthorized immigrants. Since all health insurance companies now participate in exchanges, unauthorized immigrants have a harder time finding affordable health insurance plans. Essentially they are locked out of personally purchasing affordable private health insurance. Unauthorized immigrants are still not eligible to participate in federal public health care or other safety net programs.[37] And since unauthorized immigrants are not legally allowed to work in the United States, their employers do not likely give them health insurance. Unauthorized immigrants rely almost exclusively on emergency rooms and local clinics for their health care needs.[38] The Affordable Care Act has minimal benefits for unauthorized immigrants.

The Affordable Care Act may not improve health care even for some authorized immigrants. A combination of legal status and length of residency determines whether a low-income foreign-born individual qualifies for federal public benefits programs.[39] Even with subsidies, some very low-income immigrants cannot afford health insurance. And, because of immigration and residency requirements, they do not qualify for federal benefits either.[40] Some low-income authorized immigrants are not any better off than their unauthorized counterparts.

Overall the Affordable Care Act is expected to help millions of both native-born and foreign-born Americans obtain health care.

Immigrants are especially susceptible to health care scams due to language, culture, and other barriers.

However, since the Act covers only certain immigrants and does not expand public benefits eligibility to immigrants of varying status, many foreign-born individuals are still left without any health care coverage.

IMPLEMENTATION

As of its deadline of March 31, 2014, the government exceeded its enrollment goals for the Affordable Care Act. Some 7.1 million people signed up.[41] The government owes its success in part to its active outreach and multiple enrollment options. A consumer had the option to sign up in person, by phone, by mail, or online. Furthermore, enrollment services were advertised regularly and in multiple foreign languages.

However, there are problems. Many immigrants remain unaware of their obligations under a relatively new and complex law, particularly since the Affordable Care Act varies coverage with immigration status. Language and culture pose barriers to enrollment. For example, although enrollment services are available in multiple languages, they are not available in all languages and are not always provided effectively.[42] Low educational attainment and computer literacy disadvantage many immigrants; many just do not have the reading skills or computer literacy to sign up on their own. And immigration status is a factor. Many immigrants belong to mixed-status households where some but not all household members qualify for coverage.[43] Their status can add to the confusion on how families should enroll. Not surprisingly, immigrants lag behind in health insurance enrollment.[44]

32 HealthCare.gov, The Fee You Pay if You Don't Have Health Coverage (n.d.).

33 In trying to accomplish this goal, the Affordable Care Act takes into account individuals who have health care coverage through their employers, Medicare, Medicaid, and other health insurance programs. Those who already have health care coverage are exempt from coverage under the Affordable Care Act.

34 For the list of lawfully present residents covered under the Affordable Care Act, see HealthCare.gov, Immigration Status Questions (n.d.).

35 See National Immigration Law Center, Immigrants and the Affordable Care Act (ACA) (Jan. 2014).

36 *Id.*

37 Unauthorized immigrants are not allowed to participate in many federal programs such as Medicaid (see National Immigration Law Center, A Quick Guide to Immigrant Eligibility for ACA and Key Federal Means-Tested Programs (Jan. 29, 2013)).

38 Hospitals must give emergency treatment to anyone who needs it regardless of legal status or ability to pay (Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395dd; see Phil Galewitz, *Medicaid Helps Hospitals Pay for Illegal Immigrants' Care*, Kaiser Health News (Feb. 12, 2013)).

39 E.g., lawful permanent residents have a five-year waiting period before becoming eligible for Medicaid (see National Immigration Law Center, *supra* note 37).

40 See National Immigration Law Center, *supra* note 37.

41 Lindsay Holst, *7.1 Million Americans Have Enrolled in Private Health Coverage Under the Affordable Care Act*, White House Blog (April 1, 2014).

42 E.g., the Spanish translation of the Affordable Care Act website was criticized for its poor translation (see Ezra Klein, *Obamacare's Spanish-Language Web Site Is "Written in Spanglish,"* Washington Post (Jan. 13, 2014)).

43 National Immigration Law Center, Frequently Asked Questions: The Affordable Care Act and Mixed-Status Families (Oct. 2013).

44 See, e.g., Erica Pearson, *New York City's Immigrant Population Not Signing up for Health Insurance Under Obamacare: Advocates*, New York Daily News (March 19, 2014).

Health Care Scams

Immigrants are especially susceptible to health care scams due to language, culture, and other barriers. Here are some of the health care scams that have been seen and that we expect to see in the immigrant community, especially in the context of the Affordable Care Act. While the Act does not necessarily increase or decrease fraud, scammers now likely use the confusion around the Act to defraud people.[45]

AFFINITY FRAUD

The Affordable Care Act is a new tool for affinity fraud, that is, scammers target members of an identifiable class or association (e.g., race, age, religion, social group). Scammers are often trusted by their victims because the scammers are also, or pretend to be, members of their victims' class. Where cultural barriers can impede transfer of information, insider knowledge of a culture can expedite a transfer. Scammers with inside knowledge of an immigrant community can more easily convince immigrant consumers of false information and ultimately defraud them. Scammers may attempt to get immigrant consumers to purchase nonexistent services and subpar products or try to collect on products that they never sold. Indeed, there are already reports of fake websites selling fraudulent health insurance plans and scammers trying to peddle worthless insurance cards to consumers.[46]

