# AMERICAN PREDATORY LENDING AND GLOBAL FINANCIAL CRISIS

# ORAL HISTORY PROJECT

Interview with

Paul Bland

Bass Connections

Duke University

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# PREFACE

The following Oral History is the result of a recorded interview with F. Paul Bland conducted by Jon Rosen on June 23, 2021. This interview is part of the Bass Connections American Predatory Lending and the Global Financial Crisis Project.

Readers are asked to bear in mind that they are reading a transcript of spoken word, rather than written prose. The transcript has been reviewed and approved by the interviewee.

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Interviewee: Paul Bland | Location: Zoom
Interviewer: Jon Rosen | Date: June 23, 2021

Jon Rosen: I'm Jon Rosen, a student at Duke Law School and a member of the Bass Connections American Predatory Lending and Global Financial Crisis Team. It is Wednesday, June 23rd, 2021. I'm speaking with Paul Bland, the Executive Director for Public Justice, for an oral history interview. Mr. Bland joins me via zoom. Thank you so much for joining me today.

Paul Bland: Sure. Thank you very much for having me.

Jon Rosen: I'd like to start by establishing a little bit about your background. I believe that you went to Georgetown for college and Harvard for law school. Is that correct?

Paul Bland: Yes.

Jon Rosen: What made you want to go to law school? Did you know you wanted to do public interest work?

Paul Bland: No. To be honest, I thought I was going to go into politics and run for elective office. Law school was like a thing to do along the way. A bunch of twists and turns to place my life caused me to completely change around my plans.

Jon Rosen: When in your career did you first become involved with residential mortgages?

Paul Bland: In 1997, I joined this organization [which] at that time was called Trial Lawyers for Public Justice (TPLJ). In 2008 or so, we changed the name to Public Justice. My principal work at the organization dealt with – so when I started, the organization worked on a variety of issues – but I was particularly starting off working on "bad" class action settlements: settlements where the lawyers were making significant attorney's fees, the defendant was getting a very broad release and the class itself – the consumers or workers were not getting pretty much. In 1998, we had our first intake dealing with a forced arbitration clause. We were being asked to do an amicus brief in a case in an Oregon trial court. It was not really the kind of case that was appropriate for an amicus brief, but no one had actually encountered the issue at that time in our organization.

We were sort of looking at this and saying, "wow, this is crazy. It's terrible. It's really something that shouldn't be there." I began to work on challenges to forced arbitration clauses. I was looking for what arguments were available. The majority of our work was in consumer spaces. The majority of the consumer cases we were involved in [were] bulk lending. I should clarify in case this is too far afield for you. The vast majority of my work – where I was counseling cases – were in either cases involving payday lenders or credit card companies in the lending space. We did a couple of cases in the mortgage area directly, but not a lot. But, one thing that started happening early on was that we were gathering basically every case in which any court had ever refused to enforce an

arbitration clause for any reason – whether it was that people had not really genuinely agreed to it, or if the clause was so unfair that it was unconscionable and so forth.

I was marketing myself extensively to try and get cases. So, I would speak any place that would hear me on this. I was speaking at the National Consumer Law Center's Annual Conference between 2001 and maybe 2010. They gave me a plenary session to the entire conference every year. Then, I was speaking at a lot of conferences, the National Association of Consumer Advocates (NACA) and some other groups. There were a number of listservs of consumer lawyers with different types that I participated in. NACA had a class action listserv and the National Consumer Law Center had a listserv dealing with auto-fraud and different issues. A lot of lawyers, who were litigating in the mortgage fraud area, started reaching out to us for assistance and challenging arbitration clauses.

Early on – this may be arrogant – I will say that we were having a lot more success in challenging arbitration clauses than any other law firm or organization in the country. There was a period where legal services lawyers, independent consumer lawyers, large firm consumer lawyer were reaching out to us. A lot of the arguments that were successful prior to 2011 against arbitration clauses were particularly successful in the area in cases involving class actions. From fairly early on, it came to my attention that there was a great deal of controversy among consumer lawyers about having class actions in the mortgage area. The gist of the reason for that is that you would have a class action settlement and there'd be some mortgages [that] would have some illegal additional fee or something.

Your mortgage would have like $50 or $100 fee that shouldn't be there; that wasn't justified by the contract or violates state law or whatnot. If you had a class action that settled it, there were a number of states in which under a single claims theory - in a lot of places of *res judicata* or collateral estoppel - [they would] operate in a way that if you have several different claims against the defendant and you settle one completely that you can't file a second case. So what started happening was class actions lawyers would successfully get, say a $100 for everyone who had a mortgage from some company, but it wiped away the ability to assert other claims later. So, in legal services, lawyers who were resisting foreclosures would suddenly discover that there was an effective defense against their [ability] to resist the foreclosure on the ground that there had been his previous settlement.

The settlements were actually getting a hundred thousand people, $100. But then they were accidentally stripping people who had been treated fraudulently from their defenses. Then class actions became much less common in the mortgage area. I had some involvement. I handled a case in the West Virginia High Court. Co-counsel – … Dan Hedges, who was the head of Mountain State Justice [Inc.] in like 2001/2002, and [I] worked on some cases in a couple of other mortgage cases directly. But the vast majority of my experience is going to be off to the side directly, but then we're going to have been consulted by people. So that was a really long answer, but I don't want to overclaim my expertise here.

