

NEW TECH, OLD PROBLEM: THE RISE OF VIRTUAL RENT-TO-OWN AGREEMENTS

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Abstract: This Article explores how fintech has disrupted the traditional rent-to-own (RTO) industry, giving rise to new, virtual RTO agreements (VirTOs). These VirTOs have enabled the RTO industry to expand into the service industry and to markets for products not traditionally associated with rentals, such as vehicle repairs, pet ownership, and medical devices. This Article analyzes this development.

RTO agreements purport to rent products to a consumer until the conclusion of a set number of renewable rental payments, at which point ownership transfers. The fundamental characteristic of these agreements—and the reason why they are not regulated as loans—is that the consumer is able to terminate the rental agreement without penalty at any time by returning the merchandise to the rental company. RTO agreements are an extremely high-cost form of financing that were traditionally offered through brick-and-mortar stores, like Aaron's or Rent-A-Center, to low-income, subprime consumers who could not obtain traditional credit. The introduction of fintech, however, has shifted the RTO business model from traditional one-stop-shop, brick-and-mortar stores to partnerships between VirTO companies and retailers. As this Article explains, these new VirTOs have different attributes from traditional RTO agreements. In a VirTO, a third-party VirTO provider purchases the desired product from a brick-and-mortar retailer and then rents the product back to the consumer. The entire transaction between the retailer and VirTO company occurs online and unbeknownst to the consumer. This business model has allowed VirTOs to emerge in a variety of specialized markets and services. Not only are these agreements a high-cost method to ownership, but consumers often do not understand the agreements.

Although VirTOs purport to be rentals, it is nearly impossible for a consumer to return a rental financed with a VirTO. Because the items rented with VirTOs are not practical to return, this Article argues that VirTOs are not, in fact, RTO agreements. Instead, VirTOs are a sophisticated form of disguised credit. This Article demonstrates that the VirTO industry is a legal fiction designed to avoid consumer protection statutes governing credit. Accordingly, courts should treat VirTOs as credit subject to state usury and federal consumer protection laws. This Article also

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proposes a series of policy recommendations to regulate VirTOs and to ban such agreements for services and nonsensical products, like vehicle repairs and pets. The policy solutions proposed in this Article provide a model for potential strategies to protect low-income and subprime consumers from the most extreme abuses as fringe financing industries grapple with the introduction of fintech.

INTRODUCTION

John needed his car to get to work, so he took it to his local mechanic to have it repaired when its transmission stopped working.¹ His mechanic told him that it would cost \$1,200 to repair his vehicle and offered to connect him with financing. He gave his information to the mechanic, who inputted it into a computer, and told him that he was approved for “90 days same as cash” financing.² When John finally received the agreement, he was surprised and angered to learn that he was “renting” his transmission and that he would ultimately pay nearly three times the cash price of the repair.

Mary’s children had begged for a puppy ever since their neighbors had gotten a dog. Mary finally gave in and went to their local pet store to pick out a puppy.³ When Mary said that she had just finalized her bankruptcy and could not afford the puppy, the salesperson directed her to “no credit check” financing available through a third-party company. Mary, excited she could make her children happy and believing she was applying for a loan, gave her bank and social security number to the salesperson who input it into his computer. When he stated that she was approved, she purchased the puppy. Mary, however, was shocked when she received a notification from the third-party financing company indicating that she was “renting” her puppy. Mary is now scared that her family’s puppy could be taken away if she misses a payment.

Although rent-to-own (RTO) agreements have been available through brick-and-mortar retailers for decades, many consumers across the country are

¹ This hypothetical vignette is loosely based on an amalgamation of many cases and complaints that consumers have filed regarding these agreements. *See, e.g., Smart v. W. Creek Fin., Inc.*, No. 20-CV-250, 2021 WL 415130, at *1 (M.D. Ga. Feb. 5, 2021) (outlining an alleged rent-to-own (RTO) agreement financing vehicle repairs); *Prayitno v. Nextep Funding, LLC*, No. 17-cv-04310, 2018 WL 11476850, at *1 (N.D. Ill. June 27, 2018) (outlining a consumer purchase of a vehicle repair with an RTO agreement).

² *See infra* note 237 and accompanying text (explaining that virtual RTO agreements (VirTOs) are commonly advertised as “90 days same as cash”).

³ Similarly, this hypothetical scenario is loosely based on a combination of multiple cases and complaints that have been filed regarding these agreements. *See, e.g., Danger v. Nextep Funding, LLC*, 355 F. Supp. 3d 796, 801–02 (D. Minn. 2019) (outlining a consumer purchase of a pet with an RTO agreement).

unsuspectingly encountering RTO agreements in new places.⁴ RTOs, unlike regular secured credit, are contracts that purport to transfer no ownership or equity to a consumer until they have made every payment in the rental contract.⁵ Traditionally, consumers typically used RTO agreements for furniture, appliances, and other products offered in big box RTO warehouses.⁶ Now, consumers can access RTO agreements virtually—agreements offered by out-of-state, third-party RTO companies—in jewelry stores, pet stores, electronic warehouses, appliance sales departments, computer stores, mattress warehouses, medical device retailers, home improvement stores, and even tire and auto repair shops.⁷ It is hard to imagine how one could possibly “rent” a ser-

⁴ This Article uses the terms “rent-to-own,” “lease-to-own,” “lease-purchase,” and “rental-purchase” interchangeably. Most state statutes, however, refer to these types of agreements as “rental-purchase” or “lease-purchase” agreements. *See, e.g.*, KARNETTE Rental-Purchase Act, CAL. CIV. CODE §§ 1812.620–.621 (West 2023) (“rental-purchase contracts”); KY. REV. STAT. ANN. § 367.976 (West 2023) (“rental-purchase agreement”); S.C. CODE ANN. § 37-2-701 (2024) (“consumer rental-purchase agreement”); S.D. CODIFIED LAWS § 54-6A-2 (2024) (“lease-purchase agreement”). Companies offering these products will often refer to them as “leases” or “lease-to-own.” *See, e.g.*, *How It Works*, ACIMA, <http://www.acima.com/how-it-works> [<https://perma.cc/A8QG-DDW2>] (referring to its agreements as “lease-to-own solutions”); *How It Works*, KOALAFI, <https://koalafi.com/how-it-works> [<https://perma.cc/T9GZ-X575>] (referring to its agreements as “leases” and “[l]ease-[t]o-[o]wn and [l]ending solutions”); KATAPULT, www.katapult.com [<https://perma.cc/U5X4-WKZN>] (referring to “lease purchase plans” and “lease-to-own”). Because each of these terms refers to the same type of financing product, this Article uses the terms interchangeably. There is a growing number of RTO financing products for real estate and home purchasing. *See Rent to Own the American Dream: The Promises and Perils of Alternative Home Financing*, TECHEQUITY COLLABORATIVE 1, 5 (2022), <https://techequitycollaborative.org/2022/11/01/rent-to-own-the-american-dream-paper/> [<https://perma.cc/P7KT-PUW8>] (stating that companies that allow buyers to “rent to own” their homes are gaining popularity). This Article does not address RTO home ownership financing schemes. It instead focuses on RTO agreements for personal property purporting to be covered by state rental-purchase statutes.

⁵ *See infra* notes 61–68, 101, 110 and accompanying text.

⁶ *See infra* note 200 and accompanying text.

⁷ *See, e.g.*, ACCEPTANCENOW, <https://www.acceptancenow.com/RAC-Acceptance-Home.html> [<https://perma.cc/5VNY-H9KV>] (stating that customers may lease “furniture, electronics, appliances, mattresses, and more” from participating partner retailers); *How It Works*, SNAP FIN., <https://snapfinance.com/how-it-works> [<https://perma.cc/C634-D4P7>] (stating that Snap Finance lease-to-own transactions may be used to purchase items at more than 150,000 online and in-store retailers that sell products including furniture, tires and rims, car audio equipment, mattresses, electronics, auto services, appliances, sporting goods, jewelry, musical instruments, power tools, etc.); KOALAFI, <https://koalafi.com/> [<https://perma.cc/AX9D-6PLF>] (stating that more than 15,000 merchants, including RC Willey, Mattress Warehouse, Home Zone, and Texas Tires, offer customers lease-to-loan agreements through Koalafi); PROGRESSIVE LEASING, <https://progleasing.com/> [<https://perma.cc/7Z8X-WMFX>] (stating that Progressive Leasing customers can lease-to-own “furniture, electronics, jewelry, tires and wheels, mobile devices, appliances, mattresses, and more” from their retail partners that include: Bed Bath & Beyond, Guitar Center, Mattress Firm, Best Buy, Dell Technologies, Lowe’s, and Big Lots); *Ways to Shop*, ACIMA, <https://www.acima.com/marketplace> [<https://perma.cc/FX9X-M7XH>] (stating that customers can shop for furniture, mattresses, home electronics, computers, appliances, auto wheels and tires, car audio electronics, and jewelry with their approved lease amount). Although there is a large body of literature regarding traditional fringe financial products, including traditional RTO products, there has been increasing academic interest in the fringe economy given the rise in populari-

vice, such as a car repair, suggesting that these new agreements are much more like regular financing than traditional brick-and-mortar RTO agreements. As the Article argues, this impacts how these agreements should be regulated.⁸ John and Mary's experiences represent two common encounters that consumers have had with these new purchasing mechanisms.⁹

To distinguish these new agreements from their traditional predecessors, this Article refers to these new agreements as "VirTOs" (pronounced VIR-tee-ohs) because they have unique attributes compared to other RTO agreements.¹⁰

ty of internet or fintech transactions. See, e.g., Pamela Foohey, Jim Hawkins, Creola Johnson & Nathalie Martin, *Consumer Credit in America: Past, Present, and Future*, 80 LAW & CONTEMP. PROBS. 1, 4 (2017) (summarizing articles that discuss the trends, new and troubling practices, and history and future of the consumer credit industry in America); Jim Hawkins, *Earned Wage Access and the End of Payday Lending*, 101 B.U.L. REV. 705, 705 (2021) (discussing the earned wage access market and its potential to upend the payday lending market); Jim Hawkins & Tiffany C. Penner, *Advertising Injustices: Marketing Race and Credit in America*, 70 EMORY L.J. 1619, 1619 (2021) (arguing that targeted advertising drives minorities to underutilize low-cost credit offered by conventional banks and overuse expensive financing products offered by payday lenders). This Article focuses solely on RTO or rental-purchase agreements; it notes, however, that there are many new types of products that have emerged in recent years, many of which have exploded in popularity during the COVID-19 pandemic including: Klarna, Paypal, AfterPay, Affirm, Sezzle, Splitit, Uplift, Sunbit, Zip, PerPay, Zebit, Four, GreenSky, and Rent-A-Bank schemes. See Lorenzo Chiavarini, *Startup and Companies Providing Buy Now, Pay Later (BNPL) Services*, DEALROOM.CO (Oct. 16, 2023), <https://app.dealroom.co/lists/18799> [<https://perma.cc/UMF6-FP4A>] (identifying Splitit, Uplift, Sunbit, PerPay, Zebit, Four, and GreenSky as buy-now-pay-later providers); Trina Paul, *Everything You Need to Know About the Most Popular Buy Now, Pay Later Apps*, CNBC SELECT, <https://www.cnbc.com/select/best-buy-now-pay-later-apps/> [<https://perma.cc/HJ45-QUU3>] (Jan. 1, 2024) (identifying Sezzle, Zip, and PayPal as companies that offer buy-now-pay-later products); CONSUMER FIN. PROT. BUREAU, OFF. OF RSCH. PUBL'N NO. 2023-1, CONSUMER USE OF BUY NOW, PAY LATER: INSIGHTS FROM THE CFPB MAKING ENDS MEETS SURVEY 1, 2 (2023), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_consumer-use-of-buy-now-pay-later_2023-03.pdf [<https://perma.cc/YD5R-V56C>] (identifying Affirm, Afterpay, and Klarna as buy-now-pay-later companies); *The Rent-A-Bank Scheme*, CTR. FOR RESPONSIBLE LENDING (Dec. 5, 2023), <https://www.responsiblelending.org/research-publication/rent-bank-scheme> [<https://perma.cc/TFR4-UVX7>] (explaining that payday lenders worked with banks to create a Rent-a-Bank scheme that "allows banks to export their interest rates across the country," thus granting online lenders the ability "to exceed state limits on loans"). Because buy-now-pay-later and Rent-A-Bank loan schemes—although targeting similar consumers and retailers—are governed by different state and federal regulations, this Article does not address those types of products. Instead, the research, model, and insights developed through this Article are intended to provide broader insight into the challenges and opportunities with the introduction of fintech and the fringe economy and provide broad solutions.

⁸ See *infra* Part IV (arguing that VirTOs should be treated as credit and providing suggestions for VirTO regulation).

⁹ See *supra* notes 1–3 and accompanying text.

¹⁰ Although these agreements have yet to be formally named, at least one company has started to refer to them as "virtual lease-to-own financing." See SNAP FIN., <https://snapfinance.com/virtual-rent-to-own> [<https://perma.cc/2HZB-F852>] ("Get what you need with virtual lease-to-own financing today!"). Similarly, at least one local agency has referred to these agreements as virtual lease-to-own (LTO) transactions. See N.Y.C. DEP'T OF CONSUMER & WORKER PROT., THE NEW RENT-TO-OWN: MORE CONFUSING, STILL EXPENSIVE, AND OFFERED AT AN NYC STORE NEAR YOU 1, 10 (2021),

For example, unlike traditional RTO agreements in which the consumer rents the product directly from the brick-and-mortar retailer offering the product, VirTO companies purchase a physical product selected by a consumer from the brick-and-mortar or online retailer and then rent the product back to the consumer.¹¹ In a traditional RTO transaction, the retailer retains ownership of the product until the RTO is completed, whereas in a VirTO transaction ownership of the physical product transfers from the retailer to the VirTO company until the VirTO is completed.¹² This entire transaction, however, occurs online, behind the scenes, and unbeknownst to the consumer.¹³ In other words, virtually. In fact, many consumers may not even recognize that their financing agreement is actually with a third-party VirTO company, rather than the brick-and-mortar or online retailer, until the VirTO company contacts the consumer or the consumer sees the line item for an Automated Clearing House (ACH) transfer from their bank accounts.¹⁴ This Article refers to these agreements as VirTOs because the transaction largely occurs online despite the consumer purchasing the item from a physical retailer in person.

RTO financing products are not a new phenomenon.¹⁵ The introduction of VirTOs, however, has flipped the long-existing, multibillion-dollar RTO industry on its head.¹⁶ The defining characteristic of an RTO agreement is that the con-

<https://www.nyc.gov/assets/dca/downloads/pdf/partners/Lease-To-Own-Report.pdf> [https://perma.cc/5M46-GRD9] (“‘virtual’ LTO transaction”). And, still another group has referred to them as “virtual rent-to-own” or “VRTO.” See PUNEET DIKSHIT ET AL., MCKINSEY & CO., BUY NOW, PAY LATER: FIVE BUSINESS MODELS TO COMPETE 1, 10 (2021), https://www.mckinsey.com/industries/financial-services/our-insights/buy-now-pay-later-five-business-models-to-compete# [https://perma.cc/75FR-U94T] (describing the virtual rent-to-own or VRTO model).

¹¹ See *infra* notes 141–147 and accompanying text (detailing the differences between traditional RTO transactions and VirTO transactions).

¹² See *infra* notes 141–147 and accompanying text (same).

¹³ See N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 7 (“Known in the industry as ‘virtual lease to own,’ these agreements are promoted by brick-and-mortar businesses, like furniture stores, but the debt is owned by third-party financing companies—usually unbeknownst to the consumer.”).

¹⁴ Cf. Letter from Chuck Bell, Programs Dir., Consumer Reports, to Rohit Chopra, Dir., Consumer Fin. Prot. Bureau 1–2 (Mar. 25, 2022), https://downloads.regulations.gov/CFPB-2022-0002-0023/attachment_1.pdf [https://perma.cc/V393-AJ5A] (stating that one concern with products offered by companies like Afterpay, Klarna, Zip, Paypal, and Sezzle is that “[c]onsumers may . . . not realize they are entering into transactions with a third-party payment company”). “An ACH is an electronic fund transfer made between banks and credit unions across what is called the Automated Clearing House network. ACH is used for all kinds of fund transfer transactions, including direct deposit of paychecks and monthly debits for routine payments.” *What Is an ACH?*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/ask-cfpb/what-is-an-ach-en-1065/> [https://perma.cc/432D-2UAR] (Aug. 27, 2020).

¹⁵ See *infra* notes 46–76 and accompanying text (discussing the history and creation of the RTO industry).

¹⁶ See *infra* Part II (discussing how fintech has changed the RTO business model by introducing a new product, VirTOs); *infra* Part III (explaining how the emergence of VirTOs has fundamentally

sumer can terminate the lease agreement at any point without penalty.¹⁷ The ability to terminate the lease without penalty is what statutorily distinguishes RTO agreements from other leases that state and federal consumer statutes consider to be credit.¹⁸ Because statutes define RTO agreements as leases rather than loans, the consumer costs of these arrangements are purportedly not regulated by federal consumer protection statutes or state usury limits.¹⁹

changed the RTO industry); ASS'N OF PROGRESSIVE RENTAL ORGS., *THE RENT-TO-OWN INDUSTRY: ABOUT RTO 4* (2019), <https://www.rtohq.org/wp-content/uploads/2019/06/APRO-Flipbook-About-U.s.pdf> [https://perma.cc/CZU5-A5QT] (stating that the RTO industry is a multibillion-dollar industry). In a recent industry overview by the Association of Progressive Rental Organizations, the RTO industry was cited as being an \$8.5-billion industry. ASS'N OF PROGRESSIVE RENTAL ORGS., *supra*, at 4; see also Nathalie Martin & Lydia Pizzonia, *Shadow Credit and the Devolution of Consumer Credit Regulation*, 24 LEWIS & CLARK L. REV. 1439, 1465 (2020) (noting that “[i]n 2016, the Association of Progressive Rental Organizations reported revenue of \$8.6 billion”). It is evident that the industry is booming by reviewing RTO companies’ annual reports with the Securities Exchange Commission. For example, Upbound Group, Inc. (formerly known as Rent-A-Center), reported annual total revenues for 2022 of \$4,245,392,000. Upbound Group, Inc., Annual Report (Form 10-K), at 87 (Feb. 24, 2023). Similarly, Katapult, a VirTO company, reported an annual total revenue for 2022 of \$212,105,000. Katapult Holdings, Inc., Annual Report (Form 10-K), at 46 (Mar. 9, 2023).

¹⁷ See, e.g., MICH. COMP. LAWS ANN. § 445.952(d) (West 2023) (defining a “rental-purchase agreement” as “an agreement for the use of personal property by a lessee primarily for personal, family or household purposes, for an initial period of 4 months or less that is automatically renewable with each payment after the initial period and that permits the lessee to become the owner of the property”); S.C. CODE ANN. § 37-2-701(6) (2024) (“‘Consumer rental-purchase agreement’ means an agreement for the use of personal property by an individual primarily for personal, family, or household purposes, for an initial period of four months or less (whether or not there is any obligation beyond the initial period) that is automatically renewable with each payment and that permits the consumer to become the owner of the property. The term does not include a consumer credit sale as defined in Section 37-2-104, or a consumer loan as defined in Section 37-3-104, or a refinancing or consolidation thereof, or a consumer lease as defined in Section 37-2-106.”); see also ASS'N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 4 (“[C]ustomers can return the merchandise at any time for any reason without penalty. This no-obligation, no-debt feature is the cornerstone of rental-purchase.”).

¹⁸ See, e.g., 15 U.S.C. § 1602(h) (“The term ‘credit sale’ refers to . . . any contract in the form of a bailment or lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the aggregate value of the property and services involved and it is agreed that the bailee or lessee will become, or for no other or a nominal consideration has the option to become, the owner of the property upon full compliance with his obligations under the contract.”); 12 C.F.R. § 1026.2(a)(16) (2022) (“Credit sale means a sale in which the seller is a creditor. The term includes a bailment or lease (unless terminable without penalty at any time by the consumer) under which the consumer: (i) Agrees to pay as compensation for use a sum substantially equivalent to, or in excess of, the total value of the property and service involved; and (ii) Will become (or has the option to become), for no additional consideration or for nominal consideration, the owner of the property upon compliance with the agreement.”); U.C.C. § 1-203(b) (AM. L. INST. & UNIF. L. COMM'N 2001) (“A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee . . .”).

¹⁹ See Martin & Pizzonia, *supra* note 16, at 1442 (“Long ago, the rent-to-own industry passed enabling legislation to state explicitly that its transactions were outside the realm of credit. This legis-

It is tempting to call these costs “financing costs,” because that is exactly what these costs appear to be, but this is slightly inaccurate in the RTO industry vernacular: RTO agreements do not charge traditional interest.²⁰ As a result, they may not qualify as “credit” or “financing” under various consumer credit laws.²¹ Nevertheless, this Article at times uses the words associated with credit, such as financing, financing technology, loan, interest, repossession, among others, when doing otherwise seems unavoidable.

This Article explores the role of internet-based financial technology (fintech) platforms—the use of technological innovations to provide financial services—in spawning the growth of RTO agreements in non-traditional markets and its contributions to the growth of the industry as a whole.²² Prior scholarship has focused on whether RTO agreements should be considered credit and the regulatory grey space they occupy, critiques of the industry’s impact on low-income consumers, and whether RTO agreements should be banned.²³ The arguments have centered on whether traditional RTO agree-

lation removes rent-to-own transactions from all state consumer credit regulation, TILA, all other federal regulations, and state commercial law such as Article 9 of the U.C.C.”).

²⁰ See, e.g., *Lowe’s Lease to Own Program*, LOWE’S, <https://www.lowes.com/l/Credit/Lease-To-Own> [<https://perma.cc/CZ64-BZZU>] (“Progressive Leasing provides . . . a rent-to-own agreement It’s not a loan, credit or financing. . . . While there’s a cost associated with Progressive’s leasing services, we don’t charge interest.”).

²¹ See *supra* note 19 and accompanying text.

²² See *infra* Part II (explaining how fintech has disrupted the RTO industry and allowed for the creation of the VirTO agreement). Although there are other scholars who have explored fintech, the fringe economy, and/or the RTO industry, this is the first Article, to the author’s knowledge, to explore the effects of new fintech on the RTO industry.

²³ See, e.g., Michael H. Anderson, *An Economic Investigation of Rent-to-Own Agreements*, 89 CHI.-KENT L. REV. 141, 146–65 (2014) (discussing whether RTO agreements are “purchase or rental,” the risk management of RTO agreements, how consumers utilize RTO agreements, and consumer behavior as it relates to RTO agreements); Jim Hawkins, *Renting the Good Life*, 49 WM. & MARY L. REV. 2041, 2041 (2008) (analyzing “the theoretical justifications for regulating the rent-to-own industry”); Martin & Pizzonia, *supra* note 16, at 1440 (discussing shadow credit and its potential to thwart the U.S. consumer credit regulation). For example, Jim Hawkins has reviewed empirical data and interviewed key industry players to outline the traditional RTO market in his seminal work, *Renting the Good Life*. See Hawkins, *supra*, at 2117 (“I generated novel insights into the rent-to-own business by combining interviews with industry participants with the best empirical data available.”). He concludes that RTO agreements fulfill a market need and that they should be regulated with narrowly tailored regulations rather than banned entirely. See *id.* (stating overregulation of RTO agreements would prevent consumers from entering into potentially beneficial transactions and instead regulations concerning RTOs should be narrowly tailored). Similarly, Michael Anderson, an economist, argues that consumers are rational actors who use RTO agreements because they provide economic value, such as purchasing items under uncertain or unpredictable conditions. See Anderson, *supra*, at 166 (concluding that users derive value from RTO agreements and use the agreements rationally). Anderson’s theory, however, largely turns on the fact that RTOs fulfill a market need for consumers who are financially constrained. See *id.* (stating that some of the insights gained from the article’s analysis are “specific to financially constrained individuals”). In contrast, Nathalie Martin and Lydia Pizzonia argue that RTO agreements are “shadow credit” designed to purposively evade consumer protection

ments should be banned outright or whether they should be subject to tailored regulations.²⁴ As this Article argues, RTO agreements often fill a market need and offer consumers opportunities other financial products do not.²⁵ Yet, they also present many problems for consumers that can be avoided by using traditional low-cost credit, such as small-dollar loans or credit cards.²⁶ Against this backdrop, this Article analyzes how fintech has disrupted the traditional RTO business model and, given the changes in the industry, investigates whether VirTOs should be regulated in the same manner as traditional RTO agreements.²⁷

Specifically, this Article describes how the introduction of fintech to the RTO industry has encouraged retailers in various markets across the country to advertise, offer, and push consumers into such financing arrangements, exacerbating the already predatory nature of the industry.²⁸ It argues that the creation of VirTOs has altered the fundamental relationship between an RTO provider and user by even further decoupling the financing agreement from the retailer.²⁹ This disruption has eliminated the defining characteristic of RTO agreements: the ability to terminate the lease at any time without penalty.³⁰ This Article argues that VirTOs are distinct enough from traditional RTO

statutes and are extremely predatory. Martin & Pizzonia, *supra* note 16, at 1444, 1447 (stating that the RTO industry is “not bound by the large suite of laws applicable to consumer credit transactions” and concluding that “the rent-to-own industry . . . demonstrates the harm that all shadow credit products can impart on the consumer credit regulatory system”). They argue that RTO agreements should be regulated as credit. *See id.* at 1487–88 (stating that RTO transactions are plainly credit transactions but have been misclassified at the expense of the U.S. consumer credit system). Many others have explored RTO arrangements and their exploitative characteristics. *See, e.g.,* Eligio Pimentel, *Renting-to-Own: Exploitation or Market Efficiency*, 13 LAW & INEQ. 369, 370 (1995) (stating that consumer advocates argue that RTO agreements are regressive and exploitative of low-income consumers).

²⁴ *See* Anderson, *supra* note 23, at 146 (explaining that the decision between outright banning or regulating RTOs hinges on whether RTOs are purchases or leases); Hawkins, *supra* note 23, at 2117 (arguing for narrowly tailored regulation of RTOs); Martin & Pizzonia, *supra* note 16, at 1475, 1488 (arguing that misclassifying RTOs as leases rather than credit allows RTOs to sidestep consumer credit laws, which poses a risk to the entire consumer credit system). Hawkins and Anderson have argued that RTO agreements should be regulated, albeit to varying degrees. *See* Anderson, *supra* note 23, at 146 (explaining that the determination of whether to ban or heavily regulate RTOs, or whether to narrowly regulate RTOs turns on the nature of the agreement); Hawkins, *supra* note 23, at 2117 (stating that RTO regulation should be narrowly tailored). In contrast, Martin and Pizzonia have argued that RTOs should be treated as credit. *See* Martin & Pizzonia, *supra* note 16, at 1439 (arguing that RTO transactions are credit transactions).

²⁵ *See infra* notes 86–88 and accompanying text (describing the benefits of RTO agreements).

²⁶ *See infra* notes 90–126 and accompanying text (discussing the drawbacks of RTO agreements).

²⁷ *See infra* Part II (explaining how fintech has disrupted the RTO industry); *infra* Part IV (arguing that VirTOs should regulated be as credit).

²⁸ *See infra* Part III (discussing how fintech and the rise of the VirTO industry has not only introduced new problems to the RTO industry, but also exacerbated existing problems).

²⁹ *See infra* Part III.B (explaining the VirTO business model).

³⁰ *See infra* notes 214–235 and accompanying text (stating that the VirTO model corrupts the ability of consumers to terminate their agreement and return their rental).

agreements to be viewed as an entirely different financing arrangement.³¹ Accordingly, this Article also aims to provide regulators and courts with the analytical tools necessary to craft tailored regulations for the new VirTO industry.

Part I describes the traditional RTO business model, outlines how the industry grew in response to and against a backdrop of federal consumer protection statutes, and describes the traditional RTO consumer.³² It also outlines the “old problem” with traditional RTO agreements, including how these agreements evaded federal consumer protection statutes, and the costs and benefits of these agreements for subprime consumers.³³ Part II explores how the introduction of fintech has changed the industry by partnering third-party finance companies with decentralized, private retailers.³⁴ It analyzes how this has allowed the VirTO industry to expand into new and different markets.³⁵

Part III explores the opportunities and challenges of VirTOs. It outlines how the VirTO industry purports to allow consumers to access flexible financing options; yet, these agreements present new challenges, such as expanding into services and markets for products that it does not make sense to rent, and exacerbating existing challenges found in the traditional RTO market, such as targeting low-income and subprime consumers of color.³⁶

Finally, Part IV argues that VirTOs no longer retain the central characteristic of RTO agreements: the ability to terminate the lease at any point without penalty.³⁷ Accordingly, VirTOs should be subject to existing federal and state consumer protection statutes governing credit and to state usury limits.³⁸ Because courts have historically concluded traditional RTO agreements are not subject to consumer protection statutes governing credit sales, this Article also proposes a series of legislative and regulatory solutions to ensure that the most

³¹ See *infra* Part III.A (discussing the unique issues VirTOs create); *infra* Part IV (arguing that VirTOs are distinct from traditional RTOs and thus should be regulated differently).