IDENTITY THEFT

Affinity fraud may be used to perpetrate identity theft. Enrollment under the Affordable Care Act requires submission of very sensitive and personal information, such as name, address, date of birth, and social security number. Scammers can use such information to open up fraudulent financial accounts or falsely assume an identity for other deceptive purposes.[47] To perpetrate identity fraud, scammers may contact consumers under false pretenses. Scammers may offer free assistance or pretend to be an authority figure to elicit private personal information. For example, pretending to be from the U.S. Department of Health and Human Services or the Department of Homeland Security, they may cold-call immigrants to mine for personal data. Scammers may pretend that they need such sensitive information because of the Affordable Care Act. Naive consumers may unwittingly or fearfully give out their personal information and become victims of identity theft.

NOTARIOS' UNLICENSED PRACTICE OF LAW

Along the lines of affinity fraud, *notarios* may take advantage of immigrant consumers trying to purchase health insurance. *Notarios* in the United States often engage in the unlicensed practice of law within immigrant communities.[48] They advertise a range of services—document translation, letter writing, tax preparation, and immigration assistance. Often their only qualification is that they speak some English and the language of their client victims. Many low-income immigrants turn to *notarios* because they are sometimes the only affordable alternative to expensive legal services from a licensed attorney. But even the most scrupulous *notarios* are not qualified, and malpractice is not uncommon. Unscrupulous *notarios* have been known to defraud their clients of money and, worse, leave their clients with dire legal consequences.[49] *Notarios* may begin to offer their services to assist immigrant consumers in purchasing health insurance plans. If the past is any indication, *notarios* may even charge exorbitant fees to naive consumers for services that are actually free under the Affordable Care Act.[50]

UNREGULATED MEDICAL CARE AND UNLICENSED PRACTICE OF MEDICINE

Many immigrant consumers continue to face danger associated with obtaining health care services from an unregulated industry. Uninsured immigrants combine regulated and unregulated medical services to meet their primary care needs. Since the Affordable Care Act does not cover unauthorized immigrants, this trend will likely continue.

Local and nonprofit clinics are the best, and sometimes the only, option for uninsured low-income immigrants seeking basic medical services. Most clinics offer free or low-cost primary care to low-income individuals, regardless of immigration status. Such clinics are often under state or federal oversight, and their quality of care is monitored. Due to such clinics' limited resources and services, clinics are not a viable option for uninsured immigrants.

Many uninsured low-income immigrants are increasingly turning to the unregulated medical sector for their primary care needs.

Many uninsured low-income immigrants are increasingly turning to the unregulated medical sector for their primary care needs. Growing numbers of *"bodega*

45 The Council of Better Business Bureaus picked the scam around the Affordable Care Act as the "Scam of the Year" for 2013 (Council of Better Business Bureaus, Better Business Bureau Names "BBB Top Ten Scams of 2013" (Feb. 11, 2014)).

46 See Katy Steinmetz, *The Latest Obamacare Worry: Scam Websites*, TIME, Nov. 14, 2013.

47 See Michael Ollove, *The Rise of Medical Identity Theft*, STATELINE (Feb. 7, 2014).

48 In some Latin American countries, a *notario* is a special type of lawyer who holds public office.

49 Many immigrant clients of *notarios* have faced deportation due to the false promises and poor services of *notarios*.

50 Government-certified navigators help individuals enroll for free.

clinicas" are appearing in largely immigrant neighborhoods.[51] Despite their moniker, most *bodega clinicas* are not actually licensed clinics. Rather, they are unregulated private doctor's offices operating on a cash-business model. While these *bodega clinicas* can be a valuable service to low-income uninsured immigrants, the level of care and service is largely unknown. With little regulation and no oversight, medical malpractice and other deceptive practices can easily escape detection.

Worse, some uninsured immigrants turn to unlicensed medical practitioners. Desperate for medical care, some uninsured immigrants seek services from individuals without any formal medical training or from practitioners who are not licensed to practice medicine in the United States. The Affordable Care Act does nothing to mitigate these risks for unauthorized immigrants and others unable to participate in its programs. Unable to afford health care, many immigrants continue to take great risks with their finances and health.[52]

MEDICAL DEBTS AND UNFAIR DEBT COLLECTION PRACTICES

The Affordable Care Act does not alleviate immigrants' medical debt problems. It still leaves many people unable to afford health care. Most unauthorized immigrants and many Medicaid-ineligible low-income immigrants will remain uninsured.

Uninsured low-income immigrants remain susceptible to bankruptcy, bad credit history, and unfair debt collection practices. Although hospitals are not allowed to refuse patients with emergency medical needs, patients are usually responsible for paying rendered medical services. Because medical treatments are very expensive, many uninsured immigrants are unable to pay and become indebted. People with significant debts risk ruining their credit history, further destabilizing their lives. Bankruptcy may be one of their few options.