Jon Rosen: Stepping back a little bit, can you explain what arbitration clauses are, how they work, and how they come up in the context of lending?

Paul Bland: Starting in, for the first time, like 1996 or 1997 lenders started putting into their formal agreements with their customers, a provision that says you cannot go to court if you have some dispute against us. And dispute would be very, very widely interpreted. It could be tort claims, contract claims, statutory claims, and all sorts of different things. Instead of going to court, you have to take your case to a private arbitrator. And they typically, but not always, would have a bunch of information about how you would select the arbitrator, who the arbitrary would be, what rules they would operate under, and so forth. From the consumer perspective, there are a lot of issues with these arbitration clauses. One is that the vast majority of arbitration clauses prohibit the consumers from joining together in a class action. Instead, each consumer sort of atomized and required to go on their own.

… The defense lawyers … say that arbitrators tend to be much more favorable to the corporate side. Most arbitrators worked at corporate defense firms. Very few plaintiff's lawyers have successfully become arbitrators. The system is more secretive. There are issues with judicial review. That's very common to see sort of additional provisions – I don't know, I call them bells and whistles. A lot of arbitration clauses include "loser pays" provisions and they include provision saying you have to arbitrate in a really distant forum and so forth.

They [arbitration clauses] took off in 1999 – in January of 1999. There were two credit card companies of the top 10 credit card companies in America that had an arbitration clause. By the end of 1999, they were in all 10 of the 10 biggest companies' clauses and contracts. There was spurred on by a law review article for an ABA publication written by a guy named Alan Kaplinsky, who's a corporate lawyer who immodestly calls himself the father of consumer arbitration. Then very, very quickly, they expanded into most payday lenders. [Such clauses] were adopted [by] most mortgage companies, although not all. Most checking accounts, most auto title loans, and a variety of different small dollar loans. Their use just continually expanded seemingly through the 2000s.

Jon Rosen: When these arbitration clauses were proliferating through the consumer finance industry, did you find that lenders tried to put more egregious provisions in the contracts either in a clause themselves or generally?

Paul Bland: Definitely. There was a little bit of almost – if I can say this – like a conversation back and forth, if you will, between plaintiff's lawyers, defense lawyers, and courts. Early on, it was very common to see arbitration clauses that require the consumer to pay enormous costs of arbitration or to arbitrate in distant forums and so forth. What began happening was as we, on the plaintiff's side, started winning reported decisions, striking down arbitration clauses. A number of companies started rewriting their clauses to try and make them enforceable. The reasoning would be something like this – so early on I won this case in the West Virginia Supreme Court in a mortgage case was *Toppings v.*

*Meritech Mortgage*,[1] where – I co-won with Dan Hedges – the company had picked this one particular arbitration company, the National Arbitration Forum (NAF) that was really – I will just say – grossly corrupt in the way they operated. There's a huge amount of evidence to support this, in my opinion. I don't feel at all worried about a defamation suit about this. These guys operated in a way that was just – in my way of thinking – completely outrageous. They essentially advertised to banks that they would favor banks over individuals.

The company picked just the NAF. So, we had argued based on an analogy to a state supreme court case in a different setting that if somebody picks the particular person to hear a dispute – or particular entity that's going to hear a dispute – that creates a risk of the entity being biased in favor of the person picking them because the arbitrators are trying to make money. The NAF was a for-profit entity, and they made their money – in their mind – if people would write them into their clauses. They were making advertisements that, [in] effect, said, "put us in your clauses and we'll do right by you to the lenders."

After that court struck that down, a whole bunch of lenders across the country changed their clauses to not name just the National Arbitration Forum but to say, "you have a choice between the National Arbitration Forum, the American Arbitration Association, or Judicial Arbitration and Mediation Services (JAMS)," which is an arbitration group of former judges. So, the lenders, not all but a lot of lenders, changed their clauses in response to that. Early on, we won some cases getting courts to strike down arbitration clauses that made people have to travel a long way. So, a case that predates my work in this area, but a guy named Jim Sturdevant won a case in a California Court of Appeals. It was *Patterson v. ITT Consumer Financial Corp*.[2] I think it was a credit card company a long time ago. The clause said "if you had a dispute against your lender, you had to travel to Minnesota and take your case to arbitrate in Minnesota." You had a consumer with a small dollar claim – a thousand dollars or something in California. The California court was saying, “this is ridiculous and clearly unconscionable.” What started happening was lenders – the reason that lenders wanted the clauses in general was because they were trying to get rid of class actions. So, if we were able to beat a clause on the grounds – it was too expensive or this kind of thing– then they weren't getting the benefit of the ban on class actions. Lenders started realizing that we were winning more and more cases and that they needed to rewrite their clauses and make them more favorable to consumers or else they were going to lose the class action ban, which is the one they were thinking they were fighting over.

For what it's worth, with respect to individual arbitration clauses, in 2010 the Supreme Court decided the case of *Rent-A-Center v. Jackson*[3] (which I did not argue in the Supreme Court but was … the lead author of the briefs for the plaintiffs). The Supreme

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[1] Toppings v. Meritech Mortgage Services, 140 F. Supp. 2d 683. https://casetext.com/case/toppings-v-meritech-mortgage-services.

