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The Rental Crisis Will Not Be Televised: The Case for Protecting Tenants Under Consumer Protection Regimes

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THE RENTAL CRISIS WILL NOT BE TELEVISED: THE CASE FOR PROTECTING TENANTS UNDER CONSUMER PROTECTION REGIMES

Eric Sirota*

ABSTRACT

The Foreclosure Crisis of the 2000s has likely hurt renters more than homeowners. Incongruously, however, consumer enforcement agencies have been far more zealous in protecting mortgagors than tenants. This Article explores the under-protection of tenants as a class of consumers, particularly in a “commoditized” rental market, and examines how consumer enforcement agencies can more zealously incorporate tenant-protection into their mandates.

Much of the prior literature on the legal protections afforded tenants was published in the wake of the consumer rights revolution of the 1970s. This Article is the first to carefully reexamine, in the context of the modern rental market, whether tenants should be protected as consumers and whether tenants have truly reaped the benefits of consumer gains over the last half-century. The Article analyzes original interviews with state consumer protection agencies, engages in the first broad survey of state and federal tenant protection enforcement actions, and provides a new review of the caselaw addressing whether tenants are covered by consumer protection regimes.

Concluding that achieving systemic change through broad-scale policing of the rental industry is both vital and often overlooked, the Article proposes specific reforms that consumer protection agencies can adopt to better protect tenants.

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INTRODUCTION

America's tenants have faced an affordability crisis since at least the 1990s.¹ Recent data indicates that, even without the pandemic, more than half of tenants spend more than thirty percent of their income on rent, thus qualifying them as “cost-burdened”;² twenty-five percent of rental households are severely cost-burdened, which means they pay more than fifty percent of their income towards rent.³ These cost burdens will continue to increase, perhaps severely, as the pandemic continues. While governmental housing assistance programs offer some relief, less than one in four eligible households receive such help.⁴

As a result, “[e]victions have reached crisis levels.”⁵ In 2016, a staggering 6.12% of tenants faced eviction proceedings and 2.34% faced actual eviction.⁶ Matthew Desmond, the author of *Evicted*, has calculated that in some large cities evictions are filed against more

1. See Richard Florida, *The Deep Roots of America's Affordability Crisis*, CITYLAB (May 20, 2015, 3:58 PM), <https://www.citylab.com/equity/2015/05/the-deep-roots-of-americas-housing-affordability-crisis/393773/>; see also Brenda Richardson, *America's Housing Affordability Crisis Only Getting Worse*, FORBES (Jan. 31, 2019, 7:48 AM), <https://www.forbes.com/sites/brendarichardson/2019/01/31/americas-housing-affordability-crisis-only-getting-worse/#54a563a3104b>.

2. Michael Hobbes, *America's Housing Crisis Is a Ticking Time Bomb*, HUFFINGTON POST (June 19, 2018), https://www.huffpost.com/entry/housing-crisis-inequality-harvard-report_n_5b27c1f1e4b056b2263c621e; HARV. JOINT CTR. FOR HOUS. STUD., THE STATE OF THE NATION'S HOUSING 2019, at 4 (2019) [hereinafter JCHS 2019], https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_of_the_Nations_Housing_2019%20%281%29.pdf [<https://perma.cc/64KP-Y8MN>].

3. HARV. JOINT CTR. FOR HOUS. STUD., *The Impact of COVID-19 on Renters and Rental Markets*, YOUTUBE JOINT CTR. FOR HOUS. STUD. HARV. UNIV., at 8:03–9:07 (Sept. 7, 2020), <https://www.youtube.com/watch?v=0IsxVpDEY7M>; see JCHS 2019, *supra* note 2, at 5. Note that this article was drafted almost entirely before the pandemic. The pandemic increases the cost burden on rental households, perhaps severely. Renters have in large part maintained rental payments by borrowing from family and dipping into often-meager savings, and have avoided eviction due to eviction moratoriums, but these solutions are not sustainable. HARV. JOINT CTR. FOR HOUS. STUD., *supra*, at 13:32–18:53. We are likely headed towards a new eviction crisis due to the pandemic. *Id.* at 29:00–29:22.

4. *Policy Basics: Federal Rental Assistance*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 15, 2017), <https://www.cbpp.org/research/housing/policy-basics-federal-rental-assistance>; see also JOINT CTR. FOR HOUS. STUD. HARV. UNIV., AMERICA'S RENTAL HOUSING: EVOLVING MARKETS AND NEEDS 7 (2013), https://www.jchs.harvard.edu/sites/default/files/media/imp/jchs_americas_rental_housing_2013.pdf [<https://perma.cc/K58M-6TPY>] (“[From 2007-2011,] the share of income-eligible households receiving assistance shrank from an already modest 27.4 percent to 23.8 percent.”). The ‘housing assistance programs’ discussed here do not include the temporary emergency rental assistance provided as a response to pandemic, but rather refer to long term housing subsidy programs, such as subsidized housing and housing choice voucher programs.

5. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, PROTECT TENANTS, PREVENT HOMELESSNESS 14 (2018) [hereinafter NLCHP], <https://nlchp.org/wp-content/uploads/2018/10/ProtectTenants2018.pdf> [<https://perma.cc/HQ5N-AYGN>].

6. *Map & Data*, PRINCETON UNIV. EVICTION LAB, <https://evictionlab.org/map/#/2016?geography=states&type=er> (last visited Feb. 13, 2021).

than thirty percent of renters.⁷ Desmond's estimate does not account for evictions through extra-judicial means.⁸ And we are headed for a new crisis, on top of the existing eviction crisis, due to the pandemic.⁹

The situation faced by renters is partly attributable to the foreclosure crisis. But while the foreclosure crisis exacerbated the rental crisis,¹⁰ the rental crisis was already well under way.¹¹ Indeed, tenants have long faced crisis because, for decades, wage increases have not nearly kept up with rent increases.¹² Shockingly, “[a]djusting for inflation, the median rent payment rose sixty-one percent between 1960 and 2016 while the median renter income grew only five percent.”¹³ Concededly, this Article focuses on the most vulnerable tenants, but this fact does not render its analysis particularly narrow. First, a significant percentage of tenants face vulnerable economic circumstances.¹⁴ Second, even more financially stable tenants face frequent abuse.¹⁵ Indeed, tenancy involves inherent vulnerabilities,¹⁶ though abuse is, of course, far more severe towards the indigent.

Tenants, thus, face a litany of consumer abuses. The abuse tenants often suffer at the hands of landlords and property managers cannot be divorced from these epidemic levels of housing instability.¹⁷ Dwindling supply of affordable rental units forces tenants to

7. Emily Badger & Quoc Trung Bui, *In 83 Million Eviction Records, a Sweeping and Intimate New Look at Housing in America*, N.Y. TIMES: THE UPSHOT (Apr. 7, 2018), <https://www.nytimes.com/interactive/2018/04/07/upshot/millions-of-eviction-records-a-sweeping-new-look-at-housing-in-america.html> [https://perma.cc/UZ6D-X9DM].

8. *Id.*

9. Harv. Joint Ctr. for Hous. Stud., *supra* note 3, at 29:00.

10. See NLCHP, *supra* note 5, at 10–11, detailing how the foreclosure crisis exacerbated the rental crisis.

11. Florida, *supra* note 1; Richardson, *supra* note 1.

12. Hobbes, *supra* note 2.

13. JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., *THE STATE OF THE NATION'S HOUSING 2018*, at 5 (2018), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_of_the_Nations_Housing_2018.pdf [https://perma.cc/J3DS-6FRE] [hereinafter JCHS 2018].

14. See *supra* notes 1–3 and accompanying text.

15. See, e.g., Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms, Evidence from the Residential Rental Market*, 9 J.L. ANALYSIS 1, 24–25 fig.1 (2017) (documenting the prevalence of misleading lease clauses).

16. For example, tenants, especially in multi-unit buildings, depend on landlords to make repairs even where the tenants can afford such repairs themselves. See Joan L. Neisser, *The Tenant as Consumer: Applying Strict Liability Principles to Landlords*, 64 ST. JOHN'S L. REV. 527, 530 (1990).

17. Andrea Castillo, Barbara Anderson & BoNhia Lee, *Fresno Apartments Crawling with Mice, Roaches but Fearful Tenants Stay Quiet*, FRESNO BEE (May 8, 2016), <https://www.fresnobee.com/news/special-reports/housing-blight/article75831252.html> (describing cost-burdened tenants vulnerable to landlord abuse); Ezra Rosser, *Exploiting the Poor: Housing, Markets, and Vulnerability*, 126 YALE L.J. F. 458, 460–61 (2017); Louis W. Fisher, *Paying for Pushout: Regulating Landlord Buyout Offers in New York City's Rent-Stabilized Apartment*, 50 HARV. C.R.–C.L. L. REV. 491, 494–99 (2015); *Javins v. First Nat'l Realty Corp.*, 428 F.2d

live in substandard conditions.¹⁸ A study conducted by the Center for American Progress found that approximately thirty million homes in America are dangerous to live in due to unsafe housing conditions, and this epidemic has grown worse as more Americans have turned to renting.¹⁹

But the abuses tenants face are by no means limited to habitability concerns. For example, in order to make room for wealthier tenants or otherwise free up apartment space, landlords illegally oust renters through intimidation, deception, or pretextual evictions.²⁰ Illegal confiscation of security deposits is also a common problem. Fear of retaliation makes it uniquely difficult for tenants to protect themselves. Many tenants are hesitant to assert their rights for fear of retaliation.²¹ Undocumented tenants fear landlords will call immigration enforcement.²² Tenants may not even know their rights are being violated, as they are often subject to illegal or misleading lease provisions.²³ The cause of the eviction epidemic thus goes beyond the fact that tenants struggle to pay rent. As stated by Desmond, “[e]viction is a cause, not just a condition, of poverty.”²⁴

Despite these widespread abuses, tenants do not have legal parity with other consumers. For one, courts may interpret Unfair or Deceptive Acts and Practice (UDAP) statutes, states’ primary consumer protection laws, to not apply to tenants.²⁵ As this Article shows, however, even where such laws apply to tenants, consumer enforcement agencies rarely use their enforcement power to protect tenants.²⁶

1071, 1079 (D.C. Cir. 1970) (“The increasingly severe shortage of adequate housing further increases the landlord’s bargaining power and escalates the need for improving existing stock.”); *see also* NLCHP, *supra* note 5, at 8 (noting that tenants represented by counsel are exponentially less likely to face eviction, thus at least partially corroborating that eviction may often result from landlord abuses).

18. *See, e.g.*, Castillo et al., *supra* note 17.

19. Alex Fernandez Campbell, *Gas Leaks, Mold, and Rats: Millions of Americans Live in Hazardous Homes*, THE ATLANTIC (July 25, 2016), <https://www.theatlantic.com/business/archive/2016/07/gas-leaks-mold-and-rats-millions-of-americans-live-in-hazardous-homes/492689/>; *see also* Castillo et al., *supra* note 17 (noting that abusive landlords rent to a disproportionately high number of tenants).

20. Shaila Dewan, *Evictions Soar in Hot Market; Renters Suffer*, N.Y. TIMES (Aug. 28, 2014), <https://www.nytimes.com/2014/08/29/us/evictions-soar-in-hot-market-renters-suffer.html> [<https://perma.cc/5FUC-MRN2>]; Steven T. Hasty, *Protecting Tenants at Foreclosure by Funding Needed Repairs*, 20 J.L. & POL’Y 581, 592–98 (2012).

21. *See, e.g.*, Castillo et al., *supra* note 17.

22. *Id.*

23. *See generally* Furth-Matzkin, *supra* note 15.

24. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 299 (2016).

25. *See* discussion *infra* Section II.A.

26. *See* discussion *infra* Section I.D.

It is essential that tenants be fully integrated into consumer protection regimes for multiple reasons. First, UDAP statutes provide far more robust relief than tenant-landlord laws. Consumer protection laws often allow for the recovery of not only pecuniary loss, but also attorneys' fees, exemplary damages, emotional distress damages, and for the imposition of equitable relief.²⁷ The primary remedy under tenant-landlord law is the tenant withholding rent or standard contract damages.²⁸

Second, and more importantly for the purposes of this Article, tenants would greatly benefit from receiving the full attention of consumer enforcement agencies. These agencies, vested with broad and flexible authority to enforce UDAP laws, have played a key role in advancing the rights of consumers over the last half-century.²⁹ In fact, in some sense, the consumer rights movement since the 1960s has been defined by the increased role of enforcement agencies in protecting individual consumers.³⁰ Tenants, however, have not been the beneficiaries of these efforts as, in practice, consumer enforcement agencies do not fully incorporate tenants into their mandates.³¹ Tenants must enforce their own rights, though they can seldom afford counsel.³² This Article argues that tenants are entitled to the same agency attention as similarly situated consumers.

Part II of this Article, thus, compares the respective formation of the modern consumer protection legal regime and modern tenant protection legal regime. Section I.A discusses the legal gains achieved by consumers generally in the 1960s and 70s. Such gains were largely defined by increased government protection of consumers of tangible goods and, to a lesser extent, financial products and services. Part II.B discusses tenants' legal gains during this same period, illustrating that, while tenant gains were influenced by the gains of consumers at large, tenants did not receive the full benefit of the consumer protection movement. Section I.C discusses the next wave of consumer protection—that surrounding the fi-

27. See NAT'L CONSUMER L. CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 13.1 (Carolyn Carter ed., 9th ed. 2016) [hereinafter NCLC], <https://library.nclc.org/udap>.

28. *Id.* See generally David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389, 389, 407 (2011).

29. Prentiss Cox, Amy Wiedman & Mark Totten, *Strategies for UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37, 38, 42–46 (2018); see also Martha Chamallas, *The Disappearing Consumer, Cognitive Bias and Tort Law*, 6 ROGER WILLIAMS U. L. REV. 9, 19 (2000); Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 462 (2007); Christopher L. Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TUL. L. REV. 1057, 1060–61 (2016).

30. See discussion *infra* Sections I.A, I.C.

31. See discussion *infra* Section I.D.

32. Super, *supra* note 28, at 432 n.234.

nancial crisis of the 2000s—which was defined by the formation of the Consumer Financial Protection Bureau (CFPB) and increased consumer enforcement agency activism against major mortgage banks. Again, as discussed in Section I.D, these increased consumer protection efforts were not fully extended to tenants. Even though tenants arguably suffered during the Financial Crisis more than homeowners, consumer enforcement action focused far more on helping homeowners than tenants.

Part II will examine why consumer protection agencies do not, in practice, fully incorporate tenants into their mandates. Section II.A will discuss jurisprudential barriers to more robust agency enforcement of tenants' rights. This Section will also serve as an excuse to survey the case law on whether tenants are "consumers" under UDAP laws, an area largely overlooked by recent scholarship. Section II.B will discuss underlying sociological factors behind consumer agency under-prioritization of tenants. And Section II.C will analyze original interviews conducted with consumer enforcement bureaus to identify institutional barriers to these agencies fully incorporating tenants into their mandates. Part III will then discuss why robust public enforcement of tenants' rights is essential to protecting tenants, just as it is essential to protecting traditional consumers. Finally, Part IV will propose specific reforms to better empower consumer enforcement agencies to protect tenant-consumers. The Article then concludes and suggests areas for future scholarship.

I. THE FORMATION OF THE CURRENT CONSUMER AND TENANT PROTECTION REGIMES

In articulating the lack of parity between tenants and other consumers, it is important to examine the modern history of governmental efforts to protect consumers and tenants, respectively. Over approximately the last half-century, the consumer protection movement has twice generated an acute flourishing of regulatory consumer protection efforts: in the 1960s and 1970s and in the wake of the Financial Crisis of the 2000s.³³

Tenant gains since the 1960s have been predicated on the notion that tenants are "consumers" and should thus receive con-

33. Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Law*, 81 ANTITRUST L.J. 911, 912 (2017); James H. Backman, *The Tenant as a Consumer—A Comparison of Developments in Consumer Law and in Landlord/Tenant Law*, 33 OKLA. L. REV. 1, 12 (1980); Chamallas, *supra* note 29, at 10–16; *see also* Mary A. Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 510 (1982).

sumer protections.³⁴ Still, in essential ways, the gains achieved by consumers have generally not been fully extended to tenants. In large part, this is because consumers of credit and tangible goods have received a great deal of attention from consumer protection agencies, while tenants have not.

A. Consumer Gains in the 1960s and 1970s

To understand the historical context of the early tenants' rights movement, a brief discussion of the concurrent consumer rights movement is necessary. The wave of consumer activism in the 1960s and 1970s "coincided generally with the more liberal political climate of the 1960s and the movements for social equality that escalated in the late 1960s and early 1970s," as well as with social uprisings inspired in large part by consumer grievances.³⁵

Like previous consumer movements, this movement focused on "manipulative advertising and the existence of unsafe products."³⁶ Unlike past movements, this wave centered around a call for more direct government enforcement of individual consumer rights.³⁷ Historically, for example, the Federal Trade Commission (FTC) focused on antitrust activity. But in the 1970s, the FTC shifted its focus to protecting individual consumers.³⁸ States, in turn, enacted "mini-FTC," or UDAP, laws, all of which granted enforcement power to a state agency.³⁹ Federal UDAP laws and their state corollaries became the primary statutes used to protect consumers.⁴⁰ Under UDAP laws, the delegated enforcement agency generally has broad discretion, not only to sue businesses for wrongdoing, but also to issue pre-litigation subpoenas, induce businesses to enter into binding promises to not engage in certain acts, and request broad and sometimes preemptive equitable relief.⁴¹ Indeed,

34. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075–79 (D.C. Cir. 1970).

35. Chamallas, *supra* note 29, at 17–18; Anne Fleming, *The Rise and Fall of Unconscionability as the 'Law of the Poor'*, 102 GEO. L.J. 1383, 1425–26 (2014).

36. *Id.* at 17.

37. *Id.* at 17–18 ("[W]hat marked out this era from earlier bursts of energy . . . was the presence of Ralph Nader and his organization's impact on the federal government.").

38. See Pridgen, *supra* note 33, at 911–15.

39. Backman, *supra* note 33, at 16. The FTC Act does not include a private right of action. At first, state UDAP somewhat followed suit, allowing private litigants only to obtain injunctive relief, though such acts were then expanded to allow private litigants to sue for damages. See Pridgen, *supra* note 33, at 914.

40. See NCLC, *supra* note 27, § 1.1.

41. See *id.* § 13.

since the 1960s, the consumer protection regime has largely relied upon government agencies for enforcement.⁴²

Before discussing consumer gains in the 1960s and 1970s, this subsection will take a brief diversion to discuss the nature of UDAP laws.

1. A Brief Primer on UDAP Laws

The National Consumer Law Center describes UDAP laws as follows:

All fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands have enacted at least one statute with broad applicability to most consumer transactions, aimed at preventing consumer deception and abuse in the marketplace. Many of these statutes are patterned after the language in Section 5(a)(1) of the FTC Act that prohibits “unfair or deceptive acts or practices.” The term “UDAP” is an acronym for this prohibition.⁴³

UDAP prohibitions are often phrased in broad and general terms to enable flexible enforcement and application by agencies and courts.⁴⁴ Within the defined scope of trade and commerce, UDAP laws tend to prohibit the use of “unfair and deceptive acts and practices.”⁴⁵ What constitutes a “deceptive” or “unfair” practice thus warrants brief attention.

Though they are similar in ways, “unfairness” and “deception” are distinct concepts under UDAP. Deception pertains to what most would likely consider archetypal examples of consumer fraud: “[t]he FTC and the CFPB both define deception as a material representation, omission, act, or practice that misleads or is likely to mislead a consumer whose interpretation is reasonable under the circumstances.”⁴⁶

42. Cox et al., *supra* note 29, at 42–46. As another example, in 1972, Congress passed the Consumer Product Safety Act and created the Consumer Product Safety Commission with authority to create and enforce product safety standards. *Consumer Product Safety Act (CPSA)*, U.S. CONSUMER PROD. SAFETY COMM’N, <https://www.cpsc.gov/Regulations-Laws—Standards/Statutes/Summary-List/Consumer-Product-Safety-Act> (last visited Feb. 13, 2021).

43. NCLC, *supra* note 27, § 1.1.

44. *Commonwealth v. Monumental Props., Inc.*, 459 Pa. 450, 478–79 (1974).

45. CAROLYN CARTER, NAT’L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAWS 1 (2018), <https://www.nclc.org/images/pdf/udap/udap-report.pdf>.

46. NCLC, *supra* note 27, § 4.3.2.1.

Unfairness is more of a catchall referring to business practices which have the propensity to unjustly harm or take advantage of consumers.⁴⁷ Instead of strictly defining unfairness, most courts apply the following factors to determine whether a given practice is unfair: (1) whether the practice offends public policy;⁴⁸ (2) whether the practice is immoral, unethical, oppressive, or unscrupulous; and (3) whether the practice causes substantial injury to consumers.⁴⁹

Of course, no two UDAP laws are exactly the same.⁵⁰ Some prohibit only deception, not unfairness.⁵¹ Others include additional distinct categories such as “abusiveness” or “unconscionability.”⁵² Beyond these broad prohibitions, many UDAP statutes also state that violations of other enumerated statutes constitute *per se* UDAP violations.⁵³ All state UDAP statutes include a private right of action and also delegate enforcement authority to a state agency, often the Attorney General.⁵⁴

2. The Scope of Consumer Protection Efforts During the 1960s–70s

With that primer on UDAP out of the way, this Article will now turn back to the consumer protection movement of the 1960s and 1970s. Consumer gains during this era focused on protecting consumers of tangible products—such as cars, furniture, and widgets—as opposed to real property or financial products.⁵⁵ While enforcement of UDAP laws could have been utilized to increase

47. *Id.* § 4.3.3.1.

48. *Id.* (suggesting the proper question is whether the practice is “within at least the penumbra of some common law, statutory, or other established concept of unfairness”).

49. *Id.*

50. *See generally* CARTER, *supra* note 45.

51. NCLC, *supra* note 27, at App. A.

52. *Id.* § 4.3, App. A.

53. *Id.* § 3.2.2. Notably, while a small number of particularly broad UDAP statutes, like California’s, declare that any “unlawful” business practice is a UDAP violation, CAL. BUS. & PROF. CODE § 17200 (West 2017), very few, if any, UDAP laws specifically state that particular tenant abuses or violations of state tenant-landlord laws constitute *per se* UDAP violations. *See e.g.*, 940 MASS. CODE REGS. 3.17 (West 2020); WIS. ADMIN. CODE ATCP § 134.06–.10 (2018).