Hospitals contract with collection agencies and attorneys to collect medical debts. Courtrooms are filled with such cases. Default and consent judgment are very common. Furthermore, these judgments often exceed the amount of the original debt because they include administrative fees such as court costs, interest rates, and attorney fees. These additional fees compound the difficulty of low-income individuals trying to pay back their debts. And while the Fair Debt Collection Practices Act protects consumers from unfair debt collection practices, violations are not uncommon.[53]

Immigrants are especially vulnerable as debtors. They often do not understand letters and documents sent to them in English. The court system is equally foreign to them. Cultural and language barriers prevent them from bargaining with creditors. And some unscrupulous debt collectors even illegally harass immigrant consumers with threats of jail or deportation. Because the Affordable Care Act leaves out a significant number of immigrants from its coverage, these practices will persist in immigrant communities.

Prevention and Remedies for Immigrant Victims of Health Care Scams

Although the Affordable Care Act is new, scams against immigrants are not. Scammers have already adapted their schemes to fit this new forum. But government agencies and nonprofit organizations are fighting back.

OUTREACH AND EDUCATION

At the national level, AARP, the Centers for Medicare and Medicaid Services, the Federal Trade Commission (FTC), and others have released broad guidelines to help consumers protect themselves from fraud related to the Affordable Care Act.[54] In fact, a consumer need look no farther than the Affordable Care Act's own marketplace website to find information specifically related to fraud prevention.[55] For those with limited English proficiency, similar official information is available in Spanish and other foreign languages.[56]

Local service providers and community organizers are reaching out and edu-

51 See Sarah Varney, *As "Bodega Clinicas" Fill Void, Officials Are Torn on Embracing Them*, Kaiser Health News, Jan. 12, 2013.

52 See, e.g., Tovin Lapan, *State Launches Campaign to Combat Backroom Medical Clinics*, Las Vegas Sun, April 12, 2012.

53 The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692–1692o, regulates debt collectors in hopes of eliminating abusive debt collection and promoting fair debt-collection practices.

54 E.g., Sid Kirchheimer, *Beware of the Latest Health Law Cons*, AARP (Sept. 9, 2013).

55 See HealthCare.gov, Protect Yourself from Marketplace Fraud (n.d.).

56 E.g., CuidadoDeSalud.gov, Protéjase de los Fraudes del Mercado (n.d.).

Although the Affordable Care Act is new, scams against immigrants are not. Scammers have already adapted their schemes to fit this new forum.

cating consumers at a more personal level. For example, navigators, in-person assistance personnel, and certified application counselors are locally based, certified professionals whose tasks, among others, are to inform consumers and dispel confusion around the Affordable Care Act.[57] Often hosted by established local nonprofit entities, these certified professionals are quickly becoming trusted sources of information for local communities. Northern Virginia Family Service used its certified professionals to reach out to Latino, Korean, Vietnamese, and other immigrant communities. It did so by leveraging its connections with other trusted ethnic nonprofit entities and coordinating efforts among them. Fighting fire with fire, local knowledge, cultural understanding, and language abilities are often the best weapons to fight affinity fraud.

PREVENTION

For the most part, Affordable Care Act fraud prevention efforts offer similar advice. First and foremost, all guidelines encourage consumers to stay aware and get their information from trusted sources. All point to the official marketplace website, HealthCare.gov, as the foremost trusted source of information. They encourage consumers to use HealthCare.gov to stay on top of basic information related to signing up, enrollment dates, telephone numbers, links to specific state exchanges, certified navigators, and other key information.[58] Second, guidelines advise consumers to stay wary. Consumers are encouraged to probe and ask questions, especially consumers who receive unsolicited calls asking for money or personal information. Consumers should never pay, apart from monthly insurance premiums, for advice or enrollment. The FTC specifically warns against unsolicited calls from individuals holding themselves out to be insurance or government agents or offering Medicare cards and medical discount plans.[59] These calls are almost certainly scams. And, third, as in any transaction, consumers should keep good records of their health care transactions. In the event of fraud, such information can be valuable to lawyers, law enforcement, and government agencies investigating the incident.

REMEDY

Ideally a consumer would identify, avoid, and report suspected fraud before any harm occurs. If that does not happen, the FTC advises victims of fraud to contact their local, state, or federal law enforcement agency or the appropriate state department of insurance. The FTC itself is an excellent place to start, and complaints can be reported to it at 1-877-FTC-HELP or ftc.gov/complaint.[60] While individual victims may not always get relief through the FTC, their complaints can be used to track scams and help avoid fraud.

Although the Affordable Care Act is expected to result in many consumer protections and benefits, it presents many opportunities for scams on immigrant consumers. Without universal coverage for immigrants of all status, millions of mostly unauthorized immigrants continue to have poor or no health coverage. They continue to seek medical care from underregulated or unregulated sources to the detriment of personal and public health. They face mounting medical debts and associated negative consequences such as poor credit history, bankruptcy, and unfair collection practices. Even for those who are covered by the Affordable Care Act, the relative novelty and complexity of the law confuse many consumers, particularly immigrant consumers, who are generally less informed due to language, culture, and other barriers. Scammers who recognize these deficiencies may use their own language and cultural skills to deceive and defraud immigrant consumers. Affinity fraud, *notario* fraud, and identity theft are nothing new. However, the new law offers a new venue for scammers to use old tricks. While the Affordable Care Act is creating great changes for health care consumers, scammers are accommodating their deceptive practices to fit this new landscape.