³² See *infra* Part I (introducing the RTO industry and the traditional RTO business model).

³³ See *infra* notes 46–76 (detailing the creation of the RTO industry and how RTO products are defined under state statutes); *infra* notes 86–126 (explaining the costs and benefits of RTO agreements).

³⁴ See *infra* Part II (discussing how fintech has disrupted the RTO industry and gave rise to the VirTO).

³⁵ See *infra* notes 138–176 (exploring how fintech has allowed RTO companies to expand beyond brick-and-mortar stores).

³⁶ See *infra* Part III (discussing how the rise of VirTO agreements has brought new issues to the RTO industry as well as exacerbate existing issues).

³⁷ See *infra* Part IV (contending that unlike traditional RTOs, VirTOs cannot be terminated at any time without penalty and thus should be regulated as credit).

³⁸ See *infra* notes 378–389 and accompanying text (arguing that existing regulatory frameworks should be used to regulate VirTOs).

vulnerable consumers—low-income and subprime consumers—are protected from the predatory nature of VirTOs.³⁹

Although this Article focuses solely on VirTOs, its observations about fintech’s disruption of a fringe financing industry are transferable to other areas of the fringe economy, such as subprime car lending and other buy-now-pay-later products. The proposed policy solutions could provide models for ensuring that other niche fringe economy markets are better able to adapt to the introduction of fintech and that low-income and subprime consumers, who are often the most likely to use the fringe economy, are protected from the most extreme abuses.

I. THE OLD PROBLEM: TRADITIONAL RENT-TO-OWN AGREEMENTS

The traditional RTO industry has existed for decades and often flies under the radar, yet it is a multibillion-dollar industry with multiple large conglomerates.⁴⁰ For example, Upbound Group, Inc. (formerly known as Rent-A-Center), just one of the leading RTO providers, reported an annual revenue of more than four billion dollars in 2022.⁴¹ It is also not an industry that arose organically, but rather is a unique creature of state laws with specific statutory definitions.⁴² It is critical to understand the traditional RTO industry’s origins to better articulate how fintech has disrupted this industry. Section A outlines the creation of the RTO industry to explain how traditional RTO products are defined within state and federal consumer statutes.⁴³ Section B discusses who

³⁹ See *infra* Part IV (proposing regulatory solutions such as: regulating VirTOs as credit sales; banning VirTOs for nonsensical products; regulating point-of-sale retailers as credit service organizations; and utilizing existing state and federal regulatory frameworks).

⁴⁰ See *supra* notes 15–16 and accompanying text (stating that the RTO industry is a long-standing, multibillion-dollar industry).

⁴¹ See Upbound Group, Inc., Annual Report (Form 10-K), *supra* note 16, at 87 (reporting an annual revenue for 2022 of \$4,245,392,000). A little less than half of its revenue was associated with its traditional RTO sales. See *id.* (stating \$1,949,864 of Upbound’s total revenue—\$4,245,392,000—is attributable to its Rent-A-Center business). In 2019, there were around 9,200 stores in North America that offered RTO agreements. See ASS’N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 4 (stating that there are approximately 9,200 stores that offer RTOs to customers). Indeed, Upbound Group, Inc. reported that it, alone, had more than 2,424 brick-and-mortar locations in the United States and Mexico in 2022, not including its VirTO locations. See Upbound Group, Inc., Annual Report (Form 10-K), *supra*, at 7 (detailing the number of Upbound store locations excluding those under its Acima division). Similarly, Aaron’s reported that it had 1,276 stores in the United States and Canada in 2022. The Aaron’s Company, Inc., Annual Report (Form 10-K), at 6 (Mar. 1, 2023).

⁴² See *infra* Part I.A (discussing the creation of the RTO industry and its statutory definitions).

⁴³ See *infra* Part I.A (outlining the inception of the RTO industry and detailing how RTO products are defined under state and federal consumer statutes).

typically uses RTO agreements.⁴⁴ Section C explores the challenges and opportunities posed by traditional RTO agreements.⁴⁵

A. The Creation of the Rent-to-Own Industry

To fully grasp how RTO agreements operate, it is important to first understand the creation of the industry and its context within the fringe economy.⁴⁶ To do so, we need to go back to the 1960s and 1970s when Congress and state legislatures enacted consumer protection statutes like the Truth in Lending Act (TILA), state Retail Installment Sales Acts (RISAs), and state usury statutes to address abusive interest rates, hidden finance charges, and other predatory lending practices.⁴⁷ Heralded as providing real protections to consumers, these statutes also had the perverse consequence of giving rise to the RTO industry.⁴⁸ With the enactment of federal and state consumer protection statutes, courts across the country became more willing to critically analyze consumer agree-

⁴⁴ See *infra* Part I.B (describing the traditional RTO consumer).

⁴⁵ See *infra* Part I.C (investigating the pros and cons of traditional RTO agreements).

⁴⁶ “Fringe Banking” was originally coined by John P. Caskey to describe non-traditional financing products and providers. See JOHN P. CASKEY, *FRINGE BANKING: CHECK-CASHING OUTLETS, PAWNSHOPS, AND THE POOR*, at xii–xiii (1994) (describing the use of the term “‘fringe banks’ as a shorthand phrase covering both pawnshops and check-cashing outlets”); MELVIN DELGADO, *LATINO SMALL BUSINESSES AND THE AMERICAN DREAM* 21 (2011) (“Caskey coined the term ‘fringe banking’ to capture such enterprises as check-cashing outlets, pawnshops, and other establishments that cater to the urban poor in this country.”) (internal citation omitted). Caskey’s seminal work focused on pawnshops and check cashing outlets. See CASKEY, *supra*, at 3 (stating that the book explores the roles that pawnshops and check-cashing outlets play in the U.S. financial system). The term has since broadened to include payday lending, RTO providers, rent-a-bank schemes, and contract providers, among other types of lenders. See Jim Hawkins, *Regulating on the Fringe: Reexamining the Link Between Fringe Banking and Financial Distress*, 86 IND. L.J. 1361, 1362 n.1 (2011) (stating the fringe economy includes “includes pawnshops, check cashing outlets, rent-to-own stores, tax refund-anticipation lenders, the makers of car title pawns, cash leasing operations and other second-tier credit providers as well” (quoting Ronald H. Silverman, *Toward Curing Predatory Lending*, 122 BANKING L.J. 483, 486 (2005))).

⁴⁷ See James P. Nehf, *Secured Consumer Credit and the Fringe Banking Industry* (stating that the RTO industry was born from the rapid growth of the consumer credit market from 1960–1970 and flourished as a way to bypass newly enacted consumer credit laws, such as the TILA), in SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 29–31 (J.B. McDonnell & Matthew Bender eds., 2005), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010730 [<https://perma.cc/VH3Y-67VE>]. For example, TILA’s stated purpose, in fact, is “to assure meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.” 15 U.S.C. § 1601(a).

⁴⁸ See Nehf, *supra* note 47, at 30–31 (stating that although the legislative developments of the 1960s and 1970s were lauded as benefitting consumers, they also made it harder for businesses to issue credit to high-risk individuals: leading to the creation of the RTO industry).

ments.⁴⁹ These courts were increasingly willing to use long-existing contract principles to invalidate such arrangements as unconscionable.⁵⁰

Because many financing products were increasingly subject to regulation and courts were more inclined to invalidate such predatory consumer agreements, industry leaders began to look to alternative financing products to avoid such regulations.⁵¹ “By 1960, businesses had opened in low-income neighborhoods offering short-term renewable leases, with no credit check, that promised immediate possession of reasonably good quality furniture and home appliances. If the consumer renewed the lease long enough, he or she would obtain ownership of those goods.”⁵² These agreements had characteristics designed to avoid the statutory definitions for credit and interest in federal and state consumer protection statutes.⁵³ Specifically, they were purportedly short-term renewable leases, not loans subject to the new consumer protection statutes, because they were terminable without penalty at any time.⁵⁴ Ironically, the RTO market was born, although statutory law had yet to formally recognize it.⁵⁵ That would soon change.⁵⁶

By the 1970s and 1980s, consumer advocates had taken notice of the industry and the proliferation of RTO agreements.⁵⁷ Many consumer advocates

⁴⁹ See *id.* at 29–30 (stating that “[d]uring the same period” that Congress and state legislatures enacted increased credit regulation, “[c]ourts began taking a more active role as guardians of consumer interests”).

⁵⁰ See *id.* at 30 (“[J]udges invalidated, as unconscionable, several commonly used pro-creditor contract provisions, such as cross-collateral clauses, provisions for a consumer’s waiver of defenses, and a consumer’s consent to judgment upon default.”).

⁵¹ See *id.* at 31 (explaining that the legislative developments of the 1960s and 1970s made it more likely that low-income individuals would be unable to access traditional credit and that RTO pioneers noticed this market opportunity and took advantage of it by creating non-debt transactions to bypass the consumer credit laws).

⁵² *Id.*

⁵³ See *id.* (“When read literally many statutes applied only to transactions in which a ‘debt’ was created and the consumer was obligated to pay for the full value of the goods. . . . The contract was thus styled not as a sale of goods on credit but as a weekly or monthly lease that ultimately would lead transfer of ownership if the customer continued leasing for a stated period . . .”).

⁵⁴ See *id.* at 28, 31–32 (stating that RTO agreements are structured as leases, not credit transactions, to avoid consumer credit regulation and that RTO agreements allow for the return of the goods at any time without fines).

⁵⁵ See *id.* at 30–31 (stating that although the legislative and judicial developments of the 1960s and 1970s “were hailed as benefiting consumers generally, one result was the increased likelihood that low-income consumers would be denied traditional credit” and “RTO entrepreneurs noticed [this] market opportunity” that led to the establishment of the RTO industry); *infra* note 61 and accompanying text (describing the enactment of the Rental-Purchase Agreement Acts).

⁵⁶ See *infra* notes 57–62 and accompanying text (detailing the history of the statutory recognition of the RTO industry).

⁵⁷ See Nehf, *supra* note 47, at 32 (“In the 1970s and 1980s, consumer representatives challenged the legality of RTO transactions by maintaining that the contract was covered by the federal Truth-in-

brought litigation challenging RTO agreements as credit or retail installment sales subject to federal and state consumer protection statutes governing credit and arguing that the growing RTO industry was inherently predatory.⁵⁸ Although many courts disagreed with these advocates, some courts showed a willingness to conclude that RTO agreements were subject to federal disclosure regulations and state usury statutes.⁵⁹

Given courts' varied interpretations of RTO agreements, the industry engaged in a massive campaign to pass legislation clarifying that RTO agreements were not subject to federal and state consumer protection laws.⁶⁰ Eventually, forty-seven of the fifty states passed RTO regulations, most often called Rental-Purchase Agreement Acts.⁶¹ These statutes explicitly excluded RTO

Lending Act (TILA), a state's retail installment sales act, or a state's version of the U.C.C. governing sales of goods.").

⁵⁸ See *id.* ("Judges were often presented with compelling facts in which uninformed consumers paid exorbitant prices and appeared to be victimized by unscrupulous dealers.").

⁵⁹ See, e.g., *id.* at 32–33 ("Some courts agreed and characterized RTO transactions as disguised sales by looking beyond the form to the substance of the transaction and construed these federal and state statutes apply. . . . Other courts, interpreting what they perceive to be the plain language of the relevant statutes, excluded RTO agreements from their coverage."); *Clark v. Rent-It Corp.*, 685 F.2d 245, 248 (8th Cir. 1982) (holding that the consumer was entitled to present evidence that the RTO agreement was in fact a disguised credit sale subject to TILA); *Gulf Homes, Inc. v. Gonzales*, 676 P.2d 635, 637, 639 (Ariz. Ct. App. 1983) (same), *vacated in part on other grounds*, 676 P.2d 628 (Ariz. 1984). *But see In re Mahoney*, 153 B.R. 174, 179 (Bankr. E.D. Mich. 1992) (holding that the RTO agreement was a lease, not a credit sale).

⁶⁰ See Nehf, *supra* note 47, at 33 ("The uncertainty created by conflicting case law led the RTO industry to undertake a major state and federal campaign to enact laws insulating the RTO transaction from legal attack."). There are competing narratives regarding the driving forces behind the rise of RTO and other fringe financial products. Some scholars assert that the rise of consumer protection regulations, although hailed as benefitting consumers, limited the availability of consumer financial products for individuals perceived as a credit risk, thus causing them to turn to fringe products. See *supra* note 48 and accompanying text. Such scholars claim that RTOs allow consumers to return goods without incurring a default judgment for unpaid debt, that the consumer does not have to pay for the upkeep or maintenance of the goods, and that consumers can return goods they no longer want, thus fulfilling a market need. See Nehf, *supra* note 47, at 33 (stating that RTO proponents argue that RTO agreements allow consumers to "use . . . a product without the responsibility for maintenance," avoid many of the individual hardships that come with enforcement of default judgments as RTOs are not credit, and allow consumers to "return goods that simply do not work as well as anticipated, or are no longer needed or wanted, a benefit not available to those who purchase similar items under traditional credit contracts"). Others claim that the industry emerged as a "response to a growing consumer need for acquiring the use of household products without incurring debt or jeopardizing the family's credit." ASS'N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 4.

⁶¹ See Susan Lorde Martin & Nancy White Huckins, *Consumer Advocates vs. the Rent-To-Own Industry: Reaching a Reasonable Accommodation*, 34 AM. BUS. L.J. 385, 396 (1997) (stating that by 1996, forty-three states had RTO regulations, Michigan being the first to adopt such regulation in 1984); Martin & Pizzonia, *supra* note 16, at 1466 ("In the 1980s, the rent-to-own industry convinced more than forty-five state legislatures 'to adopt its preferred safe-harbor legislation-treating week-to-week contracts as renewable leases, not as purchases over time-thus exempting the business from state small-loan usury ceilings, retail installment sales acts, and other credit sale laws.'" (quoting Ed

agreements from statutory definitions defining credit and expressly exempted them from other consumer protection statutes.⁶²

These legislative efforts further insulated RTO agreements from federal and state regulations governing credit.⁶³ In the late 1970s, the Federal Reserve Board (FRB) joined these efforts, endorsing the RTO industry's conclusion that RTO agreements were not credit subject to federal and state consumer protection statutes governing credit.⁶⁴ Importantly, the FRB reasoned that leases

Mierzwinski, *The Poor Still Pay More: The Small-Loan Industry Preys on Low-Income Americans Who Often Have No Choice but to Accept Their Outrageous Payment Terms. But This Big Business May Be Facing Trouble*, TRIAL, Sept. 2008, at 40, 42)); Nehf, *supra* note 47, at 33 (stating that by 2000, forty-five states had passed RTO regulations that excluded RTO agreements from "state consumer credit laws, Article 9 of the U.C.C., and other consumer protection laws"); ASS'N OF PROGRESSIVE RENTAL ORGS., THE RENT-TO-OWN INDUSTRY: LEGISLATIVE INFORMATION 1, 13 (2021), <https://www.rtohq.org/wp-content/uploads/2019/07/Legislative-Information-Flipbook-2021.pdf> [<https://perma.cc/TES8-AS33>] (stating that as of 2021, forty-seven states have RTO laws); *see, e.g.*, Rental-Purchase Agreement Act, No. 424, 1984 Mich. Pub. Acts 1493 (codified at MICH. COMP. LAWS §§ 445.951–.970) (outlining the requirements of a "rental-purchase agreement" and indicating the statute was passed in 1984). In fact, every state except New Jersey, North Carolina, and Wisconsin has a Rental Purchase Agreement Act or statute, with most of these statutes being enacted in the 1980s. ASS'N OF PROGRESSIVE RENTAL ORGS., *supra*. Although Minnesota has a Rental-Purchase Agreement Act, in 1994, in *Miller v. Colortyme*, the Minnesota Supreme Court held that RTO agreements governed by the Rental-Purchase Agreement Act were also "credit sales" governed by the Consumer Credit Sales Act, effectively eliminating the industry in Minnesota. *See* MINN. STAT. ANN. §§ 325F.84–.97 (West 2023) (defining "rental-purchase agreement"); *Miller v. Colortyme, Inc.*, 518 N.W.2d 544, 548 (Minn. 1994) (stating that RTOs are credit sales that fall under the Consumer Credit Sales Act). Indeed, most companies no longer offer RTOs in Minnesota. *See Nominations of Michael N. Nemelka, Christian N. Weiler, and Alina I. Marshall: Hearing Before the S. Comm. on Fin.*, 116th Cong. 79 (2020) (Ex. C, statement of Christian N. Weiler), <https://www.finance.senate.gov/imo/media/doc/46156.pdf> [<https://perma.cc/9VQW-9WJD>] ("According to the Association of Progressive Rental Organizations, the lack of legislation and adverse judicial rulings have severely restricted the growth of rent-to-own businesses, and in the case of Minnesota, done away with the industry altogether."). Similarly, based on the unique language in Wisconsin and New Jersey's consumer protection statutes, Wisconsin and New Jersey courts have declared that RTO agreements are in fact credit sales subject to TILA and other state consumer protection statutes. *See, e.g.*, *Green v. Continental Rentals*, 678 A.2d 759, 766 (N.J. Super. Ct. Law Div. 1994) (stating that RTO agreements are not leases and that TILA, RISA, and the UCC apply); *Burney v. Thorn Ams., Inc.*, 944 F. Supp. 762, 776 (E.D. Wis. 1996) (holding that RTO agreements are "consumer credit transactions under the Wisconsin Consumer Act"); *Nominations of Michael N. Nemelka, Christian N. Weiler, and Alina I. Marshall: Hearing Before the S. Comm. on Fin.*, *supra*, at 79 (statement of Christian N. Weiler) ("Minnesota does have rent-to-own legislation, but the Minnesota Supreme Court has ruled that rent-to-own agreements are also a credit sale, and thus limited to an 8 percent annual rate of interest. Similar rulings have occurred in New Jersey, North Carolina and Wisconsin.").

⁶² *See* Nehf, *supra* note 47, at 39 (explaining that state RTO statutes generally do not consider RTO agreements to be credit sales as a means to exempt them from state usury limits and that many RTO statutes also expressly insulate RTOs from other state consumer credit regulations and Article 9); Martin & Pizzonia, *supra* note 16, at 1439 (arguing that the purpose of "shadow credit," such as RTO agreements, is to avoid consumer credit regulation by calling this type of credit something else).

⁶³ *See supra* note 62 and accompanying text.

⁶⁴ *See* James P. Nehf, *Effective Regulation of Rent-to-Own Contracts*, 52 OHIO ST. L.J. 751, 762 (1991) (explaining that the Federal Reserve Board, in 19s74, stated that "because the lessee's option

terminable without penalty at any time were not credit sales.⁶⁵ In other words, if the consumer could return the product to the lessor and both parties could walk away from the transaction, then the transaction was not a credit sale.⁶⁶ Similarly, in 1987, Article 9 of the Uniform Commercial Code (UCC) was revised to mirror the FRB's rule, further solidifying this interpretation.⁶⁷ Under the UCC, RTO agreements do not create a security interest in the purchased good, as long as the RTO is terminable by the consumer.⁶⁸

These RTO industry-backed statutory clarifications, in combination with changes in the banking industry and larger macroeconomic forces at the time, allowed the RTO industry to flourish in the following decades.⁶⁹ Changes in

to terminate the rental agreement negates any obligation to pay the full market value of the property, the lessee does not 'contract to pay' for the goods and the transaction falls outside the definition of 'credit sale' even if ownership transfers for no consideration at the end of the lease").

⁶⁵ See *id.* (same).

⁶⁶ See *supra* note 65 and accompanying text.

⁶⁷ See Nehf, *supra* note 47, at 35, 37–38 (explaining that the 1987 revisions to Article 9 “tipped the scales in favor of the RTO industry” by stating a security interest is not created “if the lessee is not obligated for the full term”). Nehf notes that the Official Comments to the UCC were also designed to address the court’s holding in *In re Royer’s Bakery, Inc.*, that “characterized a short term ‘no obligation’ equipment lease as a security interest.” See *id.* at 38 (discussing the UCC Official Comments’ disapproval of the holding in *In re Royer’s Bakery, Inc.*; *In re Royer’s Bakery, Inc.*, 1 UCC Rep. Serv. (West) 342, 345–46 (Bankr. E.D. Pa. 1963) (holding that an equipment lease was intended as security). The revisions to the UCC were designed to refocus the analysis from the intention of the parties to the economics of the transaction. See Nehf, *supra* note 47, at 38 (“Revised section 9-109(a)(1) specifies that Article 9 applies to any transaction, ‘regardless of its form, that creates a security interest in personal property.’ This scope provision now eliminates any reference to the parties’ ‘intent,’ however, reinforcing the idea that while objective factors in each case must be considered, the subjective intentions of the consumer and RTO dealer are not controlling.”).

⁶⁸ See Nehf, *supra* note 47, at 37–38 (stating that revised Section 1-201(37) of the UCC, now Section 1-203, states that “a lease does not create a security interest if the lessee is not obligated for the full term”); David L. Ramp, *Renting to Own in the United States*, 24 CLEARINGHOUSE REV. 797, 806 n.12 (1990) (“The ability of a customer to terminate a lease is a key factor in the new definition of security interest in the Uniform Commercial Code.”). Ramp notes that the termination clause may have another benefit for RTO providers in that it allows them to disclaim tax liability when it is most favorable for them to call the agreement a sale versus a lease. See Ramp, *supra*, at 797 (“It has been suggested by RTO dealers’ attorneys that dealers can use the termination clause both ways, contending on the one hand that RTO transactions are sales if that limits tax liability, and arguing on the other hand that the transactions are leases if the opposite position is more beneficial for tax purposes.”).

⁶⁹ See *supra* notes 57–68 and accompanying text (detailing the passing of RTO favorable legislation in the 1970s and 1980s); CASKEY, *supra* note 46, at 3, 7 (stating that fringe banking experienced a boom in the 1980s due to “[c]hanges in banking regulations and bank policies, which reflected changes in ideology, technology, and the inflation of the 1970s” and socioeconomic changes including more Americans living paycheck to paycheck). As noted earlier, the RTO industry reflects the changes in the larger “fringe” economy in the 1980s. CASKEY, *supra* note 46, at 3, 7; *supra* note 46 and accompanying text (explaining that RTOs are part of the fringe economy). Like RTOs, other fringe financing outlets, such as pawnshops and check-cashing organizations, were consolidated from small, local businesses to large national companies making the industry more sophisticated, while expanding its footprint. See CASKEY, *supra* note 46, at 2 (“In addition to its booming growth in the [1980s], the

federal banking regulations in the 1970s resulted in traditional deposit banks becoming more focused on attracting large deposits, eliminated low-profit services, such as low-cost, small-balance deposit accounts, and closed bank branches in low-income and minority communities.⁷⁰ These policy changes did not occur in isolation, but rather against the backdrop of a larger, macroeconomic trend of economic stratification.⁷¹ Indeed, the 1970s and 1980s were marked by an increase in the wealth gap, the decline of the financial outlook in low-income families, and a rise in inflation.⁷² These larger macroeconomic factors contributed to the RTO industry's proliferation as consumers turned away from increasingly costly mainstream deposit accounts and as mainstream deposit accounts became less available.⁷³

Although the RTO industry is largely considered to be part of the "fringe economy," it is no longer an industry on the fringe of mainstream banking.⁷⁴ The RTO industry is now a significant part of the economy serving low-income, subprime consumers.⁷⁵ Today it is a multibillion-dollar industry with over nine thousand stores in every state, Mexico, and Canada.⁷⁶

fringe banking industry has become increasingly sophisticated as large national chains have replaced independently owned and operated stores.").

⁷⁰ See CASKEY, *supra* note 46, at 8 (stating that as a result of the government removing caps on bank deposit rates, competitive pressures on banks caused them to seek larger deposits, close "unprofitable . . . branches, many of which were in low-income areas," and abandon lines of business that were a drag on the balance sheet, such as "small-balance deposit accounts").

⁷¹ See *id.* at 7 (stating that during the 1980s, there was an "increasing polarization in the economic well-being of American families" and that "[t]he incomes of millions of households at the lower end of the income distribution fell or stagnated").

⁷² See *id.* at 8 (stating that inflation at the end of the 1970s was "historically high"); *id.* at 106 (stating that during the 1980s there was "a deterioration in the economic situation of households in the lower end of the income distribution").

⁷³ See *id.* at 7 (explaining that the closure of bank branches and small-balance deposit accounts, the "polarization in the economic well-being of American families," and the "falling standards of living of many lower-income households" led to "the demand for fringe banking services").

⁷⁴ See Hawkins & Penner, *supra* note 7, at 1625 (arguing that "fringe banking" in general is no longer on the fringe).

⁷⁵ See Ramp, *supra* note 68 ("RTO companies deal primarily with low-income customers . . ."); Nehf, *supra* note 64, at 751 (explaining that RTO businesses claim a substantial share of the consumer durables market); *supra* note 16 and accompanying text (stating the RTO industry is a multibillion-dollar industry).

⁷⁶ See *supra* note 16 and accompanying text (explaining that the RTO industry is a multibillion-dollar industry). For comparison, in 1991, the industry was worth \$2.5 billion compared to the \$8.5 billion-dollar industry it is now. See Nehf, *supra* note 64, at 751 (describing the size of the RTO industry in 1991); ASS'N OF PROGRESSIVE RENTAL ORGS., *supra* note 16 (describing the size of the RTO industry in 2019).

B. The Traditional RTO Consumer

Most RTO consumers are low-income, and are more likely to be Black, younger, and less educated.⁷⁷ According to the Association of Progressive Rental Organizations (APRO), nearly three-fourths of all RTO consumers made less than \$36,000 per year.⁷⁸ Traditionally, RTO consumers have had some access to traditional credit and banking, such as savings accounts, but less so than the general population.⁷⁹

Although scholars may disagree on how to characterize RTO products, most consumers are renting common household products, albeit often from a name-brand provider.⁸⁰ The most recent data from the APRO demonstrates

⁷⁷ See Anderson, *supra* note 23, at 156 (concluding that the “customer base is made up of the ‘working poor’” (quoting Michael H. Anderson & Sanjiv Jaggia, *Rent-to-Own Agreements: Customer Characteristics and Contract Outcomes*, 61 J. ECON. & BUS. 51, 61 (2009))); Hawkins, *supra* note 23, at 2059 (stating that a survey conducted by the Federal Trade Commission (FTC) between December 1998 and February 1999 demonstrated that “RTO customers were significantly more likely to be African American, younger, and less educated; have a lower income; have children in the household; rent their residence; live in the South; and live in nonsuburban areas” (quoting James M. Lacko, Signe-Mary McKernan & Manoj Hastak, *Customer Experience with Rent-to-Own Transactions*, 21 J. PUB. POL’Y & MKTG. 126, 130 (2002))); David Ray Papke, *Perpetuating Poverty: Exploitative Businesses, the Urban Poor, and the Failure of Reform*, 16 ST. MARY’S L. REV. ON RACE & SOC. JUST. 223, 224 (2014) (noting that RTO stores, along with payday lenders and title pawnshops, target the low-income, urban poor); ASS’N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 8–9 (stating that 58% of individuals who use RTOs are 44 years old or younger; 15% are African American; 61% have an education of high school or less; and, 72% have an income of \$35,999 or less).

⁷⁸ See ASS’N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 9 (stating that 72% of individuals who use RTOs have an income of \$35,999 or less). According to the APRO, 72% of individuals using RTOs made less than \$35,999 per year. *Id.* Of the remainder of RTO users, 24% made between \$36,000 and \$49,999, and only 3% made more than \$50,000. *Id.*

⁷⁹ See Hawkins, *supra* note 23, at 2059–60 (“Rent-to-own customers also have more access to credit than one might assume: 44 percent of customers had credit cards, compared to 68 percent in the general population; 64 percent had a checking account, compared to 87 percent in the general population; and 49 percent had a savings account, compared to 56 percent in the general population.”).

