Consumer Finance Monitor (Season 6, Episode 30): Should Written Contracts be Eliminated for Small Dollar Transactions? A Conversation with Special Guest David Hoffman, Professor and Deputy Dean, University of Pennsylvania Carey Law School

Speakers: Alan Kaplinsky and David Hoffman

Alan Kaplinsky:

Welcome to the award-winning Consumer Finance Monitor Podcast, where we explore important new developments in the world of consumer financial services and what they mean for your business, your customers, and the industry. This is a weekly show brought to you by the Consumer Financial Services Group at the Ballard Spahr Law Firm. And I'm your host, Alan Kaplinsky, the former practice group leader for 25 years, and now senior counsel of the Consumer Financial Services Group at Ballard Spahr. And I'll be moderating today's program. For those of you who want even more information, make sure you consult our blog, consumerfinancemonitor.com, goes by the same name as our podcast show.

We've hosted our blog since 2011 when the CFPB became operational, so there's a lot of relevant industry content there. We also regularly host webinars on subjects of interest to those in the industry. So to subscribe to our blog, or to get on the mailing list for our webinars, please visit us at ballardspahr.com. And if you like our podcast, please let us know about it. Leave us a review on Apple Podcasts, Google, or wherever you get your podcasts. Also, please let us know if you have any ideas for other topics that we should consider covering, or speakers that we should consider as guests on our show.

So we have a fascinating topic to talk about today, but before I introduce you to the topic, let me introduce you to our very special guest, Professor Dave Hoffman. Dave is the William A. Schnader Professor and Deputy Dean at The University of Pennsylvania Carey School of Law, where he has taught since 2017. He was previously the Murray H. Shusterman Professor of Law at Temple University's Beasley School of Law, which he joined in 2004. Before going into academia, Dave was litigation associate at Cravath, Swaine and Moore in New York City, and a law clerk for Judge Norma Shapiro of the Eastern District of Pennsylvania. He earned his JD from Harvard Law School and a BA in archeology and history from Yale. At Penn, Dave was honored with the Harvey Levin Teaching Award in 2018. And he previously won Temple's George P. Williams Memorial Award for the Outstanding Professor of the Year in 2013.

Dave writes about all aspects of contract, contracting theory in practice. He's written dozens of articles and one case book about contracts. His most recent work, which will be the subject of my discussion with him today, explores the relationship between falling transaction costs and the proliferation of aversive written agreements. Dave was born and raised in the Philadelphia area, where he currently lives. And he comments, consults, testifies about contract law in a variety of settings. And he's an active user of Twitter. In 2020, he was appointed as a special master in the NFL players' concussion injury litigation before the Eastern District of Pennsylvania. So Dave, a very warm welcome to you, absolutely thrilled to have you on our show today.

David Hoffman:

I'm so excited to be here and I really can't wait for our conversation about this article and getting to work through it with you.

Alan Kaplinsky:

Yeah. Okay. So the title of the article is called Defeating the Empire of Forms. And it's an article that is available now on the Social Science Research Network electronic paper collection. But it's going to be published. Where is it being published, Dave?

David Hoffman:

Virginia Law Review.

Alan Kaplinsky:

Virginia Law Review some time later this year I take it.

David Hoffman:

That's right.

Alan Kaplinsky:

Okay. So let me tell you in brief, and I don't want to steal Dave's thunder, but basically, Dave's thesis is that any contract for less than $100 in value cannot be in a written form. And if it's in a written form, it will be unenforceable. It would essentially ban the use of contracts that have a value of less than $100. I must say this, when I read about this at first, I said, "Wow," that was my impression. So what I want to ask you about first is: Before telling us what the paper's thesis is, can you talk to me about how you came about to write this topic?

David Hoffman:

Thanks. Absolutely. And I'm glad your reaction was wow to the paper. That's sort of what I was going for. Maybe wow and not as crazy as I thought would be the hope by the end of the conversation.

Alan Kaplinsky:

It certainly has a wow factor, there's no doubt about that.