[2] Patterson v. ITT Consumer Financial Corp. 18 Cal. Rptr. 2d 563. https://casetext.com/case/patterson-v-itt-consumer-financial-corp.

[3] Rent-A-Center v. Jackson, 561 U.S. 63 (2010). https://scholar.google.com/scholar_case?case=4335039422321148585&hl=en&as_sdt=6&as_vis=1&oi=scholarr

Court said that arbitration clauses [could] include a provision, which became called a delegation clause, that says that the arbitrator rather than a court will decide whether an arbitration clause is unconscionable. That was something that the arbitrator, rather than the court, could decide. What happened was it became much, much harder to challenge arbitration clauses as unconscionable because the decisions kept going - the question about whether a given clause was enforced was going to the arbitrator. Since the June of 2010, you see more abusive provisions again. It's more likely, again, to see a provision that makes the consumer pay more money or have to travel distance or whatnot because there were some lenders who feel like they can get away with this stuff that they didn't. So they started off incredibly unfair, then they became more fair. Now, they've started tilting back towards becoming less fair again.

Jon Rosen: You mentioned the argument of contracts' unconscionability in these arbitration cases. Was that the most successful argument or the most common argument for defense?

Paul Bland: It became the most common argument for plaintiffs. ... I had been the principal author of the first edition of the National Consumer Law Center's book on Consumer Arbitration Agreements - which in theory is supposed to be a treatise - which should collect nearly all the cases of which any courts ever struck down an arbitration clause. A chapter on unconscionability was the biggest chapter for years. I continued to work on the sort of supplements to this chapter. We would do an annual supplement every year but we didn't do a new edition. I remember there was one year that there were more than a hundred cases that it struck down arbitration clauses as unconscionable. A great deal of those cases started arising in the setting of class actions. I'd argued that a number of cases going back to 2001 and the *Ting v. AT&T* case.[4]

I think the case that really started things going was the California Supreme Court's decision in 2005, *Discover Bank*.[5] Essentially, it was possible to argue that in a setting where the ban on class actions that was included in an arbitration clause was effectively an exculpatory clause. It made it difficult or impossible for people to bring individual cases. And that would be grounds for striking it down as unconscionable or, in a few states, as violating public policy. Those arguments were largely wiped away by the US Supreme Court's decision in April of 2011 *AT&T Mobility v. Concepcion*.[6] But, there was tons of litigation, which plaintiffs were largely winning in most places around the bans on class actions.

Jon Rosen: Were there any statutory arguments or [appeals to] statutory authority in these cases, like Truth in Lending?

Paul Bland: There had been a few wins early on in Truth in Lending, but that argument started disappearing. Very early on, there were a number of cases that found that claims

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[4] Ting v. AT&T, 319 F.3d 1126 (9th Cir. 2003). https://scholar.google.com/scholar_case?case=4728377560388145578&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[5] Discover Bank v. Superior Court, 105 Cal.App.4th 326 (Cal. Ct. App. 2003). https://casetext.com/case/discover-bank-v-superior-court-3.

[6] AT&T Mobility v. Concepcion, 563 U.S. 333 (2011). https://scholar.google.com/scholar_case?case=3870951188038012616&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[related to] the Truth in Lending Act could be the subject of a predisposed binding arbitration clause. There were cases decided in lower courts. A number of them did work the way up to the Supreme Court. By far the most catastrophic case for the plaintiffs was *CompuCredit v. Greenwood*.[7] I think that was in 2010 as well. There was a statute – the Credit Repair Organization Act. It had two provisions. One said that you have a right to go to court. There was another provision that said, no right under this act can ever be waived.

So, the plaintiffs sort of put these together. And the Ninth Circuit agreed that if you have a right to go to court and you can't waive any rights, that means you can't waive your right to go to court. Therefore, arbitration clauses are unenforceable. The Supreme court, I think it was the usual five to four said, "Oh no. That's not what this means. Of course, if Congress had wanted us to say that you couldn't have an arbitration clause –if you couldn't have arbitration for these cases –they would have said no arbitration for these cases." So, at different times there have been arguments that there are statutory exemptions and we were on lookout for cases where you can make that argument again and there are some exceptions. But by and large, that's a type of argument that's been extremely unsuccessful for the plaintiffs thus far.

Jon Rosen: Can you talk about the role that the Federal Arbitration Act (FAA) plays in arbitration cases?

Paul Bland: In 1925, [Congress] passed … the Federal Arbitration Act. The legislative history at the time makes fairly clear that what they were focused on was shipping industry in particular. It was a maritime-focused statute, and it's absolutely clear that the legislative intent was not to cover [other] claims at all. And there are some indications in hearings and legislative history that were never intended to apply to, essentially, adhesive contracts or take-it-or-leave-it contracts. Now in 1925, there was very little of the modern consumer contract. You didn't have the type of law that we have now. You don't any type of economy that we have now by a long shot.