DANIEL SEOKHWAN CHOI
Attorney

Neighborhood Legal Services Program (DC)
680 Rhode Island Ave. NE
Washington, DC 20002

202.832.6577
dchoi@nlsp.org

57 Navigators "provide outreach and education to raise awareness about the Marketplace, and refer consumers to health insurance ombudsman and consumer assistance programs when necessary" (Centers for Medicare and Medicaid Services, In-Person Assistance in the Health Insurance Marketplaces (n.d.)). In-person assistance personnel and certified application counselors play similar roles (*id.*).

58 E.g., U.S. Department of Health and Human Services, Health Insurance Marketplace, Protect Yourself from Fraud (Feb. 2014).

59 See Federal Trade Commission, Suspect a Health Care Scam? Here's What to Do (Sept. 2013).

60 *Id.*

Engaging in Empowerment-Driven Legal Practice

BY HILDA BAHENA AND ANDRYA SOPRYCH

Many people choose to become legal aid attorneys because, believing in social justice, they desire to help vulnerable individuals and families obtain equal access to our legal system. This is a daunting task because the number of individuals and families in need of legal services far surpasses legal aid resources. We are easily left feeling overwhelmed and frustrated without enough resources. Working from a specific framework is one way to focus and manage the work. Empowerment-driven legal practice improves client outcomes and benefits stakeholders from the client and community to the attorney and legal aid organization. Here we focus on the benefits for the attorney, the client, and the attorney-client relationship and suggest tools to facilitate adopting an empowerment-driven legal practice model.

Empowerment-driven legal practice relieves the attorney of the pressure to "save" the client or "resolve" the client's entire problem.

Helping Versus Empowering

To engage in empowerment-driven legal practice, we need to define what we mean by "empowerment." We would like to challenge you to think about the connotations of the word "help" and "empower." Helping assumes that the person providing the help is in control; the helper is the expert and the gatekeeper for what the help is and how it is provided. Helping can breed dependence because the focus is on solving a problem for a client. In some cases helping causes the client to become helpless; in other cases it allows the client to shift responsibility for resolving the problem from the client to the attorney.

Empowerment, by contrast, takes the focus off the attorney and places it on the client. This shift can dramatically change the roles and expectations of each stakeholder. When an attorney promotes empowerment, that attorney believes that clients "are capable of making their own choices and decisions. It means not only that human beings possess the strengths and potential to resolve their own difficult life situations, but also that they increase their strength and contribute to society by doing so."[1]

Practicing empowerment-driven lawyering requires and allows the client to be engaged in the legal process. It allows the attorney to focus on solutions that are sustainable by the client because the client is actively participating in the case strategy. See table 1 for the contrast between helping and empowering as we relate it to legal representation.

We all occasionally use the word "help" in conversation and intend the connotations that we have attached to "empower." This distinction begins to define what we mean by "empowerment-driven lawyering" and encourages you to reflect on your current approach and to adopt an empowerment framework for your practice.

Reflection

You should know how you are currently practicing so that you can see where you want to make adjustments. When you review table 1, do you see yourself more on the left column or the right? Is there a difference in what you believe and how you practice? Do you find yourself spending more time telling clients what you can do for them or talking about their role? Take some time to think about

1 Charles D. Cowger, *Assessing Client Strengths: Clinical Assessment for Client Empowerment*, 93 SOCIAL WORK 262, 264 (1994).

TABLE 1. TOOLBOX: HELPING AND EMPOWERING CONTRASTED

HELPING	EMPOWERING
You make the decisions.	The client makes the decisions.
You create the plan.	You and the client create the plan together.
You do the tasks for the client.	The client does the tasks.
You solve the problems.	You and the client solve the problems together.
It is about what you can do.	It is about what your client can do.
It leads to dependence.	It leads to self-sufficiency.

what you believe your role is with clients, what you believe your clients' role is, and how that drives your practice.

If you find yourself identifying with how we have defined "empowering," great! The tools listed under the heading "Tools" below are aimed at strengthening your alignment of your practice with your beliefs. Many may find difficult distinguishing their duties as attorneys from the responsibility to resolve the cause of the legal problem. These attorneys likely identify with how we have defined "helping." If this resonates with you, you have taken on an enormous obligation. Even if your clients' problems could be resolved and maintained entirely within the court system, that would be an arduous task.

The reality is that your clients' problems are deeply rooted in other systems, be they social, emotional, economic, or otherwise. You can help your clients use the legal system to influence the other systems. Ultimately, however, the client must choose and maintain any change or resolution. By shifting some of that responsibility back to the client, you will increase positive outcomes and sustainability. In whichever camp you find yourself, or if you are split between them, engaging in empowerment-driven legal practice yields tangible benefits for the attorney, the client, and the attorney-client relationship.

Benefits

Attorneys benefit from empowerment-driven legal practice by making efficient use of scarce attorney resources, protecting against secondary trauma and burnout, and defining the attorney's role.[2] Clients benefit by recognizing their power to take responsibility, set goals, and take action. And the attorney-client relationship benefits from enhanced communication between attorney and client. In reality the benefit to one leads to benefits for the others.

ATTORNEY

As a public interest attorney, you work in a system where the people in need of quality legal services substantially outnumber the attorneys who are in a position to provide those services. You must make difficult decisions about accepting and rejecting cases with legal merit or sympathetic facts while juggling an already overwhelming workload and doing your best to provide quality legal services.