David Hoffman:

So I've been thinking and writing about contract law for about 20 years since I joined the Legal Academy. And in that time, I've become more and more frustrated by the state, I think both of the academic scholarship and the decisions about consumer contracting. And that frustration has been born by the fact that I'm not sure we've precisely identified what's wrong with the market. Some people say the problem is terms are really bad, and lots of law professors focus on arbitration clauses, exculpation clauses, class action waivers. I'm not so sure that's really, those clauses are particularly a problem. I know, Alan, you probably agree with that part of where we are so far.

I would just say the evidence is mixed about whether particular clauses are bad for consumers. I think other people have said that the problem is that the terms aren't read, no one reads their contracts. And again, I'm not really so sure that's a problem. I wouldn't want to live in a world where I read all my contracts, in part because I have life to live, and in part because most of the things that you read, you can't negotiate for. So learning about things you can't change is a sure way to become depressed in this world. So what's the problem? And what I've become convinced the problem is, there are just too many contracts, written contracts, over classes of sort of commercial activity that don't really need written contracts to govern them.

So when I first started teaching, if I had to get to a lunch appointment downtown with a fancy lawyer like yourself, Alan, I would've taken a cab. And that cab wouldn't have been governed by a written contract. It would have just had an agreement that was oral about payment. If I joined you for lunch and I paid the bill, I probably would've paid in cash, but I might've paid with a credit card agreement, which of course would've been governed by a written contract. But if I didn't, if I paid in cash, there wouldn't have been a written contract to govern the activity. If I shopped at Acme or at Giant for groceries on the way home, that too would've been a transaction without a written contract, although it would've had a default set of rules that applied.

Now I go on Instacart, and all of the agreement is governed by a written deal. And the problem I think is that contracts, written contracts, have grown to govern more and more spheres of social life without obvious benefit for the firms that put them out, and certainly without obvious benefit for the consumers that are subject to them. Sometimes those terms have

advantages to consumers. Sometimes they advantage the firms. But I think what's happened is the transaction cost, that is the cost of creating the deal and getting assent have fallen so precipitously that firms are kind of pushing out contracts, written contracts in certain areas where it's not so obviously helpful. And the result is that everywhere we look, we're confronted by walls of text that we don't really pay attention to. And sometimes those walls of text have effects on social life.

And so the example, and this is an example that I don't quite deal with in the paper, but it is worth sort of just paying attention to. I've done some research in the last couple years about leases in Philadelphia, which again, we have a real proliferation of written, long written leases in Philadelphia drawn, built on internet forums. And those leases contain unenforceable terms that no one reads and no one really cares about, actually either. The courts won't enforce them and parties don't read them. And I think that's bad, it's bad for us to be signing deals that have terms that are unenforceable or aversive. So with that background, I came up with a theory.

Alan Kaplinsky:

Let's get into this theory or thesis that you have.

David Hoffman:

So since I think that the problem is we have too many contracts, the solution's pretty obvious. Let's have fewer, fewer written contracts. And so the proposal is what's called a statute against forms, which is you could just think of it as the reverse of the statute of fraud. So the lawyer listeners know that we have a statute of frauds that say above a certain amount, states pass a rule that says the contract has to be in writing, for goods contracts, above $500, for services contracts that last more than year for debts to pay the obligation of another, there's a bunch of different categories you learned and forgot about in law school. That's the statute of frauds.

The statute against forms says that under a certain amount, and $100 was the proposal in this crazy article I've written, under a certain amount, the state's going to pass a statute. It would be a state statute, not a federal one. The state's going to pass a statute that says it can't be in writing. So under $100, nothing's in writing and you have contracts that are oral, you have contracts that are the default rules, just as you had when I was just starting the Legal Academy in 2004. Between $100 and $500, the firms can make a choice about whether they want it to be in writing or not, and above $500, it has to be in writing. So we have a monetarily focused, which is the same as statute of fraud, a monetarily focused rule about the way you enter into contracts.

Alan Kaplinsky:

Okay. So you contemplate that this would be something that would be enacted on a state by state basis, not federal basis, I guess some kind of a uniform law. Right?

David Hoffman:

Exactly like the uniform commercial code itself.