⁸⁰ See Anderson, *supra* note 23, at 150 (stating that “consumers are using RTO for essential household items”); Hawkins, *supra* note 23, at 2063 (describing how customers rent goods including “name-brand merchandise” that “necessarily cost more than lower-quality, off-brand goods”). Jim Hawkins has argued that the traditional RTO consumer typically rents products that “enhance the quality of their lives” rather than “low quality merchandise [or] necessities.” Hawkins, *supra* note 23, at 2058. In contrast, other scholars have argued that RTO consumers are typically renting essential, rather than luxury, items. See, e.g., Anderson, *supra* note 23, at 150 (stating that “consumers are using RTO for essential household items”); Creola Johnson, *Welfare Reform and Asset Accumulation: First We Need a Bed and a Car*, 2000 WIS. L. REV. 1221, 1250 (“Contrary to the myth, the majority of rent-to-own customers do not pursue ownership of true luxury items, such as big-screen televisions or stereo entertainment systems.”). Yet, the crux of the scholarly disagreement appears to be whether a name brand household product is a luxury item because it is a name brand or whether it still is an essential product because it is a common household product. See Hawkins, *supra* note 23, at 2063 (“[E]ven goods that are considered necessities serve to enhance the quality of rent-to-own consumers’ lives because [rent-to-own] firms provide top-quality, name-brand merchandise.”); Johnson, *supra*, at

that consumers are largely renting essential items, such as furniture, appliances, and computers.⁸¹ Additionally, a survey conducted by the Federal Trade Commission in 2000 demonstrates that consumers are typically using RTO agreements to ultimately purchase the products they are renting.⁸² The RTO industry maintains that consumers only keep a fraction of the products they rent on RTO agreements.⁸³ Some consumers may be using RTO agreements to “rent” products during temporary and uncertain times; there is also, however, a pure rental industry that likely attracts more true renters.⁸⁴ More likely, the essential nature of the majority of the products rented, coupled with evidence that consumers keep the products through the life of the rental agreement, demonstrates that many consumers enter traditional RTO agreements with the ultimate intent to purchase the products they are renting.⁸⁵

1250 (“In analyzing whether IDAs should serve as a mechanism for acquiring ownership of household durables, one must distinguish between luxuries and necessities.”).

⁸¹ See ASS’N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 16 (stating that 36.7% of rentals are furniture, 24.9% are electronic items, 18.6% are appliances, and 10.7% are computers). Electronics, jewelry, and other rentals only comprised about 33% of rentals, whereas computers, appliances and furniture comprised the majority. See *id.* (stating that only 0.6% of rentals are for jewelry items).

⁸² See FED. TRADE COMM’N, BUREAU OF ECON., STAFF REPORT: SURVEY OF RENT-TO-OWN CUSTOMERS 105 (2000), <https://www.ftc.gov/sites/default/files/documents/reports/survey-rent-to-own-customers/renttoownr.pdf> [<https://perma.cc/695J-Q9W4>] (stating “most rent-to-own customers ultimately purchase the rented merchandise”). Michael Anderson’s research indicates that RTO consumers are roughly divided between true renters and true purchasers. See Anderson, *supra* note 23, at 147 (stating that “the merchandise underlying the agreement was returned 51.6 percent of the time and the remaining 48.4 percent of the time it was charged off (i.e., the item did not re-enter inventory”).

⁸³ See Ramp, *supra* note 68, at 798 (stating that RTO industry representatives claim that customers ultimately purchase the goods 20% of the time); Upbound Group, Inc., Annual Report (Form 10-K), *supra* note 16, at 7 (citing an ownership rate of 35% of leased products from its brick-and-mortar segment in 2023). In the 1990s, RTO companies argued that only 20% of products were retained by consumers. See Ramp, *supra* note 68, at 798 (“[R]epresentatives of the industry have repeatedly cited a 20-percent ‘keep rate’ as evidence that the majority of RTO customers are merely renting possession of household goods for a short time.”). Scholars have argued, however, that this is a deceptive figure because it does not account for those consumers who rent for shorter terms, pay off early or whose agreements are terminated involuntarily. *Id.* (stating that the RTO industry’s “keep rate formula” is misleading because it “completely ignores a significant number of RTO transactions”).

⁸⁴ See Hawkins, *supra* note 23, at 2095 (stating that “consumers choose rent-to-own because they are aware of risks of future losses of income: ‘Households are more likely to rent-to-own when they face uncertain or unstable levels of disposable income’” (quoting Brian J. Zikmund-Fisher & Andrew M. Parker, *Demand for Rent-to-Own Contracts: A Behavioral Economic Explanation*, 38 J. ECON. BEHAV. & ORG. 199, 214 (1999))); Workplace Talk: Redefining Furniture Rental with CORT, CORT (Aug. 7, 2023), <https://blog.cort.com/workplace/redefining-furniture-rental-with-cort/> [<https://perma.cc/BBN6-NY9S>] (stating that CORT Furniture Rental offers “an actual rent-to-rent model” while other companies offer “rent-to-own”).

⁸⁵ See *supra* note 81 and accompanying text (stating that consumers generally use RTO agreements to rent essentials); *supra* note 82 and accompanying text (stating that RTO consumers typically end up purchasing the items they are renting).

C. The Opportunities and Challenges of Traditional RTO Agreements

Traditional RTO agreements may provide individuals with additional financial options, yet these options come at a significant cost to low-income, subprime consumers.⁸⁶ RTO proponents routinely cite three arguments to justify such products: (1) some consumers want access to short-term rentals without having to invest in a full product; (2) some may want to test the product before purchasing it; and, (3) some consumers do not have the ability to access traditional credit markets and thus would not be able to purchase necessary products without RTO agreements.⁸⁷ Industry proponents also argue that RTO agreements democratize access to credit, allowing consumers who would otherwise not be able to access essential and desired products to do so.⁸⁸

These benefits, however, come with significant costs to consumers,⁸⁹ including: (1) the high cost of such credit;⁹⁰ (2) the detrimental effect on consumer credit without the opportunity to improve credit;⁹¹ and, (3) the lack of regulation in the industry.⁹²

First, RTO agreements are an incredibly expensive form of credit.⁹³ As noted above, although industry proponents assert that many consumers use RTO agreements for short-term rentals, the majority use them to ultimately purchase the products they are renting.⁹⁴ For those consumers intending to purchase their rental, most consumers will pay several times the cash value of the product or an effective interest rate that can be higher than two-hundred

⁸⁶ See *infra* notes 90–126 and accompanying text (detailing the drawbacks of RTO agreements).

⁸⁷ See ASS'N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 28–29 (stating that RTO agreements fulfill immediate and short-term needs, allow consumers to avoid investing in uncertain purchases, and provide long-term ownership options to consumers who are unable to obtain credit or purchase the item outright). Michael Anderson presents a framework in which these buyers are divided into “renters” or consumers in “situations perceived to be unpredictable or temporary,” “tentative buyers” or consumers unable to or uncertain about whether they can meet the obligations of a traditional installment agreement, and “denied buyers” or those consumers who would purchase the product outright but are unable to access traditional credit. See Anderson, *supra* note 23, at 145 (defining “renters,” “tentative buyers,” and “denied buyers”).

⁸⁸ See ASS'N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 8 (stating that RTO agreements are available to customers who have immediate needs but do not have access to credit).

⁸⁹ See *infra* notes 90–126 and accompanying text (detailing the disadvantages of RTO agreements).

⁹⁰ See *infra* notes 93–102 and accompanying text (explaining that RTOs are expensive).

⁹¹ See *infra* notes 103–116 and accompanying text (describing the consequences of RTOs on consumer credit).

⁹² See *infra* notes 117–126 and accompanying text (stating that the RTO industry lacks regulation).

⁹³ See *infra* notes 94–102 and accompanying text (explaining why RTO agreements are costly).

⁹⁴ See *supra* notes 82–83 and accompanying text (explaining that although an FTC survey found that consumers typically purchase the products they are renting, the RTO industry asserts that the opposite is true).

percent APR.⁹⁵ They also pay significant hidden costs, including reinstatement and late fees.⁹⁶

State usury limits provide no constraint on RTO agreements.⁹⁷ Although most states have a usury limit, or a maximum interest rate that lenders may charge for consumer credit,⁹⁸ RTO agreements are not subject to this limit because they are not considered credit.⁹⁹ As such, RTO agreements often cost consumers significantly more than they would have paid for the product in cash.¹⁰⁰ The fact that the agreements are technically rentals means consumers are also not gaining equity in the products they are purchasing despite paying significantly more for the product.¹⁰¹ If consumers return the good or default on a rental payment and have the product repossessed, they are not entitled to use any equity they have built in the product to pay any arrears.¹⁰²

Second, traditional RTO agreements exacerbate low-income and subprime consumers' poor credit scores.¹⁰³ Traditional RTO companies often market to low-income customers by offering "no credit check," and "no obligation" RTO agreements.¹⁰⁴ Industry representatives even claim that RTO agreements can help consumers build credit.¹⁰⁵ Yet, although many RTO com-

⁹⁵ See Hawkins, *supra* note 23, at 2076 (stating that RTO consumers often pay "more than double the purchase price" and that the implied APR is often greater than 200%).

⁹⁶ See Nehf, *supra* note 64, at 824 ("RTO contracts often authorize the dealer to assess miscellaneous charges that can significantly increase the cost to the consumer. These include fees for contract processing, late payments, reinstatement of the contract after default, home collection of payments, delivery of the goods, termination of the contract, security deposits, and personal property insurance.").

⁹⁷ See *infra* note 99 and accompanying text (stating that state usury limits are inapplicable to RTO agreements because they are not considered credit).

⁹⁸ See *50-State Survey of Consumer Finance Laws*, CONF. OF ST. BANK SUPERVISORS (Nov. 19, 2020), <https://www.csbs.org/50-state-survey-consumer-finance-laws> [<https://perma.cc/22ZV-8BLT>] (providing an interactive map demonstrating that most states have usury limits). Usury limits vary widely from state to state, financial instrument to financial instrument, and amount to amount. Most are somewhere between 7% and 50%. See, e.g., MINN. STAT. ANN. § 334.011 (West 2023) (limiting interest for a loan of up to \$10,000 to a maximum of 16% per year).

⁹⁹ See Martin & Pizzonia, *supra* note 16, at 1458 ("If rent-to-own transactions are not credit, they need not comply with usury laws and can charge whatever they want.").

¹⁰⁰ See *supra* note 95 and accompanying text.

¹⁰¹ See Hawkins, *supra* note 23, at 2057 ("Customers do not obtain any ownership rights in rented goods until they complete the contract.").

¹⁰² See *id.* at 2081 (stating that "consumers lose all equity they have invested in the rented asset if the agreement is terminated and the firm recovers the asset").

¹⁰³ See *infra* notes 104–116 and accompanying text (discussing the affects RTO agreements can have on customers' credit scores).

¹⁰⁴ See Ramp, *supra* note 68, at 797 (stating that RTO dealers focus their advertising on low-income consumers by offering terms such as "no credit check" and "no obligation to keep renting").

¹⁰⁵ See ASS'N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 27 (stating that "with the new credit scoring system developed by Credco, many consumers choose rent-to-own to begin a payment plan that demonstrates a payment history, thus elevating those consumers into—or a return to—credit-worthy status").

panies utilize credit checks to assess credit worthiness, they frequently fail to report credit payments in a manner that help consumers build credit.¹⁰⁶ As a result, traditional RTO agreements may in fact exacerbate low credit scores by routinely running credit checks, which can further reduce consumer credit scores.¹⁰⁷ At the same time, because they generally do not report on-time payments they do not help build consumer credit scores.¹⁰⁸

Indeed, the consequences for failing to make an on-time payment may be even more consequential than simply receiving a negative credit rating.¹⁰⁹ Traditional RTO companies often exercise their right to repossess the product if a consumer fails to make a payment.¹¹⁰ Often RTO companies' repossession efforts are abusive and predatory.¹¹¹ And, historically, some traditional RTO companies have used consumers' failure to return a product after missing a rental payment as grounds to make criminal reports for stolen goods.¹¹² Nearly

¹⁰⁶ See Martin & Pizzonia, *supra* note 16, at 1457 n.117 (stating that RTO companies "use the credit reporting system to check on customer's creditworthiness"); N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 10, at 16 ("The misstatements about the potential impact of LTO agreements on a consumer's credit history are particularly pernicious because different . . . companies handle credit reporting in entirely different ways: [s]ome report to one or more of the big three credit reporting bureaus[.] . . . [s]ome do not report to credit bureaus at all but do send delinquent accounts to third parties for collection, which results in reports that can damage consumer credit but not improve it.").

¹⁰⁷ See *Credit Checks: What Are Credit Inquiries and How Do They Affect Your FICO Score?*, MYFICO, <https://www.myfico.com/credit-education/credit-reports/credit-checks-and-inquiries> [<https://perma.cc/AA4H-29NH>] (stating that one credit inquiry generally will reduce an individual's credit score by five points, but that inquiries will have a larger impact on individuals with few accounts or a brief credit history); *Lowe's Lease to Own Program*, *supra* note 20 ("We do check credit reports . . .").

¹⁰⁸ See *Rent-to-Own Won't Help Your Credit Score*, CREDITINFOCENTER, <https://www.creditinfocenter.com/rent-to-own-wont-help-your-credit-score/> [<https://perma.cc/H43S-EYU9>] (stating that timely payments will not help build credit because most RTO companies do not report to credit bureaus). Some RTO companies do report customers' credit payments; for example, Acima reports to Experian. N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 10, at 16. Even so, this is only valuable to Acima customers if "the consumer's creditors pull—and exclusively rely on—the Experian report," but "[t]here is no guarantee that they will." *Id.*

¹⁰⁹ See *infra* notes 110–115 and accompanying text (describing the potential consequences for failing to make an RTO payment on-time).

¹¹⁰ See, e.g., U.C.C. § 2A-525 (AM. L. INST. & UNIF. L. COMM'N 2002) ("After a default by the lessee under the lease contract . . . the lessor has the right to take possession of the goods."); *In re Burns*, 503 B.R. 666, 673 (Bankr. S.D. Miss. 2013) (discussing repossession a bedroom set and refrigerator by one RTO firm).

¹¹¹ See Johnson, *supra* note 80, at 1256 (stating a common consumer complaint about RTOs is that the RTO companies employ abusive repossession tactics).

¹¹² See Creola Johnson, *Creditors' Use of Consumer Debt Criminalization Practices and Their Financial Abuse of Women*, 34 COLUM. J. GENDER & L. 5, 5 n.1 (2016) [hereinafter Johnson, *Creditors' Use of Debt Criminalization Practices*] (stating that a woman was arrested after an RTO company—that claims it only files criminal reports when customers steal products—filed a criminal complaint against her because she missed RTO payments on her mattress and television). Creola Johnson has produced influential works outlining the criminalization of RTO debt. See, e.g., *id.* at 7–8 (dis-

every state has a criminal theft law criminalizing “fraudulent leasing or failing to return rental property.”¹¹³ Consumers routinely report fears of RTO companies filing criminal charges rather than civil debt collection lawsuits to collect unreturned merchandise or unpaid rental payments.¹¹⁴ There are countless examples of consumers paying companies to avoid criminal charges.¹¹⁵ The consequences of missing a payment or failing to return a rental can be significant for consumers.¹¹⁶

Finally, the lack of consumer protection statutes governing RTO agreements has provided consumers with little recourse to challenge the industry’s excesses.¹¹⁷ As outlined above, state RTO legislation, largely sponsored by the industry, was designed to avoid federal and state consumer protection statutes regulating credit.¹¹⁸ As a result, state RTO statutes explicitly exclude RTO agreements from the definitions of credit under most state and federal consumer protection statutes.¹¹⁹ Because RTOs are not subject to federal disclosure laws, consumers are unaware of the true cost of their credit and are not able to compare it to other forms of credit.¹²⁰ RTO agreements also do not constitute “credit” under the Equal Credit Opportunity Act (ECOA); thus, there are few federal statutes preventing RTO companies from discriminating against protected classes.¹²¹ Additionally, because RTO agreements are not credit, RTO

curring the “consumer debt criminalization tactics” used by RTO dealers and payday lenders, especially against women); Creola Johnson, *Prosecuting Creditors and Protecting Consumers: Cracking Down on Creditors That Extort via Debt Criminalization Practices*, 80 LAW & CONTEMP. PROBS. 211, 212 (2017) (describing the “pervasive problem of companies and lenders resorting to practices that criminalize consumers who default on payments of civil debts”).

¹¹³ Johnson, *Creditors’ Use of Debt Criminalization Practices*, *supra* note 112, at 11.

¹¹⁴ *See id.* at 5 (“My client . . . became fearful as I discussed with her the possibility of not paying a rent-to-own (‘RTO’) company from which she had obtained a living room set. She told me that we had to pay the company because, as she said, ‘I don’t want them to put me in jail.’”).

¹¹⁵ *See id.* at 11–12 (“After two months of timely payments on her purchase rental agreement . . . Ms. Hall was laid off from her job and could no longer make the weekly payments on her computer. . . . Terrified of being re-arrested, convicted, and serving a long prison sentence, she found a way to pay the \$2,136 that [the RTO company] claimed she owed.”).

¹¹⁶ *See supra* notes 110–115 and accompanying text (stating that RTO dealers can repossess goods if the consumer fails to make a payment, or even press criminal charges).

¹¹⁷ *See infra* notes 118–126 (explaining that RTO agreements’ lack of consumer protection regulation leaves consumers without recourse).

¹¹⁸ *See supra* notes 60–68 and accompanying text (discussing the Rental-Purchase Agreement Acts and revisions to Article 9 of the UCC).

¹¹⁹ *See supra* note 19 and accompanying text.

¹²⁰ *See* Martin & Pizzonia, *supra* note 16, at 1442, 1467 (stating that the RTO industry is “deeply opposed to compliance with TILA, the law that requires lenders to state the APR on a loan so that customers can compare the cost of various forms of credit” and that RTO transactions, because of the Rental-Purchase Agreement Acts, are not subject to TILA).

¹²¹ Equal Credit Opportunity Act, Pub. L. No. 90-321, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. §§ 1691–1691f); *see* Dorton v. Kmart Corp., 229 F. Supp. 3d 612, 612 (E.D. Mich. 2017) (holding that the RTO agreement did not constitute credit, and therefore, was not subject to ECOA).

consumers do not have access to the protections available to credit card users, such as protections from identity theft, defective products, and other consumer fraud concerns.¹²²

Although state RTO statutes do have some regulations associated with them, they are generally limited to specific disclosures regarding the number of payments, the rental period, and the rental amount.¹²³ Most state RTO statutes allow consumers to bring a cause of action against an RTO company, yet available remedies are often circumscribed and have fewer teeth than other consumer protection statutes.¹²⁴ Constraints on remedies include limiting statutory damages in class actions, placing procedural hurdles to bring a claim, and allowing dealers an opportunity to escape liability if the error was unintentional or if they refunded the consumer's money.¹²⁵ Like other consumer agree-

But see Harris v. Rent-Way, Inc., No. 04 C 6247, 2005 WL 8178817, at *2 (N.D. Ill. Feb. 3, 2005) (denying the RTO dealer's motion to dismiss the consumer's case alleging that the RTO transaction was not a true lease, but rather a credit sale under ECOA). The ECOA defines credit as "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor." 15 U.S.C. § 1691a(d).

¹²² See *supra* note 62 and accompanying text (stating RTOs are generally not considered credit under state statutes); Kevin Brasler, *Credit Cards Provide Strong Protections for Consumers*, CONSUMERS' CHECKBOOK, <https://www.checkbook.org/boston-area/credit-card-chargebacks-a-consumer-superweapon/> [<https://perma.cc/8TPK-ULPV>] (June 2020) (stating that credit card companies will assist consumers in contesting payments for defective products); Natasha Etzel, *4 Credit Card Companies That Offer Free Identity Protection*, THE ASCENT (July 26, 2022), <https://www.fool.com/the-ascent/credit-cards/articles/4-credit-card-companies-that-offer-free-identity-protection/> [<https://perma.cc/SJP2-NM5E>] (listing credit cards that offer free identity protection); *Consumer Assistance Topics: Credit Cards*, FDIC, <https://www.fdic.gov/resources/consumers/consumer-assistance-topics/credit-cards.html#topic3> [<https://perma.cc/T7JR-C3VK>] (Aug. 22, 2022) (enumerating the consumer protections afforded to credit cards including: loss limitations if the card is lost or stolen; corrections for billing errors; transparency of the cost of credit expressed in dollars and as a percent; and protection from abusive debt collectors); 15 U.S.C. § 1666 (containing the section of the Fair Credit Billing Act governing the correction of credit billing errors).

¹²³ See Nehf, *supra* note 47, at 40 ("Nearly all RTO statutes require contracts to contain certain disclosures, including the number and timing of payments necessary to acquire ownership, a statement declaring that the consumer will not own the property until all payments are made, a listing of fees (such as a contract reinstatement fee or liability damage waiver), and a statement that the property is new or used."); see, e.g., MICH. COMP. LAWS ANN. § 445.953 (West 2024) (detailing the requirements of rental-purchase agreements including: the terms that must be included in a written statement, the written statement must be "clear and coherent," and additional disclosures at the request of the lessor).

¹²⁴ See Nehf, *Secured Consumer Credit*, *supra* note 47, at 41 (stating that RTO statutes have consumer remedy provisions); PAULINE SMALE, CONG. RSCH. SERV., RS21467, CONSUMER RENTAL-PURCHASE (RENT-TO-OWN) AGREEMENTS 5 (2007), https://www.everycrsreport.com/files/20070418_RS21467_3ace23946387a5b5f56298e98553517e088e2ec2.pdf [<https://perma.cc/CLP5-CRZR>] ("Rent-to-own transactions are addressed by state law. . . . Consumer groups have worked to strengthen state laws, criticizing most of the laws for providing inadequate protection.").

¹²⁵ See Nehf, *supra* note 47, at 41 ("All RTO laws contain consumer remedy provisions. Some states authorize statutory damages and attorney's fees for violations, although statutory damages may be excluded in class actions. In Florida, RTO dealers are liable only if they were notified of the violation in writing and failed to correct it within thirty days. In some states, dealers may escape liability

ments, RTO agreements regularly include arbitration agreements preventing courts from evaluating consumer claims under these statutes.¹²⁶ As such, the existing regulations often lack the enforcement mechanisms necessary to protect consumers from the most egregious behavior of the industry.

II. NEW TECH: THE INTRODUCTION OF FINTECH TO THE OLD RTO MODEL

The introduction of fintech has disrupted the traditional RTO business model, flipping the industry on its head.¹²⁷ The following sections discuss how fintech has altered the traditional business model and created a new financial product, virtual RTO agreements (VirTOs).¹²⁸ Section A provides an introduction to fintech,¹²⁹ and Section B describes the interaction between fintech and the RTO business model.¹³⁰

A. What Is Fintech?

Everyone who has shopped online has encountered some version of fintech. In the last decade or two, fintech has exploded, disrupting the finance industry, and creating new and different financial products, all available online.¹³¹ Fintech, as used in this Article, is defined as the use of technological innovations to provide financial services.¹³² Fintech companies typically use a payment platform to partner with e-commerce and brick-and-mortar retail-

by showing that the error was unintentional and occurred despite reasonable procedures to assure compliance.”).

¹²⁶ See, e.g., *Farr v. Acima Credit, LLC*, No. 20-CV-8619, 2021 WL 2826709, at *2, *7 (N.D. Cal. July 7, 2021) (holding that because the plaintiff was only one of three consumers who opted out of an arbitration agreement out of more than 227,375 RTO agreements, she could not adequately represent a class), *reconsideration denied*, No. 20-CV-8619, 2021 WL 5161923 (N.D. Cal. Nov. 5, 2021).

¹²⁷ See *infra* Part II.B (discussing the impact fintech has had on the traditional RTO business).

¹²⁸ See *infra* notes 131–176 and accompanying text.

¹²⁹ See *infra* notes 131–137 and accompanying text (defining fintech and describing the fintech industry).

¹³⁰ See *infra* notes 138–176 and accompanying text (describing how fintech has affected the RTO industry).

¹³¹ See, e.g., Pamela Foohey, *Consumers’ Declining Power in the Fintech Auto Loan Market*, 15 BROOK. J. CORP. FIN. & COM. L. 5, 11, 20 (2020) (noting that fintech has disrupted consumer industries, including the car lending and consumer credit industries).

¹³² See *Fintech*, CFA INSTITUTE, <https://www.cfainstitute.org/en/rpc-overview/fintech> [<https://perma.cc/3DL6-3J78>] (“Fintech, or financial technology, refers to the technological innovation in the design and delivery of financial services and products.”). Most definitions of fintech emphasize that fintech companies have an internet-based platform that either replaces or supports traditional banking services. See, e.g., Pamela Foohey & Nathalie Martin, *Fintech’s Role in Exacerbating or Reducing the Wealth Gap*, 2021 U. ILL. L. REV. 459, 488 (“[T]he key aspect of fintech is a platform that replaces or enhances ‘traditional’ banking and credit services.”).

ers.¹³³ Fintech is often considered to be electronic banking, such as digital wallets like PayPal, Venmo, and Zelle, but it also includes buy-now-pay-later, earned wage access, and overdraft avoidance finance products, and now, RTO agreements.¹³⁴ One of fintech's biggest impacts is that it allows consumers to access banks and other financial products across state lines and from anywhere at any time.¹³⁵

The full impact of fintech's influence on the finance industry, including fringe finance industries, has yet to be fully understood. Industry experts tend to agree that fintech has made loan application and loan delivery simpler and more efficient through its use of automation;¹³⁶ it, however, has yet to demonstrate that it can address the structural barriers preventing low-income con-

¹³³ See *Understanding the Intersection Between E-commerce and Fintech*, TECHFUNNEL (Feb. 22, 2023), <https://www.techfunnel.com/fintech/e-commerce-and-fintech/> [<https://perma.cc/Y6PR-7SH4>] (noting that although fintech is more prevalent in the digital sphere, it is found in both brick-and-mortar and online retailers). Foohey, Hawkins, Johnson, and Martin note that alternative financial product providers are leaving their traditional brick-and-mortar locations to sell their products online. Foohey et al., *supra* note 7, at 3. Even before the pandemic, online financial products were expected to generate more revenue than products sold at traditional brick-and-mortar locations. See *id.* (observing that as of 2017, studies showed that alternative financial providers could make more money selling their goods online compared to brick-and-mortar stores). Foohey et al. also note the rise of payday lenders offering their products online. *Id.*

¹³⁴ See *What's in Your Digital Wallet? A Review of Recent Trends in Mobile Banking and Payments: Hybrid Hearing Before the Task Force on Fin. Tech. of the H. Comm. on Fin. Servs.*, 117th Cong. 9 (2022) (statement of Renita Marcellin, Senior Pol'y Analyst, Ams. for Fin. Reform), <https://democrats-financialservices.house.gov/uploadedfiles/chrg-117hhr47649.pdf> [<https://perma.cc/5MKK-5KP6>] (stating that fintech companies offer digital wallets such as PayPal, Venmo, and Zelle); *Buy Now, Pay More Later? Investigation Risks and Benefits of BNPL and Other Emerging Fintech Cash Flow Products: Hybrid Hearing Before the Task Force on Fin. Tech. of the H. Comm. on Fin. Servs.*, 117th Cong. 1 (2021) (statement of Rep. Stephen F. Lynch, Chairman, H. Task Force on Fin. Tech.), <https://www.govinfo.gov/content/pkg/CHRG-117hhr46247/pdf/CHRG-117hhr46247.pdf> [<https://perma.cc/XM32-TSCP>] (noting that fintech has allowed for the emergence of products such as "buy now, pay later (BNPL), earned wage access, and overdraft avoidance"); Veronica Irwin, *Meet BNPL's 'Recession-Proof' Cousin: Lease-to-Own*, PROTOCOL (June 21, 2022), <https://www.protocol.com/fintech/lease-to-own> [<https://perma.cc/Q5VZ-JH49>] ("With rising interest rates testing 'buy now, pay later,' there's an alternative way to break up a purchase into manageable payments: lease-to-own or rent-to-own agreements. As the fintech industry refocuses on customers who are feeling less flush, the decades-old business model is reemerging as a possible solution.").

¹³⁵ See Garrett Fischer & Sarah Wade, *Fintech: Internet Banking Across State Borders Triggers Compliance Challenges for State Banks*, THOMPSON COBURN LLP (Jan. 20, 2017), <https://www.thompsoncoburn.com/insights/blogs/bank-check/post/2017-01-20/fintech-internet-banking-across-state-borders-triggers-compliance-challenges-for-state-banks> [<https://perma.cc/Z73D-8X5G>] (stating that fintech innovations have allowed banks to deliver products and services over the internet to customers out-of-state customers).

¹³⁶ See JUNG HYUN CHOI, KARAN KAUL & LAURIE GOODMAN, URB. INST., *FINTECH INNOVATION IN THE HOME PURCHASING AND FINANCING MARKET* 9–10 (2019), https://www.urban.org/sites/default/files/publication/100533/fintech_innovation_in_the_home_purchase_and_financing_market_2.pdf [<https://perma.cc/RE4Y-HXX8>] (stating that fintech made the mortgage application process easier and twenty percent faster).

sumers from accessing credit.¹³⁷ The following Section analyzes the impact of fintech on the RTO market specifically.