Empowerment-driven legal practice uses your time and legal expertise efficiently. First, it improves your communication with clients. Second, you may discover that you have been completing tasks that your client is capable of doing, and shifting that work to the client will be appropriate. Third, you will improve your assessment of and engagement with clients, and this will help you decide which cases to accept and minimize the guilt you may feel for having to say no. These steps will reduce both the amount of time you spend working on a case and the delays to case closure caused by client inaction or indecision.

The third point is useful not only for maximizing scarce resources but also as a protective factor against burnout. Without a model or framework for how you practice and what your priorities are, you are at risk of making decisions subjectively, perhaps being influenced by how much you were able to relate to or liked a client, your mood or level of stress that day, or a personal feeling of responsibility for resolving the client's problem.[3] Not only are these not the wisest ways to make decisions, but also they break down and blur professional and personal boundaries. You begin to feel personally responsible for case acceptance and case outcomes instead of focusing on your professional role in assisting the client.

Overpersonalization can quickly lead to burnout, especially when working with populations who have experienced trauma

2 Secondary trauma, or vicarious trauma, is the negative psychological and emotional effect that lawyers feel as a result of their work with clients who have experienced traumas and that is caused by the need to delve into the specific details of those traumas while delivering legal services (see Andrew P. Levin, *Secondary Trauma and Burnout in Attorneys: Effects of Work with Clients Who Are Victims of Domestic Violence and Abuse*, American Bar Association Commission on Domestic Violence eNewsletter (Winter 2008); Donald C. Murray & Johnette M. Royer, Legal Profession Assistance Conference of the Canadian Bar Association, The Cost of Justice: A Desk Manual on Vicarious Trauma (2014)).

3 See Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, in Relationship-Centered Lawyering: Social Science Theory for Transforming Legal Practice 320, 324 (Susan L. Brooks & Robert G. Madden eds., 2010).

through discrimination, oppression, racism, and community and domestic violence. Empowerment-driven legal practice encourages self-reflection to build self-awareness and buffer against burnout. Understanding how clients, their situations, and their stories affect you personally will help you deal with secondary trauma in a healthy way, and this will in turn keep you at your most able in advocating for clients.[4]

One way to reflect on this is to think about whether you tend to sympathize or empathize with your clients. The definitions of empathy and sympathy contain a lot of gray area. The two are often interchanged or confused, and so we define what we mean for each term here.[5] Sympathy is about the attorney. It focuses on your feelings for the client and involves imagining how you would feel if you were in the client's situation. Because sympathy is so personal, it not only opens you up to secondary trauma and burnout but also puts you at risk of losing sight of the client's goals and instead inadvertently replacing them with your own. You risk taking action in a way that is inappropriate or offensive because how you would feel or react may be different from how the client would feel or react. The client may walk away feeling like you do not understand or have not heard what the client said.

Empathy, by contrast, is about the client. It involves the attorney understanding how the client feels and what the client wants, feeling *with* the client instead of *for* them.[6] Personally empathy creates a healthy detachment that buffers against secondary trauma because you are not taking on the client's trauma and you are not experiencing it yourself. Professionally the client remains the focus of your work; the client feels heard and understood, and you can develop a healthy, productive attorney-client relationship.

Being attuned to the emotional connection of the other key players (e.g., judge, parties, opposing counsel) to the case issues also will allow you to create a better case plan. Attorneys' education and training are focused on logic and reason, the idea being that to remove emotion and feeling from the work is to be able to develop a reasonable case.[7] This approach leaves attorneys at a disadvantage because in reality emotion and human interaction affect decision making.[8] Awareness of this reality encourages a nuanced legal strategy; for example, if you realize that the judge dislikes your client, you may present a case differently from how you would if the judge were sympathetic toward your client.

Another way empowerment-driven legal practice protects against burnout, maximizes resources, and benefits the attorney is by defining the attorney's role. Many, if not all, of us personally believe in social justice and helping others. These personal convictions have led us into a profession where we can advocate and achieve justice for those in need. Feelings of personal responsibility to help can easily blur with our professional duty to advocate justice. Some amount of this invigorates our work and keeps us engaged. Too much leaves us in a position of power as a legal expert taking over our clients' lives as we try to resolve their problems for them. Empowerment-driven legal practice relieves the attorney of the pressure to "save" the client or "resolve" the client's entire problem.

Instead the attorney's role is to be the resource that gives the client information on how and what the court is looking for when deciding a case.[9] By shifting to a resource-role approach, you give your client choices of goals and actions and the potential consequences, positive and negative, attached to each choice. You are an expert in the law; the client is the expert in the client's life. The attorney benefits from this role definition by being relieved of unrealistic pressures and potentially saving time from doing work outside the scope of the attorney's role. The benefit to the client may be even greater since it is a first step in the client being empowered.

Empowerment-driven legal practice uses client strengths to build a relationship engaging the client, works to balance the inherent power differential, elicits the client's goals, and moves the client to action.

CLIENT

Empowerment-driven legal practice focuses on partnering with the clients and communities we serve. Clients are more likely to be invested in achieving legal results if they have actively participated

4 Linda G. Mills, *Affective Lawyering: The Emotional Dimensions of the Lawyer-Client Relation*, in Practicing Therapeutic Jurisprudence 419, 431–32 (Dennis P. Stolle et al. eds., 2000).