This statute was principally applied in business-to-business sort of commercial settings for the next 70 years. In 1995, this one predatory lender kept getting sued in Alabama, [and] at the time Alabama was actually a fairly pro-plaintiff jurisdiction. The company was totally ripping off low-income people, but then it was actually getting hit with some million-dollar punitive damages. And somebody came up with the idea that they could stick in an arbitration clause and try and get things away from the jury. So, the Federal Arbitration Act became morphed into the statute that was requiring arbitration of employment claims in the *Circuit City Stores v. Adams* case in 2001 and to consumer cases. And that was actually a Breyer opinion. There's a Terminex case [*Hart v. Terminex International*].[8] It was 1995 case in which Alabama had a statute that said consumer claims can never be forced into arbitration.

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[7] CompuCredit v. Greenwood, 565 U.S. 95 (2012). https://scholar.google.com/scholar_case?case=371672434140772379&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[8] Hart v. Terminex International, 336 F.3d 541 (7th Cir. 2003). https://caselaw.findlaw.com/us-7th-circuit/1484340.html.

In the Terminex case, the Supreme Court said, "Oh no, you can force those claims into arbitration." The operative provision of the Federal Arbitration Act is Section Two, which is a single sentence. It's really long sentence. There's a ton of internal punctuation, it's hard to make sense of, but the Supreme Court has effectively invented this enormous structure of law that it's read into Section Two of the Act. The late Justice O'Connor once referred to as an edifice of our own making. And I think that's true. The rules about delegation clauses – all that judge-made – the rule that arbitration clauses were intended to be for individual versus individual cases, and not for class actions is all judge-made. That's completely an invention of Justice Scalia in the Concepcion case. But it's also been found to preempt state laws. So, in the *Terminex* case, it was found to displace the state law that banned arbitration clauses that applied in consumer settings. In the Concepcion case, it was found to preempt state law under California that said that where a ban on class actions is shown to be exculpatory, that's not enforceable.

The act is now sort of federalized, [and] all this contract law [has] overridden a ton of state law. And it's endlessly growing. I'm routinely contacted by people who say, "I want to get my state legislature to pass a bill that will do X, Y, and Z. And I don't think this is preemptive because the Federal Arbitration Act only preempts a type of preemption that goes back to 1998 in the *Doctor's Associates v. Casarotto* case.[9] I repeatedly had to say to somebody, "look, the Act now has like three or four additional layers of preemption that did not exist in 1998. And, with all respect, your analysis is really under-inclusive and superficial. You're missing how complicated the courts made the statute." The statute – it's a great question – is extremely important now.

Jon Rosen: Have you seen cases where lenders will try to force consumers to arbitrate while reserving the right to litigate against consumers themselves?

Paul Bland: These non-mutual, or one-sided clauses, are very widespread. The body of law finding that these were unconscionable and unenforceable was rapidly growing. The California Supreme Court had struck down a one-sided clause, I think all the way back in the *Armendariz* case.[10] I handled the case in the New Mexico Supreme Court that found that one-sided clauses were unconscionable. There was a case in West Virginia. There are cases in a bunch of different states striking these down. The Tennessee Supreme Court, of all places, actually had a case that said that ... The majority of courts to view this issue have found that their arbitration clauses that are one-sided are unenforceable. The Rent-A-Center case essentially knocked this out. The issue that arbitration clause is one-sided, is unconscionable, now always goes to the arbitrator, or almost always goes to the arbitrator, and they're not striking those down. So that defense against arbitration clauses has broken down.

Jon Rosen: Earlier in your career, you were involved in the *Cusack v. Bank United of Texas* case.[11]

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[9] Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996). https://scholar.google.com/scholar_case?case=13331973336275382918&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

[10] Armendariz v. Foundation Health Psychcare Services, Inc., 24 Cal.4th 83. https://casetext.com/case/armendariz-v-foundation-health-psychcare-services?sort=relevance&resultsNav=false&tab=keyword.

[11] Cusack v. Bank United of Texas, 159 F.3d 1040 (7th Cir. 1998). https://casetext.com/case/cusack-v-bank-united-of-texas-fsb.

Paul Bland: Yes, I do remember that.

Jon Rosen: The mortgage class action case. Could you talk a little bit more about that?

Paul Bland: Our organization objected to what we thought were bad class action settlements. I'm a little vague on this. But, essentially, what I remember is a couple of lawyers had sued a mortgage finance company on the theory that the way they were keeping track of escrow payments was leading to some advantage for the … the mortgage companies. Now, it was a fairly small dollar per person. But it was happening over many people. Then the United States Department of Housing and Urban Development (HUD) started some kind of rule-making in which they required that the escrow procedures change from the thing that the plaintiffs were criticizing to essentially what the plaintiffs were okay with. The plaintiffs went on and sued like 90 additional mortgage companies. They ultimately started settling these cases. They had Judge Daigle, the federal district court judge in Chicago, who's very sympathetic to the plaintiffs. They had done great work getting HUD to do this. So, they started settling case after case of different lenders around the country. With the settlements –what I remember about the settlements was if you were in the class, you wouldn't get cash or any injunctive relief because the problem had already been fixed – what you would get would be essentially a coupon that, if you redeemed it, you could get like a hundred dollars off your next loan from the company.