Alan Kaplinsky:

Yeah. Okay. So I'm thinking about the stakeholders here. Let's first stay with companies. I have advocated, actually we did work, just to give you one example I could provide to you, for a casino, not a local casino, but a casino in a place. And they were getting sued more and more frequently by in class action lawsuits. So they came to me and wanted to know could they somehow bind people who enter their casino to an arbitration agreement containing a class action waiver. And what would it cover? Would it cover all kinds of claims, slip and fall claims, a claim that the slot machine was rigged against them? And we actually developed an arbitration program for them. In many cases, they might gamble less than $100. They might not even gamble at all. They might just walk through the casino and slip on a banana peel I guess, or somebody spilled their martini and they slip on that.

And then we put together an entire program. And the reason for it was because they were really getting hit with a lot of litigation and they wanted to get rid of class action litigation. That would be a problem under your framework, under your thesis. Am I right? It wouldn't work there.

David Hoffman:

I certainly think that particular casino, which whether or not they had uniquely high numbers of claimants against them, against maybe other kinds of casinos, that particular casino would not be a huge fan of this proposal, which would make it harder to limit liability in that way, yes.

Alan Kaplinsky:

Let's take it away from the casino, Dave, a lot of class actions of course, as you and I know, are for very small dollar amounts. And they're very often less than $100. It could be a claim that you're charging me a late fee on my credit card. You charged me a $25 late fee and that was invalid. It violated state law. A lot of companies are very, very committed to the use of arbitration. And they may not be able to use it in that context. Right?

David Hoffman:

I'm not so sure. It's true that the late fee, and of course, you're correct that class action practice today, especially consumer class action practice, is often very, very small harms aggregated to scale. And there's disputes about whether that's good or bad thing, whether it's useful to have litigation over such small amounts of money in these [inaudible 00:14:57] ways. But the underlying products and services are not for $25. So credit card agreements are not for $25. It might be that the late fee part is, but the question of whether the state statute governs would be about the original transaction, not about the nature of the harm.

So I actually don't think that this would have material impacts on the kinds of things that firms would like to prevent, the kind of really small stakes class action practice. Now I'm also not myself necessarily agreeing that's good that there is a cutoff on that small stakes class. But my statute would have nothing really to say about that.

Alan Kaplinsky:

Yeah, yeah. Okay. And I get your point there. Let's talk about the consumer side. Well, first of all, even before we get to that, if there's no written contract, that doesn't mean that there are no contractual obligations. Right? There's a distinction here. You're just saying you can't have a written contract. And I take it, it's sort of irrelevant whether it is signed by the consumer because the consumer can manifest assent in a variety of different ways, and so that what you have I take it is a whole body of common law that ends up applying, and federal and state statutory law.

David Hoffman:

I would think of this as, just go back to 1980, which wasn't such a long time ago, and wasn't such a bad time at all, actually. Most of the transactions that we entered into in 1980 were contractual transactions without written contracts attached. And that was very sensible, it worked very well. It wasn't anarchy. You didn't go to the food store and say, "You know what, I'm going to take this orange. I'm going to walk out without it." No, because there would be a contract, if you take the orange, you have to pay for it. And that's the world we would go back to, essentially, as opposed to going on Instacart, signing up for a contract that when they deliver sort of the groceries to you, we're just going back to a world where the contracts that we entered into are the default contracts, as you said, the common law, state statutory law, federal statutory law, and anything you orally agree to.

Alan Kaplinsky:

Oh, okay. Okay. Now I guess when I first read your article, my reaction was this is something intended just to benefit consumers. There are some benefits to industry. I mean, just eliminating need for forms and having to hire lawyers to update the forms and all of that. Right? Is that the main benefit?

David Hoffman:

When I've talked to JCs, I think JCs have ambivalent views about their terms of use. Right? So they feel like they have to have them for liability protection reasons. But they are a cost center. It's never quite clear whether the cost is worth the candle. I mean, it might be for certain kinds of goods and not for others. They will adopt a term of use particularly for small-scale products. And then they have to update it, they have to update it worldwide. They have to do the translation service for it. They have to be checking it all of the time. And so there is a sense that this is sort of an arms race. Everyone has to have a written contract for all kinds of purposes, no matter how big or small the goods or services that they're offering is.