B. The Fintech-RTO Business Model

As fintech has broadened, RTO companies have also expanded beyond their traditional brick-and-mortar stores into new industries and services, allowing the RTO industry to grow significantly.¹³⁸ There are also a significant number of new companies introducing new competition to the large traditional RTO companies.¹³⁹ Traditional RTO companies, like Rent-A-Center or Aaron's, operated big box, brick-and-mortar stores that allowed consumers to rent products directly from the store.¹⁴⁰ In the traditional business model, the store provided the product and the financing in-house.¹⁴¹ In other words, the consumer would identify an item to rent from the store and enter an RTO agreement with the store.¹⁴² The consumer then would make their payments to the store, address any repair concerns with the store, and finally return the item to the store if they no longer wished to rent the item or own the item after completing all the payments in the agreement.¹⁴³

VirTO companies, in contrast, partner with retailers to rent products to consumers.¹⁴⁴ In a VirTO arrangement, the third-party VirTO financing com-

¹³⁷ See *id.* at 10 (stating that it is unclear whether fintech firms have been able to serve previously underserved markets).

¹³⁸ See *United States Rent to Own Market Report 2023: Rising Virtual Rent-to-Own Market—ResearchAndMarkets.com*, BUS. WIRE (Nov. 13, 2023), <https://www.businesswire.com/news/home/20231113731710/en/United-States-Rent-to-Own-Market-Report-2023-Rising-Virtual-Rent-to-Own-Market---ResearchAndMarkets.com> [<https://perma.cc/H2FG-AZW6>] (stating that the RTO industry can be split into brick-and-mortar and e-commerce, with e-commerce as the dominant segment, and that one of the top growth drivers of the RTO industry is a growing “virtual rent-to-own market”).

¹³⁹ See The Aaron's Company, Inc. Annual Report (Form 10-K), *supra* note 41, at 29 (“We also face competition from . . . virtual LTO and rent-to-rent companies . . .”).

¹⁴⁰ See Hawkins, *supra* note 23, at 2067–68 (stating the RTO market's two big players are Rent-A-Center and Aaron's that “make up 5,000 of the 8,300 rent-to-own stores across the country”). In 2000, the RTO market was dominated by Rent-A-Center and Aaron's—large, public companies—and smaller independent, often local, organizations. *Id.*

¹⁴¹ See N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 10, at 10 (“In a traditional, brick-and-mortar LTO transaction, the consumer selects merchandise from a retailer and the retailer leases that merchandise directly to the consumer.”).

¹⁴² See *id.*

¹⁴³ See *id.* (“In a traditional, brick-and-mortar LTO transaction . . . [t]he parties establish a payment schedule at the outset and, after a certain number of payments, the consumer automatically owns the merchandise and the charges cease.”); ASS'N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 24 (stating that the RTO dealer is responsible for repairs and maintenance during the lease).

¹⁴⁴ See N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 10, at 10 (“In a ‘virtual’ LTO transaction, the consumer selects merchandise from a retailer, but a third-party financing company . . . purchases the merchandise from the retailer, then leases it to the consumer. By partnering with retailers in this way, . . . companies can lease a wide range of merchandise without having to stock invento-

pany is the lessor.¹⁴⁵ In other words, the third-party VirTO company purchases the product from the retail partner and then leases the product back to the consumer.¹⁴⁶ In these transactions, the consumer makes their renewal payments to the third-party VirTO company and addresses their concerns about the product to the third-party VirTO company.¹⁴⁷

In VirTO transactions, unlike traditional RTO transactions, the consumer often never communicates with the VirTO company unless an issue arises.¹⁴⁸ Rather, partner retailers promote and market VirTOs on behalf of the third-

ry themselves.”). The industry often labels RTO agreements as “Virtual Lease-to-Own.” *See id.* (discussing the “virtual lease-to-own industry”). In addition to the VirTO arrangement, traditional RTO providers also offer “e-commerce” opportunities, allowing consumers to enter RTO agreements through their online platform. *See, e.g.,* AARON’S, <https://www.aarons.com/store> [<https://perma.cc/GU67-X9U2>]. These e-commerce solutions, although entered over the internet, follow the traditional RTO business model where the consumer rents the product from the retailer. *See, e.g.,* *What Is Rent to Own: Rent to Own with Aaron’s*, AARON’S, <https://www.aarons.com/what-is-rent-to-own> [<https://perma.cc/GP6F-4UDX>] (stating that Aaron’s goods can be purchased online or in-store); *Frequently Asked Questions: How Is a Lease Different Than a Credit Transaction, Financing or a Loan?*, AARON’S, <https://www.aarons.com/FAQ> [<https://perma.cc/7LHY-FV5J>] (“With a lease, you sign an agreement to lease merchandise from Aaron’s. Aaron’s owns the merchandise, but you can take ownership after making all required lease payments or through an early purchase option.”).

¹⁴⁵ *See* N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 10 (stating that in VirTO transactions, the VirTO company buys the goods directly from retailers and then rents them to the customer). Some RTO companies have attempted to argue that they are merely RTO servicers, not the originators of the RTO agreements. *See, e.g.,* *Danger v. Nextep Funding, LLC*, 355 F. Supp. 3d 796, 812–13 (D. Minn. 2019) (providing that defendant Monterey moved to dismiss the plaintiff’s complaint claiming it was not a servicer of her RTO). Courts, however, have largely rejected that argument. *See, e.g., id.* at 813 (rejecting defendant Monterey’s motion to dismiss). Instead, these VirTO companies are generally considered lessors, and often refer to themselves as such on their materials. *See, e.g.,* FlexShopper, Inc., Annual Report (Form 10-K), at 1 (Apr. 24, 2023) (“FlexShopper enables consumers utilizing our e-commerce marketplace to shop for brand name electronics, home furnishings and other durable goods on a lease-to-own (LTO) basis.”); Katapult Holdings, Inc., Annual Report (Form 10-K), *supra* note 16, at 2 (“We are a technology driven lease-to-own platform that integrates with omni-channel retailers and e-commerce platforms to power the purchase of everyday durable goods for underserved U.S. non-prime consumers.”); PROG Holdings, Inc., Annual Report (Form 10-K), at 6 (Feb. 22, 2023) (“Progressive Leasing provides e-commerce, app-based, and in-store point-of-sale lease-to-own solutions through approximately 24,000 third-party POS partner locations and e-commerce websites in 46 states, the District of Columbia and Puerto Rico.”); Upbound Group, Inc., Annual Report (Form 10-K), *supra* note 16, at 4 (“Our Acima business offers lease-to-own solutions through retailers in stores and online enabling such retailers to grow sales by expanding their customer base utilizing our differentiated offering.”).

¹⁴⁶ *See* N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 10 (explaining that in VirTO agreements, VirTO companies buy the goods directly from the retailers and then rent them to the consumers).

¹⁴⁷ *Id.* at 12; *see Lowe’s Lease to Own Program*, *supra* note 20 (stating that customers who buy Lowe’s goods through its “lease-purchase program” should call Progressive Leasing customer service if they have questions or if the product is defective or damaged).

¹⁴⁸ *See infra* notes 149–157 and accompanying text (discussing the process in which customers enter into VirTO agreements).

party VirTO company.¹⁴⁹ As such, many retailers integrate the availability of VirTOs into each individual salesperson's sales pitch.¹⁵⁰ Unlike traditional credit in which the financier is required to disclose the financing costs and interest rates to the consumer, partner retailers or their salespeople are tasked with explaining the terms and conditions of the VirTO and addressing any questions.¹⁵¹ Once a consumer has decided to apply for financing, most transactions follow a familiar pattern: the consumer will either apply online or at an in-store kiosk or dictate their information to the salesperson, who enters the information into a web-based platform for the third-party VirTO company.¹⁵² The VirTO company often approves the consumer instantaneously and transmits a contract for electronic signature or allows the customer to sign on an electronic pad in store.¹⁵³ If the consumer is provided a copy of their agreement or any state-required disclosures, it is typically through email.¹⁵⁴ Often, VirTO com-

¹⁴⁹ See, e.g., *Lowe's Lease to Own Program*, *supra* note 20 (promoting Progressive Leasing).

¹⁵⁰ See John P. Feldman & Gerard M. Stegmaier, *When Unclear Retail Rent-to-Own Terms Draw FTC Ire*, LAW360 (May 28, 2020), <https://www.reedsmith.com/en/perspectives/2020/05/when-unclear-retail-rent-to-own-terms-draw-ftc-ire> [<https://perma.cc/Q8UK-C53T>] (stating that in retailers that offer Progressive Leasing's VirTOs, most consumers "become aware of Progressive's services through signage in the retail stores or by way of a retail salesperson's sales pitch"); N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 10, at 15 (stating that an undercover Department of Consumer Work Protection worker visited thirteen retailers that offer VirTOs and twelve of the thirteen stores' sales associates discussed the VirTOs).

¹⁵¹ See N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 10, at 15 (stating that consumers "are largely dependent on retailers to explain the terms and conditions" of VirTOs).

¹⁵² See FlexShopper, Inc., Annual Report (Form 10-K), *supra* note 145, at 1 (listing the steps of the LTO process: (1) approve consumer; (2) obtain signed consumer lease; (3) purchase item and lease to consumer; and (4) collect payments from customer per the lease); PROG Holdings, Inc., Annual Report (Form 10-K), *supra* note 145, at 7 (outlining the customer experience in six steps: (1) customers apply online or in-store; (2) a decision is rendered almost immediately; (3) customers are able to shop for leasable items; (4) customers make their initial payment when they sign the lease; (5) the customer takes the product home or schedules delivery; and (6) payments are made automatically); Upbound Group, Inc., Annual Report (Form 10-K), *supra* note 16, at 5 ("[C]ustomers complete the application process through a variety of resources, including online digital waterfall technology, retail partner electronic portals, online e-commerce websites, and the Acima mobile application."); see also Complaint at 3, *Consumer Fin. Prot. Bureau v. Snap Fin. LLC*, No. 23-cv-00462 (D. Utah July 19, 2023) [hereinafter Complaint, *Snap Fin.*] (describing Snap Finance's method of allowing VirTOs to be signed on a merchant's tablet).

¹⁵³ See Complaint, *Snap Fin.*, *supra* note 152, at 3 (stating that Snap Finance allows for VirTOs to be signed on a merchant's tablet); Katapult Holdings, Inc., Annual Report (Form 10-K), *supra* note 16, at 2 ("Consumers complete a three-step application and our fully automated approval process generates a decision in approximately five seconds or less on average"); *Lowe's Lease to Own Program*, *supra* note 20 (stating in its marketing materials that customers can shop, receive approval, and sign their lease online); N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 10, at 17 ("Only one [VirTO] company, Acima, ensures compliance with the disclosure law by texting leases to consumers' mobile phones for their e-signature.").

¹⁵⁴ See, e.g., *FAQs*, PROGRESSIVE LEASING, <https://progleasing.com/frequently-asked-questions/#anchor14> [<https://perma.cc/MX2X-D6CD>] ("Full terms are in your lease-to-own agreement, which will be mailed and emailed to you.").

panies do not proactively provide consumers a printed copy of their VirTO.¹⁵⁵ Once approved, the consumer may make an initial payment and immediately leave with their rental purchase.¹⁵⁶ All future payments—which are typically paid through automatic bank account drafts—and consumer concerns are then directed to the often out-of-state, third-party VirTO company.¹⁵⁷

Many VirTO companies partner with a combination of brick-and-mortar and online retailers.¹⁵⁸ For those that partner with online retailers, the transaction follows a similar pattern.¹⁵⁹ In other words, the consumer selects the product they would like to purchase and then applies for the third-party financing at the time of purchase or with a “virtual card.”¹⁶⁰ Partner retailers often offer financing through the companies’ “platform plug-in,” allowing the retailer to display the financing as an option at checkout.¹⁶¹ Retailers also may integrate multiple types of financing through waterfall technology, which allows the consumer to apply for financing with a prime lender (such as a traditional loan) and then automatically apply for other non-prime financing options (such as VirTOs or high-interest loans) if they do not qualify for a prime loan.¹⁶² Many

¹⁵⁵ See, e.g., *Consumer Help: Account Management*, SNAP FIN., <https://support.snapfinance.com/support/solutions/articles/31000158091-where-can-i-get-information-about-my-account-> [<https://perma.cc/623Y-B23C>] (explaining that customers can find their lease agreements in the Snap app or online in the Customer Portal).

¹⁵⁶ N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 12; see *Complaint, Snap Fin.*, *supra* note 152, at 5 (stating that Snap Finance is a Utah LLC); FlexShopper, Inc., Annual Report (Form 10-K), *supra* note 145, at i (stating that FlexShopper is incorporated in Delaware); PROG Holdings, Inc., Annual Report (Form 10-K), *supra* note 145, at 1 (stating that PROG Holdings is incorporated in Georgia).

¹⁵⁷ See, e.g., *FAQs*, *supra* note 154 (“During your lease signing, you agree for payments to be deducted automatically from your bank account and/or charged to your card . . . Charges will appear on your statement as Progressive Leasing or Prog Lease, not the store where you selected your items. . . . If you have any additional questions you can always speak with a Progressive Leasing customer service agent [via phone].”).

¹⁵⁸ See, e.g., *Lowe’s Lease to Own Program*, *supra* note 20 (promoting Lowe’s partnership with Progressive Leasing); *Find a Store*, PROGRESSIVE LEASING, <https://www.progressivep.com/my-account/find-store?lat=42.3600825&lng=-71.0588801> [<https://perma.cc/8TB3-G7AH>] (showing all the online and brick-and-mortar retailers where Progressive Leasing customers can make purchases).

¹⁵⁹ See *supra* note 152 (discussing Progressive Leasing’s customer experience).

¹⁶⁰ See *supra* note 152 and accompanying text (describing each step of the VirTO process); Katapult Holdings, Inc., Annual Report (Form 10-K), *supra* note 16, at 3 (describing their mobile app and Katapult Pay, a virtual card allowing the consumer to check out with a one-time use “virtual card”).

¹⁶¹ See, e.g., Katapult Holdings, Inc., Annual Report (Form 10-K), *supra* note 16 at 5–6 (discussing Katapult’s “platform plug-in”); PROG Holdings, Inc., Annual Report (Form 10-K), *supra* note 145, at 5 (“Progressive Leasing’s technology-based, proprietary decisioning platform offers prompt lease decisioning at the point-of-sale and is integrated with both traditional and e-commerce POS partners’ systems.”).

¹⁶² See, e.g., Katapult Holdings, Inc., Annual Report (Form 10-K), *supra* note 16, at 6 (“A waterfall is where the application will flow from the prime lender to other financing and lease-purchase options automatically Our technology supports sophisticated integration with these partners with

consumers may think they are applying for a prime loan, but ultimately get approved for a VirTO without being clearly informed of the difference.¹⁶³ Consumers may not even know that the company is automatically submitting their applications for VirTOs after they are denied a prime or subprime loan.¹⁶⁴

VirTOs are one of the fastest growing e-commerce financing instruments available and represent a significant portion of the multibillion-dollar RTO industry.¹⁶⁵ Between 2017 and 2020, in New York City alone, five VirTO companies entered into over 200,000 agreements and offered leases at more than 2,000 retail stores.¹⁶⁶ Although some of these third-party VirTO companies are new companies, many of them are simply fintech extensions of the traditional, brick-and-mortar RTO companies.¹⁶⁷ Indeed, Upbound Group (aka Rent-A-Center), one of the oldest traditional RTO companies, now earns the majority of its consolidated revenue from its VirTO provider segment, Acima, and has positioned itself to grow its VirTO offerings.¹⁶⁸

the goal of ensuring a smooth and efficient customer transaction experience during application and checkout.”).

¹⁶³ See, e.g., Complaint, *Snap Fin.*, *supra* note 152, at 2, 5 (stating that if a customer was denied by Snap Credit+, then their application was automatically submitted for a Snap Loan or Lease-Purchase Agreement); *id.* at 3, 9 (explaining that a consumer’s understanding of the agreement usually required an explanation from the sales staff, who often misled the consumer or inadequately explained the agreement). Sixty-three percent of Snap Finance’s VirTO applications occurred through merchant platforms. *Id.* at 9.

¹⁶⁴ See, e.g., *id.* at 5 (providing that upon a consumer’s Snap Credit+ application denial, they were automatically submitted for a Lease-Purchase Agreement or Snap Loan).

¹⁶⁵ See *supra* note 138 and accompanying text (stating that the RTO market can be divided into brick-and-mortar and e-commerce and that e-commerce has the larger market share); N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 7 (“[L]ease to own has been identified as the fastest growing e-commerce payment method . . .”). For example, in 2022, Upbound Group’s (aka Rent-A-Center) VirTO segment (Acima) earned \$2,110,320,000 in revenue with a gross profit of \$632,244,000. Upbound Group, Inc., Annual Report (Form 10-K), *supra* note 16, at 41. Similarly, Katapult has served 2.3 million customers since its inception. Katapult Holdings, Inc., Annual Report (Form 10-K), *supra* note 16, at 2.

¹⁶⁶ N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 10. The five companies were: AcceptanceNOW, Acima Credit, Progressive Leasing, SmartPay Leasing LLC, and Snap Finance. *Id.* at 10–11; cf. Complaint, *Snap Fin.*, *supra* note 152, at 2 (noting that Snap Finance entered into three million VirTOs with over 10,000 retail partners in forty-seven states since 2017).

¹⁶⁷ See N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 10–11 (stating that traditional RTO companies own both AcceptanceNOW and Progressive Leasing). AcceptanceNOW is the fintech arm of Rent-A-Center, Inc., whereas Progressive Leasing is the fintech arm of Aaron’s, Inc. *Id.*

¹⁶⁸ See Upbound Group, Inc., Annual Report (Form 10-K), *supra* note 16, at 15, 17 (explaining that Upbound Group is focused on growing its virtual lease-to-own products, evidenced by its purchase of Acima, and that Acima now makes up for more than fifty percent of Upbound Group’s consolidated revenue). Upbound Group, Inc. acquired Acima Holdings, a VirTO company, in 2021 for approximately \$1.4 billion. *Id.* at 66. Acima merged with Upbound Group’s existing VirTO segment, Preferred Lease. *Id.* at 6.

The VirTO market has grown in the last couple of years for a variety of reasons.¹⁶⁹ There is a very low cost to enter the market yet high-profit margins, allowing many new firms to enter the industry.¹⁷⁰ For example, Katapult, a relatively new VirTO provider, has grown significantly since its inception, originating VirTOs with an aggregate value of nearly \$200 million in 2022.¹⁷¹ Second, there are lower overhead costs for VirTO providers as compared with brick-and-mortar stores.¹⁷² Opening a new “location” is as simple as identifying a new retail partner; as such, the model is agile and ever-changing because “locations” can be opened and closed as partner retailers emerge and evolve.¹⁷³ Retailers are also drawn to offering RTO products because it results in greater sales while reducing their payment risks.¹⁷⁴ Finally, VirTO companies often require consumers to allow the company to make an automatic bank account draft, ensuring that the company receives their renewal payment and facilitating smoother collections than traditional RTO agreements or other financing forms.¹⁷⁵

As outlined below, the RTO industry’s decoupling of the retailer and the financier is a fundamental shift in the business model that has significant implications for consumers.¹⁷⁶ A full understanding of the impacts of fintech’s dis-

¹⁶⁹ See *infra* notes 170–175 and accompanying text (explaining why the VirTO market has recently grown). Progressive Leasing, Aaron’s Fintech arm, reported that it had 943,000 customers and a revenue of \$2,523,785,000 in 2022. PROG Holdings, Inc., Annual Report (Form 10-K), *supra* note 145, at 40, 42. Another VirTO company, FlexShopper, reported approximately \$106 million in net lease revenues and fees in 2022. FlexShopper, Inc., Annual Report (Form 10-K), *supra* note 145, at 1. In fact, one VirTO company estimated that the market could be as high as \$40 to \$50 billion. See Katapult Holdings, Inc., Annual Report (Form 10-K), *supra* note 16, at 3 (stating that “the total addressable market for the virtual lease-to-own market is estimated to be approximately \$40–\$50 billion”); N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 7 (stating lease-to-own is the “fastest growing e-commerce payment method”).

¹⁷⁰ See FlexShopper, Inc., Annual Report (Form 10-K), *supra* note 145, at 22 (reporting a 33% profit margin in 2022); Hawkins, *supra* note 23, at 2071 (noting the low cost of entry of the traditional RTO market).

¹⁷¹ Katapult Holdings, Inc., Annual Report (Form 10-K), *supra* note 16, at 45.

¹⁷² See, e.g., Upbound Group, Inc., Annual Report (Form 10-K), *supra* note 16, at 4 (noting that their VirTO “segment has benefited from the lower overhead cost associated with the virtual options employed at many third party locations”); Katapult Holdings, Inc., Annual Report (Form 10-K), *supra* note 16, at 7 (noting that it employs a lean and scalable business model).

¹⁷³ See, e.g., Upbound Group, Inc., Annual Report (Form 10-K), *supra* note 16, at 6 (stating that Acima’s business model is agile because it can quickly and efficiently open and close both staffed and unstaffed locations, the latter of which only require integration with a retail partner).

¹⁷⁴ See, e.g., *id.* at 4 (stating that retailers are able to grow their consumer base by offering RTO solutions); N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 26 (noting that VirTO companies often pay 100 % of the retail price which results in higher profits for the retailer than when consumers use credit cards that charge a fee to the retailer).

¹⁷⁵ See, e.g., Upbound Group, Inc., Annual Report (Form 10-K), *supra* note 16, at 17 (noting its reliance on automatic bank account drafts for collection efforts).

¹⁷⁶ See *infra* Part III (discussing how VirTOs introduce a new set of opportunities and problems in the RTO industry).

ruption to the industry is critical for evaluating whether states and courts should reconsider the costs and benefits of VirTO agreements, whether VirTOs should continue to be available for consumers, and, if so, whether new and different regulations should be implemented.

III. NEW TECH: NEW TWIST ON AN OLD PROBLEM

As outlined above, fintech has fundamentally altered the RTO industry, creating new opportunities and challenges. This Part evaluates the implications of fintech's disruption of the RTO industry and its impact on low-income and subprime consumers. It briefly describes the opportunities that exist with VirTOs before moving on to focus on the new problems that have arisen with VirTOs.¹⁷⁷

To the extent that the VirTO industry, and RTO industry as a whole, has grown significantly in the last decade, it is clearly fulfilling a unique market gap.¹⁷⁸ Many consumers who use VirTOs are accessing consumer products and services they otherwise might not be able to access.¹⁷⁹ VirTO companies almost universally promote themselves as providing a service for consumers that is not being filled by other financial providers.¹⁸⁰ Indeed, for consumers lacking credit or with subprime credit scores, RTO agreements may be the only option available to finance a desired purchase until they are better able to access traditional credit.¹⁸¹ And, to the extent that they are expanding the reach of

¹⁷⁷ See *infra* Part III.A (exploring new problems that have emerged out of the rise of VirTO agreements); *infra* Part III.B (discussing existing problems in the RTO industry that the rise of VirTOs have exacerbated).

¹⁷⁸ See generally Anderson, *supra* note 23, at 141 (stating that RTOs allow low-income and financially distressed customers to immediately acquire household products).

¹⁷⁹ See PROG Holdings, Inc., Annual Report (Form 10-K), *supra* note 145, at 7 (stating that Progressive Leasing helps “facilitate sales to customers that are otherwise unable to purchase” the products).

¹⁸⁰ See Upbound Group, Inc., Annual Report (Form 10-K), *supra* note 16, at 4 (“We provide a critical service for a large portion of underserved consumers by providing them with access to, and the opportunity to obtain ownership of, high-quality, durable products under a flexible lease-purchase agreement with no long-term debt obligation.”).

¹⁸¹ Jia Wertz, *Lease-to-Own Option Is Integral for E-Commerce Growth Strategy*, FORBES (Apr. 28, 2020), <https://www.forbes.com/sites/jiawertz/2020/04/28/lease-to-own-integral-e-commerce-growth-strategy/?sh=542bd31e5135> [<https://perma.cc/DPY9-892J>] (stating that for those with bad credit, or no access to credit, lease-to-own agreements provide means for these consumers to access products they otherwise could not attain). In fact, many of VirTO companies have several segments or integrate with more traditional loans and credit through waterfall technology. See, e.g., Katapult Holdings, Inc., Annual Report (Form 10-K), *supra* note 16, at 6 (describing their waterfall technology). Waterfall technology allows consumers to apply to a variety of financing options, including prime financing (i.e., traditional credit) and to “waterfall” through credit options until they get to the cheapest credit that they qualify for. See *id.* (“A waterfall is where the application will flow from the prime lender to other financing and lease-purchase options automatically; this gives the consumer the best option for their situation.”). For many VirTO consumers, unfortunately, VirTOs are the only agreements for which they qualify. See Wertz, *supra* (stating that for many consumers, lease-to-own is the only option they have for financing their purchases).

the industry into new retail markets, VirTOs are making more products and services accessible to these subprime consumers.¹⁸²

There are several reasons why consumers may choose RTO agreements over mainstream forms of credit. For example, RTO agreements may be cheaper for subprime consumers than other forms of credit, such as credit cards or payday loans.¹⁸³ In addition, some consumers—particularly those who are young—have become credit card-adverse, preferring options like RTO agreements or buy-now-pay-later products to avoid credit card debt.¹⁸⁴ Like traditional RTO agreements, VirTOs provide these consumers with more financing options from more retailers for more products.¹⁸⁵

VirTOs also build on the benefits of traditional RTO agreements in other, less obvious ways.¹⁸⁶ To the extent that consumers use RTO agreements for the convenience of obtaining a product or service immediately—rather than saving up for the product or putting it on “lay-a-way”—VirTOs are instantaneous and can be entered from the comfort of one’s home.¹⁸⁷ As VirTOs integrate with online retailers, consumers are able to enter such agreements with the simple click of a button.¹⁸⁸ They can also receive their purchases in the same amount of time as if they paid in cash or with traditional credit cards.¹⁸⁹ In contrast, consumers who use traditional loans from a deposit institution may have to wait days for approval and visit their bank in person during business hours.¹⁹⁰

¹⁸² See Upbound Group, Inc., Annual Report (Form 10-K), *supra* note 16, at 4 (stating that Acima’s integration with online retailers allows it to expand those retailers’ customer bases).

¹⁸³ See Hawkins, *supra* note 23, at 2089–91 (stating that “rent-to-own is not the only alternative, but is often the best option” when compared to layaway, credit cards, and payday loans).

¹⁸⁴ See Matt Ryan Webber, *Why Gen Z Consumers Prefer “Buy Now, Pay Later,”* INVESTOPEDIA (Nov. 1, 2022), <https://www.investopedia.com/why-gen-z-prefers-buy-now-pay-later-6823276> [<https://perma.cc/3XX5-4U3U>] (“According to [PYMNTS’] Buy Now, Pay Later Tracker survey, nearly 60% of consumers say they prefer buy now, pay later over credit cards. This preference is especially pronounced among younger consumers.”).

¹⁸⁵ See *supra* notes 178–182 and accompanying text (stating that VirTOs make more products available to more customers).

¹⁸⁶ See *infra* notes 187–191 and accompany text (discussing benefits VirTOs have over traditional RTOs).

¹⁸⁷ See CASKEY, *supra* note 46, at 80 (citing research concluding that consumers used traditional RTO agreements because consumers wanted the goods right away, did not need to pass a credit check, and liked the flexibility that came with RTO agreements); *infra* note 188 and accompanying text (explaining that VirTO consumers can apply for the agreements online and then proceed to shop online).

¹⁸⁸ See PROGRESSIVE LEASING, *supra* note 7 (allowing customers to click “apply now” online to “shop at [their] favorite stores and enjoy convenient lease-to-own purchase options”).

¹⁸⁹ See, e.g., *FAQs*, *supra* note 154 (stating customers who use lease-to-own options today will get their items same day or be able to setup a delivery date).

¹⁹⁰ See Bob Musinski, *How Long Does It Take to Get a Personal Loan?*, U.S. NEWS (Feb. 22, 2023), <https://money.usnews.com/loans/articles/how-long-does-it-take-to-get-a-loan> [<https://perma.cc/RM9L-NBFL>] (stating that banks and credit unions can take anywhere from one to five business days to approve a loan).

Similarly, to the extent that consumers are attracted to fringe financing because of the convenience of having storefronts in their neighborhoods, VirTOs are even more accessible than neighborhood storefronts because they can be located in one's home with the click of a button.¹⁹¹ The convenience of VirTOs alone may be worth the cost for these consumers.