So, you've got a mortgage with this lender - I think the coupon for most of the class members was not actually mailed to them because that was going to be too expensive. They put it in an ad in the *New York Times*. So, it was the Bank of Texas, right? If you read the *New York Times*, and you physically clipped out a coupon that was on page, I don't know, like C38 or something. It's like a quarter of a page or an eighth of a page. And then you took out another loan, you'd get a hundred dollars off. This was a settlement that was unlikely to help many people, right? Very, very few people were going to take out another loan and use the coupon, even if they all had it in their hands. Most people weren't going to notice a coupon. And there's an attorney's fee of several hundred thousand dollars. So, we objected and said, "you should actually send money to all the class members, and you shouldn't be using coupons. You shouldn't have money to revert to the class."

The settlement was approved by the district court, who hated our objections. And we went to the seventh circuit where we also lost. This is not exactly what they said – the opinion, but reading between the lines. I think that what was really happening was – from having been in the oral argument in front of the Seventh Circuit –was that the panel thought, "look, these cases are just not worth very much. If they have to take these cases to trial, … no one's going to get anything." Even if the class doesn't get very much, what does it matter if the cases themselves aren't worth very much? That was a useful lesson to me as a lawyer who at the time represented a lot of representing objectors.

I think that going after a case and saying, "oh, this should be worth more. Everybody should be getting a million dollars" --if the case is really unlikely to prevail, it's probably not a good argument. But, my sense at the time was that this was a case where very few

people were going to get anything. So you're going to end up having like 99% of the economic value of the settlement was going to be attorney's fees. I think that they went ahead and settled a whole bunch of additional cases down the line in that vein.

Jon Rosen: Because of cases like that and the unsuccessful settlements – and you mentioned the *res judicata* issue with mortgages - is that when consumer groups started to shift away from mortgage class actions?

Paul Bland: I'm really trying to remember when that happened. I think it was somewhere between 2000-2005. There were a couple of cases. One was, I think, involving consumer lending, [with] Dan Edelman in Chicago. There was one case that was involving some consumer lawyers who were pretty good guys, I thought. I think Gary Klein, who now is with an Attorney General's office, but at the time was a consumer lawyer. Maybe even John Roddy, who's now with Bailey & Glasser. Some consumer lawyers who were really – in my sense at least of them subjectively - I thought they were people who were really good people who were trying to get money for their clients. [They] got into some of these cases, got relief for their clients, then turned out to discover down the road that this was leading to improper foreclosures where legal aids wanted to interpose a fraud kind of defense.

There was a fight in the community and a lot of discussion, and there were some angry moments at National Consumer Law Center Conferences, where legal aid lawyers were publicly sort of shaming a couple of the class action lawyers who worked in this area. Then NACA, the National Association of Consumer Advocates, had adopted this set of standards for best practices and consumer class actions. Then they reworked their standards to put in a series of guidelines about not settling mortgage cases, unless there were very limited circumstances. But I don't remember when the timing of that [was].

Jon Rosen: In your work on arbitration, in the mid-2000s, when real estate was going up and up, did you notice a proliferation of arbitration clauses and mortgage contracts?

Paul Bland: I think they were in most mortgage contracts. I remember I worked on a case in the Eighth Circuit and maybe 2006, where the mortgage company litigated in court for a while. When they didn't like the judge, they decided to go to arbitration. We got the Eighth Circuit to find that they'd waived their right to arbitrate, though. But there were a lot of clauses. I remember talking to a number of legal aid lawyers about arbitration clauses that they were hitting. I used to be invited to speak to a lot of legal aid groups that sort of disappeared over the years. But the people were seeing these clauses again and again.

Jon Rosen: In the mid-2000s, Fannie Mae and Freddie Mac refused to underwrite mortgages with arbitration contracts. I wanted to hear about what you made of that.

Paul Bland: There had been some back-channel communications. I was not a principal in these – although I was involved a little bit – between people at Fannie Mae and Freddie Mac and the consumer advocates. My guess is that Ira Rheingold of NACA or Will Ogburn at the National Consumer Laws Center probably were more heavily involved. I wish I

remembered a little bit more of it. I don't know if they knew that they were going to be running into problems down the road and they needed some friends or if they were just doing it out of caring about consumers and doing the right thing. But that was a very substantial decision. I mean, that did play a significant role in reducing the prevalence of the arbitration clauses in those types of contracts.

Jon Rosen: Do you know of any efforts by those Government-Sponsored Enterprises (GSEs) to try to get private sector lenders to do away with the arbitration clauses?

Paul Bland: I don't think that they tried to get people to walk away. I don't remember anything where they would be getting people to walk away from clauses that they'd already entered. But, I do think that new mortgages that were originated afterwards, were much less likely to have those types of clauses. I think that set the stage for Dodd-Frank to include a provision that ban the use of arbitration clauses for those contracts. But there were a lot of – I think that most people [had] mortgages [that were] 15 or 30 years typically. There were most people in America had a clause that already had a contractor, a note that already had an arbitration clause.

Jon Rosen: Can you talk about the role that preemption plays in arbitration clauses?

Paul Bland: Do you mean preemption in mortgages clauses? Because I think that's probably a better topic if that's all right.

Jon Rosen: Right, yes.