And this is a way for everyone just to sort of cut off that cost center at the low value of it. Right? So you still of course are going to for financial contracts, for loan contracts. Of course, you're going to have written contracts. It's important. But when you're selling lawn darts on the web, do you need to have ... Maybe lawn darts is a bad example because of the liability risk. When you're selling a pocket fidget spinner on the web, do you really need to have a terms of use? Is someone going to have a repetitive stress injury, and you're going to worry about your class action? I'm not so sure. So the idea is that it helps firms to make a decision about whether or not they need to spend the time and money to do this. And it gives them kind of an easy excuse to say, "We're not doing terms of use for these kinds of service or product."

Alan Kaplinsky:

Yeah. All right. What about the consumer side? Aren't there some give ups here by consumers? In other words, there might be a written warranty that a company provides. Not everything in a consumer contract favors the company. There are parts of the bargain the favor the consumer.

David Hoffman:

I would certainly hope so, or else the consumer really is getting a bad deal. Of course, you're right, that even in small-scale written contracts, consumers are going to get things that they want. They get warranties. They understand the scope of the deal in a way that they wouldn't, they might not otherwise. So there are two things to say, one of them is, of course, the firms can always write things down. They can write down their warranty, and in fact, they probably have to. And they can be bound without the consumer being bound. So warranties bind you under sort of federal law if you sort of post them. We used to have warranties that were in writing that did not come accompanied by consumer sort of cross obligation. And that would still be the case.

When I go and buy things at a store in person, which I guess I still do once every couple years, the store often will have posted return policies. I haven't signed that return policy, but the store is bound to it. And I think that if we really have a world in which consumers are benefiting by store posted policies or store posted terms, they're going to continue to post those terms because they're a way to compete in the market. So you would go to the store that has the better warranty policy posted. You don't have to agree to it contractually.

Alan Kaplinsky:

I take it you could post it if you were conducting business online.

David Hoffman:

Of course.

Alan Kaplinsky:

You could put it on your website.

David Hoffman:

Of course, and you would. And you would if consumers really are attracted to the deal that you're offering, of course you would tell them the terms that they're being governed by.

Alan Kaplinsky:

So why is your idea better than policing bad contract terms through common law doctrines like duress, fraud, unconscionability, and statutory theories? Every state just about has an unfair deceptive acts and practices statute. And very often, that can be utilized by a consumer to bring a statutory claim. Why is your idea a better idea? Why is it a better mousetrap I guess?

David Hoffman:

A better mousetrap, I'm not sure it is. But I'll give you my best pitch, and then you can decide whether it's at least halfway persuasive. So part of this is, look, at the part of the market we're talking about, the really low value transactional claims, the number of times that judges are going to adjudicate sort of what we think of as defenses to obligation, unconscionability, misrepresentation, duress, it's pretty rare outside of the class context. I'm not so sure that in those class actions we're getting real development of common law rules about fraud, misrepresentation, unconscionability, which is the kind of arguments people made about of course the consumer, the restatement of consumer contracts is that: Are we really getting adjudication of those cases or not?

I think that we're really not. We're getting settlement in those cases pretty early in the life of the case after class cert has been given. So I don't think we get the common law development you really want in those scenarios. Of course, you're right. Of course there are affirmative state based statues for deceptive and unlawful trade practices. Again, this isn't really the part of the market where that's happening. That part of the market's happening in the rent to own cases and the financial fraud cases and the real estate fraud cases. But it's not happening in a $50 contract for groceries. That's just not realistic.

And the second thing I'd say, which is more of a deep point which goes against probably my liberal law professor community, which I guess I come from in some ways, I'm just not sure whether the practices are all bad. Like I said, arbitration clauses in a small-scale contract, those can be actually very good for consumers. It gives them a way to remediate harms in ways that can be efficient, that don't have so much money going to the lawyers. They can be faster.

Alan Kaplinsky:

And the other thing I guess I would add, Dave, is that if it really is this systemic, widespread problem, that's why we have government agencies like attorneys general that can deal with that.