54. NCLC, *supra* note 27, § 13.1. The FTC Act and UDAP statute enabling the CFPB do not allow for a private right of action. *See* 12 U.S.C. § 5511 (outlining the CFPB); Schmidt v. PennyMac Loan Servs., LLC, 106 F. Supp. 3d 859, 872 (E.D. Mich. 2015); Inst. for Truth in Mktg. v. Total Health Network Corp., 321 F. Supp. 3d 76, 86 (D.D.C. 2018) (noting that there is no private right of action under FTC Act); *see also* Cox et al., *supra* note 29.

55. *See* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 3–5 (2008) (noting consumer protection regulation’s focus on ensuring the safety of tangible products, as opposed to financial products).

protection for tenants,⁵⁶ this was seldom the case. Both state and federal agencies brought extremely few enforcement actions on behalf of tenants even through the 1980s.⁵⁷ In fact, courts have interpreted the model UDAP code, drafted in 1970, to indicate that UDAP laws should not cover tenant-landlord matters:

A consumer transaction typically involves a natural person who obtains or is solicited to obtain an item of goods, a service, or an intangible primarily for personal, family, or household purposes. Also included are certain analogous transactions in which a natural person obtains or is solicited to obtain a business opportunity in which he has not been previously engaged. In view of the extensive state regulation of securities transactions, their inclusion is left optional. On the assumption that land transactions frequently are, and should be, regulated by specialized legislation, they are excluded altogether.⁵⁸

56. For example, the Fair Debt Collection Practices Act (FDCPA) does not usually pertain to the residential rental market. Eric M. Steven, *From Landlord/Tenant to Debt Collector/Consumer and Back Again—Landlord/Tenant Notice Practice and FDCPA Compliance after Romea*, 35 GONZ. L. REV. 175, 177–82 (1999); see also Backman, *supra* note 33, at 19; Commonwealth v. Monumental Props., Inc., 459 Pa. 450, 465 (1974) (arguing that the FTC's regulation of other rental products indicates its authority to regulate rental housing). *But see id.* at 493 (Pomeroy, J., dissenting) (noting that FTC regulation of leasing arrangements has always targeted the leasing of tangible goods, not real estate).

57. See Backman, *supra* note 33, at 19. The only cases research has turned up during the 1970s and 1980s across all fifty states, the District of Columbia, and all U.S. Territories are those included in Appendix A. Further, besides *Isaacs*, *Lefkowitz*, *MacFarlane*, *Abrams*, *Zimmerman*, and *Schwab*, all of these cases regard mobile home parks. These lawsuits are commendable, especially as those living in mobile homes are often perceived to be particularly vulnerable. However, mobile home tenants represent a small percentage of American tenants, indicating that application of UDAP to mobile home laws did not evidence a general trend towards protecting tenants through UDAP Enforcement. Further, in *Schwab*, the Court ruled that tenants fall outside the scope of UDAP; in *Zimmerman*, the court ruled that the AG did not properly allege a UDAP violation based on the allegation of withholding of security deposits without additional acts of deception or fraud; the *Magley* court held that the AG did not have enforcement power over the specific case; and *Bel Fiore* held that an illegal clause in 280 leases did not constitute a problem sufficiently effecting tenants generally to be actionable under UDAP. *State v. Anchorage Trailer Sales, Inc.*, C.A. No. 76-7971, 1977 WL 18408 (Super. Ct. Alaska 1977); *State ex rel. MacFarlane v. Boulder Rental Prop. Ass'n*, No. 80 CV 1583, 1981 WL 11409, at *2 (D. Colo. 1981); *People ex rel. Fahner v. Hedrich*, 438 N.E.2d 924, 926 (Ill. App. Ct. 1982); *People ex rel. Fahner v. Testa*, 445 N.E.2d 1249, 1250–51 (Ill. App. Ct. 1983); *Commonwealth ex rel. Stephens v. Isaacs*, 577 S.W.2d 617, 617 (Ky. Ct. App. 1979); *Commonwealth v. Gustafsson*, 346 N.E.2d 706, 708 (Mass. 1976); *Commonwealth v. DeCotis*, 316 N.E.2d 748 (Mass. 1974); *State v. Solil Mgmt. Corp.*, 491 N.Y.S.2d 243 (N.Y. Sup. Ct. 1985); *State v. Magley*, 484 N.Y.S.2d 251 (N.Y. App. Div. 1984); *State v. Bel Fior Hotel*, 408 N.Y.S.2d 696 (N.Y. Sup. Ct. 1978); *Commonwealth ex rel. Zimmerman v. Nat'l Apartment Leasing Co.*, 519 A.2d 1050 (Pa. 1986); *State v. Schwab*, 693 P. 2d 108 (Wash. 1985).

58. UNIF. CONSUMER SALES PRACS. ACT § 2(1) cmt. (1) (UNIF. L. COMM'N. 1970); see, e.g., *Heritage Hills, Ltd. v. Deacon*, 551 N.E.2d 125, 127 (Ohio 1990) (citing UNIF.

Still, despite the regime's focus on consumers of tangible goods, the government also took decisive steps to protect consumers of credit.⁵⁹ Congress passed broad regulations, such as the Truth in Lending Act, Real Estate Settlement Procedures Act, and Fair Debt Collection Practices Act. Each of these statutes includes both a private right of action and delegation of enforcement authority to a federal agency.⁶⁰

Interestingly, while consumer protection agencies paid little attention to residential renters, enhanced legal protections for credit consumers came largely in response to the practices of rent-to-own furniture stores.⁶¹ Because the arrangements were rent-to-own, policy makers and enforcement agencies viewed the furniture leases as extensions of credit and the rental payments as installment payments.⁶² Residential tenants, who generally were not renting-to-buy, did not receive the attention of these agencies.⁶³

B. *Tenant Gains During this Same Era*

Still, during the 1970s, tenants also experienced significant legal gains.⁶⁴ These gains, which resulted in tenant-landlord law substantially resembling that in place today, in many ways piggy-backed off of the discourse of the consumer rights movement.⁶⁵ Such tenant gains rested on the notion that tenants are "consumers" and thus require protection from power imbalances favoring businesses.⁶⁶ As discussed in Section I.D, however, tenant gains developed under a distinct legal regime are often less robust than the consumer protection regime.⁶⁷

The primary tenant protections defining this era were the warranty of habitability and the prohibition of landlord retaliation.⁶⁸

CONSUMER SALES PRACS. ACT). Courts, however, have been less willing to read this provision to exclude homeownership transactions from UDAP. *Keiber v. Spicer Constr. Co.*, 619 N.E.2d 1105, 1108-09 (Ohio Ct. App. 1993).

59. See, e.g., Consumer Credit Protection Act, Pub. L. 90-321, 82 Stat. 146 (1968); Real Estate Settlement Procedures Act of 1974, Pub. L. 93-533, 88 Stat. 1724; Fair Debt Collection Practices Act, Pub. L. 95-109, 91 Stat. 874 (1977).

60. *Id.*

61. Fleming, *supra* note 35, at 1416-21.

62. See *id.* at 1421.

63. Backman, *supra* note 33, at 19.

64. DOUGLAS BIKLEN, COMMUNITY ORGANIZING: THEORY AND PRACTICE 131 (1983) (noting that the Civil Rights Movement and the *Javins* decision, see case cited *infra* note 79 and accompanying text, were also integral to catalyzing the tenants' right movement).

65. *Id.*

66. *Id.*; see also *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075-79 (D.C. Cir. 1970).

67. See discussion *infra* Section IV.B.

68. David A. Super describes the tenant revolution of the 1960s and 70s as follows:

These protections remain the cornerstone of tenant-landlord law today.⁶⁹

The proliferation of warranty of habitability laws was such a sea change because it marked an essential departure from the doctrine of *caveat lessee*.⁷⁰ *Caveat lessee*, the primary legal principle guiding rental transactions for hundreds of years, dictated that, with some exceptions, “the lease gave the tenant the property ‘as is’ and the landlord had no duty to keep the property in a habitable condition or fit for a particular purpose.”⁷¹ Before the warranty of habitability, America largely adhered to a “Sixteenth Century England [doctrine which] characterized a lease as a conveyance of property”⁷² to be governed by property law as opposed to contract law.⁷³ As such, the landlord’s breach of lease did not excuse tenants from abiding by their duties under the lease; tenants could not withhold rent even if the landlord violated the lease’s express warranties.⁷⁴

But under the warranty of habitability, the landlord had an implied contractual obligation to maintain the property. If the landlord failed to do so, the tenant could seek recourse by withholding rent and/or using the landlord’s breach as a defense to eviction for failure to pay.⁷⁵ The tenant could also sue for contract damages.⁷⁶

The other major achievement of the tenant revolution of the 1960s and 70s was the wide-scale prohibition of retaliatory eviction.⁷⁷ In some sense, this prohibition is the cornerstone of tenant protection law, as tenant rights mean little if landlords can evict tenants for attempting to enforce them.

Though they did not place tenants on equal footing with other consumers, increased tenant protections were predicated on rhetoric and policy arguments analogizing tenants to consumers at

The late 1960s and early 1970s saw wide-ranging changes in tenants’ rights . . . The most prominent result of the revolution, however, was reading an implied warranty of habitability into residential leases, with a corollary prohibition on evictions in retaliation for asserting these new rights. These measures, eventually adopted in almost every state, seemed to reverse the landlord’s historical dominance of the landlord-tenant relationship.

Super, *supra* note 28, at 392–93.

69. *See id.*

70. *See* Barbara Jo Smith, *Tenants in Search of Parity with Consumers: Creating a Reasonable Expectations Warranty*, 72 WASH. U. L.Q. 475, 477 (1994).

71. *Id.* at 477.

72. Neisser, *supra* note 16, at 530.

73. Backman, *supra* note 33, at 1.

74. Smith, *supra* note 70, at 478.

75. *See* Super, *supra* note 28, at 394.

76. *See id.* at 400–01.

77. *See id.* at 413–15, 427.

large.⁷⁸ Scholars, for example, often credit the D.C. Circuit Court case *Javins v. First National Realty Corp.*⁷⁹ with popularizing the warranty of habitability and eroding *caveat lessee*.⁸⁰ There, a tenant attempted to introduce evidence of the landlord's housing code violations as a defense to eviction for failure to pay rent.⁸¹ The trial court deemed evidence of the code violations inadmissible because, under *caveat lessee*, the landlord's code violations did not excuse the tenant's rent obligation.⁸²

In reversing this decision, the *Javins* appellate court clarified that courts have typically used "the special rules governing real property to resolve controversies" since a lease was, at least traditionally, a "conveyance of an interest in land."⁸³ Reversing the district court, the D.C. Circuit held that "a warranty of habitability . . . is implied by operation of law into leases of urban dwelling units"⁸⁴

The court specifically observed that while, in agrarian times, tenants were often interested primarily in renting a piece of land for agricultural purposes, "when American city dwellers . . . seek 'shelter' today, they seek a well-known package of goods and services"⁸⁵ Drawing on consumer warranty law, the court specifically argued that tenants should be protected as consumers.⁸⁶ This decision served as the jurisprudential underpinning to this paradigm shift in tenants' rights. The warranty of habitability, along with other laws protecting tenants, quickly proliferated throughout the states.⁸⁷

Still, the regime resulting from the Tenant Revolution was based on doctrines and enforcement practices distinct from those protecting consumers at-large. As discussed, while UDAP laws offer a broad array of available relief,⁸⁸ tenant-landlord law is largely de-

78. See Neisser, *supra* note 16, at 546–48 (discussing that early courts recognizing the warranty of habitability did so on the basis that modern tenants require consumer protections).

79. 428 F.2d 1071 (D.C. Cir. 1970).

80. Smith, *supra* note 70, at 483.

81. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1072 (D.C. Cir. 1970).

82. *Id.* at 1073–74.

83. *Id.* at 1074.

84. *Id.* at 1072–73.

85. *Id.* at 1074.

86. *Id.* at 1077–79 ("[W]e believe that the consumer protection cases discussed above require that the old rule be abandoned in order to bring residential landlord-tenant law into harmony with the principles on which those cases rest.")

87. This history is well-documented within several other articles quoted here and need not be repeated at length. See, e.g., Chamallas, *supra* note 29, at 10–19; Robert M. Mayer, *The US Consumer Movement: A New Era Amid Old Challenges*, 46 J. CONSUMER AFFS. (SPECIAL ISSUE) 171 (2012).

88. NCLC, *supra* note 27, §§ 1.1–1.2.

signed to enable tenants to withhold rent in a defensive posture.⁸⁹ While contract damages may be available, these are likely small.⁹⁰ Private attorneys have little incentive to represent tenants in litigation against landlords.⁹¹ While enforcement agencies play a large role in protecting the rights of consumers of tangible goods and financial products, tenant protections largely depend on private, often pro se, enforcement.⁹² As such, tenant and consumer protections each flourished during the 1970s but did so along different trajectories, to the detriment of tenants.

C. Consumer Protection Activity from Reagan to Present

With the election of Ronald Reagan and resurgence of free market ideology, the progress of the consumer protection movement greatly slowed.⁹³ Indeed, “[b]y the 1980 election of Ronald Reagan . . . the third wave of consumer activism was dead and would remain dormant for the next twenty years,”⁹⁴ though this is perhaps a bit more true at the federal level than the state level.⁹⁵

The Financial Crisis of 2007 spurred the next major wave of consumer protection advances, which focused on the regulation of consumer credit.⁹⁶ The Crisis, which burgeoned into a global economic meltdown, was largely caused by the collapse of the U.S. subprime mortgage market.⁹⁷ There are any number of dueling narratives used to explain the Crisis, but the basic story is that the housing bubble burst and brought the U.S. housing market, and then the world economy, with it.⁹⁸ Then, due to this economic downturn and the resulting spike in unemployment and decrease in property values, America was hit by a second wave of foreclosures beginning in 2010.⁹⁹

89. See Super, *supra* note 28, at 389, 407.

90. *Id.*

91. *Id.*

92. See *infra* Section III.C.

93. See Chamallas, *supra* note 29, at 19.

94. *Id.*

95. Pridgen, *supra* note 33, at 911–15.

96. *Building the CFPB*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/data-research/research-reports/building-the-cfpb/> [<https://perma.cc/ZAN3-LRPA>]; Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J., Summer 2007, <https://democracyjournal.org/magazine/5/unsafe-at-any-rate/> [<https://perma.cc/F3AN-ED5B>].

97. John V. Duca, *Subprime Mortgage Crisis: 2007-2010*, FED. RSRV.: HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/subprime_mortgage_crisis.

98. *Id.*

99. The 2010 Foreclosure Crisis may be discussed as distinct from the 2007 Financial Crisis, but for the purposes of this article, they are part of the same narrative. See *id.*; Kathleen M. Howley, *Prime U.S. Mortgage Foreclosures Increase to Record*, BLOOMBERG (Nov. 18, 2010),

In their essential 2008 article, “Making Credit Safer,” then-Professor Elizabeth Warren and Professor Oren Bar-Gill framed what would become the regulatory response to the financial crisis:

Credit products, like mortgage loans and credit cards . . . are left largely unregulated Because financial products are analyzed through a contract paradigm rather than a products paradigm, consumers have been left with unsafe credit products. These dangerous products can lead to financial distress, bankruptcy, and foreclosure, and, as evidenced by the recent subprime crisis, they can have devastating effects on communities and on the economy.¹⁰⁰

The article provided the ethical and economic underpinnings of a new wave of consumer protection focusing on consumer credit regulation. The article argued that, along with the regulation of tangible consumer products, consumer protection should focus on ensuring the financial safety of consumers of credit. As argued by Warren and Bar-Gill:

It is impossible to buy a toaster that has a one-in-five chance of bursting into flames and burning down your house. But it is possible to refinance an existing home with a mortgage that has the same one-in-five chance of putting the family out on the street—and the mortgage won’t even carry a disclosure of that fact to the homeowner Why are consumers safe when they purchase tangible consumer products with cash, but when they sign up for routine financial products like mortgages and credit cards they are left at the mercy of their creditors?¹⁰¹

Warren and Bar-Gill specifically argued for the establishment of a federal agency to regulate mortgages and other consumer credit products.¹⁰² It did not take long for this to become a reality. In 2010, with a new wave of foreclosures hitting the United States,

12:20 PM), <https://www.bloomberg.com/news/articles/2010-11-18/prime-u-s-mortgage-foreclosures-rise-to-record-on-unemployment-pressure> [https://perma.cc/V8DV-X2AD]. As illustrated by these sources, the crisis from 2007–2010 was fueled by defaults on subprime loans, while 2010 marked a spike in defaults on prime loans.

100. Bar-Gill & Warren, *supra* note 55, at 1.

101. Warren, *supra* note 96. Importantly, as discussed, before Dodd-Frank and the CFPB, there was a great deal of regulation protecting consumers of credit, but credit consumers were still not protected as much as consumers of tangible goods just as, today, consumers of rental housing enjoy less protection than consumers of credit or tangible goods. *See supra* Part II.

102. Bar-Gill & Warren, *supra* note 55, at 98–100.

Congress passed the Dodd-Frank Wall Street Reform Act.¹⁰³ The following year, Congress founded the CFPB, delegating them broad enforcement power over Dodd-Frank and empowering them to enforce Dodd-Frank's general UDAP prohibitions.¹⁰⁴ Shortly thereafter, state attorneys general teamed up with federal regulators to bring a multitude of UDAP litigation against major mortgage services for their malfeasance surrounding the crash.¹⁰⁵ Thus, in response to the financial crisis, Congress established a broad new consumer regulatory framework and a new independent agency to enforce it. State and federal agencies pursued high profile enforcement actions against mortgage servicers.

D. *These Gains Have Not Been Fully Extended to Renters*

The regulatory effort to protect homeowners in response to the Foreclosure Crisis was far more robust than that aimed at protecting renters, despite the fact that the Crisis likely hurt renters more than homeowners.¹⁰⁶ Indeed, approximately forty percent of families displaced by foreclosures during the Crisis were renters.¹⁰⁷ This does not account for renters displaced from properties zoned as owner-occupied.¹⁰⁸ More importantly, it does not account for the additional displacement of renters from job loss, rent hikes, and the conversion and demolition of rental properties taking place

103. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).

104. CONSUMER FIN. PROT. BUREAU, *supra* note 96.

105. See *What Was the National Mortgage Settlement?*, CONSUMER FIN. PROT. BUREAU (May 10, 2017), <https://www.consumerfinance.gov/ask-cfpb/what-was-the-national-mortgage-settlement-en-2071> [<https://perma.cc/V7T9-83RX>].

106. David Lurie, *Rental Home Sweet Home: The Disparate Impact Solution for Renters Evicted from Residential Foreclosures*, 111 NW. U. L. REV. 239, 247 (2016) ("Less attention has been paid to the of the foreclosure crisis on renters, who by some estimations constitute 40% of all Americans displaced by foreclosure."); Steven T. Hasty, *Protecting Tenants at Foreclosure by Funding Needed Repairs*, 20 J.L. & POL'Y 581, 593-94 (2012); Carsten Grellmann, *Why State Courts May Prove Most Effective at Allowing the Protecting Tenants at Foreclosure Act to Protect Tenants*, 20 J. AFFORDABLE HOUS. & CMTY. DEV. L. 295, 297-98 (2011) (noting deficiencies in the PTFA, such as the fact that there is no enforcement mechanism beyond tenants using it as a defense to eviction).

107. SHAMBHAVI MANGLIK, NAT'L LOW INCOME HOUS. COAL., *RENTERS IN FORECLOSURE: A FRESH LOOK AT AN ONGOING PROBLEM XI* (2012), http://nlihc.org/sites/default/files/Renters_in_Foreclosure_2012.pdf; Lurie, *supra* note 106, at 247. While not all foreclosures end in displacement, to get a sense of the scope of the problem, "[b]etween 2006 and 2014, nearly 10 million homeowners in America saw the foreclosure sale of their own homes," which indicates that at least 40 million rental households likely saw foreclosure, though this may not account for foreclosure of larger multiunit rental properties. Viktoria Ney, *Many Americans Ended up Homeless During the Real Estate Crisis 10 Years Ago— Here's Where They Are Now* (Aug. 7, 2018), <https://www.businessinsider.com/heres-where-those-who-lost-homes-during-the-us-housing-crisis-are-now-2018-8>.

108. See MANGLIK, *supra* note 107, at 5.

due to the Foreclosure Crisis.¹⁰⁹ Further, the crisis for renters both predates the Foreclosure Crisis and has continued even years after it ended.¹¹⁰ Having faced several decades of an affordability crisis,¹¹¹ renters remain largely reliant on the legal regime put in place in the 1970s.¹¹² As with the foreclosure crisis, this rental crisis is not merely one of affordability, but also of consumer abuse.¹¹³ These abuses, in turn, exacerbate affordability issues and result in serious negative externalities for families, communities, and society.¹¹⁴

Tenants, however, have not reaped the full benefit of consumer protection reforms occurring in the wake of the Financial Crisis. Under Dodd-Frank, the CFPB's regulatory power applies only to the sale of "financial products," like mortgages.¹¹⁵ Renting a house does not involve an extension of credit so these enhanced protections do not apply to tenants.¹¹⁶ Similarly, the FTC, with some exceptions, rarely takes action to protect tenants.¹¹⁷

In 2009, Congress did pass the Protecting Tenants at Foreclosure Act (PTFA), which, in many circumstances, obligates purchasers of foreclosed properties to respect the existing leases of tenants in the property.¹¹⁸ But, like most laws protecting tenants, the Act

109. Danilo Pelletiere & Keith Wardrip, *Renters and the Housing Credit Crisis*, POVERTY & RACE RSCH. ACTION COUNCIL, <https://prrac.org/renters-and-the-housing-credit-crisis> (focusing on renters directly displaced due to foreclosures as opposed to other negative externalities of the housing crisis).

110. See JCHS 2019, *supra* note 2, at 2–3; JCHS 2018, *supra* note 13, at 4–6; Carey L. Biron, *Why Unaffordable Rental Housing May Be New Normal in the US*, CHRISTIAN SCI. MONITOR (Jan. 31, 2020), <https://www.csmonitor.com/Business/2020/0131/Why-unaffordable-rental-housing-may-be-new-normal-in-the-US> [<https://perma.cc/ZG33-AYU5>] ("The price of rental properties has risen by 150% between 2010 and 2020, and it may continue to rise, according to a new Harvard study. The nation's lowest-income renters are feeling the brunt of the housing crisis.").