As outlined below, however, many of the other benefits associated with traditional RTO agreements—such as free delivery and setup, free repairs and maintenance, upgrades to the latest technology, and an opportunity to try the products before purchasing—are now illusory with the VirTO market.¹⁹² Indeed, there are several significant new problems associated with VirTOs. The following sections explore these new issues. Section A discusses new consumer challenges unique to VirTOs.¹⁹³ Section B explores how VirTOs have exacerbated existing problems in the RTO industry.¹⁹⁴

A. New Problems

The proliferation of VirTOs has introduced many challenges for consumers, most of which can be summarized into four key areas. Subsection 1 discusses the application of the RTO model to nonsensical products and services.¹⁹⁵ Subsection 2 explores the inability of consumers to terminate their RTO agreements without penalty.¹⁹⁶ Subsection 3 details the increase of misinformation and opportunities for fraud.¹⁹⁷ Finally, Subsection 4 explains how

¹⁹¹ See CASKEY, *supra* note 46, at 61 (describing how check cashing outlets may be more appealing to consumers because of their convenient locations); *supra* note 188 and accompanying text (stating that consumers can apply for a VirTO from their home online and then immediately start shopping).

¹⁹² See ASS'N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 22–24 (listing the benefits of RTOs including: delivery and setup are included in the RTO payment, the RTO dealer is responsible for repairs and maintenance during the lease, and termination of the agreement at any time); *infra* note 233 and accompanying text (stating that the consumer is responsible for repairs in VirTOs). Some of these challenges were well known before the integration of fintech to the industry. See, e.g., James J. White, *The Usury Trompe L'oeil*, 51 S.C. L. REV. 445, 459 (2000) (predicting that it would be difficult for traditional RTO companies to partner with out-of-state banks to issue loans for RTO products because the market was fragmented and because the RTO seller to accept returns and replace defective goods).

¹⁹³ See *infra* Part III.A (explaining how the creation of VirTOs has introduced new problems for consumers utilizing the RTO industry).

¹⁹⁴ See *infra* Part III.B (discussing how the creation of VirTOs has exacerbated existing problems consumers face in the RTO industry).

¹⁹⁵ See *infra* notes 199–213 and accompanying text (describing how VirTOs allow consumers to “lease” items that are partially made up of unreturnable services or items that are illogical to return, such as items customized to the consumer).

¹⁹⁶ See *infra* notes 214–235 and accompanying text (explaining that VirTOs make it incredibly difficult to terminate agreements and return rental products).

¹⁹⁷ See *infra* notes 236–261 and accompanying text (detailing how VirTOs lead to misinformation and opportunities for fraud).

new VirTOs artificially increase consumer demand for goods.¹⁹⁸ Each subsection describes each challenge and analyzes how they are directly linked to the VirTO business model.

1. Nonsensical Products and Services

The development of VirTOs has allowed the industry to become a finance option for many new and diverse products and services.¹⁹⁹ Traditional RTO products were often limited to furniture, electronics, and appliances.²⁰⁰ VirTO financing options now make agreements available for a wide range of additional and often nonsensical products.²⁰¹ These products include pets, medical equipment, eyeglasses, jewelry, wheels and tires, musical instruments, computers, among others.²⁰² These new product categories are likely meaningful areas of growth for the industry.²⁰³ For example, RTO agreements for tires and wheels generated \$721,000 in annual purchases per partner store per year.²⁰⁴

¹⁹⁸ See *infra* notes 262–268 and accompanying text (stating that VirTOs artificially increase consumer demand).

¹⁹⁹ See *supra* note 182 and accompanying text (stating that VirTOs make more products and services available to consumers); *infra* notes 200–202 (explaining that the creation of VirTOs has allowed for the RTO industry to expand into new products and services).

²⁰⁰ See Hawkins, *supra* note 23, at 2061 (stating that Rent-A-Center, a traditional RTO dealer, leases electronics, appliances, furniture, and computers).

²⁰¹ See *infra* note 202 and accompanying text (listing the new products available under VirTOs).

²⁰² See, e.g., N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 10, at 10 (describing VirTOs for “phones, furniture, eyeglasses, appliances, jewelry, even auto repair”); see also Taylor v. Timepayment Corp., No. 18cv378, 2019 WL 1375594, at *1 (E.D. Va. Feb. 5, 2019) (describing the purchase and installation of a heat pump with a VirTO); Prayitno v. Nextep Funding, LLC, No. 17-cv-04310, 2018 WL 11476850, at *1 (N.D. Ill. June 27, 2018) (outlining a consumer purchase of a vehicle repair with a VirTO); Smart v. W. Creek Fin., Inc., No. 20-CV-250, 2021 WL 415130, at *1 (M.D. Ga. Feb. 5, 2021) (outlining an alleged RTO agreement financing vehicle repairs); Danger v. Nextep Funding, LLC, 355 F. Supp. 3d 796, 801–02 (D. Minn. 2019) (outlining the purchase of a pet with a VirTO). Although there is some debate over whether consumers use RTOs for essential or luxury goods, as the RTO industry has moved into new areas like vehicle repairs and medical equipment, it is challenging prior notions that the RTO industry primarily provided services for “luxury items” rather than essential goods. Compare Hawkins, *supra* note 23, at 2063 (arguing consumers are renting goods that improve their quality of life including “name-brand merchandise” that costs more than off-brand), with Johnson, *supra* note 80, at 1250 (arguing that RTO consumers do not use the agreements to acquire luxury goods), and Anderson, *supra* note 23, at 150 (stating that consumers use RTOs to acquire essentials).

²⁰³ There is little data available on the market share of each of these products. The revenue reported by publicly traded companies, however, is in the billions, albeit not broken up by market segment. See Upbound Group, Inc., Annual Report (Form 10-K), *supra* note 16 (reporting an annual revenue for 2022 of \$4,245,392,000). Similarly, Snap Finance—a privately held RTO provider that partners with vehicle repair shops—teamed up with a major bank to finance \$1 billion in RTO agreements. See N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 10, at 11 (stating that Snap partnered with BMO Harris Bank to provide \$1 billion in lease-to-own agreements and that Snap has many retail partners in New York City, including many auto repair workshops). Given the size and growth

Renting one's pet or specially designed medical equipment, however, is at best nonsensical, and at worst, predatory. Indeed, the idea of an RTO agreement becomes increasingly strained in these markets. First, family pets epitomize a consumer "good" that is purchased with the intention of providing the pet with a "forever home." Many consumers purchase pets with the intention of making it a "member of the family" and with the intention of keeping the pet for its lifetime.²⁰⁵ There are few pet owners who would purchase a cat or dog with the intention of returning it in a few months.²⁰⁶ Similarly, consumers who rent medical equipment, like specially fitted hearing aids, are unlikely to return a product that has been specifically designed for them and improves their quality of life. Unlike furniture, these goods are not "fungible commodities" and are unlikely to be re-rented to future consumers.²⁰⁷

The expansion of the RTO industry into services—for example, vehicle repairs—similarly distorts the definition of "renting."²⁰⁸ A consumer primarily pays for the time and energy associated with the service.²⁰⁹ The service is often "consumed" before the VirTO has even been consummated; thus, consumers lack the ability to return the product at any time. Even when the "product" is a mixture of good and service—like a transmission replacement—the labor is

of the VirTO industry, it likely follows that these types of products make up a significant portion of the market share.

²⁰⁴ ASS'N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 16. The APRO's figures do not distinguish between traditional RTOs and VirTOs. *Id.*

²⁰⁵ In fact, many states criminalize abandoning animals. *See, e.g.*, N.M. STAT. ANN. § 30-18-1(B) (West 2023) ("Cruelty to animals consists of a person: . . . abandoning or failing to provide necessary sustenance to an animal under that person's custody or control."); GA. CODE ANN. § 16-12-4(b) (West 2023) ("A person commits the offense of cruelty to animals when he or she: . . . Having intentionally exercised custody, control, possession, or ownership of an animal fails to provide to such animal adequate food, water, sanitary conditions, or ventilation that is consistent with what a reasonable person of ordinary knowledge would believe is the normal requirement and feeding habit for such animal's size, species, breed, age, and physical condition.").

²⁰⁶ *See* Anna Brown, *About Half of U.S. Pet Owners Say Their Pets Are as Much a Part of Their Family as a Human Member*, PEW RSCH. CTR. (July 7, 2023), <https://www.pewresearch.org/short-reads/2023/07/07/about-half-us-of-pet-owners-say-their-pets-are-as-much-a-part-of-their-family-as-a-human-member/> [<https://perma.cc/A5WM-KWF7>] ("[N]early all U.S. pet owners (97%) say their pets are part of their family, according to a new Pew Research Center survey. About half of pet owners (51%) not only consider their pets to be a part of their family but say they are as much a part of their family as a human member.").

²⁰⁷ *See* *Commodity*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An article of trade or commerce. The term embraces only tangible goods, such as products or merchandise, as distinguished from services."); *id.* at *Fungible* ("Commercially interchangeable with other property of the same kind <corn and wheat are fungible goods, whereas land is not>.").

²⁰⁸ *See id.* at *Rent* ("To pay for the use of another's property.").

²⁰⁹ *See id.* at *Service* ("Labor performed in the interest or under the direction of others; specif., the performance of some useful act or series of acts for the benefit of another, usu. For a fee <goods and services>. In this sense, service denotes an intangible commodity in the form of human effort, such as labor, skill, or advice.").

often the predominant portion of the sale and is impossible to return.²¹⁰ The idea that a consumer would enter into a VirTO for a vehicle repair with the intention of returning the repair at any time and terminating the lease, is illusory: demonstrating that VirTOs in these types of markets are often being used much more like a loan than a rental agreement.²¹¹

One might wonder how the industry has emerged in so many new areas so quickly. The bottom line is that the business model—in which decentralized, third-party VirTO companies partner with retailers—has allowed the industry to access markets it never could have accessed through a large, big box, brick-and-mortar store.²¹² As explored further below, it is also likely that consumers are unaware that they are financing their purchase—the purchase they intend to keep—with a VirTO rather than a loan.²¹³ These consumers may also not fully understand the legal implications of financing with a VirTO rather than a loan. This trend is unlikely to change soon. Indeed, as more retailers warm up to the idea of providing financing, and consumers continue to use such financing, the VirTO industry will continue to expand.

2. Inability to Terminate RTO Agreements and Return Rental Products

Although consumers should be able to terminate an RTO agreement or purchase the product at any time—after all, this is the central characteristic of an RTO agreement—the VirTO model corrupts the ability of consumers to return their rental.²¹⁴ VirTOs purport to allow consumers to return their rental; in practice, however, it is impossible or impracticable for consumers to do so.²¹⁵ Unlike a traditional RTO where the consumer simply returns the goods to the

²¹⁰ See Gregory Hamel, *How to Calculate a Parts-to-Labor Ratio*, CHRON, <https://smallbusiness.chron.com/calculate-partstolabor-ratio-35308.html> [<https://perma.cc/SWK4-Q5LV>] (stating that the average parts-to-labor ratio for an auto repair shop is 0.8–1, meaning “for every dollar of labor sales that the company makes” it sells anywhere from eighty cents’ to a dollar’s worth of parts).

²¹¹ It appears the industry is aware of the risks associated with entering VirTOs for such products. See Upbound Group, Inc., Annual Report (Form 10-K), *supra* note 16, at 20 (stating that Rent-A-Center (now Upbound Group) acknowledges risks associated with its competitors’ willingness to “enter into customer leases where services, rather than goods, comprise the significant portion of the lease value”).

²¹² See N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 10 (stating that because VirTO companies do not stock the inventory themselves and instead purchase items from retailers after the consumer selects the item, VirTO companies can lease “a wide range of merchandise”).

²¹³ See *infra* notes 240–241 and accompanying text (stating that some consumers are surprised to learn that they entered into a lease agreement and state that they would not have entered into the agreement had they known).

²¹⁴ See *supra* note 17 and accompanying text (stating the defining feature of an RTO is the ability of the consumer to terminate at any time without penalty).

²¹⁵ See *infra* notes 216–218 and accompanying text (explaining why VirTOs make returns difficult or impracticable).

brick-and-mortar store, a VirTO company owns and leases the goods to the consumer.²¹⁶ Accordingly, the consumer cannot return the goods to the store, because the store no longer owns the goods.²¹⁷ Instead, if the consumer were to “return” the item, they would have to return the goods to an often out-of-state, VirTO company. Yet, most VirTOs do not clearly specify how or where to return leased products.²¹⁸

Although there is little data on the return rate, what data is available indicates that returns are almost non-existent in the industry.²¹⁹ For example, in 2021, a New York City investigation found that between 2017 and February 2020, only two leases out of 39,000 leases entered into by a VirTO company resulted in the consumer returning the product and terminating the lease early.²²⁰ Another Consumer Financial Protection Bureau (CFPB) investigation found that out of 1.7 million leases entered by Snap, a prominent VirTO company, only 165 items were returned.²²¹ The industry’s internal data also supports this conclusion: one VirTO company reported that consumers returned less than three percent of products leased through a VirTO in 2022.²²²

Indeed, it is difficult to think of how a consumer could potentially return a rental to a third-party VirTO company without penalty. For goods that are traditionally easy to return—for example, a piece of furniture—the consumer

²¹⁶ See *supra* notes 144–147 and accompanying text (discussing how VirTOs are structured). According to the industry, most customers return rented products within four months of entering into the RTO agreement, while only seventeen percent exercise the early purchase option. See ASS’N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 18. The APRO’s statistics, however, do not distinguish between traditional RTOs and VirTOs. *Id.*

²¹⁷ See N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 10 (stating that the VirTOs buy the product from the retailer).

²¹⁸ See, e.g., *FAQs*, *supra* note 154 (providing Progressive Leasing customers with a phone number they need to call if they want to make a return); *Frequently Asked Questions*, ACIMA, <https://www.acima.com/support/service-support-faqs> [<https://perma.cc/8X88-AZNN>] (stating customers should call customer service if they would like to return the product); N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 24 (“Some [VirTO] company leases direct consumers to call the company if they want to return merchandise, while others provide no direction at all. Consumers who call the [VirTO] company may be directed to return the merchandise to the retailer, only to be rebuffed by the retailer and directed back to the [VirTO] company.”).

²¹⁹ See *infra* notes 220–222 and accompanying text (exploring New York City and CFPB investigations as well as data reported by a VirTO company on customer returns).

²²⁰ N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 24; see also *id.* (noting that even when companies purport to accept returns, they make it extremely difficult for consumers and often charge hidden fees). But see ASS’N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 23 (claiming that “only 25% of customers rent a product until its [sic] owned,” while the “majority of customers return the product within three to four months”).

²²¹ See Complaint, *Snap Fin.*, *supra* note 152, at 15 (noting Snap Finance only had 165 surrenders out of 1.7 million leases between January 2017 and January 2020).

²²² FlexShopper, Inc., Annual Report (Form 10-K), *supra* note 145, at 8 (stating that FlexShopper found that fewer than 3% of customers returned their leased items).

might need to mail or ship the furniture to an out-of-state VirTO company.²²³ The shipping expenses of large items like furniture are cost prohibitive for most consumers and arguably constitute a penalty.²²⁴ And, as described above, for those RTO rentals involving goods that are particularly difficult to return (e.g., a pet), that are affixed to other property (e.g., a wheel or tire), or that are predominately services (e.g., a vehicle repair), it is nearly impossible for a consumer to return the product.²²⁵

In fact, there is little evidence to suggest that VirTO companies want consumers to return rented products.²²⁶ In the CFPB's recent investigation and resulting complaint against Snap, the CFPB alleges that Snap made significant efforts to obscure and deflect consumers' inquiries into returning products.²²⁷ The company went so far as to train its employees to never accept product surrenders, noting: "We use qualifying as a way to get [consumers] to work with us and not surrender. The truth is we don't want their used merchandise. We want the money they committed to paying back. Never Surrender is the motto"²²⁸ And, if the consumer insisted on surrendering the property, the company would designate a charity or disposal site for the consumer to dump the product.²²⁹ The reality is that VirTO companies, unlike traditional RTO companies, do not want the returned product and any efforts to provide consumers with the ability to return the product is often a legal smokescreen.

Relatedly, because it is difficult to physically return such products, it is also unclear where or how a consumer addresses product defects or mainte-

²²³ According to some companies, they have locations to pick up returned products. *See, e.g.*, Upbound Group, Inc., Annual Report (Form 10-K), *supra* note 16, at 6 ("In the event the customer returns rented merchandise, we pick it up at no additional charge or provide other return options.").

²²⁴ *See* Christin Perry, *How to Ship Furniture Across the Country*, FORBES HOME (Nov. 30, 2023), <https://www.forbes.com/home-improvement/moving-services/ship-furniture-across-country/> [<https://perma.cc/XPW9-L36K>] ("Long-distance furniture shipping can cost between \$400 and \$850 to ship a single, large piece of furniture.").

²²⁵ This is especially confusing for individuals who are "renting" service products, such as vehicle repairs. It is not clear whether the entire vehicle will be repossessed or whether only the "repair" good must be returned. *See* N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 10, at 24 (outlining the illusory nature of many of the VirTO early termination provisions); Complaint, *Snap Fin.*, *supra* note 152, at 14–15 (noting that Snap Finance informed consumers that some products, like mattresses, tires, and other auto parts could not be returned).

²²⁶ *See infra* notes 227–229 and accompanying text (explaining that VirTO companies appear to not want customers to return products).

²²⁷ *See* Complaint, *Snap Fin.*, *supra* note 152, at 11–12 (stating that Snap Finance did not clearly state how consumers could return items and required customers to promptly "return the Property to a reasonable place we designate").

²²⁸ *Id.* at 13.

²²⁹ *See id.* at 12–13 (stating that consumers who return their merchandise do so either "directly to Snap Finance, or to another place that Snap Finance designates (including a charity or a site for disposal)").

nance issues.²³⁰ In the traditional model, a good is generally warranted by the brick-and-mortar store.²³¹ In other words, if the product breaks, the RTO company is responsible for repairing it and must provide a replacement while the product is being repaired.²³² This is one of the many arguable benefits of a traditional RTO agreement—it externalizes the maintenance cost of the good for the consumer. Yet, in the VirTO model, the consumer is often responsible for repairing the product or remedying any defects.²³³ This difference between traditional RTO agreements and VirTOs raises lots of questions for products not traditionally associated with RTOs. For example, is the VirTO company responsible for the vet bills associated with a rented pet? Is the VirTO company responsible for ensuring the mechanic fully repaired the vehicle? The VirTO model muddies these issues.

These concerns are not limited to addressing minor deficiencies; there are significant substantive questions regarding VirTO companies' responses to consumers' failure to pay or inability to physically return the products. Historically, the RTO industry has engaged in a variety of collection efforts, ranging from instituting collections actions to abusive repossession practices to criminal prosecution.²³⁴ But, there are more questions than answers with the VirTO

²³⁰ See, e.g., *FAQs*, *supra* note 154 (stating that if a customer's product is defective or damaged, they can "contact Progressive Leasing customer service [via phone] at (877) 898-1970" and "Progressive will evaluate the product to determine the proper course of action").

²³¹ See, e.g., The Aaron's Company, Inc. Annual Report (Form 10-K), *supra* note 41, at 10 (stating that Aaron's "[g]eneral managers also administer the process of returning merchandise including making determinations with respect to inspection, product repair or replacement, sales, reconditioning and subsequent re-leasing").

²³² See *supra* note 231 and accompanying text (stating in traditional RTOs, the product is under store warranty); N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 16, at 24 (explaining that RTO dealers are responsible for repairs). Although the products often were "exchangeable," many customers were required to enter new RTO agreements, thereby restarting the number of payments necessary to own the product. See FlexShopper, Inc., Annual Report (Form 10-K), *supra* note 145, at 15 ("[O]ur customers who have leased the defective merchandise from us could terminate their lease agreements for that merchandise and/or not renew those lease arrangements, which could have a material adverse effect on our financial condition if we are unable to recover those losses from the vendor who supplied us with the defective merchandise.").

²³³ See Complaint, *Snap Fin.*, *supra* note 152, at 12 ("Snap Defendants inform consumers that they are responsible for 'all maintenance, repairs, upkeep and care' of the financed property, that the consumer 'will pay any operating costs' associated with the property, and that the consumer 'will, at [their] expense, service the Property in accordance with manufacturer standards.'").

²³⁴ See *supra* notes 111–115 and accompanying text (explaining that some RTOs employ predatory and abusive repossession tactics and even use missed payments as grounds to file criminal charges); Nehf, *supra* note 64, at 788 ("The repossession practices of RTO firms have long been the subject of consumer complaints. Judicial decisions reveal allegations of forced entry into customer residences, harassing communications with consumers whose payments are late, deceptive collection efforts, and other conduct ranging from the unfair to the criminal." (internal citations omitted)). In 2012, the FTC settled a lawsuit in which it accused an RTO company of putting tracking software into computers it

model regarding how a company may address defaults. Most agreements have provisions allowing the company to repossess the rental, but it is unclear what that means.²³⁵ For example, when the rental is affixed to a consumer's property, such as a vehicle repair, is the VirTO company able to repossess the vehicle in its entirety or just the repair? And, if it is just the repair, how does the company do so without breaching the peace? Is a consumer who cannot make a payment and cannot physically return a product potentially committing a criminal act or violating a fraudulent rental statute? If so, the VirTO model increases the likelihood of criminal prosecution because consumers who cannot afford to make monthly payments also cannot physically return the products. Although these questions remain unanswered by the VirTO industry, they ignore the real question: whether VirTOs are in fact RTO agreements when consumers are unable to return the leased product.

3. Increasing Misinformation and Fraud

The marketing for VirTO financing also often leads to misinformation, whereas the incentive structure can lead to opportunities for fraud.²³⁶ VirTOs, like traditional RTO agreements, are often advertised as "90 days same as cash with no credit check" and no hidden fees.²³⁷ Some VirTO companies never

rented. *Aspen Way Enters., Inc.*, 155 F.T.C. 483, 492–95 (2013) (restraining and enjoining RTO company from tracking and gathering data from computers leased under its rent-to-own agreements).

²³⁵ See Martin & Pizzonia, *supra* note 16, at 1467 (stating that RTO companies can repossess and re-lease the same item). Bankruptcy would not offer consumers significant protection from the challenges of being required to return a rental because RTO agreements are treated like rental agreements under the bankruptcy code. See 11 U.S.C. § 365(a) ("[T]he trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."); see, e.g., *In re Stellman*, 237 B.R. 759, 764 (Bankr. D. Idaho 1999) (holding that a debtor was required to "accept or reject" a rent-to-own agreement as an executory contract under the bankruptcy code). Accordingly, consumers are required to either assume the rental agreement or surrender the property. *How to Treat "Rent to Own" Accounts in a Chapter 13 Bankruptcy*, BANKR. L. NETWORK (Apr. 13, 2023), <https://www.bankruptcylawnetwork.com/blog/how-to-treat-rent-to-own-accounts-in-a-chapter-13-bankruptcy> [<https://perma.cc/NKT7-536K>] (stating that for RTO consumers, it is a "good idea to simply reject the rent-to-own account in [their] Chapter 13 plan, and let the seller repossess the items"). Only the rental arrears may be discharged. See *id.* (explaining that if the RTO consumer rejects the RTO account and allows the item to be repossessed, then "[a]ny deficiency will simply become an unsecured debt subject to discharge").

²³⁶ See *infra* notes 237–261 and accompanying text (explaining that VirTO marketing can lead to misinformation and fraud).

²³⁷ Feldman & Stegmaier, *supra* note 150 (stating that Progressive Leasing's marketing materials advertised "90 days same as cash with no credit check"); ASS'N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 22 ("Most RTO companies offer 90–180 days 'same as cash' payment option whereas the customer is given that amount of time to pay for the item at retail price but still using the no-obligation, rent-to-own transaction."); KATAPULT, *supra* note 4 ("Lease-to-own payments: Choose your plan and pace. No hidden fees, no confusion."). Many companies will, however, still engage in a screening process to determine consumer creditworthiness. See, e.g., N.Y.C. DEP'T OF CONSUMER &

indicate “lease” or “rent” in their product advertisements.²³⁸ Nor do some companies clearly explain that consumers will pay significantly more for the product than if the consumer paid with cash.²³⁹ In fact, consumers repeatedly express surprise at learning that they are renting their product or service rather than purchasing it.²⁴⁰ Many indicate that if they had known that they were leasing their purchase, rather than taking out a loan for the product, they would not have entered into the agreement.²⁴¹

Because the consumer is leasing the product from a third party yet physically obtaining the product from a brick-and-mortar or online retailer, VirTO companies rely on the salesperson or the retailer to explain the terms and conditions of the VirTO.²⁴² Reliance upon retail salespersons, rather than a finance provider, often results in false or misleading information provided to the con-

WORKER PROT., *supra* note 10, at 14 (stating that VirTO companies “have a screening process that, while not necessarily reliant on FICO scores like traditional credit, is still essentially an evaluation of creditworthiness”).

²³⁸ See, e.g., N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 15 (stating that VirTOs infrequently used the words “lease” and “rent” in their advertisements). In recent years, many companies have become more explicit about their products, at least in their online advertising. See, e.g., ACCEPTANCENOW, *supra* note 7 (using the word “lease”); *How It Works*, *supra* note 7 (stating that Snap consumers can purchase items with “lease-to-own”); KOALAFI, *supra* note 7 (using the phrase “lease-to-own” in describing Koalafi’s financing options); PROGRESSIVE LEASING, *supra* note 7 (stating that Progressive Leasing offers customers “lease-to-own purchase options”); *Ways to Shop*, *supra* note 7 (demonstrating that Acima uses the word “lease” in their advertising). This may be due to recent litigation against Progressive Leasing for misleading advertisements. See Feldman & Stegmaier, *supra* note 150 (stating Progressive Leasing settled with the FTC for misleading advertisements).

²³⁹ See Feldman & Stegmaier, *supra* note 150 (stating that the FTC alleged that Progressive’s “advertisements did not disclose adequately, or at all, the total cost of Progressive’s rent-to-own products”). For example, some companies imply that consumers may only exercise the early purchase option over the phone or that the early purchase requirement must be made through an immediate lump-sum fund transfer. N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 23.

²⁴⁰ See Lauren Gibbons, *Pet Leasing Would Be Banned in Michigan Under House Legislation*, MLIVE (Dec. 7, 2019), <https://www.mlive.com/public-interest/2019/12/pet-leasing-would-be-banned-in-michigan-under-house-legislation.html> [<https://perma.cc/72EZ-NE36>] (“Grandville resident Emily Heyboer didn’t realize she didn’t own her dog outright until about a year after she’d leased her poodle, Charlie, from The Barking Boutique in Grandville. . . . ‘I was never told that a lease meant that I never actually owned my dog,’ she said. ‘I was just told that I would be able to take my dog home for the low, low price of \$214 a month.’”).

²⁴¹ See, e.g., *Complaints: Acima*, BETTER BUS. BUREAU, <https://www.bbb.org/us/ut/draper/profile/leasing-services/acima-1166-22356426/complaints?page=7> [<https://perma.cc/72LR-GKR6>] (“I was not sold this as a leasing option but a finance option. . . . I was [later] informed of this company Acima is a leasing company . . . this company is text book [sic] predatory lending . . . I hate the day I went into the business . . .”); *Complaint—Class Action at 23, Danger v. Nextep Funding, LLC*, 355 F. Supp. 3d 796 (D. Minn. 2019) (No. 18-cv-00567) (“Had Plaintiff been made aware of the true cost of Defendants’ credit, she might have pursued alternative financing options such as purchasing [their pet dog] Bailey Rose with a credit card.”).

²⁴² See N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 15 (stating that customers rely on retailers to describe the product and explain the terms).

sumer.²⁴³ In fact, during a recent investigation of VirTO companies, investigators discovered that nearly all retailers lacked detailed information on the VirTOs they provided to consumers and made misleading statements about them.²⁴⁴ According to a New York City consumer investigation, such misleading statements have included promising VirTOs would help the consumer's credit, implying it was like a loan or credit card, and implying there were no financing charges associated with the agreements, among other false claims.²⁴⁵ These misstatements were not necessarily the individual retailer or salesperson's misdeeds. The New York investigation found that most VirTO companies did not even provide training to retailers about the true nature of their products or advise retailers how to discuss their products.²⁴⁶ Thus, many of these retailers, the customers' only source of information pre-contract formation, also knew nothing about the rental nature of these arrangements.²⁴⁷ In other cases, companies encouraged retailers to hide the true nature of these transactions.²⁴⁸

Even if the salesperson had the relevant information, having the salesperson—someone not typically trained in finance and with a vested interest in ensuring the consumer makes the purchase—explain the fine print of a VirTO will likely facilitate confusion about the details of the agreement.²⁴⁹ Many salespeople will explain to consumers that they offer “financing” without explaining that the “financing”—a word typically associated with a loan and se-

²⁴³ See *infra* notes 244–248 and accompanying text (detailing the ways RTO consumers' reliance on retailer explanation leads to misinformation).