David Hoffman:

So I am not convinced that this part of the market, the very small contract part of the market, that we really are going to be able to know for sure whether arbitration clauses, class action waivers, exculpation clauses are good or bad for consumers. It's going to be complicated. And I just know that judges are going to be doing kind of an inconsistent job across time and place in making those really hard policy decisions in ways that are going to be destabilizing. My view always is it's better to have ... Not always, most of the time, it's better to have bright line rules. The market can react to bright line rules. And if the rule says you just don't have to put terms in writing for really tiny contracts, I think we get maybe it's a better mousetrap, it's a different way of doing policing of terms. You don't have them at all.

Alan Kaplinsky:

Right. I take it there'd be nothing wrong with an oral contract. Right? If somebody, a company, wanted to still have a contract, they could have an oral contract. And I guess they could ... Would they be able to record it? Could they say, "Here's the contract," and then say to the consumer, "If you agree, say, 'I agree.'"?

David Hoffman:

Yeah. They could. There's a pretty famous case, Hill versus Gateway, I know you've read Frank Easterbrook's decision in which he said, "Look, why are we enforcing written contracts?" Because the alternative is this absurd world where firms would have to read contracts to consumers, and they would have to say, "I agree." Now when I first read that, I thought, "Yeah. Judge Easterbrook's right. That is the alternative. That seems really absurd." On the other hand, then I thought about it, and I

thought, "What's the likelihood that's actually going to happen?" If you're the GC of a sort of a consumer sales company, and you go to your CEO and you say, "Look, some idiot law professor has gotten some other idiot legislature to pass a statute that makes written contracts unenforceable under a certain amount, and I really want my written contract. Can I spend five minutes reading to your consumers, something about my arbitration clause or my class action waiver?" The CEO's going to say, "What percentage of consumers are going to hang up on us at that point, are going to walk away from the website?"

And the GC's going to say, "Well, we're only going to have a 40% melt rate." And the CEO's going to say, "You know what, I actually don't think it's that important. I don't think it's that important to do this. We would rather have sales without these clauses for these tiny little goods than sales with these clauses for these tiny little goods." Now if the CEO says, "We really need to say the thing," then they can say it. They can say it, just like they can say it in 1980 offline world that we all used to live in. You used to be able to live in a world where you could recite your contract to your consumers in your store and we still would.

Alan Kaplinsky:

Right, right, right. One other alternative I guess that I'm sure you've thought of, but I'd like to get your reaction to, is: Why not focus on whether it's a contract of adhesion or whether it's something that is actually freely bargained for?

David Hoffman:

Yeah. So I think that this is a great question. This is one of the real criticisms of the article by lots of folks who've read it. Look, aren't you really just worried about choice? And the answer is not really. Actually, I'm not so worried about choice. Let's just say someone said, "I freely entered into this agreement." And by freely entered into, I really mean I had equal bargaining power. I had lots of time. I could think about it. I could've chosen something else. I actually just don't think the problem with these contracts is that they weren't chosen. I mean, nothing's really chosen online in a way. I mean, the market doesn't work in that particular way. No one's really reading their contracts. But I actually really wouldn't want to. I don't think that for these kinds of contracts that the problem that we're trying to sort of solve for is that they're forced on us.

I think that's the kind of thing that comes from law professor talks who talk, who read sort of contracts in the 1910s and 1920s, and have in their mind the model of bargaining is two equal business people come and meet in the road and have a conversation in which they, at the end of that conversation, sign on paper with a seal. That's not the world we live in. And I don't think that's the world we want to live in. There was a great article by Omri Ben-Shahar a couple years ago, which turned into a book with Carl Schneider, called The Failure of Mandated Disclosure. And one of the things he said in that article and book is, "We would not want to read all of the things that are put in front of us all during a day. And if we did read all of those things, we'd be worse off."

And I really took the lesson from that. The goal of contract scholarship should not be to have people make sort of more freely informed choices about the contracts that they have. It should be to focus on the bad behavior, if there is some, make particular sort of practices unlawful, but don't sort of force people to make choices they don't want to make. I don't want to choose between contract terms. And I don't think most people do either. And so adhesion's not the problem to solve. And all of the things that people say about adhesion, we could have ChatGPT do our contract choices for us, I think just make the problem in some ways worse. We prefer to go out and spend time with the people we care about, rather than read and understand the contracts that we are presented with.

Alan Kaplinsky:

Yeah. Would your statute that you were talking about, would it apply only to consumer transactions or all transactions?