111. Richardson, *supra* note 1.

112. See generally Super, *supra* note 28 (discussing the formation of this regime in the context of later reforms).

113. See *supra* Part I; Super, *supra* note 28, at 405; *supra* notes 18–20 and accompanying text.

114. David Brancaccio & Katie Long, *Millions of Americans Are Evicted Every Year — and Not Just in Big Cities*, MARKETPLACE (Apr. 9, 2018), <https://www.marketplace.org/2018/04/09/eviction-desmond-princeton-housing-crisis-rent> [<https://perma.cc/H6TM-3QGZ>].

115. See *Dodd-Frank: Title X - Bureau of Consumer Financial Protection*, L. INFO. INST., https://www.law.cornell.edu/wex/dodd-frank_title_x_-_bureau_of_consumer_financial_protection (last visited Jan. 23, 2021).

116. Grellmann, *supra* note 106, at 313–14 (observing that while the CFPB may be well-situated to enforce the Protecting Tenants at Foreclosure Act, protecting tenants is outside of the CFPB's jurisdiction).

117. See *infra* Appendix B. Most of the Federal suits protecting tenants are Fair Housing lawsuits, which are vital but are not 'tenant-protection suits' in the context of this article, as they focus upon the disparate treatment of some groups of tenants. See, e.g., *Complaint, FTC v. Apartment Hunters, Inc.*, No. 8:18-CV-1636 (C.D. Cal. Sept. 11, 2018), 2018 WL 9815931.

118. Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, div. A. tit. VII, § 701, 123 Stat. 1633, 1660.

relies on private enforcement.¹¹⁹ The only way the law can be raised is as a defense to eviction—and there are serious doubts about its efficacy.¹²⁰ Congress took little other action to help tenants, failing to even properly fund federal housing subsidies to keep up with inflation.¹²¹

State enforcement agencies also have not prioritized the protection of tenants since the Foreclosure Crisis. This is perhaps best exemplified by the terms of the consent judgments entered into between state enforcement agencies and mortgage servicers.¹²² In the wake of the Foreclosure Crisis, state attorneys general, often in concert with federal agencies, entered into several multistate national mortgage settlements.¹²³ These settlements consisted of elaborate consent judgments, providing penalties for servicers, relief for consumers, and requiring servicers to institute extensive policy initiatives and reforms.¹²⁴ Notably, these consent judgments mandate reforms that reach far broader than the servicer conduct underlying the litigation.¹²⁵

Settlements with mortgage servicers could have also included broad relief for renters.¹²⁶ Because the vast majority of foreclosed homes were repurchased by the foreclosing lenders, the Crisis led to mortgage servicers becoming the landlords for tenants still residing in foreclosed properties.¹²⁷ Despite widespread reports of

119. Grellmann, *supra* note 106, at 297.

120. Grellmann, *supra* note 106, at 297–98 (noting deficiencies in the PTFA, such as the fact that there is no enforcement mechanism beyond tenants using it as a defense to eviction).

121. See JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., AMERICA'S RENTAL HOUSING: EXPANDING OPTIONS FOR A DIVERSE AND GROWING DEMAND 6 (2015), https://www.jchs.harvard.edu/sites/default/files/media/imp/America%27s%20Rental%20Housing%202015_WEB.pdf [<https://perma.cc/F4FN-EVTC>].

122. As federal agencies were also generally party to these consents, the substance of them is also reflective of the federal government's approach. See generally JOINT STATE-FEDERAL NAT'L MORTGAGE SERVICING SETTLEMENTS [hereinafter NMS], <http://www.nationalmortgagesettlement.com/> [<https://perma.cc/ZYS2-ZHKU>]; *Settlement Documents*, JOINT STATE-FEDERAL NAT'L MORTGAGE SERVICING SETTLEMENTS, <http://www.nationalmortgagesettlement.com/settlement-documents.html> [<https://perma.cc/E2KL-9VWS>].

123. Press Release, DOJ, Federal Government and State Attorneys General Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses (Feb. 9, 2012), <https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest>; see *Settlement Documents*, *supra* note 122.

124. *Settlement Documents*, *supra* note 122; see, e.g., Consent Judgment, United States v. Bank of Am. Corp., 1:12-cv-00361-RMC (D.D.C. Apr. 4, 2012).

125. *Id.*

126. See Grellmann, *supra* note 106, at 295 (noting that foreclosing lenders often take possession of the property and thus bear responsibility for remaining tenants under the PTFA).

127. Janet Portman, *Rights of Renters in Foreclosure*, NOLO, <https://www.nolo.com/legal-encyclopedia/renters-foreclosure-what-are-their-30064.html> (last visited Feb. 16, 2021).

tenant abuse in foreclosed properties, however, these consent judgments included little help for renters.¹²⁸

Taking one such consent judgment as an example,¹²⁹ in the 130-page general settlement,¹³⁰ there are only two items dedicated to protecting tenants in foreclosure, and both of them do only slightly more than tell mortgage servicers to follow the law. One provision obligates servicers to follow the law and to put policies in place to ensure they follow the law.¹³¹ Another section empowers the Settlement Monitor to assess servicer treatment of tenants.¹³² If the Monitor finds that the servicers are unreasonably injuring tenants, the Monitor may include compliance metrics assessing treatment of tenants.¹³³ These metrics may not go beyond assessing servicer compliance with existing law, though, and no new tenant protections are included.¹³⁴

That said, in recent years, state consumer enforcement agencies have increasingly taken action to protect tenants, though there is little aggregated data on the matter.¹³⁵ There is reason to believe, though, that consumer fraud bureaus do not fully incorporate tenants into their mandates. One strong, though imprecise, indicator comes from the National Attorneys General Training and Research Institute database, a database of attorney general lawsuits, which only active attorneys general can access. A search by administrators uncovered a total of only four hits using the search terms “tenant” or “landlord.”¹³⁶

Further, research indicates that, as of July 2019, twenty-six states had never brought an enforcement action to protect tenants.¹³⁷

128. See, e.g., Consent Judgment, United States v. Bank of Am. Corp., No. 1:12-cv-00361-RMC, at A-40, E-9, E-25 (D.D.C. Apr. 4, 2012); see also *Settlement Documents*, *supra* note 122.

129. Though the other consent judgments are not materially different in this regard. See *Settlement Documents*, *supra* note 122.

130. Consent Judgment, United States v. Bank of Am. Corp., No. 1:12-cv-00361-RMC (D.D.C. 2012). This includes the settlement through Exhibit A.

131. *Id.* at A-40 (“Tenants’ Rights. 1. Servicer shall comply with all applicable state and federal laws governing the rights of tenants living in foreclosed residential properties. 2. Servicer shall develop and implement written policies and procedures to ensure compliance with such laws.”).

132. *Id.* at E-8–E-9.

133. *Id.*

134. *Id.* at E-9.

135. One article aggregated the types of consumer lawsuits brought by state attorneys general in 2014, but, perhaps tellingly, in quantifying the industries targeted in these lawsuits, the authors did not code for tenant-landlord cases. Cox et al., *supra* note 29; see also E-mail from Prentiss Cox, Prof. of Law, Univ. of Minn. Law Sch., to Author (Aug. 19, 2019) (on file with author).

136. E-mail from Emily Myers, Antitrust Counsel, Nat’l Att’ys Gen. Training & Rsch. Inst. to Author (Apr. 1, 2019).

137. See *infra* Appendix A. This chart is based on original research attempting to chart all tenant-related state civil enforcement actions, excluding fair housing/discrimination cases, through July 2019. Research methods involved searching on Westlaw and state consumer

While there has been a recent uptick of tenant enforcement efforts, they have been primarily concentrated within New York, District of Columbia, Delaware, Maryland, and Massachusetts, and thus do not indicate a national trend.¹³⁸ Further, some states that took a particularly active role in mortgage servicing litigation have not extended such efforts to protect tenants reeling from the Housing Crisis.¹³⁹

II. EXPLANATIONS FOR THE STATUS QUO

The question then becomes: Why, in practice, don't consumer protection agencies fully integrate tenants into their mandates? "Consumer enforcement agencies," in this context, refers to state consumer protection bureaus, which are usually a subdivision of the Attorney General's Office, as well as federal agencies like the FTC and CFPB.¹⁴⁰

This Article focuses on state consumer protection agencies because these seem to be the agencies best situated and most likely to protect tenants.¹⁴¹ After all, integral to the Tenant Revolution of the 1970s was the view that tenants are consumers in need of consumer protection.¹⁴² Likewise, this Article focuses on consumer enforcement agencies' application of UDAP laws, as these laws pro-

protection agency websites for lists of actions brought on behalf of tenants. Common search terms included: attorney general; consumer protection; tenant!; State ex rel.; People ex rel.; and landlord. The Center for State Enforcement of Antitrust and Consumer Protection Laws site was also searched for press releases from the last 12 months, then the web page for each relevant state office was visited to see if there were any additional press releases or cases mentioned, and a web search was done for new cases related to tenants and consumer protection in each state.

138. *Id.*

139. Iowa, for example, has brought few lawsuits on behalf of tenants, see *infra* Appendix A, but led a multistate coalition of state consumer enforcement bureaus in mortgage servicer "Robosigning litigation," one of civil law enforcement's most prominent responses to the Foreclosure Crisis. See *State Attorneys General Are the New Bank Regulators*, AM. BANKER (Feb. 1, 2012), <https://www.americanbanker.com/opinion/state-attorneys-general-are-the-new-bank-regulators>; see also Carole Fleck, *\$25 Billion Deal Reached to Aid Distressed Homeowners*, AARP (Feb. 9, 2012), <https://www.aarp.org/money/credit-loans-debt/info-02-2012/robo-signed-foreclosures.html>.

140. The CFPB's jurisdiction, however, generally does not extend to the residential rental market, and tenants do not seem to turn to the FTC for help. See generally FTC, CONSUMER SENTINEL NETWORK, DATA BOOK 2019, at 7 (2020), https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2019/consumer_sentinel_network_data_book_2019.pdf.

141. This is not, however, meant to be a nominal point. This Article discusses *infra* that tenants need protection from consumer enforcement agencies. This Article takes no stance on whether this should be done through existing agencies or whether new agencies should be established to specifically focus on tenant issues.

142. See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Commonwealth v. Monumental Props., Inc.*, 459 Pa. 450, 467-68, 477-80 (1974).

vide consumer protection agencies with their primary mandates. It also bears mention, however, that other enforcement agencies have not filled this gap.¹⁴³

There are three primary explanations for the seeming hesitance of these delegated agencies to employ UDAP laws to protect tenants: statutory/jurisdictional explanations, sociological explanations, and institutional explanations.

Section II.A discusses statutory/jurisdictional explanations, i.e., instances where UDAP statutes explicitly exclude the protection of tenants or where courts have interpreted them to do so. Section II.B then discusses sociological explanations for tenants' lack of parity with other consumers. This Section focuses on the overarching social and political structures that make it less likely for government institutions to prioritize renters.

Finally, Section II.C discusses institutional explanations, as expressed by the agencies themselves. To learn more about consumer agencies' attitudes and approaches to protecting tenants, the author interviewed representatives from ten state consumer fraud bureaus.¹⁴⁴ Of course, this does not constitute a statistically significant sample, and this Article does not claim to be a quantitative analysis. Rather, these interviews are used to offer qualitative insights into consumer protection bureaus' approaches to tenant protection.

A. Statutory/Jurisdictional Explanations

While it is not the case in most states, a significant minority of state UDAP statutes exclude tenants.¹⁴⁵ The scope of commerce regulated by UDAP varies by state.¹⁴⁶ A prototypical UDAP statute may, for example, prohibit the use of unfair or deceptive practices within the scope of trade and commerce, where commerce is defined as the "advertising, selling, and leasing of goods and services."¹⁴⁷ Some UDAP statutes exclude or include specific transactions within their scope, such as real property transactions.¹⁴⁸ UDAP statutes also often exempt certain specific industries, commonly the utility industry, for example.¹⁴⁹ UDAP laws may also ex-

143. See *infra* Appendix A; Grellmann, *supra* note 106, at 297.

144. See *infra* Section II.C.

145. See NCLC, *supra* note 27, § 8.2; Susan L. Thomas, Annotation, *Coverage of Leases Under State Consumer Protection Statutes*, 89 A.L.R. 4th 854 (1991).

146. Thomas, *supra* note 145.

147. See NCLC, *supra* note 27, at App. A.

148. See *id.*

149. See *id.* § 2.3.

clude from coverage practices otherwise permitted by law, i.e., practices sanctioned by other more industry-specific regulations.¹⁵⁰

In some instances, UDAP statutory language is seemingly explicit about the inclusion or exclusion of tenant issues; statutory text, however, is not always determinative.¹⁵¹ For example, leasing of real property is specifically included within the scope of “trade and commerce” covered by Michigan’s UDAP law, but at least one court has excluded such coverage on the basis that state tenant-landlord law displaces UDAP’s application.¹⁵² Similarly, while Maryland’s UDAP law explicitly prohibits “the use of any unfair, abusive, or deceptive trade practice . . . in . . . [t]he . . . lease . . . of . . . consumer realty,” courts have significantly limited the protections the law offers to tenants.¹⁵³

It should also be noted that reading a UDAP statute to either include or exclude tenants is not necessarily determinative of whether that state’s consumer protection bureau will use UDAP to protect tenants. For example, several Florida cases hold that Florida’s UDAP statute applies to protect tenants,¹⁵⁴ but Florida’s state consumer protection agencies have brought few, if any, UDAP en-

150. See *id.* § 2.3.3.3. Section 2.3.3.1 summarizes the mainstream approach to such exclusions: Certain UDAP statutes exclude from UDAP coverage only practices “permitted” by law or “authorized” by a regulatory agency. This language exempts far fewer practices than statutes using the term “regulated,” since a practice may be remedied by the UDAP statute where there is an insufficient showing that the particular challenged activity is specifically permitted or authorized by law.

To claim this type of exemption, “a defendant must show more than the mere existence of a related or even overlapping regulatory scheme that covers the transaction. Rather, a defendant must show that such scheme affirmatively permits the practice which is alleged to be unfair or deceptive” Conduct is not specifically authorized by an agency merely because it has not been specifically prohibited.

151. For example, see discussion of the CFPB’s jurisdiction, text accompanying *supra* note 115. See also WYO. STAT. ANN. § 40-12-505(d)(iv)–(v) (2007) (mandatory security freezes imposed by Wyoming’s UDAP law on credit reporting agencies do not apply to tenant screenings); *State v. De Anza Corp.*, 416 So. 2d 1173, 1175 (Fla. Dist. Ct. App. 1982) (citing exclusion of real estate transactions from previous version of statute as basis for excluding tenant-landlord issues from current statute). Though the inclusion of “real estate” in the definition of covered “trade or commerce” does appear to be an indicator that courts will read the statute as covering tenants more than the statute’s inclusion of “lease” transactions without specifically including real estate transactions. See, e.g., *infra* notes 163–64 and accompanying text (discussing Hawai’i jurisprudence).

152. See *Davis v. Boydell Dev. Co.*, No. 16-011635-CZ, 2019 WL 2605789, at *5 (Mich. Ct. App. June 25, 2019).

153. MD. CODE ANN., COM. LAW § 13-303 (West 2018); NCLC, *supra* note 27, § 2.2.6.1; see also, e.g., *Scroggins v. Dahne*, 645 A.2d 1160, 1164 (Md. 1994) (“We do not believe the legislature intended the CPA to be applicable to statements or omissions concerning the leased premises occurring during the term of the lease.”) (quoting *Richwind v. Brunson*, 645 A.2d 1147, 1158 (Md. 1994)).

154. See *Beacon Prop. Mgmt., Inc. v. PNR, Inc.*, 890 So. 2d 274 (Fla. Dist. Ct. App. 2004); *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773 (Fla. 2003); *Equity Residential Props. Tr. v. Yates*, 910 So. 2d 401 (Fla. Dist. Ct. App. 2005); *Wright v. Emory*, 41 So. 3d 290 (Fla. Dist. Ct. 2010).

forcement actions targeting tenant abuse.¹⁵⁵ On the other hand, New York courts have significantly limited UDAP's application to tenant-landlord matters, but New York employs UDAP to protect tenants far more actively than any other state.¹⁵⁶ Still, for obvious reasons, if a state's UDAP law excludes tenants, that state's consumer protection agency is significantly less likely to take action to protect tenants.¹⁵⁷

Courts limit the application of UDAP laws to tenants generally on one of two grounds: either tenant-landlord matters are not within the scope of "trade or commerce" covered by UDAP laws, or the state's tenant-landlord laws displace UDAP as applied to tenant-landlord-issues. These will be discussed in turn.

1. *'Tenant-Landlord' Transactions Fall Outside the Scope of Regulated Trade or Commerce*

There are three primary bases on which courts deem tenant-landlord transactions to fall beyond the scope of trade and commerce under UDAP. The first, and most common, is that rental transactions are not "trade or commerce" because they are a subset of real estate transactions. The second is that, in the residential rental context, UDAP applies only to points of sale, as opposed to the ongoing tenant-landlord relationship. The third is that tenant-landlord issues are private conflicts outside of UDAP's scope.

155. See *infra* Appendix A.

156. Under New York's UDAP statute, consumers must not only prove individual injury but also that the conduct in question affects consumers more generally. Courts thus limit UDAP's application to tenant issues on the basis that the conduct in question was not "consumer-oriented conduct aimed at the public at large." *Aguaiza v. Vantage Props., LLC*, 893 N.Y.S.2d 19, 20 (N.Y. App. Div. 2010). As such, a number of New York decisions categorize seemingly systemic tenant issues as not sufficiently "consumer-oriented" to fall within the scope of UDAP. See, e.g., *State v. Bel Fior Hotel*, 425 N.Y.S.2d 659, 661 (N.Y. App. Div. 1980) ("We do not believe the provisions of a damage deposit clause in each of the 280 separate but identical contracts can be fairly be called 'repeated' or 'persistent' within the meaning of the statute."); see also *State v. Magley*, 484 N.Y.S.2d 251, 253 (N.Y. App. Div. 1984) ("[W]e are unable to conclude that Special Term abused its discretion in denying petitioner's request for an injunction . . . enjoining respondents from commencing proceedings to evict tenants not offered a one year lease Special term concluded under the circumstances of this particular case, injunctive relief was not appropriate since the legal and/or factual issues differed as to the various tenants and, therefore, could be better resolved in separate proceedings to which the tenants would be parties.") Notably, in *Magley*, the court is specifically limiting the reach of the state in enforcing UDAP, stating that the conduct the state seeks to address would be better addressed through individual private lawsuits.

157. See *infra* Appendix A.

a. *Residential Leasing Does Not Involve the Exchange of Goods or Services*

Several courts restrict UDAP laws' application to tenant-landlord relationships on the basis that real estate transactions, or transactions centered around the conveyance of real property, fall outside the scope of trade and commerce covered by UDAP.¹⁵⁸ The model Uniform Consumer Sales Practices Act somewhat endorses this approach.¹⁵⁹ Such a stance evokes the historically prominent view, largely abandoned by scholars, that tenant-landlord matters should be adjudicated under "the special rules governing real property" conveyances, rather than the laws regulating commerce.¹⁶⁰

Hawai'i's jurisprudence on the matter exemplifies this approach.¹⁶¹ Hawai'i's UDAP statute affords standing only to "consumers" and defines a consumer, in relevant part, as "a natural person who primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services . . ." ¹⁶² "Purchase" is read to encompass "contract to buy," "lease" and "contract to lease."¹⁶³

In *Fernandez v. Mark Development, Inc.*, the court questioned whether rental housing is a "good" and/or "service."¹⁶⁴ Concluding that it is neither, the court deferred to the historically dominant view of renting underlying *caveat lessee*—that rental transactions are "real property" transactions, not "consumer" transactions.¹⁶⁵ Again, to fall within the scope of regulated commerce, the transaction must involve either the sale of "goods" or "services."¹⁶⁶

158. See Thomas, *supra* note 145, § 3[c]; see NCLC, *supra* note 27, § 8.2.1.

159. See UNIF. CONSUMER SALES PRACS. ACT § 2(1) cmt. (1) (UNIF. L. COMM'N 1970) (specifically recommending that real estate transactions be excluded from UDAP coverage, though on the basis that they are more appropriately regulated by separate real estate-specific laws, thus demonstrating the futility in disentangling the rationales on which courts limit UDAP's application to tenant matters).

160. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970).

161. See *Souza v. Fisher*, CAAP-12-0001699, 2017 WL 1293657, at *6–7 (Haw. Ct. App. Apr. 2, 2017) (citing *Cieri v. Leticia Query Realty, Inc.*, 905 P.2d 29, 41 (Haw. 1995); *Fernandez v. Mark Dev. Inc.*, No. 29331, 2011 WL 5089808, at *2 (Haw. Ct. App. Oct. 25, 2011)).

162. HAW. REV. STAT. §§ 480-1, 480-13(b)(1) (2020). In addition, Hawai'i's UDAP includes, in its definition of a consumer, one "who commits money, property, or services in a personal investment." *Id.* § 480-1. Interestingly, Hawai'i courts interpret UDAP to encompass home purchases because buying a house is a "personal investment," while renting a house, according to these courts, is not. This distinction exemplifies the narrow, and often disadvantageous, space tenants occupy under UDAP. *Fernandez*, 2011 WL 5089808, at *2 (Ct. App. 2011).

163. *Fernandez*, 2011 WL 5089808, at *1.

164. 2011 WL 5089808, at *2.

165. *Id.*

166. *Id.* at *1.

To define “goods,”¹⁶⁷ the court looked to Hawai‘i’s Uniform Commercial Code (UCC),¹⁶⁸ which defines “goods” as tangible items: “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale” Because this definition seemingly does not include real property, the court held that rental transactions do not involve the purchase of goods.¹⁶⁹

In evaluating whether renting property involves purchasing a “service,” the court stressed that the conveyance of property does not involve purchasing services: “The rental of real property ‘involve[s] the transfer of a possessory interest in the real property for a period of time, in exchange of payment’ ” and the “rental agreement is a transfer of real property for a specified term, not a ‘service’ under” UDAP.¹⁷⁰ Interestingly, some courts appear more willing to apply the “real property” exemption to rental transactions than transactions surrounding homeownership.¹⁷¹

Other courts exclude tenants based on *expressio unius est exclusio alterius*—the canon of interpretation that the inclusion of one thing implies the exclusion of another.¹⁷² In *Roberson v. Southwood Manor Associates*, for example, the Alaska Supreme Court held UDAP does not apply to rental transactions, in part because the UDAP law, in enumerating per se violations, does not include violations of tenant-landlord law.¹⁷³ Though the court conceded that the referenced list is non-exhaustive, it interpreted the exclusion of tenant-landlord/real property from the enumerations as indicative of legislative intent.¹⁷⁴

Such reasoning illustrates a contrasting approach between courts who hold UDAP applicable to tenants and those who do not. The “not-apply” courts are more likely to apply strict constructionist modes of interpretation, relying on the narrow and technical definition of terms.¹⁷⁵ The “apply” courts, in contrast, interpret UDAPs’ scope as broad and flexible, focusing more on the policy behind UDAP than strict textualism.¹⁷⁶ As stated by one such

167. *Id.* at *2.