²⁴⁴ See N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 10, at 15 (“During DCWP's undercover operation, the investigator asked 12 retailers if they had any virtual LTO information he could take with him; 11 said no. This failure to provide information—or, more nefariously, the tendency to provide false or misleading information—is also apparent in consumer complaints.”).

²⁴⁵ *Id.* at 15–16.

²⁴⁶ See *id.* at 27 (stating that “retailers are poorly trained and sometimes encouraged to deceive or evade”).

²⁴⁷ See *id.* at 17 (“Retailer training is so limited that some may not understand that they are legally obligated to show the disclosures to consumers.”).

²⁴⁸ See *id.* at 27 (stating that the trainings that VirTO companies provide are often focused on moving the customer's attention away from critical information).

²⁴⁹ The business model for VirTOs also creates a “trilateral dilemma,” or a situation in which consumers “rely on the recommendations of financial service providers, but these providers are frequently incentivized to steer the consumer in a manner that serves the provider's interest, not the consumer's.” See Adam J. Levitin, *The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses*, 108 GEO. L.J. 1257, 1306 (2020). There is the significant potential for retailers to engage in “loan packing” or to add additional fees, costs, or products that are not necessary once financing is secured. See *id.* at 1265. For example, in the FTC's lawsuit against Progressive Leasing, the FTC alleged that consumers always ended up paying more than the stated retail price—sometimes at a substantial increase. Feldman & Stegmaier, *supra* note 150. The crux of the FTC's lawsuit against Progressive Leasing turned on a theory that Progressive was engaging in deceptive trade practices in violation of Section 5(a) of the Federal Trade Commission Act. *Id.*

cured transaction—is in fact a rental agreement.²⁵⁰ And, because most of these transactions occur online or on tablets, the technology allows the consumer and/or the retail salesperson to conveniently click past any required disclosures or the fine print regarding the agreement without being clearly alerted to the true nature of the agreement.²⁵¹ In fact, it is not uncommon for a salesperson to sign the agreement on behalf of the consumer and for the consumer to never actually see the agreement.²⁵²

Although most alternative finance providers deliver documents to consumers via text or email, some deliver documents through tablets at the point-of-sale.²⁵³ Unfortunately, this mode of delivery disincentivizes consumers from reading and understanding the terms of the VirTO agreement. For example, consumers who sign the documents on a tablet at the point-of-sale may feel pressure to sign quickly while a line forms behind them, never actually reading the documentation provided.²⁵⁴ Some consumers are also only provided with

²⁵⁰ See N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 10, at 15 (stating that VirTO sales associates at times “[f]alsely imply[] that an LTO agreement is like using a credit card and/or advertising LTO agreements alongside traditional financing products without mentioning that LTO is a lease product”).

²⁵¹ See *id.* at 17 (“The technology used by at least four [VirTO] companies allows the retailer to click past disclosures without consumers seeing them and to e-sign on the consumer’s behalf by typing a name or some other digital identifier.”). For one potential proposal to improve oversight of potentially exploitative consumer contracts more broadly, see generally Yehuda Adar & Shmuel I. Becher, *Ending the License to Exploit: Administrative Oversight of Consumer Contracts*, 62 B.C. L. REV. 2405 (2021) (arguing for administrative oversight of consumer standard form contracts to help combat exploitative terms in consumer contracts).

²⁵² See Complaint, *Snap Fin.*, *supra* note 152, at 3 (noting that retailers frequently signed VirTOs on behalf of consumers). This process is not uniform to the industry but represents a common scenario. See, e.g., N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 10, at 17 (stating that at least four VirTO providers permit the retailer to skip through the disclosures and e-sign on behalf of the customer). In some cases, the company will send the lease via text to the consumer’s phone where they can click through the lease agreement to sign it. See *id.* (stating that Acima texts leases to customers for their digital signature). There are also numerous accounts of consumers allegedly being a party to such VirTOs, but not having entered such agreements. See, e.g., *Smart v. W. Creek Fin., Inc.*, No. 20-CV-250, 2021 WL 415130, at *1 (M.D. Ga. Feb. 5, 2021) (stating that the plaintiff asserted he never intended to enter or sign the lease-to-own agreement that the retailer claims he executed).

²⁵³ See *supra* note 154 and accompanying text (stating that Progressive emails agreements to consumers); *supra* note 252 and accompanying text (stating some VirTOs text agreements to consumers for e-signatures and that some allow agreements to be signed on tablets).

²⁵⁴ There is an argument that this process violates the consumer protection requirements in the federal e-sign statute. See 15 U.S.C. § 7001(c)(1) (“Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if . . . (C) the consumer—(i) prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records; and (ii) consents electronically, or confirms his or her consent electronically, in a

the documentation on the store-owned tablet, so the consumer does not have a copy to review or take home.²⁵⁵ Similarly, when documents are delivered via text or smartphone, it may be unclear that the email or text is meant to provide them with information on their VirTO.²⁵⁶

As noted earlier, VirTO companies often market their products to retailers by highlighting that they allow retailers to reach consumers who may otherwise not be able to afford their products.²⁵⁷ These same retailers have an interest in making the sale and may have expertise the consumer is relying on to determine the scope of their purchase. For example, many consumers rely heavily on a mechanic's expertise to advise them on what repairs are needed for their vehicle.²⁵⁸ For dishonest mechanics, the ability to broker financing while also determining what repairs are needed may prove irresistible. Yet, many VirTO providers fail to implement procedures that would detect fraud on behalf of merchants.²⁵⁹ And, because VirTO companies claim VirTOs are not granting credit, and therefore are not subject to most federal consumer protection statutes governing credit, there is no protection for fraudulent transactions, unlike credit card payments or other financing instruments.²⁶⁰ Because these practices appear to be systemic to the industry, these types of misrepresentations have also recently been the subject of multiple regulatory actions.²⁶¹ In

manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent . . .").

²⁵⁵ See, e.g., Complaint at 3, *Pepin v. Snap RTO, LLC*, No. 18-cv-01667 (D. Conn. Oct. 8, 2018) (stating that the plaintiff completed an online application in-store but was not given a copy of an agreement).

²⁵⁶ See, e.g., *Foohy & Martin*, *supra* note 132, at 496 (noting that the delivery of auto loan documents via smartphone or tablet could result in consumers not reading or understanding the documents).

²⁵⁷ Many VirTO companies also incentivize retailers to push these products because they have eliminated any fees and pay full market price for the product. In fact, for some retailers, it is more profitable to have the consumer enter a VirTO than it is for the consumer to use their credit card because they can charge the RTO company a delivery fee. See, e.g., N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 10, at 26; Upbound Group, Inc., Annual Report (Form 10-K), *supra* note 16, at 5 (describing how retailers charge a delivery fee that is then passed on to consumers).

²⁵⁸ See *supra* note 181 and accompanying text (stating that, for some, lease-to-own agreements are the only means for the customer to make the purchase).

²⁵⁹ See N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 10, at 28 (discussing the lack of mechanisms to ensure accountability for retailers engaging in misconduct related to VirTOs). For example, in response to a subpoena from the New York City Department of Consumer and Worker Protection, four out of the five companies served did not have mechanisms for detecting retailer misconduct or fraud. *Id.* As just one further example, some VirTO companies did not even have a process to detect "obvious misconduct" such as required emails in applications being listed as "idonthaveemail." *Id.*

²⁶⁰ See *supra* note 122 and accompanying text (explaining that RTO consumers do not receive the same protection afforded to credit card consumers).

²⁶¹ See Press Release, FTC, Rent-To-Own Payment Plan Company Progressive Leasing Will Pay \$175 Million to Settle FTC Charges It Deceived Consumers About Pricing (Apr. 20, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/04/rent-own-payment-plan-company->

short, the environment VirTOs create provides ample opportunity for misinformation and fraud.

4. Artificially Increasing Consumer Demand

The VirTO industry has significantly increased the number of items sold by retailers for better or worse.²⁶² This may mean that many consumers who otherwise would not have been able to purchase essential products and services are now able to do so. But it also may mean that retailers are artificially increasing consumer demand, selling non-essential products to consumers who would not have purchased such products without financing.²⁶³ In fact, there is some evidence that VirTO companies' true customers are retailers, not individual consumers.²⁶⁴ VirTO companies often market their products directly to retailers rather than consumers. For example, many companies message their products by highlighting that they allow retailers to reach consumers they otherwise would not have been able to reach and that they will be able to sell additional products and services.²⁶⁵ These VirTO companies are not wrong. In

progressive-leasing-will-pay-175-million-settle-ftc-charges-it [<https://perma.cc/H25B-6WBS>] (stating that the FTC charged Progressive Leasing with misleading its customers about lease pricing and that Progressive Leasing settled the case for \$175 million); *see also* PROG Holdings, Inc., Annual Report (Form 10-K), *supra* note 145, at 83 (outlining the Pennsylvania Attorney General's complaint against Progressive Leasing for violating the state "Rental-Purchase Agreement Act by failing to disclose certain terms and conditions" on "hang tags" physically affixed to the merchandise); Upbound Group, Inc. Annual Report (Form 10-K), *supra* note 16, at 82 (noting a settlement agreement with the California Attorney General with AcceptanceNOW enjoining it from charging a cash price for RTO agreements above the cash price offered by the retailer and requiring employee training on compliance requirements). The FTC alleged that Progressive Leasing's marketing of VirTOs in tens of thousands of retailers across the U.S. misled consumers. Press Release, *supra*. Progressive Leasing trained salespersons to use phrases like, "no interest" or "same as cash" without explaining to consumers the true nature of their agreements. *Id.* After receiving over 15,000 complaints, the FTC pursued litigation reaching a \$175 million settlement in which Progressive Leasing would have to monitor third parties such as retailers. *Id.*

²⁶² *See supra* note 182 and accompanying text (stating that VirTOs have expanded the RTO industry and have allowed retailers to expand their consumer bases).

²⁶³ *See supra* note 249 and accompanying text (stating that salespeople, who have a vested interest in making the sale, are charged with explaining VirTOs and often mislead consumers).

²⁶⁴ *See, e.g.,* Foohey & Martin, *supra* note 132, at 496 (noting that auto loan platforms often advertise to dealers, raising questions about whether the dealers are their customers rather than the consumer); *see also* Wertz, *supra* note 181 (arguing that retailers can exponentially grow sales by integrating lease-to-own agreements into their e-commerce strategy). David Ray Papke has also explored the concept of RTO businesses serving as a facilitator in the process of commodification or turning items into commodities. Papke, *supra* note 77, at 226. His work does not distinguish between traditional RTOs and VirTOs, but to the extent VirTOs are increasing consumerism in many more industries, it is worth considering. *See generally id.* (stating that, in the context of consumer capitalism, the RTO industry facilitates the commodification of items).

²⁶⁵ *See* Wertz, *supra* note 181 ("Ensuring financing options for all types of customers including customers with good credit, evolving credit, and even no credit history is key to making sure you are

fact, one company indicated that its retail partners tripled their sales after integrating its financial product.²⁶⁶

Although VirTOs may be allowing consumers to purchase items they would not have otherwise been able to purchase, they are also likely increasing general consumerism and encouraging consumers to purchase items that they do not ultimately need, may not need immediately, or that may not make financial sense.²⁶⁷ Although there are certainly issues with consumers purchasing products they do not need, the larger concern with VirTOs are the financial consequences of such purchases. For products that consumers need, the costs associated with VirTOs may well be worth the benefits. But for those products that are non-essential or essential products that could be purchased later, the high cost of such agreements, combined with the extreme difficulty of termination, may outweigh any potential benefits. Because VirTOs are so conveniently available with the click of a button from inside one's home, the increase in consumerism may have dire financial consequences for many consumers.²⁶⁸

B. Exacerbated Old Problems

Not only have VirTOs presented new challenges, they have also exacerbated many of the existing challenges of traditional RTO agreements. Some of these challenges include targeting low-income and subprime consumers in potentially discriminatory ways, increasing the costs of credit for such consumers, and exacerbating such consumers' inability to reach traditional credit markets.²⁶⁹ Subsection 1 discusses the exorbitant cost of VirTOs.²⁷⁰ Subsection 2 describes how VirTOs target low-income and subprime consumers.²⁷¹ Finally, Subsection 3 explains that VirTOs do not help consumers build their credit.²⁷²

serving everyone and not missing a potential sale,' said Orlando Zayas, CEO of Katapult, a lease-to-own platform. 'Consumers will need financing now more than ever to get the products they want.'").

²⁶⁶ See *id.* (stating that one of Acima's retail partners tripled its sales after introducing VirTO solutions).

²⁶⁷ See Hawkins, *supra* note 23, at 2058 (arguing that consumers do not use RTOs to lease low-quality necessities, but instead use RTOs to rent goods that "enhance the quality of their lives").

²⁶⁸ See *supra* note 187 and accompanying text (stating that VirTOs can be entered into online, from the comfort of the consumer's home).

²⁶⁹ See *infra* notes 273–319 and accompanying text (discussing how VirTOs have exacerbated the following existing problems in the RTO industry: the costliness of RTOs, the targeting of low-income and subprime consumers, and failing to build consumer credit).

²⁷⁰ See *infra* notes 273–288 and accompanying text (explaining that VirTOs make high-cost RTOs more accessible than ever).

²⁷¹ See *infra* notes 289–312 and accompanying text (stating that VirTOs' targeting of low-income and subprime consumers exacerbates the existing disparities in access to financial markets).

²⁷² See *infra* notes 313–319 and accompanying text (describing why VirTOs may prevent subprime consumers with poor credit ratings from improving their credit scores).

1. High-Cost Credit

The biggest and most frequently cited problem with traditional RTO agreements is that they are an expensive form of financing.²⁷³ Similarly, VirTOs are a high-cost form of financing.²⁷⁴ A consumer may pay two to three times the cash price with an effective APR of more than two-hundred percent with a VirTO.²⁷⁵ Some studies have shown that the cash price for the item is often also marked up, making RTO agreements even more expensive than purchasing with cash.²⁷⁶ And, RTO companies often charge extremely high late fees among other charges and fees.²⁷⁷ By the time consumers actually complete their purchase, consumers could pay more than three times what they would have paid with cash or a credit card.²⁷⁸ At the same time, despite paying more for their purchase together with higher fees, consumers do not build equity in the product.²⁷⁹ Unlike a secured installment contract, the consumer builds no

²⁷³ See, e.g., Hawkins, *supra* note 23, at 2044 (stating that “[a]cademics, courts, and journalists often appeal to the high price of rent-to-own transactions as an automatic justification for regulation”); Nehf, *supra* note 64, at 752–53 (“By charging high prices . . . RTO dealers are often accused of deceiving and exploiting a particularly vulnerable class of consumers . . .”); Ramp, *supra* note 68, at 802 (“One of the principal complaints about the RTO industry is the exorbitant prices that it charges low-income consumers.”).

²⁷⁴ DIKSHIT ET AL., *supra* note 10, at 10 (“The virtual rent-to-own (VRTO) players, including AcceptanceNow and Progressive Leasing, are primarily targeting the subprime consumer base and have very high implied APRs.”).

²⁷⁵ See Hawkins, *supra* note 23, at 2076 (stating that RTO consumers often pay “more than double the purchase price” and that the implied APR is often greater than 200%); Katapult Holdings, Inc., Annual Report (Form 10-K), *supra* note 16, at 4 (noting that consumers will generally pay up to 2 to 2.25 times the cash price, depending on state law limitations). According to the RTO industry, although a consumer may pay more for an RTO product, consumers will always pay more for financing and the value of an RTO “is its products combined with its service, flexibility and no-obligation transaction . . .” ASS’N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 24.

²⁷⁶ See, e.g., Wendy A. Wiedenhoft Murphy, *Exploited and Empowered Inclusion: Contesting the Flawed Consumer in the United States*, 48 J. SOCIO. & SOC. WELFARE 5, 12 (2021) (stating that RTO retailers often charge low-income consumers a “poverty premium”).

²⁷⁷ See, e.g., Hawkins, *supra* note 23, at 2098 (stating that “late fees can drastically increase the actual costs of ownership if the customer misses some payments”); N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 24 (“Snap charges \$20 for each bounced payment and 10% for each late payment . . .”); cf. Anderson, *supra* note 23, at 152 (providing one study that showed that approximately 37% of RTO payments were late).

²⁷⁸ See Zikmund-Fisher & Parker, *supra* note 84, at 200–01 (comparing the cost of a \$599 television paid for on credit card, with a 19.8% APR to be paid off in 12 months, versus an RTO agreement for 91 weeks and finding that the total credit card cost was \$714 while the total RTO cost was \$2,456).

²⁷⁹ See Hawkins, *supra* note 23, at 2082 (stating that an RTO consumer “forfeits all equity if the contract terminates”).

equity with a rental agreement.²⁸⁰ If a consumer terminates the rental early, or defaults, any money paid towards the purchase price is forfeited.²⁸¹

VirTOs, like traditional RTO agreements, offer consumers a high-cost form of credit.²⁸² Now, however, this high-cost credit is available with the mere click of a button.²⁸³ Historically, RTO consumers have reported they use RTO agreements despite the high cost because they want to be able to purchase the good immediately, they do not have to pass a credit check, and they are able to make low periodic payments and terminate the rental at any time.²⁸⁴ Others report that the convenience, both in terms of locations and opening hours, is a major factor in why they use non-traditional financing.²⁸⁵ Because VirTOs are available through online retailers' sales platforms or when checking out at a brick-and-mortar retailer, VirTOs provide consumers with the ultimate convenience: the ability to purchase products or services at their local, neighborhood retailers or online anytime from anywhere.²⁸⁶ Accordingly, VirTO companies are reaching more consumers, many of whom would otherwise have used other forms of credit or would have saved up for their purchases.²⁸⁷ These consumers may be unsuspectingly entering high-cost VirTOs simply because they are instantaneously available without shopping around for other

²⁸⁰ See *id.* at 2050 (“The customer forfeits all equity she has in the goods in the context of a lease, but she retains her residual interest if the transaction is a credit sale.”).

²⁸¹ *Id.* at 2082.

²⁸² See *supra* note 274 and accompanying text (noting that VirTOs and traditional RTOs are both an expensive form of financing).

²⁸³ See *supra* note 188 and accompanying text (stating that VirTO consumers can apply for a lease online and then immediately start shopping).

²⁸⁴ See CASKEY, *supra* note 46, at 80 (citing a study concluding that traditional RTO consumers used the agreements because they wanted the good immediately, did not need to pass a credit check, and liked the flexibility of RTO agreements).

²⁸⁵ See *id.* at 79 (stating that consumers use fringe financing partially because they value the convenience).

²⁸⁶ See, e.g., *Find a Store*, *supra* note 158 (listing all the online and brick-and-mortar stores where Progressive Leasing customers can make purchases).

²⁸⁷ See Wertz, *supra* note 181 (stating that VirTOs allow customers to purchase items they otherwise would not be able to, that in turn allows businesses to gain customers they otherwise would not be able to do business with). Because most VirTO providers require consumers to provide their bank account numbers and to allow automatic withdrawals, there is anecdotal evidence that consumers who have access to traditional deposit banks, and likely traditional credit, like credit cards, are still using VirTOs. See, e.g., *Consumer Help: What Are the Requirements to Apply for Lease-to-Own Financing with Snap?*, SNAP FIN., <https://support.snapfinance.com/support/solutions/articles/31000158108-what-are-the-requirements-to-apply-for-lease-to-own-financing-with-snap> [<https://perma.cc/KET4-2KRF>] (stating that in order to lease-to-own with Snap, consumers must have “an active checking account”); cf. Hawkins, *supra* note 23, at 2059 (“Rent-to-own customers also have more access to credit than one might assume: 44 percent of customers had credit cards, compared to 68 percent in the general population; 64 percent had a checking account, compared to 87 percent in the general population; and 49 percent had a savings account, compared to 56 percent in the general population.”). These consumers are likely using a high-cost form of credit unnecessarily.

forms of financing. And, for those consumers who are not able to access traditional credit, they continue to pay more to merely obtain the benefit of accessing products immediately while deferring the costs.²⁸⁸

2. Targeting Low-Income and Subprime Consumers

Like traditional RTO companies, VirTO companies often target low-income, subprime consumers by offering the promise of instantaneously owning a product or obtaining a service without having to pay cash.²⁸⁹ Historically, consumers of RTO agreements have been individuals who either are unable or do not want to use a traditional loan offered by a traditional bank.²⁹⁰ Most of these consumers are low-income and have subprime credit scores, often making less than \$36,000 per year.²⁹¹ VirTO companies appear to be similarly targeting such consumers.²⁹² Indeed, many VirTO companies view themselves as

²⁸⁸ See ASS'N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 8 (stating that consumers who do not have access to traditional credit can immediately access goods through RTOs).

²⁸⁹ See *Buy Now, Pay Later: Five Business Models to Compete*, *supra* note 274, at 10 (“The virtual rent-to-own (VRTO) players . . . are primarily targeting the subprime consumer base . . .”); N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 14 (“NCN [no-credit needed] companies are very savvy businesses that use ‘modern technology and alternative data sources’ to target consumers who have just enough financial stability to pay what appears to be a reasonable monthly bill but not enough to qualify them or credit that, ultimately, is not predatory.”). See generally Papke, *supra* note 77, at 224 (noting that RTO stores, along with payday lenders and title pawnshops target low-income, urban poor).

²⁹⁰ See ASS'N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 8 (stating that RTOs make goods available to consumers who do not want long-term obligations or cannot access traditional credit). Even if consumers were able to secure a traditional loan, many traditional banks do not provide small-dollar loans because the costs to provide such loans outweigh the interest the bank could collect. Devin Langdon Mack, *The Cost of Credit: Protecting Consumers in a Regulated Fringe Credit Market*, at 21–22 (May 21, 2017) (LL.M. thesis, George Washington University) (ProQuest) (explaining that banks infrequently offer small, short-term loans because the underwriting costs would outweigh the interest collected, resulting in a financial loss on the loan).

²⁹¹ ASS'N OF PROGRESSIVE RENTAL ORGS., *supra* note 16, at 9. APRO data shows that 31% of consumers of RTO agreements made \$24,000–\$35,999, 28% made \$15,000–\$23,999, and 13% made less than \$15,000 per year. *Id.*

²⁹² See, e.g., PROG Holdings, Inc., Annual Report (Form 10-K), *supra* note 145, at 15 (“Progressive Leasing serves subprime consumers.”). VirTO companies often advertise that there is “no credit needed,” presumably to attract consumers who would not be able to access such credit. See, e.g., ACCEPTANCENOW, *supra* note 7 (“Shop with Confidence—Without Using Credit!”); ACIMA, <http://www.acima.com> [<https://perma.cc/QL7A-WMNX>] (“Get the things you love—all without perfect credit”); *How It Works*, KOALAFI, *supra* note 4 (“A great choice if you’re still building your credit.”); PROGRESSIVE LEASING, *supra* note 7 (“Shop at your favorite stores and enjoy convenient lease-to-own purchase options. No credit needed.”); SNAP FIN., <https://snapfinance.com/finance/appliances> [<https://perma.cc/8K85-K7XZ>] (“Good credit? Poor credit? No credit? Snap Finance has got you covered with lease-to-own financing made simple.”). Although many of these companies advertise “no credit needed,” the fine print often indicates that they do in fact check credit and that their advertisement really means that the agreement is not a loan but an RTO agreement. See, e.g., ACIMA, *supra* (“Get the things you love—all without perfect credit. . . . The advertised service is a

offering subprime financing and target subprime consumers.²⁹³ For example, one VirTO company explicitly targeted “Asset-Limited Income-Constrained and Employed” or what it called, “ALICE” consumers.²⁹⁴

VirTO companies’ focus on low-income and subprime consumers exacerbates already existing disparities in consumer access to financial markets.²⁹⁵ Traditional RTO consumers are more likely to be Black and lower income.²⁹⁶ This reflects the larger disparities in access to traditional financial markets. Black, Latinx, and Native American households are also much more likely to be unbanked or underbanked.²⁹⁷ Because the VirTO industry significantly expands the reach of the RTO industry and markets its products to those individuals with lower access to traditional credit, it necessarily exacerbates the existing disparities in access to credit markets.²⁹⁸ Although there is limited data on VirTOs, a New York City investigation found that VirTOs were heavily offered in communities of color.²⁹⁹ The concentration of retailers partnering with third-

rental or lease purchase agreement provided by Acima. It is not a loan, credit or financing. While no credit history is required, Acima obtains information from consumer reporting agencies in connection with a lease application. . . . ‘The No Credit Option’ or ‘All PERFECT Without Credit’ means this is not a credit, loan, or financing transaction. It does not mean or imply no inquiry will be made of credit history or creditworthiness.”). These advertisements mirror many of the advertisements from traditional brick-and-mortar and online stores. *See, e.g., Rent to Own with Aaron’s, AARON’S*, www.aarons.com/what-is-rent-to-own [<https://perma.cc/PY2Q-DSTF>] (“Even if your credit isn’t the best, Aaron’s offers approvals when other stores won’t. Renting to own is not credit, and when you rent to own, you avoid large upfront payments by making affordable monthly payments instead. Plus, you get additional benefits that you won’t get with traditional financing options.”).

²⁹³ *See, e.g., FlexShopper, Inc., Annual Report (Form 10-K), supra* note 145, at 1 (“Many of our customers fall within the near-prime or subprime Fair Isaac and Company (“FICO”) score categories and may have difficulty purchasing durable goods or services.”); *PROG Holdings, Inc., Annual Report (Form 10-K), supra* note 145, at 15 (“Progressive Leasing offers lease-to-own solutions to subprime consumers through point-of-sale retail partners via in-store, mobile, and online solutions.”).

²⁹⁴ Complaint, *Snap Fin.*, *supra* note 152, at 2.

²⁹⁵ *See infra* notes 296–301 and accompanying text (identifying existing disparities in consumer financial markets and explaining how VirTOs make the issue worse).

²⁹⁶ *See Papke, supra* note 77, at 228 (stating that an FTC study found RTO consumers are more likely to be “African American, younger, lower income, have children in the household, rent their residence, live in the South, and live in non-suburban areas”).

²⁹⁷ *See Foohey & Martin, supra* note 132, at 476–77 (“In 2017, 6.5% of all households in America were unbanked, meaning they had no bank account, and another 18.7% were underbanked, meaning they have bank accounts but still use alternative financial services. In comparison, 16.9% of Black households and 14% of Latinx households were unbanked. Just under 13% of ‘other’ households, which includes Native Americans, were unbanked. Another 30.4% of Black, 28.9% of Latinx, and 28% of ‘other’ households were underbanked in 2017.”).

²⁹⁸ *See supra* note 138 and accompanying text (stating that VirTOs have allowed the RTO industry to expand into new categories resulting in significant growth); *supra* note 174 and accompanying text (explaining that VirTOs’ partnership with retailers allow retailers to grow their customer base and reach more potential consumers).

²⁹⁹ *See N.Y.C. DEP’T OF CONSUMER & WORKER PROT., supra* note 10, at 13 (finding that LTO retailers are predominantly located in communities of color).

party VirTO companies was higher in communities with more than seventy percent of residents identifying as Black or Hispanic/Latino than in other communities.³⁰⁰ Not only are consumers of color more likely to fit the economic profile of a typical RTO consumer, but the industry is actively targeting these consumers.³⁰¹

Unfortunately, the VirTO industry reflects larger trends in the introduction of fintech and in the fringe economy.³⁰² Fringe financing has long targeted low-income consumers, and often, low-income consumers of color.³⁰³ Indeed, research shows that fringe financial services have been concentrated in communities of color.³⁰⁴ The introduction of fintech has allowed companies targeting subprime consumers more opportunities to reach consumers with little or no credit and to quickly provide them with loans.³⁰⁵ And, because companies typically offer these loans online or through retailers on tablet screens, con-

³⁰⁰ *Id.* Although the mere presence of these companies in communities of color does not necessarily mean that individuals of color will use those products, there is evidence that alternative financial lenders are well-experienced in marketing alternative finance products to these communities. *See, e.g.,* Foohey & Martin, *supra* note 132, at 486 (stating that alternative finance providers “hire celebrities, such as Magic Johnson and Tavis Smiley, to pitch their products” and “hire persons of color to go to Black churches to persuade pastors to argue against regulations limiting the loans, offer money for summer camp, and pay finder’s fees for new loans”). And the research indicates that Black and Latinx Americans are more likely to use such products when compared with white Americans. *See id.* at 460, 487 (stating that “[p]eople of color use payday loans and other fringe lending at a much higher rate than white Americans” and that “Black Americans, and Latinx Americans disproportionately use these other fringe products”). It should also be noted that, according to third-party VirTO companies, the concentration of these retailers was not targeting communities of color, but rather simply offering financing options to those who were “financially marginalized.” N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 13.