Paul Bland: The financial banks and lenders on mortgages had a choice, essentially, of three different regulatory regimes. It's a weird system to devise a system in which a company gets to pick who their regulator is going to be. There [are] the national banks that are regulated by the Office of the Comptroller of the Currency (OCC). Then, there was the Office of Thrift Supervision, OTS. Then, there were state bank regulators. The Office of Thrift Supervision had extremely sweeping language in their statute, the Home Owners' Loan Act (HOLA) and in their regulations that would preempt the entire field of lending under that statute.

The OCC was funded principally through user fees. In other words, if a bank decided to be regulated by the OCC, then it paid a substantial sum into the agency and that became a big part of their budget. So, the agencies began to compete to see who could be friendliest to the banks and the Office of Controller of Currency became absolutely servile to the industry. They would do anything to try and please industry lawyers. What they started trying to do was essentially market their charter to go to banks and say, "you should pick the OCC as your lender, because if you do, we will make sure that states fraud claims and consumer deception claims will be found to be preempted. We'll give you a defense against state law claims." And they had to compete with the Office of Thrift Supervision, where [they] had that sort of more naturally in their charter.

While George W. Bush was president, the OCC issued a set of regulations. There were a lot of bad things in them. But one of the provisions that was really notable was a

provision that essentially said that the OCC claimed that they were the sole arbiter of whether or not companies' disclosures to consumers were appropriate. So, when there would be a claim that a given disclosure was deceptive or misleading to consumers, the agency could be reliably counted upon, and come and argue that the consumer case was preempted – that the only remedy, if you thought their disclosures were deceptive, you should go write a letter to the OCC and complain. So, there were series of cases – some individual and some class actions – against lenders of all sorts of different types in which the defendants would say "oh, that's preempted by federal law."

In the wake of the 2008 financial crisis, Elizabeth Warren famously advocated very powerfully for the idea that most Americans were misled about fundamental terms of their mortgages. There was a variety of different data and anecdotes and whatnot that demonstrated and supported the idea that most Americans thought their mortgages were cheaper than they really were and so forth. Part of what was happening was whenever somebody tried to bring a case that argued a given set of disclosures was misleading and deceptive, the federal government was coming in and joining with the bank and saying that the case under the state's consumer protection laws or fraud claims had to be wiped away.

A journalist at Mother Jones – I think Stephanie Mencimer – wrote a big story where she broke down … she looked at the Office of Controller of Currency's amicus briefs. There was some crazy number, like 72 amicus briefs and in 68 or 70 in the cases or something crazy, the federal government had taken the bank side. That was sort of relentlessly the case. I was involved in several cases in different settings where the Office of Controller of Currency, or the OTS, was coming in and filing amicus briefs against us and siding with the bank. These are supposed to be … protecting consumers. Instead, they were fiercely trying to wipe cases away. What started eventually getting out of this was it became next to impossible to win a case against a lender that was of any scale – because the lender would just argue that there were no laws that apply to them.

And part of what's frustrating about this is, in theory, federal law should only preempt state law if the federal law is actually going to provide some kind of remedy for a problem. And that was not really the case here because neither the OTS nor the OCC was in the business of actually policing misleading comments by lenders. They both were in the business of helping the lenders out and they did not give a crap about the consumers and they weren't doing any serious regulation. I think that that was a factor. There was a hands-off approach that became disastrous. I remember early on hearing a number of legal aid lawyers and Ira Rheingold, who was the Executive Director of the National Association Consumer Advocates, repeatedly talking about Countrywide being like one of the most corrupt companies they had seen in any setting in America, like as bad as the worst payday lender in the country, like as bad as companies who exist for six months steal people's money then they hide the money in the Cayman Islands. Then the people leave the jurisdiction. Countrywide was just like routinely misleading people, pushing people into mortgage products that were wildly overpriced that people couldn't afford. They were also deceiving the lenders upstream. There was the securitization issue. So, you had a moral hazard problem. You had a complete regulatory failure.

And the regulatory failures were too tied into the incentives that the regulators had. If Bank of America had decided they no longer want to be regulated by the OCC, they were paying in such large user fees that the OCC would have had to lay off 10% of their staff, you know? So, they started approaching them like a client, as if you were a travel agent and you had a single company that was half your income, you would do whatever to keep that company happy. The regulatory failure as particularly exhibited through a combination of no affirmative regulation and then preemption of state law really created a wild west situation.

Jon Rosen: Can you talk about your role in the Maryland case *Sweeney v. Savings First Mortgage*?[12]

Paul Bland: Yes. I forgot about that. That was a fun case. Maryland had a statute dealing with the fees if somebody refinanced a mortgage. I think what was going on was that there was a practice of flipping where you'd have a mortgage and someone would come and say, "oh, you should refinance. You'll get some cash out of it." Then there would be a bunch of closing costs – they don't really stress the closing costs. Then, you refinance, and a couple of years later, they get you to refinance again, that's typically too soon barring unusual financial circumstances. So, Maryland had a statute that limited if you were refinancing the property a couple of times in a short period – so you were like flipping it twice in five years or something – that there was a very limited fee you could charge the second time. There was a consumer with an individual case and the lawyer was a guy named Scott Borison, who's this wonderful, sweet guy who's working at the time out of Frederick, Maryland. He's a great trial lawyer, and he's great with witnesses. He's great at depositions. I think Scott himself would say that he's not always as much of a paper-brief writing kind of lawyer.