168. *Id.* (citing HAW. REV. STAT. § 480-13(b)(1)).

169. *Id.*

170. *Id.* (internal citations and quotation marks omitted).

171. See *Fernandez*, 2011 WL 5089808; *Woods v. Littleton*, 554 S.W.2d 662 (Tex. 1977). Compare, e.g., *Keiber v. Spicer Constr. Co.*, 619 N.E.2d 1105, 1108–09 (Ohio Ct. App. 1993) (home construction contract regulated by Ohio’s UDAP), with *Heritage Hills v. Deacon* 551 N.E.2d 125, 128 (Ohio 1990) (tenant-landlord matters excluded from Ohio’s UDAP).

172. See, e.g., *Roberson v. Southwood Manor Assocs., LLC*, 249 P.3d 1059, 1060–61 (Alaska 2011).

173. *Id.* at 1063.

174. *Id.*

175. See, e.g., *id.*

176. See, e.g., *Commonwealth v. Monumental Props., Inc.*, 459 Pa. 450, 477–480 (1974).

court, “it is impossible to frame definitions which embrace all unfair practices Even if all known practices were specifically prohibited, it would be at once necessary to begin over again.”¹⁷⁷

b. *Tenant-Landlord Matters Are Not Sufficiently Transactional to Fall Within UDAP*

Courts may limit UDAP law application to tenant-landlord matters that take place within the on-going tenant-landlord relationship and instead only apply UDAP to points of sale. Multiple Maryland decisions, for example, hold that UDAP does not regulate habitability concerns arising after lease formation.¹⁷⁸ In *Scroggins v. Dahne*, a tenant sued her landlord under Maryland’s UDAP law, arguing that the landlord committed an illegal trade practice by renting her an apartment with peeling lead paint.¹⁷⁹ At least in part, however, because the paint began to peel after lease formation, the court ruled UDAP inapplicable:

[In *Richwind*,] [w]e held instead that [t]he CPA applies to a lease at the time the consumer enters into it, and the Act is intended to govern deceptive trade practices which induce the prospective tenant to enter into such a lease As the chipping or peeling paint did not exist at the time the lease was entered into, the landlord could not be said to have engaged in a deceptive trade practice under the CPA.¹⁸⁰

Tellingly, while Maryland is more active than most states in using UDAP to protect tenants, Maryland’s consumer enforcement suits focus on discrete deceptive transactions—the charging of illegal fees, the illegal withholding of security deposits, and the like—rather than, for example, ongoing habitability concerns.¹⁸¹

177. *Id.* at 463 (quoting H.R. REP. NO. 63-1142 (1914)).

178. *Scroggins v. Dahne*, 645 A.2d 1160, 1164 (citing *Richwind Joint Venture 4 v. Brunson*, 335 Md. 661, 645 A.2d 1147 (1994), *overruled by Brooks v. Lewin Realty III, Inc.*, 835 A.2d 616 (Md. 2003)). By overruling *Richwind*, *Brooks* seems to overrule *Scroggins* in principle.

179. *Id.*

180. *Id.* at 696 (internal citations and quotations omitted).

181. See *infra* Appendix A (citing *Stacey J. Hawkins v. Reg’l Mgmt., Inc.*, No. 2550 (Md. Ct. Spec. App. Jan. 19, 2018)); Press Release, Md. Att’y Gen. Attorney General Frosh Sues Landlords for Defrauding Rental Applicants (Apr. 18, 2016); Press Release, Md. Att’y Gen., Attorney General Frosh Announces Settlement With Homes Direct, Inc. (June 22, 2006); Press Release, Md. Att’y Gen., AG Gansler: Developer of Unbuilt Retirement Community for Veterans in Baltimore Co. Must Reimburse Deposits to Applicants (June 3, 2014); Press Release, Md. Att’y Gen., AG Gansler Announces Settlement With Property Manager (Sept. 26, 2013); Press Release, Md. Att’y Gen., AG Gansler’s Consumer Protection Division Settles

A federal district court, interpreting Illinois's UDAP law, was even more explicit in holding that incidents within an ongoing tenant-landlord relationship are not part of regulated trade or commerce.¹⁸² While Illinois's UDAP law generally applies to tenant-landlord matters,¹⁸³ the court held it did not apply to an allegedly illegal eviction because the "eviction of Plaintiff was not 'advertising,' 'offering for sale,' 'sale,' or 'distribution,' and thus did not qualify as trade or commerce under the Act."¹⁸⁴ Such reasoning tends not to entirely foreclose UDAP's application to tenant matters, but rather limit it to discrete transaction points.

c. Tenant-Landlord Issues Are Private Matters, Not "Consumer" Matters

Courts may also limit UDAP's application to tenant matters on the basis that tenant-landlord issues are too localized or private to truly exist within trade or commerce. In some such cases, courts merely analyze whether UDAP applies, for example, to disputes between roommates, a distinct scenario which will not be further discussed here.¹⁸⁵

Charges of Fabricated Damage Claims Against Prince George's Co. Apartment Owner (Mar. 21, 2012); Press Release, Md. Att'y Gen., Attorney General Gansler Settles with Property Management Company: JPI Apartment Management Agrees to Stop Charging Certain Fees (Oct. 16, 2008); Press Release, Md. Att'y Gen., Attorney General Settles with Three Property Management Companies (Feb. 6, 2007); Press Release, Md. Att'y Gen., Attorney General Settles with Property Management Company: Associated Estates Realty Corporation Agrees to Stop Charging Certain Fees (Jan. 26, 2007).

182. *Falk v. Perez*, 973 F.Supp.2d 850, 868 (N.D. Ill. 2013).

183. See e.g., *Anast v. Commonwealth Apartments*, 956 F. Supp. 792 (N.D. Ill. 1997); *Petrauskas v. Wexenthaller Realty Mgmt., Inc.*, 542 N.E.2d 902 (Ill. App. Ct. 1989); *Carter v. Mueller*, 457 N.E.2d 1335 (Ill. App. Ct. 1983); *People ex rel. Fahner v. Testa*, 445 N.E.2d 1249 (Ill. App. Ct. 1983); *People ex rel. Fahner v. Hedrich*, 438 N.E.2d 924 (Ill. App. Ct. 1982). See also *Brown v. Veile*, 555 N.E.2d 1227, 1231 (Ill. App. Ct. 1990).

184. *Falk*, 973 F. Supp. 2d at 868 (quoting 815 ILL. COMP. STAT. ANN. 505/1(f)). *Falk*, however, may not actually deter Illinois's Consumer Fraud Bureau from bringing UDAP claims to challenge illegal evictions. Illinois brought and successfully settled one of the higher profile UDAP claims on behalf of tenants. Press Release, Illinois Att'y Gen., Madigan Announces \$1 Million Settlement with Safeguard Properties (June 3, 2015), https://illinoisattorneygeneral.gov/pressroom/2015_06/20150603.html [<https://perma.cc/9VAD-EBH3>].

That said, other states may be hesitant to bring UDAP tenant-protection actions based on activity that sounds less in classic deception. See *Simpson v. Yonts*, 197 Ga. App. 311 (1990) (holding that landlord's failure to repair fuse box does not rise to the level of and unfair or deceptive act even if it constitutes a breach of landlord's duty to repair); *Pelleteri v. Caspian Grp., Inc.*, 851 So. 2d 1230, 1241 (La. App. 4th Cir. 2003); *McCormack v. Brower*, 948 A.2d 1259 (Me. 2008); *Simpson v. Young*, 153 N.H. 471 (2006).

185. *Billings v. Wilson*, 493 N.E.2d 187 (Mass. 1986); *Sayah v. Hatzipetro*, 492 N.E.2d 1131 (Mass. 1986); *Neihaus v. Maxwell*, 766 N.E.2d 556 (Mass. App. Ct. 2002); *Young v. Patukonis*, 506 N.E.2d 1164 (Mass. App. Ct. 1987). See also NCLC, *supra* note 27, § 2.2.6.3, n.1130 (collecting cases). While these instances are not central to this article, it does bear mentioning that it would be somewhat anomalous for a consumer fraud bureau not to pursue action against a landlord because the landlord runs only a small operation, as data sug-

Other decisions, however, limit the application of UDAP to tenant matters in more pertinent ways.¹⁸⁶ According to some such decisions, the tenant-landlord relationship is presumptively private, as opposed to being part of the regulated marketplace.¹⁸⁷ Multiple New York courts have taken this view.¹⁸⁸ In one case, for example, a New York court characterized tenant accusations of a larger landlord's allegedly widespread efforts to force tenants to prematurely leave the property as "only private disputes between landlords and tenants, and not consumer-oriented conduct aimed at the public at large, as required by statute."¹⁸⁹

2. Tenant-Landlord Law Displaces UDAP as Applied to Tenants

Another commonly cited basis for courts to restrict UDAP's application to tenants is that tenant matters are governed by a separate set of laws which, according to such courts, displace UDAP's application to tenant-landlord matters. The commentary to the Uniform UDAP statute adopts this view: "On the assumption that land transactions frequently are, and should be, regulated by specialized legislation, they are excluded altogether."¹⁹⁰

The notion that tenant-landlord law displaces UDAP is based in a broad application of the principle that conduct cannot violate UDAP where it is sanctioned by more specific laws. In most states, courts read this exemption narrowly: if a more specific statute explicitly permits certain conduct, UDAP cannot be read to prohibit such conduct.¹⁹¹ Other courts, however, read this exemption quite broadly: if an industry is subject to a specific regulatory scheme, then businesses within that industry are categorically exempt from

gests consumer fraud bureaus most frequently bring actions against small operations. Cox et al., *supra* note 29, at 61–62. That said, a landlord running a small operation for profit is distinct from a homeowner renting to a roommate. *But see* PNR, Inc. v. Beacon Prop. Mgmt., 842 So.2d 773 (Fla. 2003) ("[W]hen considered with the other provisions of the FDUTPA [Florida's UDAP], it is clear that the prohibition is broad enough to protect against instances of unfair or deceptive conduct as to a single party or under a single transaction or contract The very provisions that outline the parameters for individual remedies under the FDUTPA are triggered by the commission of a single act."). Though, again, it is exceedingly unlikely that an enforcement agency would target or even know about such isolated instances.

186. NCLC, *supra* note 27, § 2.2.6.

187. *Id.*

188. *See* cases cited *supra* note 156.

189. *Aguaiza v. Vantage Props., LLC*, 893 N.Y.S.2d 19, 20 (N.Y. App. Div. 2010).

190. *Heritage Hills v. Deacon*, 551 N.E.2d 125, 127 (Ohio 1990) (quoting UNIF. CONSUMER SALES PRACS. ACT § 2(1) cmt. (1) (UNIF. L. COMM'N. 1970).

191. NCLC, *supra* note 27, § 2.3.3.1.

UDAP.¹⁹² Again, the specific language of the UDAP statute is not necessarily outcome determinative.¹⁹³

Heritage Hills v. Deacon exemplifies how courts may broadly apply this exemption to exclude tenant-landlord matters from UDAP coverage.¹⁹⁴ There, the Ohio Supreme Court addressed whether lease clauses seemingly abrogating the landlord's duty to make repairs violate UDAP.¹⁹⁵ To answer this question, the court analyzed whether Ohio's UDAP statute applies to tenant-landlord matters at all, and concluded it does not.¹⁹⁶ Importantly, the court cited no exemption of otherwise regulated conduct within the text of Ohio's UDAP and conceded that "the Act does not specifically exclude a lease of real property."¹⁹⁷ Still, the court argued that the tenant-landlord code should displace UDAP in regulating tenant-landlord matters:

This specific statutory scheme for resolving landlord-tenant disputes would appear to exclude application of [UDAP] to residential leases Clearly, the Consumer Protection Act covers a very broad area of transactions; whereas, the Residential Landlord and Tenant Act covers one very specific small area of transactions, and is complete within itself for that area. We therefore must conclude that for all transactions within its purview the Residential Landlord and Tenant Act controls and preempts the field.¹⁹⁸

Such cases illustrate the narrow space tenant-consumers are forced to occupy under state regulatory regimes. Indeed, in many instances, when an industry is regulated by a separate regulatory scheme, there is a state or federal agency who enforces that scheme. Tenants are excluded from UDAP enforcement because they are regulated by another set of laws, but there is generally no state or federal agency tasked with enforcing those laws.¹⁹⁹ In this sense, tenants neither have their cake nor eat it.²⁰⁰

192. *Id.*

193. Compare *Heritage Hills*, 551 N.E.2d at 127 (excluding tenant-landlord matters without citing UDAP provision exempting transactions permitted by other laws), with, e.g., *Carter v. Mueller*, 120 Ill.App.3d 314 (1983) (interpreting Illinois's UDAP to apply to tenant-landlord matter though Illinois UDAP contains no such explicit language).

194. *Heritage Hills*, 551 N.E.2d at 127.

195. *Id.*

196. *Id.* at 127–28.

197. *Id.*

198. *Id.* at 128 (quoting *Chelsea Plaza Homes v. Moore*, 601 P.2d 1100, 1104 (Kan. 1979)).

199. Nathan Tempey, *The Case for Licensing Landlords*, GOTHAMIST (Feb. 23, 2017), <https://gothamist.com/news/the-case-for-licensing-landlords> [<https://perma.cc/V47R-NVGG>]; Frasier Sherman, *Can I Buy Houses Then Rent Them Out Without a Real Estate License?*,

In *Davis*, for example, the Michigan Appellate Court upheld the trial court's decision excluding tenants from UDAP coverage based upon Michigan's regulated industries exemption which excludes from coverage "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."²⁰¹ The problem is no state or federal board or agency regulates Michigan landlords; rather, the court relies on Michigan's home rule structure, which empowers counties to regulate landlords.²⁰² As a result, in Michigan, the state consumer protection agency cannot protect tenants, as they are excluded from UDAP coverage, but there is no state agency taking their place, leaving tenants in a regulatory no man's land.²⁰³

Further, unless they are based upon explicit statutory language, decisions like the Ohio court's are hard to square with UDAP's general prohibition of "unfair" conduct: violation of public policy is a key factor in determining unfairness.²⁰⁴ In states like Ohio,²⁰⁵ violations of tenant-landlord law are seemingly exempt from UDAP for the exact reason such conduct is "unfair" under UDAP—because it violates public policy.²⁰⁶ It is similarly counterintuitive for business conduct to be exempt from UDAP coverage because it is illegal.²⁰⁷ Regardless, several jurisdictions exclude tenants from UDAP on this basis.

LEGALBEAGLE.COM, <https://legalbeagle.com/13593692-can-i-buy-houses-then-rent-them-out-without-a-real-estate-license.html> [<https://perma.cc/ERB8-L3SC>]. Contrast to, for example, the roofing industry which, in many states, is regulated by a specific licensing board, as well as local inspectors and permit boards. *Contractor Licensing Requirements – State by State*, HOME ADVISOR (2019), <https://www.homeadvisor.com/r/state-by-state-licensing-requirements/> [<https://perma.cc/H39P-BUVN>].

200. *Compare* *Davis v. Boydell Dev. Co., Inc.*, No. 16-011635-CZ, 2019 WL 2605789, at *4 (Mich. Ct. App. June 25, 2019) (per curiam) (excluding tenants from UDAP coverage based on Michigan's regulated industries exemption), *with* *49 Prospect Street Tenants Ass'n v. Sheva Gardens, Inc.*, 547 A.2d 1134 (N.J. 1988) (distinguishing inclusion of tenant-landlord matters in UDAP with exclusion of securities matters on the partial basis that securities matters are overseen by a specifically delegated regulatory agency).

201. *See* *Davis*, 2019 WL 265789, at *4.

202. *See id.* (noting that Michigan leaves the regulation of landlord licensing to municipalities).

203. *See id.*

204. NCLC, *supra* note 27, § 4.3.3.3.1.

205. Ohio's UDAP statute prohibits both deceptive and unfair practices and defers to FTC guidance and definitions. OHIO REG. CODE 1345.02. The FTC, like most states, includes violation of public policy as a factor in determining statutory unfairness. NCLC, *supra* note 27, § 4.3.3.3.1.

206. NCLC, *supra* note 27, § 4.3.3.3.1.

207. In *Conaway v. Prestia*, for example, the Superior Court of Connecticut, relying on the FTC guidance treating violation of public policy as a factor in assessing unfairness, held that a landlord committed an unfair act by violating legal licensing requirements but collecting rent anyway. 464 A.2d 847 (Conn. 1983). The court stressed the landlord's violation of other regulations made the conduct more, not less, likely to be unfair under UDAP. Ex-

B. Sociological Explanations

Consumer enforcement agencies' approach to tenant issues reflects the greater social structures in which these agencies exist.²⁰⁸ Tenants, as a demographic, have less power and resources than other consumer classes—for example, homeowners.²⁰⁹ Less powerful groups tend to receive less attention from the government.²¹⁰ This is not to say that individuals at consumer enforcement agencies have any disregard for tenants. Rather, it applies a basic principle of much sociological thought—that individual institutions reflect the larger social structures in which they are situated.²¹¹ This principle helps explain, for example, why code enforcement is so chronically underfunded.²¹²

Indeed, one would expect tenants to receive less consumer agency attention, especially compared to their homeowners counterparts. Compared to homeowners, tenants have significantly less money,²¹³ are members of age demographics less likely to vote,²¹⁴

panding on *Conaway*, in *Gaylord v. Mosher*, the court held that a landlord committed statutory unfairness by locking tenants out of their home, in violation of the state's landlord-tenant ordinance. 1991 WL 253709, at *3 (Conn. Sup. Ct. 1991). Again, citing FTC guidance, the court stated that “[t]hese violations offended public policy and therefore constituted a CUTPA [Connecticut’s UDAP Statute] violation.” *Id.*

208. Kathryn Sabbeth, *(Under)Enforcement of Poor Tenants Rights*, 27 GEO. J. ON POVERTY L. & POL’Y 97, 130–31 (2019) (“The underenforcement of housing standards is a classic case of ‘underenforcement’ on behalf of communities that have not been a political priority . . . [P]oor people do not enjoy law enforcement resources in proportion to their numbers in the population . . . Underenforcement is ‘a form of social disinvestment’ . . . State and federal actors equipped with more resources could pursue certain categories of housing conditions enforcement, but, perhaps for the same reasons that the local agencies are under-resourced, the better-funded government units have devoted relatively little attention to the concerns of poor tenants.”). This social disinvestment is not an accusation of mal-intent against agency employees and leaders, but rather a statement about the sociological forces necessarily reflected in a society’s institutions.

209. *Homeowners vs Renters Statistics*, IPROPERTY MGMT. (Feb. 2020), <https://ipropertymanagement.com/renters-vs-homeowners-statistics/> [https://perma.cc/3696-ATWX].

210. Sabbeth, *supra* note 208, at 130.

211. *See, e.g.*, ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* xxiii–xxvi (1984).

212. Sabbeth, *supra* note 208, at 130.

213. *Quick Facts: Resident Demographics*, NAT’L MULTIFAMILY HOUS. COUNCIL, <https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics> (click “U.S. Household Incomes”) (last visited Feb. 4, 2021).

214. Renters are younger than homeowners and older demographics are more likely to vote. *See* Jordan Misra, *Voter Turnout Rates Among All Voting Age and Major Racial and Ethnic Groups Were Higher Than in 2014*, U.S. CENSUS BUREAU (Apr. 23, 2019), <https://www.census.gov/library/stories/2019/04/behind-2018-united-states-midterm-election-turnout.html> [https://perma.cc/KQ9P-TB4T]; *Quick Facts: Resident Demographics*, NAT’L MULTIFAMILY HOUS. COUNCIL, <https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics> (click “Renters and Owners”) (last visited Feb. 5, 2021) (noting that tenants are younger than homeowners).

and have a much higher rate of transience.²¹⁵ Tenant issues also have a disproportionate effect on socially disadvantaged groups such as racial minorities and women.²¹⁶ In *Evicted*, Desmond documents how Black women likely experienced the brunt of the rental crisis.²¹⁷ Thus, though the rental crisis has been worse than the foreclosure crisis,²¹⁸ and the foreclosure crisis was worse for renters than homeowners,²¹⁹ it is no surprise that homeowners receive more attention than renters.

Such inequities are likely reproduced in the structure of consumer enforcement agencies themselves.²²⁰ Most agencies rely on consumer complaints, thus disadvantaging vulnerable tenants fearing retaliation or those with less technological access to the complaint process.²²¹ Problems homeowners face with mortgage banks likely stem from the standardized practices of large institutions, which make it more difficult to aggregate tenant issues for enforcement purposes.²²²

Further, differences between mortgage-lending and rental institutions may make it more difficult for bureaus to bring enforcement actions against the latter. Indeed, it is no surprise that more vulnerable populations do business with smaller and less visible entities, which are, in turn, more difficult for the government to hold accountable. For example, it is easier for landlords to dodge enforcement than it is for, say, Bank of America. Absentee landlords may be hard for law enforcement to locate or take meaningful action against. There are no absentee mortgage banks. Similarly, for

215. Compare IPROPERTY MGMT., *supra* note 209 (noting that 54% of rental households turnover from year to year), with Stephanie Booth, *Should I Sell My House? 6 Signs It's Time to Move On*, REALTOR.COM (July 10, 2019), <https://www.realtor.com/advice/sell/how-long-should-you-live-in-your-home-before-selling> [<https://perma.cc/95KQJDCW>] (stating average homeowners stays in home for 10 years).

216. Terrence McCoy, *Eviction Isn't Just About Poverty. It's Also About Race — and Virginia Proves It*, WASH. POST (Nov. 10, 2018, 5:50 PM), https://www.washingtonpost.com/local/social-issues/eviction-isnt-just-about-poverty-its-also-about-race—and-virginia-proves-it/2018/11/10/475be8ae-d7bd-11e8-aeb7-ddcad4a0a54e_story.html [<https://perma.cc/G78G-PPPE>]; DESMOND, *supra* note 24, at 98.

217. *Id.*

218. *Supra* notes 106–07 and accompanying text.