5 Karen E. Gerdes, *Empathy, Sympathy, and Pity: 21st-Century Definitions and Implications for Practice and Research*, 37 Journal of Social Service Research 230 (2011).

6 *Id.* at 233.

7 Mills, *supra* note 4, at 421.

8 Marjorie A. Silver, *Love, Hate, and Other Emotional Interference in the Lawyer/Client Relationship*, 6 Clinical Law Review 259, 276 (1999).

9 Ruth J. Parsons et al., *Empowerment, Self-Determination, and Shared Decision-Making: A Model for Empowerment Practice*, in Relationship-Centered Lawyering: Social Science Theory for Transforming Legal Practice 288, 291–92 (Susan L. Brooks & Robert G. Madden eds., 2010).

in deciding the ultimate case goals.[10] Such a legal practice gives clients the power to take responsibility for their lives, to make decisions, and to accept the results that accompany their choices.

Taking responsibility does not mean assuming blame or that the legal crisis is the client's fault; rather, clients have a role and an investment in achieving the outcome they desire. This benefits clients who are used to being told what they cannot do, what they do not have, and what their weaknesses are. In encouraging them to take responsibility, you are telling them that they are strong and can affect their situation.

Once empowered to take responsibility, clients can engage in setting goals for their cases. A common consequence of living in poverty is to have no choices and no control. As a public interest attorney, either you can keep clients having no choices or control by telling them what the goals and outcome of their case should be or you can educate them on their legal options and encourage them to tell you what they want.

Understanding what your clients want can help you together set reasonable and workable legal goals. You may need to help your clients believe that they can select their legal goals. One way to begin is to explain your role as a tool for clients to use to reach their goals, and not as an authority trying to prescribe what is best for your clients. This role can be hard when you see the harm that can come to clients from losing subsidized housing or not getting a favorable custody decision; however, we must give adults the dignity of making their own choices whether we think those choices are good or bad. Reinforcing your role as a "tool" or "resource" to clients empowers them to make informed decisions.

10 *Id*. at 291.

Clients can become paralyzed when they are consumed by feelings of helplessness and despair. Their feelings can legitimately interfere with their processing the legal proceeding and legal options. Their paralysis makes moving their cases forward almost impossible because they cannot complete tasks and do not do anything to improve their situation.

Partnering with the client from the beginning and explaining the legal options and the benefits and risks attached to each option give the client control over the direction of the case. Sharing power in the attorney-client relationship helps the client take ownership of the case instead of becoming paralyzed or disengaged. Taking ownership creates investment, encouraging participation. If a client is an active participant, the client is more likely to take steps to give the attorney the needed evidence to present to the court.

Empowerment-driven legal practice essentially engages clients to believe that they can affect the outcomes of their cases—to tell you what they want and what they are capable of maintaining. Crafting the legal strategy around clients' realistic goals and desired outcomes improves client participation. Active client participation is crucial for client success within and beyond the courtroom and is necessary for maintaining an appropriate professional attorney-client relationship.

Active client participation is crucial for client success within and beyond the courtroom and is necessary for maintaining an appropriate professional attorney-client relationship.

ATTORNEY-CLIENT RELATIONSHIP

Communication is the cornerstone of the attorney-client relationship and of effective representation. Empowerment-driven legal practice uses client strengths to build a relationship engaging the client, works to balance the inherent power differential, elicits the client's goals, and moves the client to action.

As attorneys, we are taught to focus on the problem, the deficit, the "wrong." To a point, this is necessary to conduct a legal analysis. After all, identifying the legal issue, the cause, and the available legal remedies is the service being provided to the client. A prolonged focus on deficits, however, reinforces a client's feeling of having no control and being personally deficient, especially if the client is forced to be part of the court process.[11] Such a focus highlights the attorney's power and the client's lack of power.[12] Clients who feel powerless are likely either to surrender all control of the process or to fight you every step of the way. If they surrender all control, the same or similar legal problem will likely reoccur with the expectation that you or someone else will "fix it." The clients believe that they have no control over the issue and that therefore taking steps to change would be futile. If they have the opposite reaction and have an iron fist around the little power they do have, they will seem to be digging in their heels and forcing you to drag them along, making a resolution of the issue difficult, if not impossible.

Empowerment-driven legal practice encourages the attorney to focus on client strengths and away from deficits or blame as soon as possible. Often "strength iden-

11 Cowger, *supra* note 1, at 264.

12 Silver, *supra* note 8, at 260–61.

tifying" almost immediately draws clients into the relationship, builds investment in the case and themselves, and creates responsibility on their part. A balanced attorney-client relationship empowers clients to have choices and control over their lives. After the attorney assists a client in identifying the client's strengths, the attorney and the client can together find the legal solutions appropriate for the client. The client and the attorney can then request legal remedies that are practical and reasonable for the client within the parameters of the court system. Remember that "winning" the case does not matter if the client is unable to comply or follow through with the court orders and henceforth avoid the legal issue.