The mortgage industry came in and they had an argument that this was preempted by the statute, the Depository Institutions Deregulation and Monetary Control Act (DIDMCA). They were trying to get preempted this anti-flipping statute. Scott had already filed his opening brief in the Maryland Court of Appeals. And there were some other lawyers, who had a consumer class action that was based on this statute, who freaked out because they thought he was going to lose. So, they reached out to Scott, we talked to him, he agreed to bring us in. I can't remember if we did it completely pro bono. But we did a proportionate of the attorney's fees [for] the case, since it was a dispute over like $3,500 for the one consumer, Ms. Sweeney. I think she was the bus driver. Then, the attorney fees [would be] a thousand dollars, right?

What I'm remembering about this was that … [given] the language of the statute, that they had a really good argument that would preempt it. We did a very deep dive into this. We just recently hired at TLPJ a lawyer named Leslie Bailey, who's now a senior lawyer there. She's an extraordinary brief writer. She dove into legislative history of the DIDMCA, and it was nothing about this. It was because they were basically trying to get preemption for brokers. That was the statute was not about brokers at all. Then we looked at the regulatory record and the agency had issued a zillion opinion letters. The opinion letters were clear that they didn't mean to regulate brokers either. Scott's

[12] Sweeney v. Savings First Mortgage, 879 A.2d 1037. https://scholar.google.com/scholar_case?case=968693315875493338&hl=en&as_sdt=6&as_vis=1&oi=scholarr.

opening brief on the appeal made like three arguments in the first two – I think were not well-founded and we abandoned them.

We took the third argument, which he had made in a paragraph with no cites. And we expanded [it] into like a 40-page reply brief, and got permission to the court to file an extra-long brief. The oral argument was really fun because the defendant showed up with this guy who was like this long-time regulatory kind of lawyer who did regulatory work. As far as I could tell, he had never appeared in a court before. He was not a courtroom lawyer and not familiar with appeals. I meet this guy and his team outside the courthouse and [he] said something like, "wow, you guys have terrific briefs." And this guy, chuckles, he says, "well, you should think this young woman here, because she's the one who wrote the briefs." And [he] introduces me to like the angriest-looking person you've ever seen. [and says,] "She's written the brief. She really understands this inside and out." This guy who was arguing did not.

So, I get up and I talk. I get the first question, like, "isn't the language of the statute against you?" And I'm like, "well, you have to read it in context where it references this and references that how you really know what they really meant when you looked at the legislative history and the regulatory stuff." This guy gets up and gets the first question from the then Chief Judge of the Maryland Court of Appeals, Robert Bell. [Bell] says to him something like "Counsel, it seems to me that the language of the statute is against you," which is like good news for us. And the guy says, "oh, well, in that case, you should look at the legislative history or regulatory stuff," which is where we were killing them. Instead of actually knowing what his best argument was, he immediately flees to their worst argument. And you could just tell right then, like the other six judges leaned back, it was like over. He talked for like 25 more minutes and completely wasted his time. He completely didn't get it. That was a nice case. I was really happy about that.

Jon Rosen: With preemption, were there specific states that you were seeing, trying to get around … preemption through legislation or litigation strategy?

Paul Bland: I think that some state banking regulators were pretty good. I want to say, I think North Carolina had a pretty good banking regulator. ... For the most part, I was mostly familiar with California consumer class actions. That's where a lot of the arbitration wars were taking place at that time. I don't remember much from the state regulators there. California and some other states had really good UDAP or Unfair Deceptive Acts and Practices Statutes, sometimes called Consumer Protection Acts in different states. Those statutes tended to have very broad language that, unlike common law fraud where you have to prove reliance and so forth, they would essentially say if a reasonable consumer would be likely to be deceived by some either statement or an omission or a half-truth, then it's actionable. There were a lot of banks that were saying things that I thought were clearly going to be liable under state, if you could get to the UDAP. What was happening was OCC was blocking cases that were trying to involve those statutes. Other people who were closer to mortgage litigation would probably remember more about state regulators. But I'm sorry, that's not sticking with me.

Jon Rosen: How did you evaluate Dodd-Frank's attempt to narrow federal banking preemption?

Paul Bland: I think this was affected enormously by the death of Senator Kennedy. I am trying to remember the name of the guy. ... When Senator Kennedy died, there was a race. And a Republican won that seat. His name was Brown. I can't remember his first name.[13] He was this super handsome sort of show pony, completely substance-less guy. He was very close to industry in bunch of different places. On the other hand, he was hoping to keep his seat, although he wasn't able to hold off Elizabeth Warren.

Essentially, in order to get him to vote for Dodd-Frank – and these Democrats were very close and whether they had 60 votes to be the filibuster and get cloture – in order to get this guy's vote, they had to put up with one thing: they exempted from Dodd-Frank car dealers. They sell cars; but of course, they also originate loans all the time. So exempting car dealers was an extremely harmful thing to consumers because car dealers in the lending space frequently engage in predatory lending. But I think that he also was one of the people who – I think some of the language on preemption got a little bit watered down. So, one of the things that was frustrating - you'd read the Senate Report on Dodd-Frank – and I think the House is similar. My recollection is that there was a very strong language that would say in the run-up to the 2008 financial crisis, the excessively broad federal preemption was encouraging fraud, making it easier for lenders to defraud people, and we need to limit federal preemption.