219. *Id.*

220. These class differences between tenants and homeowners also manifest themselves through the jurisprudence and statutory language just discussed in Section IIA. *See, e.g.*, *Fernandez v. Mark Dev.*, 2011 WL 5089808, at *2 (Haw. Ct. App. Oct. 25, 2011). For example, in *Fernandez*, the Hawai'i appellate court held that because Hawai'i's UDAP protects personal investments but not real property transactions, rental transactions fall outside UDAP, though home sales do not. *Id.*

221. *See* DESMOND, *supra* note 24, at 186–192 (noting, for example, that tenants facing domestic violence forego calling the police for fear of alerting the landlord to the disturbance and facing eviction).

222. *See, e.g.*, Complaint at *51, *United States v. Bank of Am.*, 12-cv-00361-RMC (D.D.C. 2012), http://www.nationalmortgagesettlement.com/files/Complaint_Corrected_2012-03-14.pdf [<https://perma.cc/4TPF-HMRT>].

obvious reasons, it is less likely for mortgage banks to be judgment proof than small-time landlords. While mortgage banks are by no means a paragon of trustworthiness and accountability, at least consumer fraud bureaus can find them and collect from them.

Thus, consumer enforcement agencies are less likely to respond strongly to the crises affecting tenants than those affecting homeowners because tenant vulnerability is less noticeable and harder to enforce. Indeed, tenants have faced severe affordability problems on and off since World War II.²²³ While this crisis has spiked in recent years, it is not new for tenants to face frequent hardship. On the other hand, homeowners' widespread default on mortgages was shocking, sudden, and, therefore, far more noticeable.²²⁴ The invention and popularity of mortgage-backed securities stemmed from the common sentiment of: "Who the hell doesn't pay their mortgage?"²²⁵ As such, it is easier for agencies to view the Foreclosure Crisis as a "crisis" in the true sense—a sharp and damaging deviation from the norm. It is easier for the plight of low-income tenants to fly beneath the radar.

C. Institutional Factors

To better understand why consumer protection agencies do not treat tenant protection as central to their mandates, the author interviewed representatives from ten state consumer protection bureaus.²²⁶ Importantly, this Article does not purport to be a quantitative study. The author spoke to the bureaus to get better insight into the range of institutional factors and norms influencing agency treatment of tenant matters.²²⁷

223. See *Commonwealth v. Monumental Props., Inc.*, 459 Pa. 450 (1974).

224. FINANCIAL CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT 4 (Jan. 27, 2011), <https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf> [<https://perma.cc/H7TJ-D7CK>].

225. Cezary Podkul, *The Regrets of Lewis Ranieri*, WALL. ST. J. (Sept. 6, 2018), <https://www.wsj.com/articles/the-regrets-of-lewis-ranieri-1536240610> [<https://perma.cc/7K3W-FBLY>]; Paramount, *The Big Short Opening Scene*, YOUTUBE (2015), <https://www.youtube.com/watch?v=JDjjsCunnhI>.

226. Representatives from the consumer financial protection bureaus of the following states were interviewed: Iowa, Michigan, Wisconsin, Idaho, North Carolina, South Carolina, Connecticut, Arkansas, Vermont, and Indiana. There was no exact science to the states interviewed for this article, as much of it depended on which states were willing to participate. The interviews tended to focus on states that brought few if any enforcement actions regarding tenant issues, did not have clear jurisprudence excluding tenants from UDAP, and had a relatively high ratio of complaints regarding tenant landlord issues based on their published lists, though, in some instances, the interviews themselves cast some doubt on the applicability of these criteria.

227. Analysis of the interviews begins with premise that the agencies interviewed do not prioritize tenant protection in their enforcement efforts. This does not necessarily reflect

In speaking to these individuals, most acknowledged that their offices do not often bring enforcement actions aimed at protecting tenants. They provided the following rationales:²²⁸ (1) Common tenant issues are not transactional in nature or are not core ‘consumer’ issues; (2) Matter regulated by another entity and/or set of laws and/or other resources available; and (3) Lack of actionable consumer complaints from tenants.

In many ways, these rationales parallel judicial rationales for limiting UDAP’s application to tenants—that real estate issues are not consumer issues, that landlord-tenant law displaces UDAP, and that tenant-landlord issues are private disputes and, thus, do not truly exist within the stream of commerce as regulated by UDAP. That said, consumer bureaus were less likely to frame these issues in jurisprudential terms and more likely to discuss them as logistical impediments.²²⁹ These factors will be discussed in turn below.

1. Tenant-Landlord Issues Are Not Core Consumer Issues

In some instances, interviewees indicated that tenants’ issues were not core “consumer” issues, at least not of the type central to the agency’s mandate.

One manifestation of this view is that the primary mandate of consumer bureaus is to police the market for scams—misrepresentations which generally take place at a transaction point—rather than to regulate the on-going relationship between tenant and landlord. One representative, for example, stated that while the office may take on tenant cases that more closely resemble classic scams, for example, where the landlord advertises amenities that are not actually present:

the view of those interviewed but is, rather, based upon the small number of lawsuits or official settlements regarding tenant-landlord matters. *See infra* Appendix A.

228. Two other factors which received very brief attention from a small number of offices were the notion that consumer bureau regulation of landlords could have adverse market consequences for tenants (“[C]onsumer bureau intervention would result in landlords behaving as follows: Yep, we’re gonna make all these fixes. And you know what, our rent’s going to go up.”) and fear of making bad law (noting that office makes non-litigation efforts to help tenants and noting that a court decision could strip them of authority to do so: “[M]aybe we’ve never brought a seminal case because we just want to keep our power as is.”).

229. For example, one representative stated that their office was unlikely to get involved in habitability matters regulated by housing codes, not because, as a matter of statutory interpretation, these codes displaced UDAP, but because it was a more efficient division of labor for code enforcement to handle such matters. *See* Interview with Daniel Mosteller, Special Deputy Att’y Gen., N.C. Dep’t Just. Consumer Prot. Div., at 20:20 (Aug. 9, 2019) [hereinafter North Carolina Interview] (on file with author).

[I]f it's landlord harassment, that's not going to meet our standards, because there's not going to be a misrepresentation or omission So [changes] in lease terms . . . don't really meet our standards, unless there's some misrepresentation that is being made along with it, and it relates to the transaction itself. It's all centered around the actual transaction.²³⁰

This same representative stated that the office was also less likely to cover habitability issues because such issues did not revolve around “deceptive statements And . . . if those aren't . . . present, we would have difficulty bringing an enforcement action within our office.”²³¹ This view was stated perhaps most bluntly by a representative from another state office: “[Tenant-landlord is] definitely not the core of what [the state UDAP statute] is meant to be.”²³²

The just-quoted office elaborated that their priorities were informed by the enumerated industries listed in the UDAP statute they enforced.²³³ This office noted that the enumerated list of industries the office could regulate under UDAP was not exhaustive.²³⁴ Still, when asked whether there was “a particular hesitance or logistical impediment” to the office being more active on tenants issues, the office responded “I think you just look at the statute So if I take a look at the index, it shows what is core to the CPA. We get assistive technology, lead and children's product safety, musical performances, fair credit reporting, credit card companies, structured settlements, unlicensed loans.”²³⁵

Somewhat in contrast to the approach expressed above—that classic deception takes place at transaction points—some offices stated that tenant-landlord matters more resemble contract disputes than consumer fraud. As one deputy attorney general explained, if a tenant-landlord complaint alleges deceptive or misleading conduct or an unfair business practice, “it might fall under the Idaho Consumer Protection Act.”²³⁶ Such complaints, accord-

230. Interview with Betsy DeNardi, Dir. Consumer Prot. Div., Off. Ind. Att'y Gen. Consumer Prot. Div., at 9:56 (July 31, 2019) [hereinafter *Indiana Interview*] (on file with author).

231. *Id.*

232. See Interview with Emp., Vt. Off. Att'y Gen., Consumer Prot. Unit (July 23, 2019) [hereinafter *Vermont Interview*] (on file with author).

233. *Id.*

234. *Id.*

235. *Id.*

236. Interview with Stephanie N. Guyon, Deputy Att'y Gen., Idaho Att'y Gen. Off. (July 18, 2019) [hereinafter *Idaho Interview*] (on file with author). This somewhat inverts the

ing to the Deputy Attorney General, usually involve misrepresentations in a rental advertisement.²³⁷ In contrast, other tenant-landlord complaints raise issues governed by “the lease agreement,” which is “subject to traditional contract law adjudication,” not the Idaho Consumer Protection Act.²³⁸ In other words, “simply because you don’t perform the way your contract requires you to perform doesn’t mean that you’re engaging in an unfair or deceptive practice.”²³⁹ Under this approach, “consumer protections” are more likely to serve as a backstop for matters not addressed by contract.

To summarize, agencies may be hesitant to prioritize tenant issues because they are not “core” consumer issues. This can be expressed as a political-linguistic point—that many tenant-landlord issues are not encompassed by the commonly held interpretation of “consumer fraud.” It can also be understood as expressing an underlying concern regarding administrative overreach—that the agency should impose limits on the scope of its regulation based on industries enumerated in the statute, even if such enumerations are not exhaustive. An underlying assumption of this rationale may be that it is inefficient for consumer bureaus to dedicate significant resources towards tenant issues when other resources exist specifically to help tenants. How resource allocation plays into such agency decisions will be discussed in the following subsection.

2. Tenant-Landlord Matters Regulated Through Separate Mechanisms/Concerns of Resource Allocation

As discussed in Section II.A.2, courts limiting UDAP application to tenant-landlord issues often do so on the basis that UDAP laws are displaced by specific tenant-landlord codes. Consumer agencies may adopt a similar view, but one founded more on concerns about resource allocation and logistics. Consumer agencies may be hesitant to prioritize tenant-landlord issues because other resources are available to tenants. For example, there is a distinct tenant-landlord statutory scheme and eviction process, government agencies exist specifically to help tenants, and Legal Aid traditionally allocates significant resources toward eviction prevention.²⁴⁰

notion that consumer issues are transactional, as some issues are not truly ‘consumer’ issues because they are governed by private transactions, not general consumer concerns.

237. *Id.*

238. *Id.*

239. *Id.*

240. See *Suggested List of Priorities for LSC Recipients*, LEGAL SERV. CORP. (May 20, 1996), <https://www.lsc.gov/suggested-list-priorities-lsc-recipients> [<https://perma.cc/CKP6-8HYZ>].

Paralleling the reasoning in the above subsection, some state consumer enforcement attorneys expressed that their bureaus' lack of specifically enumerated authority to enforce tenant-landlord law indicates that they may not, or should not, prioritize tenant issues. As noted by a representative of one bureau in explaining why they brought few tenant-protection suits, "Well, we're not specifically referenced in the Landlord Tenant Act."²⁴¹

Another office takes its cues from the fact that tenant-landlord laws exist as part of a statutory scheme distinct from that which the consumer protection bureau enforces. A deputy attorney general with the office further explained that "even though leasing and renting" is a business practice that falls within the Consumer Protection Act, leasing and renting issues specific to the tenant-landlord relationship are covered under the state's tenant-landlord laws, which the office does not enforce.²⁴²

Some offices stated that, because tenants are protected by distinct statutory regimes and have other resources available, it is a more efficient division of labor for other entities to focus on helping tenants: "We're not code enforcement . . . They can deal with [tenant issues] in a lot quicker timeline."²⁴³ As stated by a representative of one bureau in explaining why the office seldom brought enforcement actions regarding tenant-landlord issues:²⁴⁴

Because there's the Department of Housing, because there's housing court, because there's the Department of Economic and Community Development, because there's Section Eight and the local entities that service Section Eight, because there are other entities that actually service housing concerns. And we're not operationally set up for these cases, because we wouldn't be bringing the case on behalf of a tenant when tenants are usually calling. They want something now, something's gone wrong in their property, their landlord is acting a certain way. And they want the problem fixed, either, you know, abated rent, or to take better care of the property no matter what it is.

241. Interview with Kelly Rainsford, Deputy of Regul. Enf't, S.C. Dep't of Consumer Affs. (Aug. 8, 2019) [hereinafter South Carolina Interview] (on file with author).

242. Idaho Interview *supra* note 236. Notably, some agencies cited court decisions outside of the tenant-landlord context towards the principle that their office was not permitted to "bootstrap" violation of other laws as a basis for a UDAP violation unless specifically enumerated by UDAP. *See, e.g.*, Interview with Benjamin E. Bellus, Assistant Att'y Gen., Consumer Prot. Div., Iowa Att'y Gen. Off. (Aug. 21, 2019) [hereinafter Iowa Interview] (on file with author).

243. North Carolina Interview, *supra* note 229.

244. Interview with Julianne Avalone, Legal Dir., State of Conn., Dep't of Consumer Prot. (July 25, 2019) [hereinafter Connecticut Interview] (on file with author).

They're usually calling and the city or some other state agency that specializes in housing, that can mediate on their behalf, or resolve the issue directly with the landlord. As you know, whether it's often the city coming out and taking care of the blight and then putting a lien on the property; whatever that is we don't have that immediate remedy.

Some representatives even stated quite explicitly that hesitance to prioritize tenant issues is "primarily a resource issue."²⁴⁵ One attorney noted candidly that if the office prioritized tenant issues, it "could open a floodgate and we don't have the resources . . . I would be doing nothing else [but tenant issues] and would still fall behind."²⁴⁶ Indeed, evictions and the like are so prevalent that they are regulated by a distinct legal regime and subject to a unique court procedure. If consumer bureaus prioritized such matters, the thinking goes, it would fundamentally alter their mission such that they could no longer afford to take action against traditional scams. According to those espousing this line of reasoning, such a shift in mission would be inefficient, especially where code enforcement, HUD, and Legal Aid are already tasked with assisting tenants.

3. Lack of Tenant Complaints

Perhaps more than any other single factor, consumer protection attorneys cited lack of actionable tenant complaints as the reason their bureaus do not bring more enforcement actions on behalf of tenants.²⁴⁷ One state agency, for example, received only eight complaints from 2014 through Summer 2019.²⁴⁸ The representative of this bureau recalled, for example, that in one instance, they received a media report of a landlord renting to students who would illegally increase rent at the last minute, but the office did not take enforcement action because it received no complaints from the

245. Iowa Interview, *supra* note 242.

246. *Id.*

247. Interview with Katharyn Barron, Mich. Dep't Att'y Gen., Consumer Prot. Div. (July 29, 2019) [hereinafter Michigan Interview] (on file with author) ("The biggest reason relative to a lack of enforcement in that area is we don't see a lot of complaints.").

248. South Carolina Interview, *supra* note 241. As discussed elsewhere in this article, however, even where there is a quantitatively small number of tenant complaints, this may be a reflection of office structure as much as tenant desire to file complaints. For example, this office representative stated, "We don't get a lot of . . . landlord-tenant complaints . . . partly because they might call ahead of time and . . . tell us what the issue is . . . and we refer them before they ever . . . file an actual complaint with us." *Id.*

aggrieved consumers.²⁴⁹ A representative of another bureau sought to explain the low quantity of tenant complaints by inferring that even if the agency considered tenant issues to be core consumer issues, tenants themselves would not intuitively think to turn to a consumer agency: “[I]t’s possible that people don’t realize they could bring their complaints to the Attorney General’s office [P]eople think about coming to our office when . . . they’ve been scammed and not for something that they think . . . isn’t . . . a scam [like if] they’re frustrated with . . . [their] landlords.”²⁵⁰

More commonly, though, representatives noted that it was the quality, not quantity, of tenant complaints that limited the agency’s ability to bring enforcement actions. After all, tenant complaints are one of the most common complaints to consumer enforcement bureaus.²⁵¹ Several bureau representatives noted that they receive many complaints from tenants, but that such complaints tend to be too individuated to generate escalated enforcement efforts.²⁵² Noting that their office took on systemic consumer issues, as opposed to representing individual consumers, one representative stated that, while they received a significant number of tenant complaints, tenant issues were often “very individualized and fact dependent” and thus not “super conducive to the type of cases we bring.”²⁵³ Several bureaus said tenant complaints often constituted “one-offs.”

Agencies find it more difficult to assist tenants when their complaints appear more intensely fact dependent. It may be difficult, for example, for a consumer enforcement agency to help tenants being threatened with illegal eviction; doing so would require the agency to gage which eviction threats were illegal and to navigate inevitably conflicting accounts of interactions and transactions between the tenant and landlord.

Representatives of several bureaus noted that, in other industries, a single act of consumer fraud is likely to affect a large number of consumers in a fairly uniform way.²⁵⁴ Thus, landlord practic-

249. *Id.*

250. Indiana Interview, *supra* note 230.

251. For example, per annual Consumer Federation of America Surveys, every year, from 2019 to 2012, landlord-tenant issues were among the top ten issues complained of to state consumer enforcement bureaus. *E.g.*, CONSUMER FED. OF AM., CONSUMER COMPLAINT SURVEY REPORT 2019, at 5 (2020), <https://consumerfed.org/wp-content/uploads/2020/07/Top-Consumer-Complaints-Report-7-27-20.pdf> [https://perma.cc/2Q2W-DVG8]; CONSUMER FED. OF AM., 2012 CONSUMER COMPLAINT SURVEY REPORT, at 5 (2013), <https://consumerfed.org/pdfs/top-10-consumer-complaints-07-31-2013.pdf> [https://perma.cc/CU7N-NS2E].

252. *See, e.g.*, North Carolina Interview, *supra* note 229; Michigan Interview, *supra* note 247; Indiana Interview, *supra* note 230; Iowa Interview, *supra* note 242.

253. North Carolina Interview, *supra* note 229.

254. *E.g., id.*

es analogous to traditional “scams”—such as false advertising or systemic confiscation of security deposits—are more practical for consumer divisions than ongoing issues faced by tenants over the course of the lease.²⁵⁵ One bureau representative noted that they would be more likely to take action if a landlord falsely promised refrigerators to a complex of tenant units, than if a landlord failed to complete a number of disparate repairs over a prolonged period of time.²⁵⁶

As such, the lack of complaints, the individualized nature of the complaints, the lack of resources to deal with these seemingly diffuse complaints, and the individualized nature of tenant-landlord relationships all play important roles in consumer bureaus’ practices towards tenant-consumers.

III. THE NEED FOR INCREASED CONSUMER AGENCY ENFORCEMENT OF TENANTS’ RIGHTS

There are several reasons why public enforcement of tenants’ rights is necessary. First, as will be discussed in Section III.A, on a fundamental level, renters should receive the full attention of consumer protection agencies because renters are consumers. Similarly, just as Warren and Bar-Gill noted the inconsistencies in the fact that agencies regulated tangible goods more than financial products, it is inconsistent for agencies to focus little on the rental industry when they devote significant resources to analogous industries. Section III.B thus argues that enforcement agencies should afford consumers of rental housing parity with other consumers. Section III.C argues that, for a variety of reasons, private enforcement cannot adequately regulate the rental industry, and Section III.D notes that public enforcement and private enforcement serve distinct goals. Finally, as discussed in Section III.E, achieving a fair and stable rental market is integral to advancing essential government goals.

A. *Consumer Protection Agencies Should Protect Renters Because Renters Are ‘Consumers’*

In his 1980 article “The Tenant As a Consumer?,” James Backman stresses several key similarities between tenants and the arche-

255. *Id.*

256. Michigan Interview, *supra* note 247.

typal consumer.²⁵⁷ For example, “[c]onsumer transactions are defined typically as those for ‘personal family or household purposes,’ ” and residential tenants are those who occupy “a structure that is used as a home, residence or sleeping place.”²⁵⁸ Both traditional consumers and residential tenants are “characterized in contrast to their counterparts in . . . business.”²⁵⁹ Modern tenant-landlord transactions, like other consumer transactions, are transactional in nature.²⁶⁰ Further, tenants and traditional consumers both suffer from a lack of bargaining power and “are typically subject to standard form contracts” Similarly, both tenants and traditional consumers suffer the brunt end of the knowledge asymmetry between themselves and the landlord or supplier.²⁶¹ As the landlord engages in the transaction to turn a profit, the landlord is likely to exploit these asymmetries to the tenant-consumer’s detriment.²⁶²

Other scholars make a similar argument as a more semantic point.²⁶³ If consumers are purchasers of goods or services, the argument goes, then tenants are “consumers” because tenants purchase housing goods and services.²⁶⁴

Others have analogized tenants to other consumers by discussing the principles underlying products liability. As stated by Joan L. Neisser in her article “The Tenant as Consumer: Applying Strict Liability Principles to Landlords:”

The public policy supporting strict liability in the landlord context is compelling A tenant in an apartment building does not have the control over the common areas or the resources and expertise to assure that such areas are reasonably safe. Nor is the tenant in the position to check that the wiring and heating facilities in the building are safe. The modern tenant must rely on her landlord to carry out these responsibilities. . . . An assessment of the realities of the landlord-tenant relationship also indicates that the

257. Backman, *supra* note 33, at 3.

258. *Id.*

259. Backman, *supra* note 33, at 3; *see also* Thomas Bothwell, *Washington Tenant Remedies and the Consumer Protection Act*, 10 GONZ. L. REV. 559, 559–76 (1975) (arguing tenants should fall within Washington’s UDAP statute).

260. *See* Backman, *supra* note 33, at 1.

261. *Id.* at 3.

262. *Id.* at 4.

263. *See, e.g.*, Claude W. Vanderwold, *The Tenant as a Consumer*, 3 U.C. DAVIS L. REV. 59 (1971).

264. *Id.* at 62–63 (“A social and legal trend has begun to protect the consumer of goods. The tenant is a consumer of housing, i.e., space and services. Since the tenant is a consumer in his own right and has disabilities similar to those of the consumer of goods, he should be included within the consumer protection trend and receive the benefits which that trend has to offer.”)

landlord, as owner of the enterprise, is in the best position to absorb the costs of maintaining the property. The landlord can obtain insurance to protect herself from the impact of liability, and she can raise rent to defray any added costs encountered in keeping the premises reasonably safe.²⁶⁵

Much of the literature on the topic, while still compelling and relevant, came in the more immediate wake of the 1970s Tenant Revolution. The rental industry has obviously changed a great deal since then, so an updated look is necessary.²⁶⁶

Indeed, especially in recent years, the rental market has been “commoditized.”²⁶⁷ Advertising and transacting within the residential rental market looks like advertising and transacting within any other consumer market. Searching for rental housing resembles any other type of online shopping.

Prospective renters today, for example, tend to find rental housing through online aggregation platforms that use analytics to tailor their advertising to each specific consumer.²⁶⁸ Advertisements for rental housing advertise the amenities and services that accompany the unit.²⁶⁹ Aggregation platforms not only include consumer-oriented housing displays but also discount sales and targeted advertisements for third-party provided housing amenities, such as

265. Neisser, *supra* note 16, at 549–50. Neisser also implicitly makes one of the arguments against treating tenants as consumers—that consumer protection regimes generally cause costs to be passed on to consumers.