³⁰¹ *See supra* note 77 and accompanying text (explaining that RTO customers are more likely to be Black); Hawkins & Penner, *supra* note 7, at 1621 (“Lenders offering credit at extremely high prices, such as payday lenders, target members of racial minority groups. African Americans and Latinos use these ‘fringe banks’ at a disproportionately high rate.”).

³⁰² *See, e.g.,* Foohey, *supra* note 131, at 18 (explaining that Carvana aims to finance customers with bad credit, Car.Loan.com offers auto loans to individuals who need subprime financing, such as those in bankruptcy; myAutoloan.com offers quick auto loans through a national lender network, and Auto Credit Expense, which similarly partners with a lender network to provide financing options, offers a fast pre-qualification process).

³⁰³ *See* Papke, *supra* note 77, at 224, 228 (stating that “[r]ent-to-own outlets, payday lenders, and title pawns target the urban poor” and that “rent-to-own customers [are] more likely to be African American”).

³⁰⁴ *See* Terri Friedline & Zibei Chen, *Digital Redlining and the Fintech Marketplace: Evidence from US Zip Codes*, 55 J. CONSUMER AFFS. 366, 369 (2021) (“The growth of higher-cost alternative financial services has been concentrated in black and brown communities. At the county level, for instance, increases in the number of payday lenders per capita are associated with increases in a county’s [B]lack population.” (citations omitted)).

³⁰⁵ *See, e.g.,* Foohey, *supra* note 131, at 18 (stating that companies, such as Carvana, have “taken cues from other business inspired by technological innovations” to provide financing to consumers with poor credit).

sumers are less able to comprehend the intricate nature of these agreements.³⁰⁶ There is also increasing evidence that the introduction of fintech to other fringe financing markets has resulted in similar disparities.³⁰⁷

Disparities in those who use VirTOs also cause them to disparately experience the hazards of such agreements, exacerbating systemic inequities in multiple ways.³⁰⁸ These disparities plainly include worsening wealth and debt disparities, but they also include exacerbating systemic disparities in less direct ways.³⁰⁹ Because consumers cannot return products easily, they are forced to continue making payments or face potential criminal liabilities.³¹⁰ In states where VirTO providers can use the criminal legal system to collect when consumers default and fail to surrender their rentals, it is one more avenue used to disproportionately imprison people of color.³¹¹ And because VirTOs are cur-

³⁰⁶ See, e.g., *id.* at 21 (“[T]he delivery of documents to consumers via computers and tablets may induce people to sign agreements they have not seen or had a chance to understand. . . . Studies show that people read text differently on paper than on a screen. Screens, smartphones, and tablets inhibit people’s ability to navigate long and complex text, which decreases reading comprehension.”).

³⁰⁷ See Foohey & Martin, *supra* note 132, at 499 (“Over the past several years, payroll cards, early wage access programs, auto lending, and other seeming innovations in banking and lending have replaced prior mainstays of consumer banking and finance. A closer look at these products brings heightened concerns about their likelihood of trapping people of color, in particular, in a cycle of debt that further bleeds them of income and impedes their savings.”). Although tech algorithms purport to eliminate bias, there is increasing evidence that the algorithms may exacerbate or reflect the implicit bias of those who write the algorithms. See *id.* at 498 (noting that “[s]cholars increasingly warn that the ‘tech’ part of fintech results in inadvertent racial, ethnic, and gender discrimination based on algorithms”); cf. Upbound Group, Inc., Annual Report (Form 10-K), *supra* note 16, at 5 (noting that Acima uses proprietary software for approving consumers).

³⁰⁸ See *infra* notes 309–312 and accompanying text (identifying disparities that VirTOs exacerbate).

³⁰⁹ See Foohey & Martin, *supra* note 132, at 475–76 (“The hollowing out of the middle class that has come with increased income inequality and a widening wealth gap also has driven Americans from traditional banks and financial products. Paying more for credit, such as subprime home and auto loans, short-term financing, such as payday loans, and reliance on alternative financial services, such as check cashing outfits, are hallmarks of the debt inequality that is now part of middle-class life.”).

³¹⁰ See *supra* notes 214–235 and accompanying text (discussing the barriers to returning leased products and the potential consequences of missing a payment).

³¹¹ See Martin & Pizzonia, *supra* note 16, at 1456, 1471 (stating that RTO consumers are “more likely to be African-American” and that, in most states, RTO dealers can report consumers to police for violating state theft laws leading to a criminal misdemeanor charge or even possibly a felony conviction); Johnson, *Creditors’ Use of Debt Criminalization Practices*, *supra* note 112, at 54–55 (“[T]he RTO industry has no shortage of criminal laws that they employ to coerce the customers into paying or turning over RTO merchandise.”). The criminal justice system, through “rental theft” and similar laws, is frequently operationalized by the RTO industry to criminalize low-income customers that are unable to keep up with payments. NAT’L CONSUMER L. CTR., THE RENT-TO-OWN RACKET: USING CRIMINAL COURTS TO COERCE PAYMENTS FROM VULNERABLE FAMILIES 12 (2019), <https://www.nclc.org/wp-content/uploads/2022/09/report-rent-to-own-racket.pdf> [<https://perma.cc/KQF7-SSYG>] (describing how rental theft statutes can be used “to criminalize the failure to return rental property at the end of the lease term”). Only three states’ rental theft statutes in the United States specifically exclude RTO transactions. *Id.* As 41% of RTO customers are racial or ethnic minorities, communities

rently not considered credit, bankruptcy is not a safe haven for consumers trying to escape debt or avoid criminal charges and potential imprisonment.³¹²

3. Failing to Build Consumer Credit

VirTOs, like traditional RTO agreements, are marketed as no-credit-needed agreements that allow consumers to build their credit.³¹³ Yet, this is untrue for two reasons: (1) most companies do, in fact, screen consumers' creditworthiness; and, (2) on-time payments are generally not reported to the big credit bureaus.³¹⁴ Accordingly, VirTOs may further entrench consumers with poor credit ratings in the subprime market.

Most VirTOs include in the fine print that the company checks consumer creditworthiness.³¹⁵ Some of these companies obtain consumer data from the big credit bureaus.³¹⁶ To the extent these credit checks are "hard pulls," they

of color disproportionately experience the impact of these practices of criminalization. *See id.* at 7 (describing the disproportionate targeting of "low-income [P]eople of [C]olor by the RTO industry"); *see also* Johnson, *Creditors' Use of Debt Criminalization Practices*, *supra* note 112, at 67 n.204 (describing the unique burdens placed on members of communities of color by certain debt recovery practices). For an examination of the way that the criminal debt legal system is implicated in mass incarceration, *see generally* Alex Kornya et al., *Crimsumerism: Combating Consumer Abuses in the Criminal Legal System*, 54 HARV. C.R.-C.L. L. REV. 107 (2019).

³¹² *See supra* note 235 (stating that bankruptcy does not provide protection for RTO consumers).

³¹³ *See supra* notes 104–105 and accompanying text (stating that RTO providers advertise that RTOs do not require credit checks and also claim that the agreements can help build credit); *see also* N.Y.C. DEP'T OF CONSUMER & WORKER PROT., *supra* note 10, at 9 (introducing the concept of "no-credit needed" agreements).

³¹⁴ *See infra* notes 315–319 and accompanying text (explaining that most VirTOs check consumers' credit and do not report on-time payments).

³¹⁵ *See, e.g.*, ACCEPTANCENOW, *supra* note 7 ("Without using credit" means this is not a credit, loan, or financing transaction. It does not mean or imply no inquiry will be made of credit history or creditworthiness. We consider multiple data points in reviewing your application and regularly approve customers with less than perfect credit history. Lease agreement requires, at a minimum, verification of residence, income, and personal references."); ACIMA, *supra* note 292 ("The No Credit Option" or "All Without Credit" means this is not a credit, loan, or financing transaction. It does not mean or imply no inquiry will be made of credit history or creditworthiness. We consider multiple data points in reviewing your application and regularly approve customers with less than perfect credit history."); PROGRESSIVE LEASING, *supra* note 7 ("No credit needed . . . We know a three-digit number doesn't tell your story. That's why every Progressive Leasing approval is NO CREDIT NEEDED. Our underwriting process allows us to consider everyone with less-than-perfect credit. We look at many data points including income and banking history and regularly approve people with less than perfect credit or very little credit history. . . . Progressive Leasing obtains information from credit bureaus. Not all applicants are approved."); SNAP FIN., *supra* note 292 ("While no credit history is required, Snap obtains information from consumer reporting agencies in connection with the lease-to-own application. Not all applicants are approved.").

³¹⁶ *See, e.g.*, PROGRESSIVE LEASING, *supra* note 7 ("Progressive Leasing obtains information from credit bureaus.").

may, in fact, be hurting consumer's credit and can in no way improve a credit score.³¹⁷ This one-way street for credit building is unfair and inappropriate.

Ironically, many VirTO companies advertise that they are helping consumers build credit.³¹⁸ Yet, few VirTO companies report on-time payments to the major credit bureaus.³¹⁹ It is unclear how, if companies do not report payment history, VirTOs build consumer credit. Instead, these companies appear to be further stratifying consumers in the subprime market.

IV. NEW (AND OLD) SOLUTIONS

The rise of VirTOs and shift in the business model provides a good opportunity to reconsider whether RTO agreements should be treated like credit and subject to federal consumer protection and state usury statutes, and if so, which RTO agreements. As outlined below, VirTOs lack the central characteristic of RTO agreements: the ability to terminate the lease without penalty.³²⁰ As such, these agreements should be considered credit and subject to state usury statutes and a large array of federal consumer protection laws, including the Truth in Lending Act (TILA) and Equal Credit Opportunity Act (ECOA), among others.

Even if VirTOs are not considered traditional credit, states should ban them for certain products and implement tailored regulations in the remaining markets. State and federal consumer protection agencies should also use the existing statutes and enforcement mechanisms at their disposal to address the growing challenges with VirTOs.

The market for VirTOs, despite their challenges, has grown in part because many consumers do not have access to traditional, low-cost credit and continue to use such products.³²¹ To truly ensure consumers can secure the credit necessary to purchase essential items, states should work to identify av-

³¹⁷ See *supra* note 107 and accompanying text (stating that credit inquiries generally decrease a consumer's credit score).

³¹⁸ See, e.g., *How It Works*, KOALAFI (May 21, 2022), <https://web.archive.org/web/20220521055851/https://koalafi.com/how-it-works> ("A Koalafi lease isn't just a great way to manage a big expense—it also helps you build your credit. We buy the item and lease it to you, reporting your progress to the credit bureaus so your credit score improves.").

³¹⁹ See *supra* note 108 and accompanying text (stating that most RTOs do not report to credit bureaus); *FAQs*, *supra* note 154 ("We do not currently report to credit bureaus. Progressive Leasing provides a lease-to-own purchase program, not credit."). But see Complaint, *Snap Fin.*, *supra* note 152, at 16 (noting that Snap Finance reported consumer payment history to DataX, a subprime credit reporting agency service); *Need Help?*, KATAPULT, <https://katapult.com/katapult-for-shoppers/faq/#1655806843684-377c00ce-cc3e> [<https://perma.cc/VUQ6-HS9V>] ("We may check past transactional history and report information about your lease purchase agreement to credit reporting agencies . . .").

³²⁰ See *infra* note 327 and accompanying text (stating that VirTOs are different from traditional RTOs in that they are difficult to terminate).

³²¹ See *supra* note 181 and accompanying text (stating that RTOs help those with poor credit or without access to credit to purchase products they could not otherwise obtain).

enues to truly make low-cost credit more accessible.³²² Doing so will ensure low-income, subprime consumers are not reliant on high-cost VirTOs. Section A of this Part argues that VirTOs are disguised credit sales.³²³ Section B explains why states should ban VirTOs for nonsensical products.³²⁴ Section C contends that states should regulate point-of-sale retailers as credit service organizations.³²⁵ Finally, Section D argues that existing state regulatory frameworks should be used to regulate VirTOs and point-of-sale retailers partnering with VirTO companies.³²⁶

A. VirTOs Are Disguised Credit Sales

Courts have the immediate ability to address many of the problems associated with VirTOs and their business model by holding that VirTOs are credit under the existing federal consumer protection statutes and state usury statutes. VirTOs, unlike traditional RTO agreements, no longer retain the central characteristic of RTO agreements: the ability to terminate the rental at any time without penalty.³²⁷ VirTOs should accordingly be treated like credit, subject to state usury laws, rather than like RTO agreements which are insulated from existing consumer protection statutes governing credit and state usury limits.³²⁸ There is a

³²² For example, Wells Fargo, like other large banks, recently launched a small-dollar loan product for customers to easily access \$250 or \$500 loans. Allissa Kline, *Wells Fargo Launches Small-Dollar Loan as an Alternative to Overdrafts*, AM. BANKER (Nov. 16, 2022), <https://www.americanbanker.com/news/wells-fargo-launches-small-dollar-loan-as-an-alternative-to-overdrafts> [<https://perma.cc/C2ZL-5NTG>]. Under the loan, customers would pay a flat fee of \$12 for a \$250 loan or \$20 for a \$500 loan. *Id.* Customers can only have one outstanding loan at a time and may use the product up to three times a year. *Id.*

³²³ See *infra* notes 327–358 and accompanying text (arguing that VirTOs are disguised credit sales).

³²⁴ See *infra* notes 359–365 and accompanying text (suggesting that states should ban VirTOs for products that are not traditionally rented—nonsensical products).

³²⁵ See *infra* notes 366–377 and accompanying text (explaining why states should ban point-of-sale retailers as credit service organizations).

³²⁶ See *infra* notes 378–389 and accompanying text (contending that existing state regulatory frameworks should be utilized to regulate VirTOs).

³²⁷ See *supra* notes 214–235 and accompanying text (stating that the VirTO model corrupts the ability of consumers to terminate their agreement and return their rental).

³²⁸ See *supra* note 62 and accompanying text (stating that state RTO laws generally exempt RTO agreements from state usury limits and statutory definitions of credit). There is some precedent for treating alternative finance vehicles as credit. For example, income sharing agreements (ISAs) have been treated as credit, subject to federal consumer protection statutes governing credit, despite having alternative financing mechanisms. See, e.g., *CFPB Takes Action Against Student Lender for Misleading Borrowers About Income Share Agreements*, CONSUMER FIN. PROT. BUREAU (Sept. 07, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-student-lender-for-misleading-borrowers-about-income-share-agreements/> [<https://perma.cc/63C7-BB6B>] (stating that even though the ISA industry claims that it does not provide consumers with loans, ISAs are credit and are subject to consumer protection laws). There is also a long history of consumer advocates arguing that traditional RTOs should be treated like credit. See *supra* notes 57–59 and accompanying

simplicity to this solution. Courts already have the tools available to address the problems with VirTOs; it is not necessary for federal or state legislatures to pass any additional legislation to address the problems created by VirTOs.³²⁹

Historically, however, courts have been hesitant to conclude that traditional RTO agreements are loans or “credit sales” subject to federal consumer protection statutes or state usury statutes.³³⁰ Most courts have concluded that

text (describing consumer advocate efforts to address predatory RTO agreements in the 1970s and 1980s). Consumer advocates continue to argue that RTO agreements, and even VirTO agreements, should be classified as credit rather than a rental agreement. *See, e.g.*, N.Y.C. DEP’T OF CONSUMER & WORKER PROT., *supra* note 10, at 31 (“New York should end the distinction between RICs and LTO agreements, since, given the obstacles faced by consumers who wish to terminate leases, the distinction is negligible in practice.”); *infra* notes 333–340 and accompanying text (describing litigation addressing whether VirTO agreements are subject to state usury statutes and federal consumer protection statutes governing credit).

³²⁹ This is not to say that federal or state legislation could not help clarify that VirTOs are credit subject to federal consumer protection statutes and state usury limits. It certainly could. It is not necessary, however, for courts to conclude that VirTOs are disguised credit sales subject to federal and state consumer protection statutes governing credit.

³³⁰ *See, e.g.*, *Ortiz v. Rental Mgmt., Inc.*, 65 F.3d 335, 336 (3d Cir. 1995) (finding that the RTO agreement did not violate the TILA because it was “terminable without penalty at any time” and thus was not a credit sale under the TILA); *In re Rembert*, 293 B.R. 664, 667 (Bankr. M.D. Pa. 2003) (sustaining Aaron’s objection to debtor’s voluntary petition under Chapter 13 of the Bankruptcy Code and holding that an RTO agreement was not a disguised security agreement); *Ysasi v. Nucentrix Broadband Networks, Inc.*, 205 F. Supp. 2d 683, 687–88 (S.D. Tex. 2002) (holding that “even if these leases were construed as rent-to-own leases, because there is no termination penalty they are not covered by the TILA”); *In re Johnson*, 203 B.R. 498, 503 (Bankr. S.D. Ga. 1996) (holding that a lease-purchase agreement “constitute[d] a true lease subject to [Georgia law]”); *In re Hanley*, 135 B.R. 311, 313 (Bankr. C.D. Ill. 1990) (finding that the RTO agreement was exempted from the TILA because it was not a credit sale); *In re Martin*, 64 B.R. 1, 3 (Bankr. S.D. Ga. 1984) (holding that the RTO agreement was “not a disguised security transaction” and was instead a “true lease”); *Smith v. ABC Rental Sys. of New Orleans, Inc.*, 491 F. Supp. 127, 129 (E.D. La. 1978) (finding that the RTO agreement was not a credit sale under the TILA); *Silva v. Rent-A-Center, Inc.*, 912 N.E.2d 945, 945, 950, 952 (Mass. 2009) (holding that an RTO agreement was not a retail installment sale (i.e., credit sale) under RISA but was subject to the Massachusetts Consumer Lease Act because the consumer could terminate the lease at any time without penalty); *State v. Action TV Rentals, Inc.*, 467 A.2d 1000, 1000, 1004 (Md. 1983) (finding that the RTO agreement was not an installment sale agreement and thus was not subject to RISA); *Hawkes Television, Inc. v. Me. Bureau of Consumer Credit Prot.*, 462 A.2d 1167, 1167 (Me. 1983) (holding that the RTO agreement “did not constitute a ‘consumer credit sale’ subject to usury provision of Consumer Credit Code”). *But see* *Fogie v. Thorn Ams., Inc.*, 95 F.3d 645, 654 (8th Cir. 1996) (enjoining the RTO dealer “from entering into usurious credit sales transactions”); *Clark v. Rent-It Corp.*, 685 F.2d 245, 248 (8th Cir. 1982) (holding that the consumer was entitled to present evidence that the RTO agreement was in fact a disguised credit sale); *Burney v. Thorn Ams., Inc.*, 944 F. Supp. 762, 776 (E.D. Wis. 1996) (holding that RTO agreements are “consumer credit transactions under the Wisconsin Consumer Act”); *Perez v. Rent-A-Center, Inc.*, 892 A.2d 1255, 1255 (N.J. 2006) (holding that the RTO agreement was a retail installment sales contract (i.e., credit sale) under the NJ Retail Installment Sales Act); *Aple Auto Cash Express, Inc. v. State ex rel. Okla. Dep’t. of Consumer Credit*, 78 P.3d 1231, 1233–34 (Okla. 2003) (stating, in a heading, that the RTO dealer’s business transactions were “nothing more than disguised loans, rather than *bona fide* sales or rental agreements and should be regarded as such”) (changed from all capitals); *Green v. Cont’l Rentals*, 678 A.2d 759, 766 (N.J. Super. Ct. Law Div. 1994) (stating that RTO agreements are not leases and that TILA, RI-

traditional RTO agreements are not credit because the consumer had the ability to terminate the rental at any time without penalty and because they do not charge traditional interest.³³¹ VirTOs appear like RTO agreements and purport to function similarly, but the impracticality of returning the rented products warrants treating VirTOs differently.³³²

Of the handful of courts to encounter VirTOs, only one court has squarely addressed whether these agreements may be subject to federal consumer protection statutes governing credit and state usury statutes.³³³ The remainder of courts encountering VirTOs have yet to reach the issue of whether they constitute credit or have implicitly addressed the issue.³³⁴ The only case to directly address this issue arose under Minnesota law, one of the few states to consider traditional RTO agreements to be credit for the purposes of state usury statutes and the state Consumer Credit Sales Act.³³⁵ In 2019, in *Danger v. Nextep Funding, LLC*, the U.S. District Court for the District of Minnesota held that a consumer had sufficiently alleged that a VirTO for a family pet was in fact a credit sale subject to TILA and the Minnesota state usury statute under Minnesota law.³³⁶ This case, however, was highly specific to Minnesota law and re-

SA, and the UCC apply); *Gulf Homes, Inc. v. Gonzales*, 676 P.2d 635, 637, 639 (Ariz. Ct. App. 1983) (holding that an RTO agreement was in fact a disguised credit sale subject to TILA).

³³¹ See, e.g., *Silva*, 912 N.E.2d at 952 (holding that because the RTO agreement could be “terminated at any time without penalty, it was not a ‘credit sale’ within the meaning of the Federal Truth in Lending Act” nor an ‘extension of credit’ under RISA”).

³³² See *supra* notes 214–235 and accompanying text (discussing the difficult and impractical nature of returning goods under VirTOs).

³³³ See, e.g., *Danger v. Nextep Funding, LLC*, 355 F. Supp. 3d 796, 796–97 (D. Minn. 2019) (holding that a VirTO for a pet was a credit sale subject to TILA and Minnesota usury statutes); *Prayitno v. Nextep Funding, LLC*, No. 17 C 4310, 2020 WL 3414955 (N.D. Ill. June 22, 2020) (denying the VirTO dealer’s motion for summary judgment on the consumer’s TILA claim and finding that the transaction was financing for “‘a bona fide sale of property’ and services without making a loan of money, for purposes of the Illinois Interest Act and CILA”). This undoubtedly will be the subject of the CFPB’s recent litigation against Snap, however. See Complaint, *Snap Fin.*, *supra* note 152, at 4 (alleging that Snap’s VirTO agreements “were ‘credit’ and ‘credit sales’ under the Truth in Lending Act (TILA) and its implementing regulation Z”).

³³⁴ See, e.g., *Prayitno*, 2020 WL 3414955, at *7–8 (stating that the TILA only applies to “consumer credit transactions” and denying the VirTO provider’s motion for summary judgment on the consumer’s TILA claim).

³³⁵ See, e.g., *Danger*, 355 F. Supp. 3d at 813, 815 (holding that the VirTO consumer sufficiently alleged claims against the VirTO provider for violations under TILA and state usury law); *Miller v. Colortyme, Inc.*, 518 N.W.2d 544, 548 (Minn. 1994) (holding that RTO agreements “are consumer credit sales within [the meaning of Minnesota Law] and are “subject to the same consumer protection laws as ordinary credit sales, including the general usury statute”). But see *Danger v. Nextep Funding, LLC*, No. 18-cv-00567, 2020 WL 7137063, at *1 (D. Minn. Dec. 7, 2020) (approving a nationwide class action settlement for “all persons (a) within an address in the United States (b) who signed a Consumer Pet Lease Agreement with Nextep Holdings, LLC f/k/a Nextep Funding, LLC (c) between February 26, 2016 and January 9, 2019 (d) for personal, family, or household purposes”).

³³⁶ See *Danger*, 355 F. Supp. 3d at 796–97 (finding that the VirTO consumer sufficiently alleged TILA and state usury law claims against the VirTO provider).

lied heavily on an earlier state supreme court case, *Miller v. Colortyme*.³³⁷ In 1994, in *Colortyme*, the Minnesota Supreme Court concluded that the legislature defined RTO agreements as credit sales under the state Consumer Credit Sales Act (CCSA).³³⁸ Accordingly, the *Colortyme* court reasoned, because RTOs are consumer credit sales they are subject to the state usury statute.³³⁹ The federal court in *Danger* subsequently relied on *Colortyme* to conclude that the consumer had sufficiently alleged that her VirTO, like traditional RTO agreements in Minnesota, was subject to the statute usury statute.³⁴⁰

In allowing the consumer's claim to proceed, the *Danger* court also rejected the VirTO company's argument that it was subject to the time-price differential exception to the state usury statute, which excludes sellers offering products for lower prices if the consumer pays cash.³⁴¹ It reasoned that the VirTO company was not the seller but rather the lessor because it purchased the product from the seller and rented it to the consumer, therefore, the time-price differential exception did not apply.³⁴²

The only other court to have occasion to evaluate whether VirTOs were subject to TILA and state usury statutes had a split interpretation.³⁴³ In 2020, in *Prayitno v. Nextep Funding, LLC*, the consumer entered a VirTO for repairs to his transmission and brought claims under TILA and the state usury statute.³⁴⁴ The U.S. District Court for the Northern District of Illinois rejected Nextep's argument that the consumer lacked standing to pursue a claim under TILA because it found evidence suggesting that the consumer would not have pursued VirTO financing if they had known the APR.³⁴⁵ But the court did not address—nor did Nextep raise—whether the parties' VirTO was credit for the purposes of TILA.³⁴⁶ The court did, however, agree with Nextep that its VirTO was more akin to an installment sale than a credit card purchase or loan and accord-

³³⁷ See *id.* (citing *Colortyme*, 518 N.W.2d at 546, 548, 549).

³³⁸ *Colortyme*, 518 N.W.2d at 548.

³³⁹ *Id.*

³⁴⁰ See *Danger*, 355 F. Supp. 3d at 815 (stating that the consumers state usury violation claim against the VirTO provider is viable). The court also allowed the TILA claim to proceed because the consumer alleged in her complaint that her agreement was credit for the purposes of TILA and determining whether it was in fact credit would require evaluating the facts of the case. *Id.* at 813.

³⁴¹ *Id.* at 814–15.

³⁴² See *id.* at 815 (finding that “this is not a case of a *seller* fixing one price for cash and one price for credit” because “Premier Pups is the seller, not Defendants” and noting that the “Minnesota Supreme Court has expressed an unwillingness to expand the time-doctrine unless justified by economic needs and social attitudes”).

³⁴³ See *infra* notes 344–347 and accompanying text (discussing *Prayitno v. Nextep Funding, LLC*).

³⁴⁴ No. 17 C 4310, 2020 WL 3414955, at *1 (N.D. Ill. June 22, 2020) (denying the VirTO dealer's motion for summary judgment on the consumer's TILA claim).

³⁴⁵ *Id.* at *7.

³⁴⁶ See *id.* (discussing the substance of The TILA claim).

ingly dismissed the consumer's claims under Illinois' Consumer Installment Loan Act and Interest Act, which only apply to the loan of money.³⁴⁷

Although limited, *Danger* and *Prayitno* offer some insight into how courts should evaluate these agreements. As evidenced above, VirTOs no longer retain the central characteristic of RTO agreements—the ability to terminate the VirTO at any time without penalty.³⁴⁸ It is nearly impossible to terminate a VirTO with a VirTO provider, and the evidence shows that very few consumers do, in fact, terminate their agreements.³⁴⁹ First, to the extent that VirTOs are available for services, as opposed to merchandise, they are not RTO agreements and should not be treated as such. In fact, there is a question whether VirTOs—or RTOs for that matter—for services can even be RTO agreements under most state RTO statutes, which limit RTOs to “personal property.”³⁵⁰ A service likely is not “personal property” under these statutes for good reason. There is simply no way for a consumer to return a service or to terminate the “rental.”³⁵¹ These agreements are essentially highly profitable disguised credit and should be treated as credit for the purposes of federal consumer protection and state usury statutes.

Although it is readily apparent that VirTOs for services should be treated as credit, it is a murkier issue when the rental is predominantly merchandise or a good. For example, the price for a specially designed medical device includes some labor associated with tailoring the device to the user, however, the

³⁴⁷ *Id.* at *8–9.

³⁴⁸ See *supra* note 214 and accompanying text (stating that VirTOs corrupt consumers' ability to terminate their agreement and return the rental).

³⁴⁹ See *supra* notes 219–222 and accompanying text (stating that the limited data on returns demonstrates that customers rarely return their items).

³⁵⁰ See, e.g., MICH. COMP. LAWS ANN. § 445.952(d) (West 2023) (defining a “rental-purchase agreement” as, “an agreement for the use of *personal property* by a lessee primarily for personal, family or household purposes, for an initial period of 4 months or less that is automatically renewable with each payment after the initial period and that permits the lessee to become the owner of the property.”) (emphasis added); S.C. CODE ANN. § 37-2-701(6) (2023) (“‘Consumer rental-purchase agreement’ means an agreement for the use of *personal property* by an individual primarily for personal, family, or household purposes, for an initial period of four months or less (whether or not there is any obligation beyond the initial period) that is automatically renewable with each payment and that permits the consumer to become the owner of the property. The term does not include a consumer credit sale as defined in Section 37-2-104, or a consumer loan as defined in Section 37-3-104, or a refinancing or consolidation thereof, or a consumer lease as defined in Section 37-2-106.”) (emphasis added).