And the CFPB [Consumer Financial Protection Bureau] will never preempt something through a letter ruling. They have to do it through a regulation. Before they would preempt something, they would just meet with the state banking regulators and talk it through all those kinds of stuff. And there was an effort from the Democrats to try and sharply rein in preemption. The first thing they did is they did get rid of the Office of Thrift Supervision, which had its sweeping field preemption. But I think they were also intending to limit OCC preemption. My sense is that it got somewhat watered down in the process. I think it was to get to hold onto the 60th vote to pass it. When you looked at the legislative history and the floor debate. Some Democrat would stand up and say, "the whole purpose of this bill is to dramatically strengthen the power of state law to protect against defrauding people.

Then some Republican would get up and say, "the important thing about this bill is it's intended to preserve the federal preemption, which right now gives us the uniformity that best protects consumers." You would see this Senate debate in which each side was claiming that the same language totally supported them. One of the things that has been frustrating – I think this is particularly true because of the arbitration clauses – coming out of Dodd-Frank, a number of us thought the next big frontier in consumer appellate litigation is going to be to what extent did Dodd-Frank change the ability of the OCC to preempt state UDAP laws. That seemed like the case that you thought was going to take over. Right after Dodd-Frank, the next year, the Supreme Court decides the Concepcion case by five to four votes, and arbitration clauses became bulletproof in class actions.

There's very, very little case law that really explores the extent to which Dodd-Frank changes preemption, is my understanding. At least the last time I checked, there was

[13] Scott Brown.

very little. I remember when the Consumer Financial Protection Bureau's rule that would limit on forced arbitration clauses was first adopted early in 2017, being with a number of consumer lawyers who said, "okay, now we're finally going to get the fight about whether Dodd-Frank solved the preemption problem or not, or to what extent it solved the preemption problem." Then the rule got overturned in the Congressional Review Act. So, I still think there's an open question. I think that there are certainly some provisions of Dodd-Frank that are aimed at narrowing preemption. There's something there. But it's not as clear. It's not as conclusive and complete as you would hope.

Jon Rosen: Looking back at the crisis over a decade later what do you see as the most important lessons for state level policymakers?

Paul Bland: I think that Elizabeth Warren was right when she said that a gigantic number of Americans do not understand the terms of the loans they enter into. People think that their interest rates, their fees, and their penalties are lower than they actually are. And that's not a mistake. I think that what you see is lenders who are able to package things in language that is likely to deceive many consumers, if not most consumers. If you really want to do something about this, you need to be thinking in terms of something like UDAP that says if something's likely to deceive that it's actionable – as opposed to, a stricter standard like fraud.

I think mortgages is a problem area. But for a lot of consumers, the burdens from other types of loans also became an issue. So, you did see a lot of consumers – the move towards payday lending was growing in the years leading up to 2008. Around 2008, there had been a story on some national news media that there were more payday lenders than there were McDonald's franchises in the United States. That industry grew very, very rapidly from 2000 and on. I also think that where states should, they should be thinking in terms of some kind of usury cap. That's difficult because the federal preemption there is much clearer. National banks can export their interest rate. But I do think that, if you were in the U S Congress, something like the Military Lending Act for All – that would cap interest rates at 36% –would probably greatly reduce our threat of people being over overextended.

Jon Rosen: We are nearing the end of the interview. Is there anything I didn't ask about that you'd like to talk about?

Paul Bland: No. I mean, I did want to talk about the federal preemption issue. I think the only other thing I would say is that the Supreme Court has made it over the years harder to bring a class action than it had been 10 years ago, 15 years ago, 20 years ago. So, one thing I think [is] that even if arbitration clauses disappear more broadly from lending contracts, and even if federal preemption is sharply reined in, it's going to be harder and harder to bring class actions. We are waiting for the Supreme court to decide the *TransUnion v. Ramirez* case right now, which is an effort to overturn a $60 million jury verdict in a statutory damages class action. I think there've been a series of cases that make that harder.

I think that to the extent in the past, the country as a whole relied on private enforcement of laws, rather than government enforcement by and large, the class action device was the principal way of enforcing consumer laws. That's still going to be a real challenge if the only thing you have is class action. I think there's some states that are looking at sort of *qui tam*-like rules. There would be a statute that would let somebody bring a case for at least injunctive relief against a company that's breaking the law even if you can't certify a class, that kind of thing. There's going to be a need for – if the conservative majority of the Court continues to narrow Rule 23[14] – some other types of remedies appear for consumers or else private enforcement of law is still going to be really reined in.

Jon Rosen: Thank you so much, Mr. Bland for your time. It's really great to speak with you.

Paul Bland: I really appreciate you taking the time. I enjoyed it. I hope this was some of this was helpful to you.

[END OF SESSION]

[14] Rule 23 of the Federal Rules of Civil Procedure states the parameters under which parties can bring class action lawsuits.