266. See, e.g., Better Business Bureau, *Is That Rental Listing Real? A BBB Study of Rental Scams Involving Apartments, Houses and Vacation Properties*, BETTER BUS. BUREAU (Dec. 10, 2019), <https://www.bbb.org/article/news-releases/21033-bbb-investigation-rental-scams> [<https://perma.cc/D2JD-JNRC>] (noting “millions of scams” regarding false apartment listings and the like). Tenant abuses go well beyond these basic “scams,” but their existence highlights how the rental market resembles any other market regulators routinely police. *Id.*

267. Omri Barzilay, *Technology Is Finally Changing the Apartment Rental Experience*, TECHCRUNCH (Sept. 4, 2016), <https://techcrunch.com/2016/09/04/technology-is-finally-changing-the-apartment-rental-experience> [<https://perma.cc/9GAQ-TDM9>].

268. *Id.*

269. See, e.g., *1960 Lindsay Ln*, ZILLOW, https://www.zillow.com/homedetails/1960-Lindsay-Ln-Ann-Arbor-MI-48104/54793391_zpid/ [<https://perma.cc/R3PB-SVBB>] (noting that amenities such as washer/dryer come with unit); *212 N 5th Ave*, BACKERSTREETPROPERTIES, <http://bakerstreetproperties.rentlinx.com/212-N-5Th-Ave-Ann-Arbor-MI-48104> [<https://web.archive.org/web/20200201223927/http://bakerstreetproperties.rentlinx.com/212-N-5Th-Ave-Ann-Arbor-MI-48104>]. This, however, does not necessarily provide a contrast to rental advertising pre-internet. See, e.g., Dan Reed, *This 1958 Ad Shows How Yesterday's Luxury Apartments Became Today's Affordable Apartments*, GREATER GREAT WASH. (July 25, 2018), <https://ggwash.org/view/64165/this-1958-ad-shows-how-yesterdays-luxury-apartments-became-todays-affordabl> [<https://perma.cc/3Q7Q-B9J2>]. But advertisements for rental housing today are likely far more ubiquitous.

internet services.²⁷⁰ An advertisement for one home inevitably displays links to advertisements for similar homes.²⁷¹ Aggregation platforms also allow for one-stop shopping of housing and furniture rental.²⁷²

In some instances, it can be hard to disentangle the aggregation website from the actual landlord. Aggregation sites like Rezi not only waive application fees when tenants apply through the site with participating landlords but also enable tenants to pay their rent online through the Rezi site itself.²⁷³ Bungalow not only aggregates listings, but also adopts and paraphrases the lessors' representations about these listings: "Move-in ready homes[.] Our homes are designed to be move-in ready. Think furnished common areas, super fast wifi, and flexible leases."²⁷⁴ Further, at least in some instances, Bungalow handles ongoing maintenance requests and the like: "House stuff, handled [.] We coordinate professional cleanings, call the utility providers for you, and collect rent from your roommates each month."²⁷⁵

Even Craigslist, which was once perhaps analogous to the classified section of a newspaper, is filled with rental company ads which offer the sorts of deals and specials one would associate with any other consumer product.²⁷⁶ The aesthetic of rental company websites is often not very different from that of aggregation sites—the difference is that rental companies are only aggregating their own properties.²⁷⁷

As illustrated above, this consumerist approach extends beyond the point of sale.²⁷⁸ Rental companies, for example, use their websites to simultaneously solicit maintenance requests and advertise

270. See, e.g., *Medical Center Court Apartments*, TRULIA, <https://www.trulia.com/c/mi/ann-arbor/medical-center-court-1005-maiden-ln-ann-arbor-mi-48105-2050038819> [<https://perma.cc/QF33-99F4>] ("Get up to a MONTH FREE on select apartments!").

271. See, e.g., *8401 Rockmoor Ridge Road Charlotte, NC 28215*, AM. HOMES 4 RENT, <https://www.americanhomes4rent.com/Property/8401-Rockmoor-Ridge-Road-Charlotte-NC-28215/8ef29910-2a74-e511-80da-3863bb358df8> [<https://perma.cc/GJ9G-75RC>].

272. See, e.g., *Furniture Rental*, CORT, <https://www.cort.com/furniture-rental> [<https://perma.cc/3949-3MTN>].

273. See, e.g., REZI, <https://www.rentrezi.com/#!/tenant> (last visited Apr. 10, 2021).

274. BUNGALOW, <https://bungalow.com/> [<https://perma.cc/C4JT-Y9KN>].

275. *Id.*

276. See, e.g., *\$1,025 / 2br - Dearborn Heights - 2 Br Move in Special *Free 50* Tv at Lease Signing*, CRAIGSLIST, <https://detroit.craigslist.org/wyn/apa/d/dearborn-heights-dearborn-heights-br/7261822011.html> [<https://perma.cc/GR43-D3TU>].

277. See, e.g., MICH. RENTAL, <http://michiganrental.rentlinx.com/listings/type:Apartments> [<https://perma.cc/3NQ7-7CWT>]. Michigan Rental is a relatively small landlord, with its properties mostly concentrated in Ann Arbor, Michigan, but tellingly, its aesthetic is very similar to that of rental aggregation sites.

278. See, e.g., *Property Management*, REINHART REALTORS, <https://www.reinhartrealtors.com/property-management/> [<https://perma.cc/7BNP-WGC8>].

other products.²⁷⁹ The maintenance request screen itself likely features links to other company products.²⁸⁰ Some rental companies advertise special repair services and/or other services available for an additional cost.²⁸¹ Most fundamentally, rental ads promote the quality of the apartment and the inclusion of (at least impliedly) well-functioning amenities.

Residential rental marketing, thus, at the very least, fits squarely within a consumerist aesthetic; the tenant-landlord relationship involves the same types of advertising, specials, upsells, third-party contracting, boilerplate terms of use, and the like that leave consumers susceptible to abuses within any other market.

Further, the ongoing nature of the tenant-landlord relationship blurs the distinction between “scams” that take place at the point of sale and other less traditional consumer abuses. For example, if the landlord fails to make repairs of advertised amenities, does that render these advertisements “false” in a traditional sense? This question need not be answered. Rather, it simply illustrates that abuses faced by tenants are analogous to abuses faced by other consumers. Treating rental markets as unique from other markets is anachronistic at best.

Still, simply making an analogy between tenants and consumers generally does not entirely address why consumer enforcement agencies should fully incorporate tenants into their mandates, a matter addressed in the following Sections.

B. *Consumer Enforcement Agencies Already Focus on Industries Particularly Analogous to the Rental Industry*

The argument that consumer enforcement agencies should protect tenants is that much stronger considering these agencies already protect other similarly situated consumers.²⁸² Two particular-

279. See, e.g., J. KELLER PROPS., <https://www.jkellerproperties.com/> [<https://perma.cc/C9CP-V3LK>].

280. See, e.g., *Maintenance Service Requests*, INVITATION HOMES, <https://www.invitationhomes.com/maintenance-service-requests/> [<https://perma.cc/L4S6-MDRH>]; *Maintenance Requests*, J. KELLER PROPS., <https://www.jkellerproperties.com/maintenance-requests-2/> [<https://perma.cc/HED5-M24Z>].

281. See, e.g., *ProCare and Maintenance Requests – Resident Resources*, INVITATION HOMES, <https://www.invitationhomes.com/procare/> [<https://perma.cc/EU83-F3ZP>].

282. Bar-Gill & Warren, *supra* note 55, at 3–4. Such an argument again somewhat parallels that employed by Warren and Bar-Gill in arguing for an enforcement agency dedicated to protecting consumers of financial products. While enforcement agencies had not historically entirely ignored financial product markets, Warren and Bar-Gil argued that consumers of tangible products were the primary focus of government enforcement, making consumers of financial products an afterthought. However, if financial consumers are analogous in

ly analogous industries come to mind: the home improvement industry and the mortgage and mortgage servicing industry.²⁸³

As an initial matter, it is worth noting that large numbers of consumers already complain to consumer protection agencies about tenant-landlord issues.²⁸⁴ Thus, tenants have a manifest desire to be assisted by consumer protection agencies, even while other potential sources of help exist.²⁸⁵

As has been discussed, it is already well-settled practice for consumer protection bureaus to focus their resources on regulating the home repair and mortgage lending industries. Employing similar logic, enforcement bureaus should consider the protection of tenants as central to their mandates.

1. Home Repair

Existing data indicates that state consumer protection bureaus likely file more enforcement claims against the construction and home repair industry than any other industry.²⁸⁶ Consumer complaints about home repair contractors are often at or near the top of consumer protection bureaus' annual consumer complaints lists.²⁸⁷

It is easy to analogize home repair transactions and rental transactions for consumer enforcement purposes. Even if renting a home is, itself, merely a transfer of property interest, the rental transaction necessarily implies that the landlord will also provide ongoing repair services. Landlords advertise the quality of their apartments and their own quality as landlords. Tenants rent property with the expectation that their landlord will make repairs, and lease agreements often reflect this expectation. Even if they do not, the warranty of habitability is read into leases by law.²⁸⁸

essential ways to consumers already receiving the attention of enforcement agencies, it stands to reason that financial consumers should as well.

283. Other potentially analogous industries are the timeshare and storage rental industries. The similarities between timeshare consumers and tenants are obvious, especially as the only difference between timeshare consumers and traditional tenants is the option to buy at the end of the lease. Similarly, tenants face many of the same problems as consumers of storage space, yet storage consumers likely receive more attention from consumer agencies. However, there is less data available to gauge the extent to which agencies pursue rent-to-buy, timeshare, and storage companies so a comparison is more difficult.

284. For each of the last ten years, complaints about tenant-landlord issues have been within the top ten categories of consumer complaints to state consumer enforcement bureaus nationwide. *See supra* note 251.

285. *See id.* (demonstrating that tenants often make complaints to consumer protection agencies).

286. Cox et al., *supra* note 29, at 66 tbl.4.

287. *See id.*

288. Super, *supra* note 28, at 393.

As such, even if renting involves a property transaction, the tenant is clearly exchanging money for the landlord's services.²⁸⁹ Indeed, tenants literally contract with landlords to provide repair services for the rented property. Thus, as consumer agencies often pursue enforcement actions against shoddy repair companies, so too should they pursue landlord and property management companies that fail to properly make repairs or maintain the property.

2. Mortgage and Mortgage Servicing

Examining consumer enforcement activity in the wake of the foreclosure crisis helps illustrate why such agencies should take more action to protect tenants. The formation of the CFPB solidified the notion that purchasers of credit, especially mortgages, are consumers in need of protection from consumer enforcement agencies. Indeed, the CFPB was formed largely in response to the foreclosure crisis.²⁹⁰ Further, in the wake of the Crisis, both private and public UDAP litigation targeting mortgage servicers greatly proliferated.²⁹¹ Nearly every state entered into consent judgments with mortgage banks as part of the National Mortgage Settlements, regardless of whether these states' UDAP laws apply to the mortgage industry.²⁹²

Yet, regulation of the rental market is more important than regulation of the mortgage industry. Leases are shorter term than mortgages, making renters far more vulnerable to displacement. Property management companies and landlords play a central role in the day-to-day wellbeing of their tenants, as they are obligated to make repairs and ensure habitability. Mortgage servicers, on the other hand, only habitually interact with homeowners in default.

289. See *Woods v. Littleton*, 554 S.W.2d 662 (Tex. 1977). In *Woods*, for example, plaintiffs brought a claim under UDAP, alleging that defendant seller sold them a home and promised to make any needed repairs, but then failed to make repairs that arose. *Id.* at 664. The Texas Supreme court addressed the question of whether plaintiffs were "consumers," i.e., purchasers of good and services, under the UDAP statute. *Id.* at 666. While the Texas statute explicitly includes real estate transactions, the court concluded that, even if real estate transactions are excluded, plaintiffs were still consumers, "[s]ince the builders . . . promised to repair any defects in the home that arose within the first year, Woods not only purchased the real property but also, and in addition, the services of the builders . . ." *Woods*, 54 S.W.2d at 666–67; see also *Fernandez v. Mark Dev., Inc.*, 262 P.3d 670 (Haw. Ct. App. 2011).

290. See Megan Slack, *Consumer Financial Protection Bureau 101: Why We Need a Consumer Watchdog*, WHITE HOUSE: BLOG (Jan. 4, 2012, 11:13 AM), <https://obamawhitehouse.archives.gov/blog/2012/01/04/consumer-financial-protection-bureau-101-why-we-need-consumer-watchdog> [<https://perma.cc/3CLT-YUQ3>]; Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, Summer 2007, <https://democracyjournal.org/magazine/5/unsafe-at-any-rate/> [<https://perma.cc/F3AN-ED5B>].

291. See Cox et al., *supra* note 29, at 38–39.

292. Cox et al., *supra* note 29, at 38–39; see also NMS, *supra* note 122.

Even during times of crisis, this constitutes only a relatively small minority of homeowners.²⁹³ Otherwise, the main job of mortgage services is simply to process payments and send periodic letters to borrowers.²⁹⁴ There is, thus, likely potential for more consumer abuse in the rental context.

Notably, the foreclosure process, like the eviction process, is governed by a distinct statutory scheme in most states,²⁹⁵ yet consumer fraud agencies still regulate mortgage lenders, as opposed to treating the foreclosure process as displacing UDAP enforcement.²⁹⁶ Again, agency protection of tenants is all the more necessary, as the foreclosure process generally provides more protection than the eviction process, even in states with non-judicial foreclosure processes.²⁹⁷ As such, it is inconsistent for consumer agencies to give lower priority to tenants than homeowners.

Further, while there are of course differences between the mortgage lending industry and rental industry, they are similar in several relevant ways. Both borrower-lender and tenant-landlord transactions involve an ongoing relationship where one party is generally motivated by profit and the other by the desire to establish a stable living situation. The borrower/tenant makes monthly payments to the lender/landlord each month, but if the borrower/tenant defaults, then the lender/landlord may retake the home. In many instances, the lender/landlord will report the default to credit reporting agencies or tenant screening agencies such that the borrower/tenant will have trouble securing high quality housing in the future. These transactions are thus similarly high stakes to the consumer—the consumer may lose their home if they fail to pay.

A possible distinction is that a mortgage involves the selling of a financial product while a lease involves only the transfer of a real

293. *Mortgage Delinquency Rates in the United States from 2000 to 4th Quarter 2020*, STATISTA (Mar. 18, 2021), <https://www.statista.com/statistics/205959/us-mortgage-delinquency-rates-since-1990> (noting that peak rates of delinquency were at 9.3% during the 2007-2010 housing crisis).

294. *Mortgage Lenders and Mortgage Servicers*, INVESTOPEDIA (Aug. 1, 2019), <https://www.investopedia.com/ask/answers/100314/whats-difference-between-mortgage-lender-and-mortgage-servicer.asp> [<https://perma.cc/M5QN-6FFY>].

295. Amy Loftsgordon, *Key Aspects of State Foreclosure Law: 50-State Chart*, NOLO, <https://www.nolo.com/legal-encyclopedia/50-state-chart-key-aspects-state-foreclosure-law.html> [<https://perma.cc/32EQ-C4MQ>].

296. *Compare id., with U.S. Foreclosure Laws by State*, REALTYTRAC, <https://www.realtytrac.com/real-estate-guides/foreclosure-laws/> [<https://perma.cc/9SGX-NXQQ>].

297. *Compare U.S. Foreclosure Laws by State, supra* note 296, with Devon Thorsby, *Does Your State Have Fair Eviction Laws?*, US NEWS & WORLD REP. (June 1, 2018, 1:03 PM), <https://realestate.usnews.com/real-estate/slideshows/does-your-state-have-fair-eviction-laws> (state foreclosure processes generally far more lengthy and requiring more stages than state eviction processes).

property interest. But such a distinction illustrates its own banality. The consequences to the borrower/tenant of failing to make the contractually required payments are closely analogous. Further, the fact that homeowners, unlike tenants, build equity with each payment is certainly not a reason to protect tenants less.

Another potentially relevant distinction between tenants and homeowners is that protecting borrowers is more feasible because the mortgage-lending market is more concentrated than the rental market. As will be discussed below, however, the rental industry has become increasingly concentrated. In fact, that the use of rental-backed securities is still emergent provides all the more reason for increased regulation of this industry as it is being formed.²⁹⁸

Further, that the rental industry may be more diffuse does not meaningfully distinguish it from the mortgage industry for agency enforcement purposes. In fact, data suggests that state consumer protection bureaus are more likely to bring an enforcement case against a business with less than three employees than one with more than 400; even more commonly, these bureaus file actions against individuals as opposed to business entities.²⁹⁹ For example, state consumer bureaus bring a large percentage of suits against the home repair industry, which itself explains why suits against small businesses and individuals are so common.³⁰⁰ These distinctions do not provide a meaningful difference that justifies protecting homeowners, but not renters, as consumers.

C. Private Enforcement Is Insufficient

The Tenant Revolution of the 1970s was an essential step forward for tenants but, in contrast to other consumer classes, enforcement agencies still do not prioritize tenant protection, leaving tenants to enforce their own rights.³⁰¹ Such a system is largely ineffective.³⁰² Regardless of the reason private enforcement of tenants'

298. See Alana Semuels, *When Wall Street Is Your Landlord*, ATLANTIC (Feb. 13, 2019), <https://www.theatlantic.com/technology/archive/2019/02/single-family-landlords-wall-street/582394> [<https://perma.cc/647G-F3NF>].

299. Cox et al., *supra* note 29, at 61–62.

300. See Cox et al., *supra* note 29, at 66; ABBE WILL, JOINT CENTER FOR HOUSING STUDIES, *ACHIEVING SCALE IN THE RESIDENTIAL REMODELING INDUSTRY: FINDINGS FROM INTERVIEWS WITH INDUSTRY LEADERS*, at iii (2014), https://www.jchs.harvard.edu/sites/default/files/w14-2_will.pdf [<https://perma.cc/762E-G96M>] (“[T]he industry continues to be highly fragmented, with the vast majority of remodeling companies operating as relatively small, single-location businesses.”).

301. See Super, *supra* note 28, at 459.

302. *Id.* at 398 (stating warranty of habitability has not proven effective); Melissa T. Lonegrass, *Eliminating Landlord Retaliation in England and Wales – Lessons from the United States*, 75 LA. L. REV. 1071, 1108–17 (2015) (finding anti-retaliation laws have not proven

rights does not work, it is fairly clear that it does not.³⁰³ Indeed, “the results achieved by” the pro-tenant reforms of the 1970s “have been far from what their advocates predicted.”³⁰⁴

As discussed, the most important innovations of the Tenant Revolution were the warranty of habitability and anti-retaliation laws.³⁰⁵ Both have proven ineffective. As observed by one scholar: “[B]oth statistical and anecdotal reports suggest that tenants lose nearly all eviction cases, whether or not landlord retaliation is involved. In fact, reports that tenants ‘always’ lose eviction cases, or lose in 95% to 99% of cases, are not unusual.”³⁰⁶ Similarly, a study of 2014 eviction cases in Essex County, New Jersey found that tenants asserted the habitability defense in only 0.2% of cases.³⁰⁷ Interestingly, commentators have gone to great lengths to diagnose the shortcomings of a private enforcement-based tenants’ rights regime, but often the proposed solutions, such as providing tenants free attorneys or reforming the summary eviction process, still leave tenants almost entirely reliant on private enforcement.³⁰⁸

effective in the United States); Mary B. Spector, *Tenants’ Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 194–203 (2000) (citing summary eviction procedures and other factors as reasons the Tenant Revolution did not produce the desired results); Furth-Matzkin, *supra* note 15, at 8 (documenting the prevalence of illegal lease clauses).

303. Super, *supra* note 28, at 394.

304. *Id.*

305. *Id.* at 394; *see also* Lonegrass, *supra* note 302, at 1106.

306. Lonegrass, *supra* note 302, at 1107 (“Additionally, reported decisions in which tenants prevail on retaliatory eviction claims are few and far between . . .”).

307. Paula A. Franzese, Abbott Gorin & David J. Guznik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS U. L. REV. 1, 5 (2016). Importantly, the study finds the warranty of habitability to be effective in remedying code violations in the few instances that it is raised. However, the article is largely dedicated to explaining barriers to the defense being raised.

308. *See, e.g.*, Fisher, *supra* note 17, at 510–17 (arguing for additional compulsory lease terms); *see generally* Franzese et al., *supra* note 307 (arguing for removing impediments to tenants’ ability to assert defenses to eviction); Denise J. Deschenes, *Consumer Protection Legislation and the Assertion of Tenant Rights: The Massachusetts Paradigm*, 59 B.U. L. REV. 483, 503–05 (1979) (advocating tenant use of UDAP laws in private lawsuits); Spector, *supra* note 302 (advocating for reforms to summary eviction process); Lurie, *supra* note 106 (advocating for private fair housing litigation); Lonegrass, *supra* note 302 (advocating reforms to better enable tenants to raise retaliation); Grellmann, *supra* note 106, at 317 (noting that the Protective Tenants at Foreclosure Act is best enforced by tenants in state courts as opposed to by a government agency). The main exception seems to be where commentators propose that steps be taken to better enable HUD to regulate landlords receiving housing subsidies, though some commentators also argue in fairly general terms that more government enforcement of tenants’ rights is necessary. *See, e.g.*, Sabbeth, *supra* note 208 (offering a public-private enforcement hybrid solution); Franzese et al., *supra* note 307, at 42–43 (advocating, in part, for a court database to bolster HUD enforcement, though this argument ignores that only a very small percentage of poor tenants receive HUD benefits); *see also* Super, *supra* note 28, at 461 (advocating, primarily, that expanded housing subsidies is key to protecting tenants).

Providing tenants with counsel and bolstering available defenses will help tenants as a whole.³⁰⁹ For example, New York's recent tenant reforms have made a tremendous difference.³¹⁰ But, at least until rent control and free counsel are enacted on a broad scale, public enforcement is essential to filling private enforcement gaps.³¹¹

Not surprisingly, the deck is largely stacked against tenants. The advances of the Tenant Revolution were designed to allow tenants to play defense. As stated by David Super, "The essence of the tenants' rights revolution was . . . straightforward Tenants could raise the landlord's failure to comply with [the implied warranties of habitability and repair] as a defense in an eviction proceeding for nonpayment of rent."³¹² Tenants facing such abuses are expected to invite court proceedings by deliberately withholding rent.³¹³ Doing so, however, is an extremely risky proposition, as it merely places at-risk tenants in a summary court proceeding already weighed heavily against them.³¹⁴ Further, once in court, tenants must often escrow rent to pursue their defenses, such that the tenant must effectively pay rent before arguing in court that rent should be abated.³¹⁵ This requirement is often cost-prohibitive for tenants, especially if the tenants' rental money was spent on alternative shelter or needed repairs.³¹⁶

Further, the "summary" nature of eviction proceedings cannot be overstated.³¹⁷ One study found that the average eviction hearing

309. Mara Gay, Opinion, *Evictions Are Down in New York. Thank the Voters.*, N.Y. TIMES (Dec. 26, 2019), <https://www.nytimes.com/2019/12/26/opinion/new-york-evictions.html> [<https://perma.cc/PX3E-FCLD>] (detailing the efficacy of rent control laws and providing tenants facing eviction with counsel).