There are only so many ways to approach and resolve a case; typically they all require the client to take action or compromise. Therefore you must be able to counsel the client toward action. Often clients cannot see their own strengths because they are overwhelmed by their circumstances. If you can assist clients in recognizing and acknowledging that even in the bleakest space they are using skills that keep the situation from being worse, you can encourage clients to keep using those skills and engage them to take the next step toward a solution.[13] This approach can stop a case from falling apart or being stuck. The client becomes empowered by actively participating in the court process.

Deliberately following an empowerment-driven approach in legal services can reduce miscommunication in that the client's desired goals are ascertained and a balance in the attorney-client relationship is created.[14] Empowerment-driven legal practice helps us attorneys think with purpose about the message we are sending and how we are conveying our message to influence the actions of all those involved. Such a legal practice helps us recognize ineffective communication and reframe it so that we can get our intended message across. And such a legal practice can improve lawyering, advocacy, and case results.

Tools

Empowerment-driven lawyering may require a shift in beliefs. To be successful, you must believe that people can make decisions and resolve problems.[15] You become a tool that clients may use because of your expertise in the legal issue, but you are not the expert responsible for resolving their problem. If you already believe in empowerment or are ready to shift to it, these tools will help you maintain an empowerment-driven legal practice.

LOOK THROUGH A STRENGTHS PERSPECTIVE

You can interact with clients and consider their cases through a strengths perspective.[16] Emphasizing strengths empowers and motivates. In collaboration with your clients, you identify and use their strengths to achieve their goals. Framing your questions and conversations to elicit or highlight your client's strengths requires a conscious effort. When you must talk about problems, weaknesses, or shortcomings, do so in a constructive way and if possible highlight what can be done to improve problems, weaknesses, or shortcomings:

- "I can see it took a lot of effort to find child care so you could come to this appointment on your own. Your coordination skills are a strength of yours and will be an asset during this case."
- "Thank you for sharing how difficult it can be for you to get out of bed. Your determination that allowed you to get here despite everything else is a strength that will be important as we work together."

PRACTICE SELF-REFLECTION: ANALYZE COUNTERTRANSFERENCE

Countertransference is your emotional response to the client or the client's situation.[17] Whether consciously or unconsciously, you react to clients, their personalities, their mannerisms, and their stories. Your reaction influences your interactions with clients. Through self-reflection, you can come to understand this response and how it affects your decision making, attitude, and work on cases.

These are questions you can explore on your own or with a trusted colleague to analyze countertransference and practice self-reflection:

- What triggers your different responses (e.g., anger, tears, withdrawal, or joining)?
- How do you react to client personalities and temperaments (e.g., in a quiet, rambling, skeptical, passive, needy, or detached manner)?
- Of whom in your family or history does a client remind you? How do you react to that person you know? How do you react toward people who remind you of that person?[18]
- What is your knee-jerk reaction to a client's story? What leads you to

13 Peter De Jong & Scott D. Miller, *How to Interview for Client Strengths*, 40 Social Work 729 (1995).

14 See Gerdes, *supra* note 5, at 230 ("[W]hile thoughts create words, words also play a role in creating and directing thoughts—thoughts that, in turn, powerfully influence action.").

15 See Cowger, *supra* note 1, at 264.

16 *Id.* at 264–65; De Jong & Miller, *supra* note 13, at 729.

17 Mills, *supra* note 4, at 431–32; Silver, *supra* note 8, at 261, 265, 296–98.

18 Silver, *supra* note 8, at 298.

Attorneys can inadvertently turn a client interview into a cross-examination and impede their ascertainment of the client's desired goals. Instead consider a direct examination with open-ended questions to allow the client to express fully the desired legal outcome.

that reaction? How much does that initial reaction influence how you litigate or interact with your client?

- Can you consciously recognize your reactions to clients or client situations and decide how that will or will not influence your work on that case?

DISCOVER WHAT THE CLIENT WANTS AND DEVELOP WELL-FORMED GOALS

Take time at the beginning of each case to hear the client and what the client wants.[19] This advice may seem obvious, but, interviewing client after client, you can lapse into hearing the problem and assuming the solution the client wants. Even when the goal seems obvious, and even if ultimately your assumption is right, forming goals with, not for, the client helps define the relationship as a partnership with the client having responsibility for the outcome. Check in with the client throughout the case to see if the client's goals are still what you are working for or if they have changed. Legal cases can be lengthy, and situations change, or clients understand the consequences of their decisions differently over time. You must make sure you continue to work toward an outcome the client actually wants.

Due to legal training, attorneys can inadvertently turn a client interview into a cross-examination and impede their ascertainment of the client's desired goals. Instead consider a direct examination with open-ended questions to allow the client to express fully the desired legal outcome. These questions can help you

discover what the client wants and develop goals in partnership with the client:

- "What do you want and expect from services?"
- "What do you want to happen in relation to your current problem situation?"
- "If you were to wake up tomorrow and your problem was solved while you were sleeping, what would be different that would let you know your problem was solved?" This type of "miracle question" is a conversation starter that aims to get the client's focus off the problem and onto the solution.[20]

AVOID BLAME AND BLAMING

Avoid conversations that focus on who is to blame for events, situations, or actions.[21] Instead of focusing on the past and who is at fault, direct your client to the present and future where you and the client can influence the outcome.

Engaging in a future orientation allows the client to take responsibility for what the client can do and encourages change and action. Both internalizing and externalizing blame can be paralyzing. If the problem is the client's fault, how can the client fix it? If it is someone else's fault, why should the client fix it? A continued focus on blame and blaming is counterproductive no matter who is at fault.