³⁵¹ Compare *Property*, BLACK'S LAW DICTIONARY, *supra* note 207 (defining personal property as “[a]ny movable or intangible thing that is subject to ownership and not classified as real property”), with *id.* at *Service* (defining service as “the performance of some useful act or series of acts for the benefit of another” and “an intangible commodity in the form of human effort, such as labor, skill, or advice”). See also, e.g., *Catalina Mktg. Sales Corp. v Dep't of Treasury*, 678 N.W.2d 626 (Mich. 2004) (outlining the “incidental to service” in determining the application of sales tax to transactions involving the “provision of services and the transfer of tangible personal property”).

device is often the predominant cost of the purchase.³⁵² Yet, even for these products, the VirTO model effectively eliminates the ability of the consumer to terminate the agreement.³⁵³ The finance company is often out-of-state, requiring a consumer to either ship the product to the out-of-state company or to return it to a local drop-off center, if such center exists.³⁵⁴ Many of the products offered by VirTO providers are impossible, expensive, or illegal to ship or drop-off.³⁵⁵ Consumers cannot just ship a pet or vehicle repair to a third-party. Nor do most consumers know how to or have the ability to remove products that are affixed to other property, like vehicle repairs. It is simply not possible for most consumers to return these products.

Many VirTO providers also appear to recognize that the VirTO business model raises questions about whether VirTOs are in fact credit subject to consumer protection statutes and state usury laws.³⁵⁶ In their SEC filings, these companies allude to the fact that there are risks associated with their VirTO model, such as having courts and regulators conclude their rentals are credit subject to federal and state consumer protection statutes.³⁵⁷ The Consumer Financial Protection Bureau (CFPB) and state agencies have also started to take

³⁵² See, e.g., Abram Bailey, *Hearing Aid Price Tracker*, HEARINGTRACKER (Jan. 3, 2024), <https://www.hearingtracker.com/how-much-do-hearing-aids-cost> [<https://perma.cc/WM4G-UT2R>] (stating that hearing aid purchases that “included a professional fitting . . . averaged \$1533 while purchases that did not include a professional fitting averaged \$704”).

³⁵³ See *infra* notes 354–355 and accompanying text (explaining why the VirTO model curbs the consumer’s ability to return products that are predominantly merchandise).

³⁵⁴ See *supra* note 218 and accompanying text (stating that VirTOs do not explain to customers how or where to return leased items).

³⁵⁵ See *supra* note 205 and accompanying text (stating that it is a crime in most states to abandon animals); *supra* notes 223–225 and accompanying text (stating that shipping can be prohibitively expensive and that it is impossible or impractical to return an item affixed to other property); *How to Ship Plants and Live Animals*, UPS, <https://www.ups.com/us/en/support/shipping-support/shipping-special-care-regulated-items/prohibited-items/plants-and-animals.page> [<https://perma.cc/7SY8-ECGT>] (stating that shipping mammals is prohibited).

³⁵⁶ See Upbound Group, Inc., Annual Report (Form 10-K), *supra* note 16, at 17 (“Our Acima segment offers the lease-to-own transaction through the stores or websites of third-party retailers and, therefore, faces risks different from those that have historically been associated with our traditional lease-to-own business conducted in our Rent-A-Center Business store locations. These potential risks include . . . increased regulatory focus on the virtual lease-to-own transaction and/or the potential that regulators adopt new regulations or legislation (or existing laws and regulations may be interpreted in a manner) that negatively impact Acima’s ability to offer virtual lease-to-own programs or certain products or services through third-party retail partners, and/or that regulators may attempt to force the application of laws and regulations on Acima’s virtual lease-to-own business or certain products or services in inconsistent and unpredictable ways that could increase the compliance-related costs incurred by us, restrict certain business activities and negatively impact our financial and operational performance . . .”).

³⁵⁷ See *id.*

notice of VirTOs and have raised similar concerns.³⁵⁸ Courts evaluating these issues should similarly conclude that VirTOs are in fact credit subject to federal consumer credit laws and state usury laws.

B. States Should Ban VirTOs for Nonsensical Products

To the extent that VirTO providers have partnered with service providers and non-sensical retailers, such as pet stores, medical device providers, and mechanics, states should ban such VirTOs.³⁵⁹ In these contexts, VirTOs are particularly predatory, as consumers are plainly entering such agreements to purchase the “products.” Indeed, most consumers are not intending to return personally fitted medical devices, like hearing aids, or beloved family pets. Rather, these consumers are using these agreements as loans and they should be treated as such. States should pass state laws banning such agreements or treating VirTOs for these products as loans like they are being used. These statutes need not be limited to VirTOs; traditional RTO agreements for such products and services, to the extent they even exist, should also be banned.

Many states are already passing statutes to limit specific types of VirTOs, especially related to pets.³⁶⁰ Nevada’s statute—one of the only states so far to eliminate RTO agreements for vehicle repairs, batteries, and hearing aids—provides a good starting point for other states.³⁶¹ Nevada prohibits RTO providers from leasing “any living animal or . . . pets, tires, batteries and hearing aids” if the good has de minimis value at the end of the lease.³⁶² It also requires all retail installment loans for such goods to adhere to TILA.³⁶³ But states can, and should, go further by prohibiting these types of products from being allowed in VirTO financing arrangements outright. For example, California and Massachusetts have also recently passed bills prohibiting pets from being involved in financing agreements entirely.³⁶⁴ Several other states have also pro-

³⁵⁸ See *id.* at 22 (noting that Acima received a CFPB civil investigative demand in 2020 to determine whether Acima extends credit and whether it complies with consumer protection statutes); *id.* at 82 (stating that a coalition of thirty-eight state attorneys general sent a letter in 2021 stating that they had initiated a multi-state investigation into the business practices of Acima).

³⁵⁹ See *supra* notes 199–213 and accompanying text (discussing how VirTOs allow for the application of the RTO model to nonsensical products and services).

³⁶⁰ See *infra* note 364 and accompanying text (stating that California and Massachusetts have banned pet financing agreements).

³⁶¹ See *infra* note 362 and accompanying text (listing the items RTO providers cannot lease in Nevada).

³⁶² NEV. REV. STAT. ANN. § 597.997 (West 2023).

³⁶³ *Id.*

³⁶⁴ See CAL. CIV. CODE § 1670.10 (West 2023) (“(b) A contract entered into on or after January 1, 2018, for the lease of a dog or cat that provides for or offers the option of transferring ownership of the dog or cat at the end of the lease term is void as against public policy. (c) In addition to any other remedies provided by law, the consumer taking possession of a dog or cat transferred under a contract

posed legislation banning pet rentals, but these laws have yet to pass.³⁶⁵ Although bans on pet rentals are a good starting point, states should implement legislation banning VirTOs, and RTO agreements as a whole, for all nonsensical products and services.

C. States Should Regulate Point-of-Sale Retailers as Credit Service Organizations

Because VirTO companies partner with retailers to provide VirTOs, states should also regulate retailers as credit service organizations. Credit service organizations are most commonly recognized as entities that work with consumers to repair their credit.³⁶⁶ Most state statutes, however, define credit service organizations broadly to include any person who, in exchange for a fee or other consideration, provides or obtains credit from another provider.³⁶⁷ Credit is

described in paragraph (1) of subdivision (a) or in subdivision (b) shall be deemed the owner of the dog or cat and shall also be entitled to the return of all amounts the consumer paid under the contract.”); MASS. GEN. LAWS ANN. ch. 272, § 80I (West 2023) (“(b) No person shall engage in the business of leasing or renting a dog . . . A violation of this section shall be punished by a fine of not less than \$100 for the first violation, not less than \$500 for the second violation and \$1,000 for subsequent violations. Fines may be levied on both the business that is leasing a dog and the person that has entered into a rental agreement.”).

³⁶⁵ See Gibbons, *supra* note 240 (“State Rep. Bill Sowerby, D-Clinton Twp., is sponsoring legislation with Republican Rep. Tommy Brann of Wyoming that would prohibit any contract where ownership of a pet is contingent on making payments over a period of time. House Bill 5273 was referred to the House Agriculture Committee for further review.”). Proposed Michigan 2019 House Bill 5273 would have amended Michigan’s Consumer Protection Act to prohibit the sale or transfer of ownership of a companion animal, if ownership was contingent upon installment payments, a lease, or a loan in which a security interest was created in the companion animal. H.B. 5273, 2019 Leg., Reg., 100th Sess. (Mich. 2019). Although the bill had bipartisan support and was sponsored by 35 legislators, it died in committee. See *House Bill 5273 (2019)*, MICH. LEGISLATURE, [https://www.legislature.mi.gov/\(S\(edizjv5t1as0bcr5o35553yz\)\)/mileg.aspx?page=GetObject&objectname=2019-HB-5273](https://www.legislature.mi.gov/(S(edizjv5t1as0bcr5o35553yz))/mileg.aspx?page=GetObject&objectname=2019-HB-5273) [<https://perma.cc/QX8D-WEMF>] (showing that House Bill 5273 has not had any movement since it was referred to the Committee on Agriculture on December 5, 2019). Animal rights groups have also indicated support for a ban on pet leasing because it is predatory and pet leasing is counter to creating lifelong pet ownership. See, e.g., *AKC Board Addresses Predatory Pet Leasing*, AM. KENNEL CLUB: GOV’T RELS. BLOGS (Sept. 28, 2015), <https://www.akc.org/clubs-delegates/government-relations/government-relations-blogs/akc-board-addresses-predatory-pet-leasing/> [<https://perma.cc/3KGL-VCGG>] (“AKC supports a ban on predatory pet leasing schemes that victimize potential owners, undermine a lifetime commitment to a pet, and do not confer the rights and responsibilities associated with legal ownership of a pet.”).

³⁶⁶ See, e.g., *Credit Services Organization Registration Application*, CAL. OFF. OF ATT’Y GEN., <https://oag.ca.gov/consumers/credit-services-organizations> [<https://perma.cc/8QSC-BU9R>] (“A Credit Services Organization is a business that, in exchange for a fee, offers to perform services or provide advice or assistance to improve a consumer’s credit record, history, or rating, or to assist the consumer with obtaining a loan or other extension of credit.”).

³⁶⁷ See, e.g., DEL. CODE ANN. tit. 6, § 2402 (West 2023) (“(a) A credit services organization is a person who, with respect to the extension of credit by others and in return for the payment of money or other valuable consideration, provides, or represents that the person can or will provide, any of the

also typically defined broadly as “the right to defer payment of debt.”³⁶⁸ Retailers who integrate VirTOs into their online sales platforms and/or who advertise and encourage consumers to apply for VirTOs do in reality constitute a credit service organization.³⁶⁹ And, although the RTO industry may argue that VirTOs do not create debt, as outlined above, consumers are generally using such financial instruments to purchase products and to “defer payment” of the purchase.³⁷⁰ As such, VirTOs should be considered credit for the purposes of credit services organization statutes.³⁷¹ States, however, should also pass legislation to eliminate any ambiguity and to ensure that VirTOs are considered “credit” for the purposes of credit service protection statutes.³⁷²

following services: (1) Improving a buyer’s credit record, history or rating; (2) Obtaining an extension of credit for a buyer; or (3) Providing advice or assistance to a buyer with regard to paragraph (a)(1) or (2) of this section.”); MICH. COMP. LAWS ANN. § 445.1822 (West 2023) (“(b) ‘Credit services organization’ means . . . a person who, in return for consideration, attempts to sell, provide, or perform 1 of the following . . . (ii) The obtaining of an extension of credit.”); MINN. STAT. ANN. § 332.52 (West 2023) (“(a) ‘Credit services organization’ means any person that, with respect to the extension of credit by others, sells, provides, performs, or represents that the person will sell, provide, or perform, in return for the payment of money or other valuable consideration, any of the following services: (1) improve a buyer’s credit record, history, or rating; (2) obtain an extension of credit for a buyer; or (3) provide advice or assistance to a buyer with regard to either clause (1) or (2).”).

³⁶⁸ See, e.g., DEL. CODE ANN. tit. 6, § 2401(3) (West 2023) (“‘Extension of credit’ means the right to defer payment of debt or to incur debt and defer its payment offered or granted primarily for personal, family or household purposes.”); IOWA CODE ANN. § 538A.1 (West 2023) (“‘Extension of credit’ means the right to defer payment of debt or to incur debt and defer its payment offered or granted primarily for personal, family, or household purposes.”).

³⁶⁹ See *infra* note 370 and accompanying text (explaining why retailers who partner with VirTO companies are effectively credit service organizations). Some courts have interpreted state credit service protection statutes to require the seller to obtain a “fee” directly from the consumer in exchange for obtaining the extension of credit. See, e.g., *Gomez v. Jackson Hewitt, Inc.*, 46 A.3d 443, 473 (Md. 2012) (“[T]he plain language of the CSBA can reasonably and most logically be understood as reflecting the legislative intent that the ‘payment of money or other valuable consideration’ *in return for credit services* flow *directly* from the consumer to the credit services business. Therefore, under the CSBA, respondent is not a ‘credit services business,’ and Gomez is not a ‘consumer.’”). Other courts have concluded that receiving any consideration, even if the consideration is in the form of the loan or purchase itself, is sufficient to render an entity a credit service organization. See, e.g., *CashCall, Inc. v. Md. Comm’r of Fin. Regul.*, 139 A.3d 990, 1004–05, 1006 (Md. 2016) (stating that to fulfil the statutory definition of a credit services business, the extension of credit must be in return for valuable consideration, and finding “that by collecting the full value of the loan, including the origination fee paid by the consumer, CashCall engaged in a ‘credit services business’”); *Fugate v. Jackson Hewitt, Inc.*, 347 S.W.3d 81, 86 (Mo. Ct. App. 2011) (holding that a credit service organization need not collect the fee directly from the consumer); *Harper v. Jackson Hewitt, Inc.*, 706 S.E.2d 63, 71 (W. Va. 2010) (same). There are clear questions as to whether point-of-sale retail providers are, in fact, obtaining consideration in the form of compensation and additional purchases for marketing, facilitating, and accepting VirTOs subjecting them to credit service organization regulations.

³⁷⁰ See *supra* note 82 and accompanying text (stating that an FTC survey demonstrated that RTO consumers typically use the agreements to ultimately purchase the products they are leasing).

³⁷¹ The author is unaware of any cases evaluating this issue.

³⁷² Given the analysis in Part IV.A, states already have the tools to treat retailers as Credit Service Organizations for the purpose of state Credit Service Organization statutes. See *infra* notes 327–358

Most state credit service organization or protection statutes prohibit credit service organizations from making false or misleading statements regarding a credit offering.³⁷³ For example, credit service organizations are not permitted to guarantee to improve a consumer's credit or an extension of credit.³⁷⁴ To the extent that VirTOs have resulted in increased misrepresentations regarding the true nature of VirTOs, their terms, and/or the products being purchased, requiring retailers to adhere to state credit service protection statutes would provide an additional layer of protection for consumers. Retailers would be required to ensure that the information and advertisements they provide consumers regarding VirTOs is accurate and clear. They also would be required to ensure that all salespeople understand such agreements and accurately and truthfully convey information regarding such agreements. Therefore, point-of-sale retailers who benefit from partnerships with VirTOs should be required to provide accurate and truthful information when facilitating consumers' access to VirTOs. They should accordingly be regulated as credit service organizations.³⁷⁵

Credit service organization statutes provide a potential method for ensuring that retailers—who often benefit greatly by offering VirTOs—are held accountable for any misrepresentations made by them or VirTO companies.³⁷⁶ It also addresses the trilateral dilemma, in which consumers are relying on retailers for financial advice but where retailers are incentivized to steer consumers to products that benefit the retailer rather than the consumer.³⁷⁷ Retailers who partner with VirTOs should be regulated as credit service organizations to reorient the incentive structure to ensure that retailers are steering consumers to financial products that are in their best interests rather than the retailer's. Credit service organization statutes should be considered as an avenue to hold re-

and accompanying text (arguing that VirTOs are disguised credit sales). But passing legislation to clarify would simply reinforce this point and eliminate any ambiguity.

³⁷³ See, e.g., IOWA CODE ANN. § 538A.3 (West 2023) (“[A] credit services organization shall not: . . . Make or use a false or misleading representation in the offer or sale of the services of a credit services organization.”).

³⁷⁴ See, e.g., DEL. CODE ANN. tit. 6, § 2403 (West 2023) (“A credit services organization may not: . . . (3) Make or use a false or misleading representation in the offer or sale of the services of a credit services organization, including: a. Guaranteeing to “erase bad credit” or words to that effect unless the representation clearly discloses that this can be done only if the credit history is inaccurate or obsolete; and b. Guaranteeing an extension of credit regardless of the person's previous credit problem or credit history unless the representation clearly discloses the eligibility requirements for obtaining an extension of credit . . .”).

³⁷⁵ This potential solution is not necessarily limited to VirTOs. To the extent retailers are facilitating access to high-cost credit and/or buy-now-pay-later products through waterfall technology or other methods, this solution would ensure that retailers accurately convey such information regarding those financial products.

³⁷⁶ See *supra* note 182 and accompanying text (stating that integrations with VirTOs allow retailers to expand their customer base).

³⁷⁷ See *supra* note 249 and accompanying text (explaining that VirTOs create a trilateral dilemma).

tailers responsible for any financing arrangement in which the financier partners with the retailer to deliver financial instruments to ensure the retailer is providing accurate information and steering consumers to products that are in the consumers' best interests.

D. Using Existing Regulatory Frameworks

In addition to the new legislation proposed above, states and federal agencies should use the existing regulatory frameworks to regulate VirTOs and point-of-sale retailers partnering with VirTO companies. As the industry has expanded into new areas, there is an opportunity, as well as an obligation, for states and the federal government to renew efforts to regulate the industry. The CFPB, Federal Trade Commission (FTC), and state attorneys general should continue and expand investigations into the VirTO industry. Because VirTOs should be considered credit, they fall squarely within the CFPB, FTC and most state attorneys general's regulatory purview.³⁷⁸

Indeed, the FTC, CFPB, and state attorneys general have already started to investigate and regulate VirTO companies.³⁷⁹ The CFPB recently filed suit against Snap Finance, a leading VirTO provider, for violations of the Consumer Financial Protection Act (CFPA), the Electronic Funds Transfer Act (EFTA), the Truth in Lending Act (TILA), and the Fair Credit Reporting Act (FCRA).³⁸⁰ This litigation is the first to squarely address whether VirTO agreements are providing credit, and are thus subject to federal consumer protection statutes.³⁸¹

³⁷⁸ See Levitin, *supra* note 249, at 1320 (stating that the FTC has the “power to prohibit unfair or deceptive acts and practices in interstate commerce” and that the CFPB has the “power to prohibit unfair, deceptive, or abusive acts in consumer finance”); *What Attorneys General Do*, NAT’L ASS’N OF ATT’YS GEN., <https://www.naag.org/attorneys-general/what-attorneys-general-do/> [<https://perma.cc/8L38-7RPL>] (“While varying from one jurisdiction to the next due to statutory and constitutional mandates, the role of attorney general typically includes: . . . Acting as public advocates in areas such as child support enforcement, consumer protections, antitrust and utility regulation . . .”). Many VirTO companies seem to recognize that their business model opens them to potential regulation. See, e.g., PROG Holdings, Inc., Annual Report (Form 10-K), *supra* note 145, at 25 (noting the online origination process could pose greater risks than the traditional model).

³⁷⁹ See, e.g., PROG Holdings, Inc., Annual Report (Form 10-K), *supra* note 145, at 14 (noting that in 2021, California issued a subpoena to Progressive Leasing to see if it was in compliance with state consumer protection laws); *supra* note 358 and accompanying text (stating that the CFPB is investigating Acima to ascertain whether it complies with consumer protection statutes and also that thirty-eight state attorneys general are investigating Acima's business practices).

³⁸⁰ Complaint, *Snap Fin.*, *supra* note 152, at 4.

³⁸¹ See *id.* (alleging that Snap's VirTO agreements “were ‘credit’ and ‘credit sales’ under the Truth in Lending Act (TILA) and its implementing regulation Z”); Jon Hill, *CFPB Doubles Down on Credit Claims in Snap Finance Suit*, LAW360 (Oct. 17, 2023), <https://www.law360.com/articles/1733483/cfpb-doubles-down-on-credit-claims-in-snap-finance-suit> [<https://perma.cc/PRU8-WV2K>] (“Snap has called for the case to be thrown out on multiple grounds, criticizing it as a flawed, ‘first-of-its-kind attempt’ by the CFPB to impose federal laws governing credit on state-regulated lease-to-own

The CFPB alleges that Snap engaged in deceptive practices and failed to provide required disclosures for credit transactions.³⁸² It also argues that because consumers have no ability to return products purchased with Snap's VirTO, Snap was in fact providing credit subject to federal consumer protection statutes.³⁸³ This investigation and resulting complaint demonstrates that the CFPB can, and should, regulate VirTO companies.

Some states have also already started to regulate VirTO companies through existing unfair and deceptive practices statutes.³⁸⁴ For example, Massachusetts recently pursued a claim against a VirTO company for leasing pets in violation of the Massachusetts Consumer Protection Statute.³⁸⁵ In states with broad unfair and deceptive practices statutes, state attorneys general should use these

contracts that are otherwise outside the agency's jurisdiction."'). There have been other cases attempting to address RTO agreements for specific types of products like vehicle repairs or pets. *See, e.g.,* Prayitno v. Nextep Funding, LLC, No. 17 C 4310, 2020 WL 3414955, at *1 (N.D. Ill. June 22, 2020) ("Plaintiff Chan-Li Prayitno claims that, in offering plaintiff financing for a new auto transmission, defendant Nextep Funding LLC . . . obscured the true cost of the financing, violating the Truth in Lending Act . . .").

³⁸² *See* Complaint, *Snap Fin.*, *supra* note 152, at 4 ("[T]he Snap Defendants were required to provide certain disclosures to help consumers assess the cost of their financing but failed to do so, depriving consumers of essential—and legally mandated—information.").

³⁸³ *See id.* at 20–21 ("Regulation Z's definition of 'credit sale' includes leases, '(unless terminable without penalty at any time by the consumer)' From January 2017 to at least March 2020, the Snap Defendants' Purchase Agreements only permitted consumers to terminate their Agreement at the conclusion of an automatically renewing 60-day term, and only if consumers were current on their payment obligations through the end of that term.").

³⁸⁴ *See, e.g.,* Press Release, Mass. Off. of the Att'y Gen., AG Healey Secures More than \$930,000 in Debt Relief and Restitution in Illegal Dog Leasing Case (Apr. 13, 2022), <https://www.mass.gov/news/ag-healey-secures-more-than-930000-in-debt-relief-and-restitution-in-illegal-dog-leasing-case> [<https://perma.cc/258Z-ZAXF>] (stating that Monterey Financial Services settled with Attorney General Maura Healey for \$930,000 for illegally leasing dogs in Massachusetts). Massachusetts recently settled two lawsuits against RTO companies offering lease agreements against pets. *See id.*; Assurance of Discontinuance at 2–4, *In re Credova Financial, LLC*, No. 21-84CV00925 (Mass. Super. Ct. Apr. 22, 2022), <https://www.mass.gov/doc/credova-financial-aod/download> [<https://perma.cc/367X-PEHA>] (stating the settlement terms Credova and Nextep Holdings agreed to following allegations they were illegal leasing dogs in Massachusetts). In its lawsuit against the now-dissolved Monterey Financial Services, the company agreed to stop collecting on existing pet leases, transfer ownership of pets to all customers, cancel any outstanding debt, and pay \$175,000 in restitution to customers and \$50,000 to the state. Press Release, *supra*. In the Massachusetts Attorney General's lawsuit against Credova and Nextep Holdings, the companies agreed to cancel more than \$125,000 in outstanding debt for consumers with pet leases. Assurance of Discontinuance, *In re Credova Financial, LLC*, No. 21-84CV00925. The lawsuits alleged violations of the Massachusetts criminal statute prohibiting the lease of pets in violation of the Massachusetts Consumer Protection Statute. *See* Assurance of Discontinuance, Monterey Financial Services, LLC, No. 22-0809F (Mass. Super. Ct. Apr. 13, 2022), <https://www.mass.gov/doc/monterey-financial-services-aod/download> [<https://perma.cc/846Q-HA2W>] ("Monterey Financial violated General Laws chapter 93A, § 2 by improperly holding leases for dogs in violation of M.G.L. c. 272, § 801. M.G.L. c. 272, § 801, makes the leasing of dogs illegal in Massachusetts.").

³⁸⁵ *See supra* note 384 and accompanying text (describing two settlements Massachusetts secured from VirTO providers that lease pets).

statutes to address VirTO companies' deceptive practices. Even for states with narrower unfair and deceptive practices statutes that may not cover VirTOs but certainly cover retailers, states should use such statutes to regulate the point-of-sale retailers who partner with VirTO companies.

In addition, state enforcement agencies should also evaluate whether existing regulations governing point-of-sale retailers provide opportunities to further regulate the provision of VirTOs. For example, state statutes governing motor vehicle repairs often contain provisions regulating the financing arrangements that are available for such repairs.³⁸⁶ These statutes also provide agencies that do not normally regulate banking and finance with the authority to regulate financing schemes for motor vehicle repairs.³⁸⁷ This is just one example of the many state statutes governing specific industries; there are likely many more that may offer creative ways to regulate retailers partnering with VirTO companies to offer VirTOs. Regulators with authority over retailers partnering with VirTO companies should carefully evaluate existing regulatory statutes to determine whether there are avenues to regulate retailers offering VirTOs.

Although this Article is focused on VirTOs, the policy recommendations and regulatory suggestions outlined above may provide models for regulating other fringe financing industries grappling with the introduction of new technology. There is a growing trend in the fringe economy towards third-party financing through partnerships with retailers who may have previously offered in-house financing.³⁸⁸ The introduction of fintech-based lenders, like Carvana, to the auto financing industry is just one example of a fringe financing industry experiencing a similar disruption.³⁸⁹ The policy suggestions above may provide a roadmap for addressing the impacts of these trends on consumers.

CONCLUSION

The rise of fintech-based VirTO companies has resulted in a seismic shift in the RTO business model. Rather than renting directly from the brick-and-mortar retailer-RTO companies, VirTO consumers now select products from retailers who sell the merchandise to a third-party VirTO company to rent back to the consumer. Unbeknownst to most consumers, this transaction often occurs online, behind the scenes, and with the click of a button.

³⁸⁶ See, e.g., MICH. COMP. LAW ANN. § 257.1307e(g) (West 2023) (stating that “a motor vehicle repair facility” must comply with TILA and RISA “if the customer finances repairs through the facility”).

³⁸⁷ See *id.*

³⁸⁸ See *infra* note 389 and accompanying text (stating that Carvana is an example of fringe financing disruption).

³⁸⁹ See *supra* note 305 and accompanying text (explaining that fintech has allowed companies, like Carvana, to provide financing to consumers with poor credit).

Although VirTOs may provide low-income, subprime consumers the ability to access more items from more retailers at any time and from anywhere, this convenience comes at a steep price. VirTOs are an extremely expensive form of financing. Unfortunately, the terms of this financing are often not readily available to consumers. Indeed, because the transaction between VirTO providers and retailers often happens behind the scenes, many consumers never truly understand the nature of their VirTOs. To the extent VirTOs purport to be rental agreements, the practical implications of the VirTO business model—and the products and services with which they are often associated—demonstrate that the ability to terminate VirTOs at any time is illusory. Put simply: VirTO agreements are sophisticated disguised loans and should be treated as such. And, to the extent VirTOs have expanded into nonsensical products and services, states should ban them in those markets.

The creation of VirTOs is just one example of how technology is disrupting the fringe financial market. The disruptions to the RTO industry, and the resulting challenges, are indicative of the larger disruptions to fringe financing and the challenges posed to subprime consumers. Because fintech is not only disrupting the fringe economy, but fundamentally altering the nature of the financial products offered, this new technology provides rich opportunities to investigate whether new approaches and definitions are needed to better protect consumers.

Although fringe financing may offer consumers increased access to credit, it generally is not the type of low-cost, traditional credit that will help consumers build equity and a solid financial footing. Instead, VirTOs perpetuate and exacerbate the cost of poverty and the stratification of access to credit. Yet, many consumers are forced to use such products because they are unable to access traditional low-cost credit for small-dollar loans. In addition to addressing fringe financial markets like VirTOs, the federal government and states should work to make traditional, low-cost credit more accessible to low-income and subprime consumers to eliminate the market for such products. Fintech companies interested in democratizing access to credit can help reduce the barriers to traditional low-cost credit by reducing the costs to underwriting small-dollar loans rather than introducing new and predatory financial products.