310. See Gay, *supra* note 309; see also Josh Barbanel, *New York Evictions Are Plunging Under New Rent Control Law*, WALL ST. J. (Nov. 26, 2019), <https://www.wsj.com/articles/new-york-evictions-are-plunging-under-new-rent-control-law-11574793114> [<https://perma.cc/TYK7-QHHZ>].

311. See Waterstone, *supra* note 29.

312. Super, *supra* note 28, at 394.

313. *Id.* at 407–08.

314. *Id.*

315. Franzese et al., *supra* note 307, at 13–14.

316. See *id.*

317. As stated by one scholar:

A summary proceeding for eviction exists in every state [T]his procedure fails to accommodate what scholars have called a "revolution" in the law of landlords and residential tenants that significantly expanded tenants' rights by the adoption of such doctrines as the warranties of habitability and retaliatory evictions. Instead . . . continued use of the summary proceeding . . . undermines many of the benefits the revolution hoped to accomplish.

Spector, *supra* note 302, at 137.

lasts for one minute and 44 seconds.³¹⁸ Such procedures include little formal discovery.³¹⁹

Even more importantly, the most vulnerable tenants can rarely afford counsel³²⁰ and thus must navigate a chaotic court process on their own.³²¹ Landlords, on the other hand, almost inevitably have attorneys who tend to run the show in eviction court.³²² Providing free counsel to tenants facing eviction is an essential step and makes a tremendous difference for tenants.³²³ Still, these counsels are forced to represent tenants within the confines of existing eviction procedures.³²⁴

Similarly, to obtain free counsel, tenants must come to court. Defaults amongst tenants are high.³²⁵ Eviction notices are often confusing and come with very quickly approaching court dates, sometimes in as little as three days.³²⁶ Such hearings are inevitably scheduled during the workday or in the morning when parents are shuffling their kids off to school.

318. LAWYERS' COMM. FOR BETTER HOUS., NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT 7 (2003), <https://lcbh.org/sites/default/files/resources/2003-lcbh-chicago-eviction-court-study.pdf> [<https://perma.cc/MKM2-5AS3>]; Curtis Black, *Chicago Should Implement Right to Counsel in Eviction Court Like New York and San Francisco*, CHI. REP. (Sept. 6, 2019), <https://www.chicagoreporter.com/chicago-should-implement-right-to-counsel-in-eviction-court-like-new-york-and-san-francisco> [<https://perma.cc/TZ4H-K73P>].

319. *Working: How Does a Tenants' Rights Attorney Do His Job?*, SLATE (Jan. 2, 2020), <https://slate.com/podcasts/working/2019/11/how-does-a-tenants-rights-attorney-do-his-job> [<https://perma.cc/GX2Z-CUSG>]. Some states court rules explicitly disallow discovery in eviction cases. See, e.g., N.J. COURT RULE 6:4-3. Ironically, tenant defenses against landlords often require extensive discovery and even expert testimony. Tenants raising a habitability defense, for example, must present extensive evidence of the condition of the home and their attempts to notify the landlord of the condition. To prove the presence of lead paint and its health effects, tenants will likely need expert testimony or at least that of a home inspector or doctor. See, e.g., Kenneth R. Lepage, *Lead-Based Paint Litigation and the Problem of Causation: Toward a Unified Theory of Market Share Liability*, 37 B.C. L. REV. 155, 158 (1995).

320. Franzese et al., *supra* note 307, at 12–13.

321. Super, *supra* note 28, at 406–07.

322. See Gay, *supra* note 309 (detailing how pro se plaintiffs must go up against represented landlords in New York); Heidi Schultheis & Caitlin Rooney, *A Right to Counsel Is a Right to a Fighting Chance*, CTR. AM. PROGRESS (Oct. 2, 2019), <https://www.americanprogress.org/issues/poverty/reports/2019/10/02/475263/right-counsel-right-fighting-chance> [<https://perma.cc/7UHR-P5C4>] (“When it comes to evictions, tenants are set up to fail. In eviction lawsuits nationwide, an estimated 90 percent of landlords have legal representation, while only 10 percent of tenants do.”).

323. Schultheis & Rooney, *supra* note 322.

324. Munira Alimire, *Examining the Tenant Right to Counsel Rollout Landscape*, MEDIUM (July 15, 2019), <https://medium.com/legal-design-and-innovation/examining-the-tenant-right-to-counsel-rollout-landscape-567f70f70899> [<https://perma.cc/JN58-KLPS>].

325. See Badger & Bui, *supra* note 7 (“‘The whole system works on default judgments and people not showing up,’ said Martin Wegbreit, director of litigation at the Central Virginia Legal Aid Society. ‘Imagine if every person asked for a trial. The system would bog down in a couple of months.’”).

326. *Move Out in Three Days? Are They Serious? The Meaning of Eviction Notices*, IOWA LEGAL AID (June 11, 2018), <https://www.iowalegalaid.org/resource/move-out-in-three-days-are-they-serious-the-m> [<https://perma.cc/PXD9-TAPA>].

These high rates of default are, indeed, no coincidence. The eviction process is designed to be carried out in the absence of tenant-defendants, as evictions generally take place during overcrowded court “cattle calls,” which likely could not function if all the tenants show up.³²⁷ Further, landlords often mislead tenants about their right to appear, or the usefulness of appearing.³²⁸

Fear of retaliation also significantly hampers tenants’ ability to enforce their own rights in court, even in a defensive posture, thus contributing to high rates of default.³²⁹ The most rational course of action may be for tenants to simply leave and find new housing, even if there are viable defenses or counterclaims to the eviction.³³⁰ Providing tenants with an additional disincentive to litigate, if tenants leave before an eviction judgment is entered, they avoid a damning mark on their credit report.³³¹ Even if no judgment is entered, prospective landlords may catch wind that tenant-applicants are in litigation with their current landlord, dimming tenants’ chances of finding new quality housing.³³²

Undermining the entire current protection scheme, private enforcement of state anti-retaliation laws has also proven largely ineffective, again due to the fact that most tenants are not represented in a court process already stacked against them. Further, retaliatory motive is empirically difficult to prove. And, ironically, the threat of retaliation may deter some tenants from alleging retaliation. As with other consumers, statutory protections should be coupled

327. See Badger & Bui, *supra* note 7.

328. See generally, e.g., Furth-Matzkin, *supra* note 15 (noting the prominence of illegal lease clauses and their misleading effects on tenants).

329. See Spector, *supra* note 302, at 137; Lonegrass, *supra* note 302.

330. Super, *supra* note 28, at 408.

331. See D.C. BAR PRO BONO CTR., *Judgments, Writs, and Stopping Evictions - Information for Tenants*, LAWHELP.ORG, <https://www.lawhelp.org/dc/resource/judgments-writs-and-stopping-evictions-inform> [<https://perma.cc/3EKH-XYMZ>].

332. See Rudy Kleysteuber, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L.J. 1344, 1353 (2007). It is also very difficult for tenants to get negative rental history marks removed from the credit reports used by future landlords. Most creditors, like mortgage lenders, credit card companies and car financiers, rely on the “big three” credit reporting agencies—Trans Union, Equifax, and Experian. Therefore, consumers are entitled to a free annual copy of the credit reports creditors rely on and can complain to credit reporting entities under the Fair Credit Reporting Act accordingly. The tenant screening industry, which is a subset of the consumer reporting industry, is less oligopolistic, which, ironically, hurts consumers because it is much harder to determine what entity to complain to in the instance of a potential inaccuracy. See Kleysteuber, *supra*, at 1356; Paul Schack, *Tenant Screening Agencies and Reports*, MASS. L. HELP (May 2017), <https://www.masslegalhelp.org/housing/lt1-chapter-2-agencies-reports> [<https://perma.cc/49K7-CK2Q>]; see also TEX PASLEY, HENRY OSTRO-SHAH & ERIC SIROTA, SHRIVER CTR. ON POVERTY LAW, SCREENED OUT: HOW TENANT SCREENING REPORTS UNDERMINE FAIR HOUSING LAWS AND DEPRIVE TENANTS OF EQUAL ACCESS TO HOUSING IN ILLINOIS 3–8 (2021), <https://www.povertylaw.org/wp-content/uploads/2021/01/tenant-screening-final-report.pdf> [<https://perma.cc/U3ZT-EAXV>].

with the attention of consumer protection agencies, as private enforcement of these laws does not alone prove effective.

Public consumer enforcement, while far from panacean, avoids many of these pitfalls, often for obvious reason. Enforcement agencies have far deeper pockets and far more power than individual tenants. Enforcement agencies control the pace of litigation as plaintiffs outside of the confines of the summary eviction process. They do not fear retaliation.

Otherwise put, consumer agencies must police the rental market for the same reasons they do other markets—consumers are neither powerful nor coordinated enough to effectively police for themselves.³³³ Tenants, who are often low income and who must litigate their claims in a summary court process with potential homelessness hanging over their head, are uniquely disadvantaged by these asymmetries. There is reason to believe that consumer fraud bureaus can effectively protect renters from abuses,³³⁴ just as they protect consumers in analogous industries.

D. *Public Enforcement Serves a Distinct Purpose from Private Enforcement*

But, more than that, consumer agency enforcement efforts play a distinct and complementary role to private enforcement.³³⁵ Ten-

333. See Waterstone, *supra* note 29, at 461–63 (arguing that public enforcement can overcome financial disincentives to private litigation and that “most of the limitations that apply to private attorneys general do not apply to public enforcement authorities”). The article notes that public enforcement has become necessary as a substitute for private class action litigation as courts curtail the availability of class action litigation.

334. See, e.g., Final Consent Judgment, *Illinois v. Safeguard Props., LLC*, No. 13CH20715 (June 3, 2015); see also Carrie Wells, *Maryland Attorney General Settles with Safeguard Properties*, BALT. SUN (Aug. 28, 2015), <https://www.baltimoresun.com/business/bs-bz-safeguard-settlement-20150828-story.html>; Waterstone, *supra* note 29, at 456 (noting examples of the efficacy of both public and private structural litigation); ETHAN LUTZ, MIKE LITT & ED MIERZWINSKI, U.S. PIRG EDUC. FUND, POSITIONED TO PROTECT: HOW STATE AND LOCAL AUTHORITIES CAN FILL THE CFPB VOID 28–29 (2018); Cox et al., *supra* note 29, at 49; Mark Totten, *The Enforcers & The Great Recession*, 36 CARDOZO L. REV. 1611, 1638, 1644 (2015); Peterson, *supra* note 29, at 1104; Abigail M. Lyle & Nikki Skolnekovich, *Client Alert: State Attorneys General Continue to Fill the Enforcement Gap for Consumer*, HUNTON ANDREWS KURTH (Jan. 2019), <https://www.huntonak.com/images/content/5/5/v2/55737/state-ags-fill-enforcement-gap-consumer-protections.pdf> [<https://perma.cc/9265-6AXU>] (demonstrating attorneys advising financial clients to comply with regulations and promptly address consumer complaints to avoid UDAP enforcement actions); *A Midyear Review of State Attorney General Enforcement*, FOLEY & LARDNER LLP: INSIGHTS (June 29, 2018), <https://www.foley.com/en/insights/publications/2018/06/a-midyear-review-of-state-attorney-general-enforce> [<https://perma.cc/7TCH-M2JH>] (warning clients of costs associated with AG enforcement actions and illustrating how AG consumer divisions have empirically helped shaped large scale policy).

335. LUTZ ET AL., *supra* note 334, at 28–29; Cox et al., *supra* note 29, at 49; see also Totten *supra* note 334; Peterson, *supra* note 29, at 1104; Lyle & Skolnekovich, *supra* note 334; FOLEY & LARDNER LLP, *supra* note 334. See generally Pridgen, *supra* note 33 (emphasizing the complementary roles played by public and private enforcement).

ant litigants, and their attorneys, are focused on achieving the tenant's immediate needs, be it allowing the tenant to stay in the home for the long or short term or designing a move-out plan that least damages the tenant's credit. Of course, in the aggregate, these private efforts can lead to systemic change.³³⁶ But public enforcement actions can focus more deliberately on the systemic regulation of an industry.³³⁷ Public enforcement agencies, likewise, can act as aggregators of tenant grievances.³³⁸ Further, public enforcement efforts are, by design, more specifically targeted and higher profile than private litigation. This enhances the general deterrent value of consumer enforcement actions, especially where such actions are brought under UDAP laws that generally allow for far more powerful remedies than the largely reactive protections of tenant-landlord law.³³⁹

As with other industries, private and public enforcement of tenants' rights complement each other. The Foreclosure Crisis sparked the emergence of mandatory foreclosure mediation programs and increased funding to provide individual representation to homeowners,³⁴⁰ but also the establishment of the CFPB and activism from state attorneys general. There is already a great deal of literature arguing that enforcement is most effective when robust efforts are made both by private litigants and enforcement agencies.³⁴¹ Relatedly, high profile enforcement actions may help bring more attention to tenants and bolster their private enforcement.³⁴² Tenants need such protection at least as much as other consumers.

The need for increased public enforcement becomes that much greater as the rental industry becomes increasingly nationalized.³⁴³ Indeed, corporations are increasingly dominating the rental market. An entity with significant consolidated resources, such as a government agency, is thus necessary to serve as a check upon this industry. As stated by Harvard's 2018 report on *The State of the Nation's Housing*, "[a]lthough conversions of single family homes

336. See, e.g., Barbanel, *supra* note 310.

337. Waterstone, *supra* note 29, at 461 ("Apart from being allowed to play a structural role, public enforcement authorities are uniquely suited to fill the structural enforcement gap.")

338. *Id.* at 467 (noting that enforcement by public enforcement agencies is especially needed where individuals' claims are likely too individuated for class action cases).

339. NCLC, *supra* note 27, § 13.1.

340. See, e.g., Melanca Clark & Daniel Olmos, *Emerging Strategies in Foreclosure Mediation*, NCSC (2011), <https://cdm16501.contentdm.oclc.org/digital/collection/financial/id/170> [<https://perma.cc/PX9P-MGRN>].

341. See, e.g., Pridgen, *supra* note 33, at 946.

342. *Cf. id.* (noting that state attorney general consumer enforcement actions "can stretch the boundaries of consumer protection in ways that benefit consumers").

343. JCHS 2018, *supra* note 13, at 26–27; Semuels, *supra* note 298 (noting that institutional investors are buying up large portions of rental stock).

added significantly to the rental stock right after the housing crash, multifamily construction ramped up quickly to become the main source of additional supply.”³⁴⁴ In some urban areas, the dominance of these larger rental companies is especially pronounced.³⁴⁵ In fact, more recently, there has even been somewhat of a flourishing of rental-backed security investors and the like.³⁴⁶ Little data exists on whether tenants in these newer multifamily buildings are likely to face abuse. On the one hand, the new units tend to be fairly high end,³⁴⁷ indicating that abuse may be less likely as wealthy tenants are less likely to face abuse. On the other hand, large buildings are more likely to be owned by corporate investors, and there is some data suggesting that corporate landlords are more abusive than individual landlords, at least in some respects.³⁴⁸ Regardless, relying so heavily on David to police Goliath is not sustainable. Tenant-consumers need a champion of their own, as the government already provides for most other consumers subject to potential abuses from businesses big and small.

E. *The Importance of Public Consumer Enforcement Actions in
Furthering Other Government Interests*

There is no dearth of literature on the negative externalities of housing instability. Housing stability is a keystone of public health.³⁴⁹ Similarly, “[T]he impact of poor housing conditions on educational achievement is well established.”³⁵⁰ Housing instability is also a significant criminogenic factor.³⁵¹ Assisting tenants facing

344. JCHS 2018, *supra* note 13, at 26.

345. *Id.* at 26–27.

346. See Semuels, *supra* note 298.

347. See JCHS 2018, *supra* note 13, at 26–27.

348. See Semuels, *supra* note 298 (quoting tenant stating “ ‘I said I’d never rent from a big company again’ ”); Hyojung Lee, *Who Owns Rental Properties, and Is It Changing?*, HARV. JOINT CTR. FOR HOUS. STUD.: BLOG (Aug. 18, 2017), <https://www.jchs.harvard.edu/blog/who-owns-rental-properties-and-is-it-changing> [<https://perma.cc/8YLG-RU92>] (citing a study that found corporate landlords are more likely to pursue eviction than smaller landlords); Mandu Sen & Moses Gates, *The High Cost of Bad Landlords: Impacts of Irresponsible Building Ownership in New York City*, REG’L PLAN ASS’N (Oct. 24, 2018), <https://citylimits.org/2018/10/24/report-bad-landlords-are-few-in-number-but-destructive-in-impact> [<https://perma.cc/5QSM-VQV3>] (“But while bad landlords own only one in 50 buildings, their buildings tend to be large.”).

349. DANNY FRIEDMAN, ECOTEC, *SOCIAL IMPACT OF POOR HOUSING 12* (2010), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.476.9406&rep=rep1&type=pdf> [<https://perma.cc/2WCV-TN74>].

350. *Id.* at 9.

351. See Corina Graif, Andrew S. Gladfelter & Stephen A. Matthews, *Urban Poverty and Neighborhood Effects on Crime: Incorporating Spatial and Network Perspectives*, 8 SOC. COMPASS 1140, 1144 (2014); Marie Skubak Tillyer & Rebecca J. Walter, *Low-Income Housing and Crime:*

landlord abuses is thus essential to government goals of ensuring public health, providing students a quality education, and fighting crime.

What bears specific mention is that government enforcement agencies have already acknowledged this but are not fully committed to it in practice. Notably, for example, various enforcement agencies directly regulate the use of lead paint in rental housing for exactly these reasons.³⁵² The presence of lead paint in rental housing has decreased over time. But other hardships faced by tenants have similar, if less biologically determinative, impacts. The Rental Crisis is its own public health crisis.³⁵³

Perhaps framing the Rental Crisis in terms of its negative externalities will help highlight the need for public enforcement. Managing public health epidemics, providing education, reducing crime, and addressing neighborhood blight are familiar roles of government. Even if protecting individual tenants does not fit neatly into the role of enforcement agencies, protecting society as a whole clearly does.

IV. PROPOSED REFORMS

Having argued that consumer enforcement agencies should better incorporate tenant protection into their mandates and explored the current barriers to them doing so, this Part will propose specific reforms to help agencies overcome such barriers and more robustly use their enforcement powers to protect tenant-consumers. These barriers, of course, vary by agency. And agencies in states whose UDAP statute does not apply to tenants obviously face additional barriers to using their enforcement authority to help tenants. As such, this section will propose separate reforms depending on whether courts read the underlying UDAP statute to protect tenants. Many of the reforms suggested for one camp, however, may help the other.

The Influence of Housing Development and Neighborhood Characteristics, 65 CRIME & DELINQ., 969, 969–93 (2018).

352. Press Release, Env't Prot. Agency, EPA Enforcement Actions Help Protect Vulnerable Communities from Lead-Based Paint Health Hazards (Oct. 23, 2019), <https://www.epa.gov/newsreleases/epa-enforcement-actions-help-protect-vulnerable-communities-lead-based-paint-health-1> [<https://perma.cc/LGR3-JFLD>]; Press Release, Hous. & Urb. Dev., Secretary Carson Kicks-Off National Healthy Homes Month – Announces Protect Our Kids! Campaign to Enforce Lead Safety Rules (June 1, 2018), <https://archives.hud.gov/news/2018/pr18-051.cfm> [<https://perma.cc/ZUV2-WCQ2>].

353. Allison Bovell-Ammo & Megan Sandel, *The Hidden Health Crisis of Eviction*, B.U. SCH. PUB. HEALTH (Oct. 5, 2018), <https://www.bu.edu/sph/2018/10/05/the-hidden-health-crisis-of-eviction> [<https://perma.cc/7N4Q-Q2TB>].

Before entering discussion, however, it is important to give credit where it is due. The following Section will thus discuss the non-law enforcement actions agencies take to protect tenants.

A. *Ways Consumer Enforcement Agencies Currently Help Tenants Beyond Law Enforcement*

First, many agencies engage in educational and outreach efforts. Some publish³⁵⁴ or edit³⁵⁵ know-your-rights materials for renters and materials for landlords to help assure legal compliance. Agencies, similarly, hold in-person workshops for tenants and landlords.³⁵⁶

Importantly, there is not necessarily a correlation between the agencies that undergo these efforts and those whose UDAP statutes apply to tenants or who more commonly litigate these issues.³⁵⁷ Indeed, bureaus hesitant to litigate on behalf of tenants may vigorously take up other tenant protection efforts. Hawai'i, for example, whose UDAP statute does not cover tenants, operates a tenant hotline through its consumer protection agency.³⁵⁸

Further, consumer enforcement agencies may engage in lobbying on behalf of tenants.³⁵⁹ For instance, while Iowa's consumer fraud bureau may lack authority to litigate tenant matters related to violations of Iowa's Landlord Tenant Act, the office has lobbied the state legislature to enhance tenant protections.³⁶⁰ When students in Iowa City began arguing for security deposit reform, for

354. See, e.g., *Renter's Rights*, ATT'Y GEN. TEX., <https://www.texasattorneygeneral.gov/consumer-protection/home-real-estate-and-travel/renters-rights> [<https://perma.cc/3UC7-V56Z>]; *Landlord/Tenant Guide*, WIS. DEP'T OF AG., TRADE & CONSUMER PROT., <https://datcp.wi.gov/Pages/Publications/LandlordTenantGuide.aspx> [<https://perma.cc/4GDF-RRTU>].

355. See, e.g., Iowa Interview, *supra* note 242.

356. See, e.g., Vermont Interview, *supra* note 232.

357. For example, the Texas Attorney General's Consumer Fraud Bureau creates resources to educate tenants but has brought few consumer protection enforcement actions on behalf of tenants. See *Renter's Rights*, *supra* note 354. *Contra infra* Appendix A.