19 Cowger, *supra* note 1, at 265; De Jong & Miller, *supra* note 13, at 730–31.

20 De Jong & Miller, *supra* note 13, at 731.

21 Cowger, *supra* note 1, at 266.

LOOK FOR EXCEPTIONS

Exceptions are the times "when the client's problem could have occurred but did not."[22] An exception would be a month a client pays the rent when the client can never pay the rent. Exceptions are about strengths and thus excellent tools for empowering the client to be an active participant in the case. Exceptions help the client and you identify solutions that can be achieved and maintained. Exceptions can encourage and prepare clients to follow through with the tasks you need them to complete to move the case forward.

To replicate an exception or use the strengths identified to create an exception in another area of your client's life, you want to explore what made an exception happen. Use exceptions to help figure out how the client can reach or sustain the legal goal. Use exceptions to encourage client completion of tasks to move the case forward. For example, your client Joe did part of an assignment for his case but not all of it. Instead of focusing on what he did not do, focus on what he did do. Explore how he was able to accomplish the part he did and thus unearth some of his strengths. You can talk to him about how he can use those strengths or turn them into new strengths to accomplish the rest of the task. Consider:

- "Tell me about a time you …" (set a goal and met it, paid rent on time, had a pleasant visitation exchange, etc.).
- "We planned for you to begin parenting classes by December. You called and set up an intake appointment. Tell me how you were able to accomplish this."

USE COPING QUESTIONS

You have likely encountered clients who cannot identify any exceptions. No matter what you say or do, such clients are consistently negative and have an "everything is terrible and always will be" attitude. Getting this type of client to identify strengths and think about solutions can be exceptionally hard. Coping questions are meant for just such a client.[23] A coping question starts where the client is—everything is awful—and finds strengths in that the client keeps going in spite of how miserable everything is. For example:

- "Wow, it sounds like things are really tough right now and you can't see how it will get any better. How do you keep going?"
- "With everything working against you, how did you make it into my office today?"
- "I can hear that things are really bad right now. How did you manage to pick up the phone when I called?"

USE SCALING QUESTIONS

Scaling questions are also good for clients who are consistently negative.[24] Ask the client to rate the issue on a scale of 0 to 10 with 0 being absolutely awful and 10 being the best it could be. If the client says anything other than 0, you can then ask about what makes it better than 0. For example:

- A client is telling you she cannot continue to do the visitation exchanges because they are always unbearable. You ask her to rate the most recent exchange, and she gives it a 1. You might say, "I can see this weekend's exchange was a really bad experience for you. You gave it a 1 instead of a 0. What makes it a 1?"
- You have a client who is persistently negative and says that things are so bad that she is unable to leave the house to search for housing, but you have negotiated an agreed 30-day move-out to avoid an eviction and loss of her housing voucher. You might ask her, "On a scale of 0 to 10, with 0 being the worst and 10 the best, what kind of day would you need to have to search for housing?" Then ask what number she would rate today. Explore with her the difference between today's number and the number needed to search for housing. Explore what makes today better than a 0 and see if any of those strengths can be applied to move today's number toward the one needed for her to look for housing.

WHAT IS BETTER?

"What is better" questions are apt tools when you have already established a relationship with a client.[25] Identify strengths and what is going well first before you get into what is wrong or going badly. "What is better" questions help focus your conversations on solutions instead of problems. Such questions help uncover exceptions that have happened since the last time you talked.

Clients tend to call their attorneys and immediately start talking about everything that has gone wrong since the last time they spoke, or attorneys begin the conversation by asking if there have been any problems. This pattern sets the precedent for all conversations to focus on problems and tells the client that you are most interested in what is wrong. This pattern highlights or reestablishes the power disparity between the attorney and the client—the client is consumed by problems; you are there to fix them.

When you and your client become experts on the solutions, you are able to engage in conversations about how to build on, modify, or scrap a solution and pick a new one. You will be able to work through

22 De Jong & Miller, *supra* note 13, at 731.

23 *Id.* at 733.

24 *Id.* at 732–33.

25 *Id.* at 733–34.

cases more quickly because your focus is on the outcome and how to get over any hurdles instead of on the initial problem and the hurdles themselves.

Consider beginning a conversation with your client with:

- "What is better since the last time we …" (met, spoke)?
- "What is better with …" (visitation exchanges, school, getting to the doctor, looking for housing, etc.)?

The above tools are communication techniques that will help you practice empowerment-driven lawyering. They allow you to explore your relationship with the client further to identify and meet the client's legal goals. Empowerment-driven legal practice for stakeholders can pave a pathway to quality, productive legal services with long-term benefits for clients and communities with economic and social barriers.

HILDA BAHENA
Department Director

Catholic Charities Legal Assistance Department
651 W. Lake St.
Chicago, IL 60661

312.948.6983
Hbahena@catholiccharities.net

ANDRYA SOPRYCH
Social Worker and Manager of Client Support Services

Cabrini Green Legal Aid
740 N. Milwaukee Ave.
Chicago, IL 60642

312.738.2452
andryasoprych@cgla.net

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50 E. Washington St. Suite 500
Chicago, IL 60602