358. HAW. DEP'T OF COM. & CONSUMER AFFS., HANDBOOK FOR THE HAWAII RESIDENTIAL LANDLORD-TENANT CODE (2016), <https://cca.hawaii.gov/hfic/files/2013/03/landlord-tenant-handbook.pdf> [<https://perma.cc/M56F-BGDJ>]. Towards the proposition that Hawai'i's UDAP does not cover landlord-tenant matters, see, for example, *Cieri v. Leticia Query Realty*, 80 Haw. 54, 59 (1995); *Kim v. CB Richard Ellis Haw., Inc.*, 288 Fed. App'x 312, 314 (9th Cir. 2008); and *Souza v. Fisher*, No. 1RC12-1-000925, 2017 WL 1293657, at *7 (Haw. Ct. App. Apr. 7, 2017).

359. See, e.g., Press Release Ken Paxton, Tex. Att'y Gen., AG Paxton Joins 25-State Bipartisan Coalition Calling on Education Secretary to Preserve States' Oversight of Student Loan Industry (Oct. 24, 2017), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-joins-25-state-bipartisan-coalition-calling-education-secretary-preserve-states-oversight> [<https://perma.cc/E5GN-KVN8>] (providing an example of attorneys general lobbying on behalf of consumers); see also Mark Totten, *Credit Reform and the States: The Vital Role of Attorneys General After Dodd-Frank*, 99 IOWA L. REV. 115, 172 (2013).

360. Iowa Interview, *supra* note 242.

example, the consumer fraud bureau sent a representative to the state capital to engage in a prolonged lobbying effort.³⁶¹ As stated by the office, “our lobbyists are over there [at the state legislature] just to . . . represent the consumer and make sure consumers have a voice.”³⁶² Notably, Iowa’s office also lobbied to compensate for its own lack of enforcement power in the rental arena, successfully persuading the legislature to ensure tenants maintained robust private remedies against landlords.³⁶³

Consumer fraud bureaus also help tenants by engaging in the initial mediation of their complaints and by referring tenants to other sources of help. Many consumer protection bureaus have processes whereby initial consumer complaints are fielded by non-attorney advocates. These advocates may attempt to mediate complaints as a matter of course, such that, when a tenant files a complaint, the advocate sends a mediation letter to the landlord being complained about.³⁶⁴ This process alone can help the individual tenant without the office escalating the matter further. Consumer fraud bureaus may additionally refer complaining tenants to pro bono legal assistance or code enforcement.³⁶⁵ The value of these efforts should not be downplayed. Still, reforms are necessary for consumer agencies to more robustly utilize their enforcement power to protect tenants.

B. *Reforms in States Whose UDAP Laws Do Not Protect Tenants*

In a sizeable minority of states,³⁶⁶ it is difficult for consumer fraud bureaus to protect tenants because the UDAP statute they enforce does not protect tenants. The most obvious reform, then, is for the legislature to amend the statute to cover tenant-landlord matters. Such reforms can take a number of forms. Most intuitively, the legislature can amend the definition of “commerce” to explicitly include tenant-landlord matters. Further, the legislature can incorporate the state tenant-landlord law to the list of enumerated statutes whose violation is considered a per se UDAP violation or, more broadly, add language that the breach of any consumer-

361. *Id.*

362. *Id.*

363. *Id.*

364. *See, e.g.,* Michigan Interview, *supra* note 247 (“We mediate them [complaints from tenants] . . . like any other complaint that we get.”).

365. *See, e.g.,* South Carolina Interview, *supra* note 241; Iowa Interview, *supra* note 242; Idaho Interview, *supra* note 236; Connecticut Interview, *supra* note 244; Vermont Interview, *supra* note 232.

366. *See* NCLC, *supra* note 27, § 8.2; *see generally* Thomas, *supra* note 145, at §§ 3, 6.

oriented statute also constitutes a presumptive UDAP violation. More subtly still, the legislature can add a provision to the tenant-landlord code giving the attorney general enforcement authority over some or all of its provisions. There are, however, significant hurdles to enacting legislative fixes, especially in states with powerful landlord and property management lobbies. It is thus worth exploring other courses of action that will allow these agencies to more robustly protect tenants.

One regulatory solution, which bypasses the legislative process, is for consumer agencies to enact regulations interpreting their UDAP statute to apply to tenants. The agency cannot enact regulations which contradict the plain language of the statute. In many instances, however, courts holding that UDAP does not apply to tenants are interpreting an ambiguous statute.³⁶⁷ For example, as discussed above, several courts read tenant-landlord law to displace UDAP's application to tenants even where the statute itself contains no anti-bootstrapping provision.³⁶⁸ In such instances, courts may defer to regulations espousing a contrary interpretation.³⁶⁹

Another solution, which requires the passage of neither state-specific litigation nor the adoption of regulation, is participation in multistate litigation. State consumer agencies have shown a willingness to team up with other states to regulate industries not covered by their own UDAP statutes. Indeed, states participated in national mortgage servicing litigation even where their state UDAP statute did not apply to mortgage banks.³⁷⁰ Because defendants in multistate litigation must often settle with all plaintiffs at once, states may be able to obtain consent judgments even where their underlying UDAP statute does not cover the regulated industry.³⁷¹ This solution is increasingly appealing as the rental industry has become increasingly nationalized in recent years.³⁷²

Similarly, state consumer fraud bureaus may collaborate with federal actors beyond joint litigation efforts. For example, state consumer fraud bureaus may be able to bring larger scale abuses to

367. See *supra* Section II.A.2; e.g., *Heritage Hills v. Deacon*, 551 N.E.2d 125, 127 (Ohio 1990) (holding UDAP is displaced by tenant-landlord laws even though statute contained no regulated industry exemption).

368. See *supra* Section II.A.2.

369. Aaron Saiger, *Chevron and State Deference in Administrative Law*, 83 FORDHAM L. REV. 555, 557–60 (2014) (noting that, while most states do not embrace *Chevron* deference as enthusiastically as federal courts, most state courts do defer at least somewhat to state regulations in certain instances).

370. For example, Michigan entered into a consent judgment with the defendants in the national mortgage settlement regarding their mortgage servicing practices even though Michigan's UDAP is read not to apply to the mortgage-servicing industry. NCLC, *supra* note 27, at App. B.

371. *Id.*

372. See Lee, *supra* note 348; see Semuels, *supra* note 298.

the attention of the FTC and DOJ and aid in investigations.³⁷³ As discussed earlier, while the FTC and CFPB do not prioritize tenant issues, state consumer enforcement action can influence federal priorities.³⁷⁴ As such, even in states where UDAP statutes do not cover tenants, consumer fraud agencies may take enforcement action to protect renters.

C. Reforms in States Whose UDAP Law Covers Tenants

As discussed, consumer protection agencies tend not to fully incorporate tenant protection into their mandates even if the underlying UDAP statute and corresponding jurisprudence allow them to do so. This Section proposes reforms that will better allow such agencies to protect tenant-consumers. This Section will largely focus on the institutional barriers, especially those cited by bureaus themselves, and propose ways to overcome them. Section IV.C.1 will propose changes in institutional norms and viewpoints (intangible reforms). Section IV.C.2 will discuss reforms to bureaus' complaint processes, and Section IV.C.3 will address concerns about agency resources.

1. Intangible Reforms

At a somewhat fundamental level, if agencies are to better protect tenants, they must start viewing tenants as similarly situated with other consumers. For example, the notion that agencies have insufficient resources to protect tenants begs the question, why agency resources should be allocated to other consumer groups instead. While it is quite possible that agencies focusing more on tenants must focus less on, for instance, home repair cases, this only becomes a reason not to prioritize tenants if home repair consumers are already considered more central to the agency's mission.

Similarly, before assuming tenants have access to other resources, it is necessary to assess the practical value of those alternative resources. Agencies must ensure not to create a Hobson's

373. See, e.g., Press Release, Fed. Trade Comm'n, FTC Announces Sweep Against 10 Auto Dealers (Jan. 9, 2014), <https://www.ftc.gov/news-events/press-releases/2014/01/ftc-announces-sweep-against-10-auto-dealers> [<https://perma.cc/4X2X-QD25>]. Tellingly, Michigan's UDAP law likely does not cover truth-in-lending matters regarding auto loans. Still, in 2014, Michigan's Attorney General helped the FTC investigate lending fraud by an auto lender as part of the FTC's industry sweep.

374. Pridgen, *supra* note 33, at 930.

choice for tenants, where consumer agencies do not focus on tenant issues because tenants have access to false or inadequate alternatives. For example, while code enforcement and Legal Aid strive to protect tenants, code enforcement is severely hamstrung by underfunding and limitations in scope,³⁷⁵ and Legal Aid only has the capacity to help so many clients.³⁷⁶

Relatedly, agencies must ensure parity between tenants and other consumer groups who have other resources available to them. For example, agencies commonly litigate home repair cases³⁷⁷ even though repair contractors are often regulated by state licensing boards, local permit administrators, and distinct statutory schemes.³⁷⁸

Similarly, bureaus may be hesitant to litigate tenant cases because tenant complaints are individuated and fact intensive. But this does not distinguish tenant cases from home repair or used car cases, which bureaus often do litigate.³⁷⁹ Indeed, home repair cases necessarily involve analyzing the quality of multiple home repair jobs and used car cases involve investigating the specific problems with specific cars. In fact, it is all the more important for enforcement agencies to aggregate individuated complaints as their fact intensive nature may make them ineligible for class relief.³⁸⁰

Consumer protection agencies also appear more willing to target classically “deceptive” business practices than practices that fall more into “unfairness,” to the potential detriment of tenants.³⁸¹ As noted above, abuses faced by tenants are more likely to be coer-

375. See Sabbeth, *supra* note 208, at 130.

376. *The Unmet Need for Legal Aid*, LEGAL SERVS. CORP., <https://www.lsc.gov/what-legal-aid/unmet-need-legal-aid> [<https://perma.cc/56PJ-QXZ8>].

377. Cox et al., *supra* note 29, at 66 tbl. 4.

378. HOME ADVISOR, *supra* note 199.

379. See, e.g., *Your Rights under Maryland's Lemon Law*, MD. OFF. ATT'Y GEN., <http://www.marylandattorneygeneral.gov/Pages/CPD/lemon.aspx> [<https://perma.cc/LML2-GCB5>] (providing examples of Lemon Law violations which exemplify the likely fact-intensive nature of such enforcement actions).

380. See Waterstone, *supra* note 29, at 463.

381. See MORRISON & FOSTER, *THE CFPB & UDAAP: A “KNOW IT WHEN YOU SEE IT?” STANDARD* 7–28 (2014), <https://media2.mofo.com/documents/140604-cfpb-udaap.pdf> [<https://perma.cc/Z9DF-2MPC>] (showing that the CFPB employs deception authority nearly three times as often as unfairness authority); James C. Cooper, *The Perils of Excessive Discretion: The Elusive Meaning of Unfairness in Section 5 of the FTC Act*, 3 J. ANTITRUST ENF'T 87, 109–10 (2015) (discussing FTC hesitance to expand the scope of its standalone “unfairness” authority); Peterson, *supra* note 29, at 1092 (noting that CFPB unfairness claims are generally coupled with deception claims because most ‘deceptive’ behavior also likely constitutes ‘unfair’ behavior and also the CFPB’s cautious use of “abusiveness” standard); Cox et al., *supra* note 29, at 53 (noting that between 2011 and 2015, the CFPB only employed the “abusiveness” standard, which is in ways analogous to state unfairness); Matthew A. Edwards, *The FTC and New Paternalism*, 60 ADMIN. L. REV. 323, 350–60 (2008); see *supra* Section II.C.1 (illustrating how representatives from several enforcement bureaus note that their bureau is more likely to target more classic instances of “deception”).

cive, injurious, or violating of public policy than classically deceptive. For example, an illegal lockout, while arguably implicitly communicating a deceptive message to tenants, is more clearly problematic because it fits within the UDAP unfairness factors.³⁸² While “unfair” may be a more inherently ambiguous standard than “deceptive,” a shift towards greater enforcement of unfair practices will be beneficial to tenant consumers.

2. Lack of Actionable Tenant Complaints

A more concrete barrier to consumer agencies prioritizing tenant issues is the lack of actionable complaints for tenants. Agencies, understandably, rely largely on consumer complaints to find targets of enforcement actions. Even though agencies do receive a quantitatively high number of tenant complaints, they tend to lack a critical mass of complaints against a single target regarding a distinct issue. There are ways for agencies to police industries, however, while relying less on seemingly anecdotal individual complaints trickling in one at a time.

Agencies can learn about industry abuses from an array of sources beyond consumer complaints. Such sources may have already aggregated consumer complaints in ways useful to consumer protection agencies. One such source is media reports, which may help identify bad landlords, their bad practices, and the names of tenants complaining about them. Searches of legal databases to find the businesses most commonly facing litigation from tenants may also prove useful. Collaborations with code enforcement, Legal Aid, and other entities who track tenant grievances may further inform consumer agencies of potential targets.

Agencies should also use their pre-litigation subpoena power to police the rental industry. Consumer protection agencies generally have the power to issue pre-litigation investigatory subpoenas against potential targets. In all probability, tenants are often more likely to complain directly to landlords than to consumer enforcement agencies, and agencies may be able to subpoena such internal complaints.³⁸³ Bureaus can employ creative strategies to find targets. In instances where an agency learns, perhaps from the me-

382. See *Illinois v. Safeguard Props.*, No. 2013CH20715 (Ill. Cir. Ct. June 5, 2014) (denying Safeguard’s motion to dismiss Illinois’s UDAP claim based on Safeguard illegally ejecting legal occupants of foreclosed homes and stating that the deceptiveness element that the business must intend for the consumer to rely on the illegal activity makes little sense in evaluating unfairness).

383. See, e.g., Complaint at ¶¶ 11, 78, *Illinois v. Safeguard Props.*, No. 2013CH20715 (Ill. Cir. Ct. Sept. 9, 2013); see also, NCLC, *supra* note 27, § 13.

dia, that abuses within a certain industry are rampant, the agency can subpoena the subjects of these media reports or, if lacking such reports, the largest players in an industry notorious for abuse.

For example, one of the higher profile state consumer agency actions protecting tenants was Illinois's 2013 lawsuit against Safeguard Properties for illegally evicting tenants and homeowners from foreclosed properties.³⁸⁴ The lawsuit resulted in a million-dollar settlement, which largely went towards restitution for consumers, and the first major reforms in the default property management industry.³⁸⁵ Tellingly, Illinois's Complaint alleged both that Safeguard was the largest player in the industry and that the Attorney General had knowledge of many consumer complaints made directly to Safeguard by Illinois residents.³⁸⁶

Consumer fraud bureaus may also take action to solicit more targeted and actionable consumer complaints. Media and publicity campaigns and initial high-profile actions by the consumer fraud bureaus themselves can effectively solicit consumers to complain about specific issues or against specific entities. New York has employed both targeted solicitation of tenant complaints and collaboration with other tenant service providers to more aggressively enforce tenants' rights as consumer rights.³⁸⁷ For example, New York's AG, by far the nation's most active in enforcing tenants' rights, employs a special tenant complaint form³⁸⁸ and collaborates with other agencies and non-profits specifically formed to assist tenants.³⁸⁹ The state's expressed intent to help tenants as consumers then becomes a self-fulfilling prophecy by generating additional tenant complaints.

384. See generally Complaint, *Illinois v. Safeguard Props.*, No. 2013CH20715 (Ill. Cir. Ct. Sept. 9, 2013).

385. Press Release, Ill. Att'y Gen., Madigan Announces \$1 Million Settlement with Safeguard Properties (June 3, 2015), http://www.illinoisattorneygeneral.gov/pressroom/2015_06/20150603.html [<https://perma.cc/H6EZ-XYCH>].

386. See Ill. Att'y Gen., *supra* note 385; Complaint at ¶¶ 11, 78, *Illinois v. Safeguard Props.*, No. 2013CH20715 (Ill. Cir. Ct. Sept. 9, 2013).

387. See, e.g., Press Release, N.Y. Att'y Gen., Attorney General James And Governor Cuomo Announce Lawsuit Against Queens Landlord for Violating Rent Stabilization Laws and Tenant Harassment (Mar. 1, 2019), <https://ag.ny.gov/press-release/2019/attorney-general-james-and-governor-cuomo-announce-lawsuit-against-queens> [<https://perma.cc/VH4U-UHS3>] (discussing AG consumer fraud lawsuit, in collaboration with NY's Tenant Protection Unit, Legal Services NYC, and other organizations protecting tenants, against major landlord for tenant harassment and violation of rent control laws); see also *Tenant Harassment*, NYC.GOV: BLDGS., <https://www1.nyc.gov/site/buildings/renter/tenant-harrasment.page> [<https://perma.cc/KK87-8PG6>] (describing coordination between state and local agencies by Tenant Harassment Task Force).

388. See N.Y. OFF. OF ATT'Y GEN., DEP'T OF L., RENT SECURITY COMPLAINT FORM (2019), <https://ag.ny.gov/sites/default/files/nyc-rent-security-complaint-english.pdf> [<https://perma.cc/N388-KFE6>].

389. See N.Y. Att'y Gen., *supra* note 387.

3. Concerns about Resources

Consumer enforcement bureaus may be concerned that if they venture strongly into the tenant arena, they will be overwhelmed with tenant complaints. After all, consumer bureaus do not have the resources to handle thousands of individual tenant complaints, nor are they equipped to double as code enforcement. This obstacle, however, is not unique to regulation of the rental industry. Consumer protection agencies adapt to this problem in their policing of other markets and can apply similar strategies here.

First, especially in more concentrated rental markets, agencies can target larger rental property investors or property management companies. Such actions are likely to be high profile and thus have at least some general deterrent effect across the industry. In pursuing mortgage servicing litigation, for example, consumer enforcement agencies tellingly targeted the biggest banks.³⁹⁰

Further, forcing a market-dominant business to reform may force industry-wide reform. For example, if a major property management company agrees not to solicit renters with leases containing illegal provisions, landlords utilizing that company must ensure their leases do not contain those illegal provisions, or else must find another management company, which may be difficult and expensive.

In less concentrated markets, consumer fraud bureaus still find ways to send shots across the bow. For example, agencies may engage in industry sweeps, where a number of lawsuits are filed simultaneously against different businesses within an industry to challenge a common industry practice.³⁹¹ If, for example, a consumer fraud bureau announces a number of lawsuits against small landlords for failing to make repairs, this sends a message to other

390. See generally *Settlement Documents*, *supra* note 122 (listing settlement documents from national mortgage litigation brought by states and federal agencies targeting major mortgage servicers such as Bank of America, Wells Fargo, and JP Morgan Chase).

391. See, e.g., Press Release, Dep't of Just., Justice Department and Federal Partners Announce Enforcement Actions of Dietary Supplement Cases (Nov. 17, 2015), <https://www.justice.gov/opa/pr/justice-department-and-federal-partners-announce-enforcement-actions-dietary-supplement-cases> [<https://perma.cc/RT3C-CA6W>] (dietary supplements); Press Release, Dep't of Just., Southern Illinois Takes Part in Largest-Ever Nationwide Elder Fraud Sweep (Mar. 7, 2019), <https://www.justice.gov/usao-sdil/pr/southern-illinois-takes-part-largest-ever-nationwide-elder-fraud-sweep> [<https://perma.cc/5TZE-4NFW>] (elder fraud); Press Release, Fed. Trade Comm'n, Law Enforcement Partners Announce New Crackdown on Illegal Robocalls (June 25, 2019), <https://www.ftc.gov/news-events/press-releases/2019/06/ftc-law-enforcement-partners-announce-new-crackdown-illegal> [<https://perma.cc/BQF5-UVUY>] (telemarketing calls); Press Release, Ill. Att'y Gen., Madigan Cracks Down on Unlicensed Public Insurance Adjusters, Home Repair Scams Across Chicagoland Area (Apr. 23, 2012), http://www.illinoisattorneygeneral.gov/pressroom/2012_04/20120423.html [<https://perma.cc/QLU7-DD69>] (unlicensed insurance adjusting).

small landlords. Consumer protection agencies adapt to their lack of resources by targeting large players or taking concentrated action against a number of smaller players. Agencies can readily apply such strategies to the rental market.

CONCLUSION

Thus, while residential tenants are similarly situated to other consumers, they lack legal parity with traditional consumers. Consumer protection agencies' treatment of tenant issues helps illustrate this disparity. This Article attempts to elaborate upon and propose solutions to such enforcement trends. Still, there has been little quantitative analysis regarding the types of enforcement actions brought by consumer enforcement issues. One of the few studies that undertakes this analysis did not code for tenant-landlord actions.³⁹² Thus, more complete quantitative corroboration of this Article's claims will be necessary, as will a quantitative analysis of the types of actions consumer enforcement agencies do take to protect or educate tenants.

There is little literature of whether tenants should be treated as consumers within a consumer protection regime dominated by UDAP enforcement. This Article, hopefully, fills some of those gaps and helps to bring attention to the consumer abuses faced by tenants.

But more analysis is necessary, especially in light of COVID-19. Consumer scams generally, and rental scams specifically, have proliferated during the pandemic.³⁹³ Further, like the Foreclosure Crisis of the late aughts, the economic fallout from the pandemic leaves tenants especially vulnerable. Facing job and income loss, those seeking to rent have fewer options. A new wave of foreclosures³⁹⁴ caused by the pandemic will likely lead to a new wave of landlord absenteeism and illegal evictions by foreclosing lenders. This Article was written primarily before the pandemic, but how consumer agencies protect tenants in the midst of the pandemic requires further inquiry.

392. E-mail from Cox, *supra* note 135.

393. See, e.g., Emma Fletcher, *Pandemic Purchases Lead to Record Reports of Unreceived Goods*, FED. TRADE COMM'N (July 1, 2020, 10:00 AM), <https://www.ftc.gov/news-events/blogs/data-spotlight/2020/07/pandemic-purchases-lead-record-reports-unreceived-goods> [https://perma.cc/HH9S-GUZF]; Randy Mac, *Rental Scammers Take Advantage of Coronavirus Pandemic*, NBC L.A. (May 6, 2020), <https://www.nbclosangeles.com/news/local/rental-scammers-take-advantage-of-coronavirus-pandemic/2358403> [https://perma.cc/6W3W-4DT7].

394. See Jeff Andrews, *A Foreclosure Crisis Could Still Happen*, CURBED (July 27, 2020), <https://www.curbed.com/2020/7/27/21335855/coronavirus-foreclosures-housing-crisis>.

APPENDIX A

An appendix that includes a survey of all enforcement actions brought on behalf of tenants by agencies of the fifty states, District of Columbia, and U.S. territories prior to August 7, 2019 can be found online at mjlr.org.

APPENDIX B

An appendix that lists all federal tenant protection suits prior to August 7, 2019 can be found online at mjlr.org.