David Hoffman:

So I mean, I think that's a little bit unclear. I mean, the statute itself basically says, "All transactions," I'm not so sure that I really understand. Although, I read what the really smart drafters who are my friends, have the restatement of consumer contract said, I'm not sure I understand the distinction between consumer contracts and non-consumer contracts. I mean, the line of who is a consumer is very much more fuzzy than it used to be. And so it would apply to all transactions, at least as it's

currently written. Again, you might say to yourself, "Is that destabilizing? Is there some potential perverse effect?" Are there some kinds of business to business transactions where the really small, that we really want them to be in writing? And if so, what would that look like?

One of the advantages of having a state statutory regime is that you can have actors at the local level tell us a little bit more about their own needs. State statutes are subject to lobbying. They're subject to sort of localized exemptions. There is a UCC, but if you look at how it's adopted, every state has a little bit of a different version of it based on interests in that state, so agricultural interests in the Midwest had effect on the adoption of the UCC in the Midwest. Technological interests in the West would have an effect on the adoption of the statute. So I'm kind of up for the idea that the political process in again, the unlikely world that anyone is ever interested and wants to talk to me about this, I'm up for the idea that political process would affect sort of the scope question, which is what you're really asking.

Alan Kaplinsky:

Yeah. So what's been the reaction that you've received? I assume you've circulated your article or draft article on some of your peers, other professors and some of them on who I would call consumer advocates and some of them industry advocates. How have they reacted to it?

David Hoffman:

So I think that the parts of the article that say that it's not clear, that contract terms are bad for consumers, that is the classic [inaudible 00:32:06] of contract terms and arbitration, the class action and the waivers, are bad for consumers, that consumer advocates don't like that particular part. The part that says that lawyers are often adding transaction costs to really small contracts without really adding value for the businesses at all. Well, that doesn't make my lawyer friends particularly happy. And the part that says that the real goal here ought to be to eliminate contracts whatsoever, as opposed to focusing on choice, well, that doesn't make the people who care about sort of choice and readership in contracts real happy.

So everyone's kind of a little bit taken aback, which is what I hope for. I mean, the goal of the article is to really push people to think. What is the problem you're actually solving for? And what is a real solution that can work in the market that we have? And I think that the innovation here, I mean if there's an innovation, it's one to really focus on how falling transaction costs is the real source for increasing contracts, not evil courts, not evil lawyers, not evil firms, but it's just gotten cheaper to do. That's innovation number one. And the second innovation is, look, if you're worried about contracts, the solution is fewer of them. And I think that lots of people have your reaction, which is sort of like, "Huh, that can't be right." And then they read it again and they thought, "Well, I'm not sure why it's not right, but I'm sure there's a reason that it's not right," and that's where I think a lot of people leave the article.

The article has 15 pages at the end as sort of, here are all of your concerns and questions. Let me try to shoot them up and down and see how they work. And I think lots of people leave that section saying, "There must be another objection I haven't thought of that is the actual killer objection here."

Alan Kaplinsky:

Yeah. Yeah. So I take it that this is the first time that anybody has thought of this idea. You really are a pioneer.

David Hoffman:

I don't like to hear that, Alan. I mean, the worst thing you can say about a legal argument is that it's novel. And the second worse thing is that it's unprecedented. I think there've been versions of make particular contract terms unlawful. Lots of people would like to get rid of your baby, of course, arbitration class action stuff. But I don't think this particular flavor of ice cream has yet been put out there yet.

Alan Kaplinsky:

Yeah. So what's the next step with this? I mean, I know it will be published in The Virginia Law Review, if I got that right, sometime later in the year. Have you planned ahead? Are you going to go to the Uniform Law Commissioners and actually suggest something to them? I mean, how does this gain traction? Or is this just a thought piece?

David Hoffman:

Yep. So that's the real question. I think I have been talking to, thinking about the Uniform Law Commission approach. What I would like to do over the next six months before publication, I've got some time here before the article actually comes out, is to really try to vet all of the objections. And that's the most important thing, is to really understand what the problems are with this sort of idea before I push it out into the actual policy-making world, so I'm taking it on a roadshow. This is part of that roadshow. There will be other venues as well. Anyone who reads the article, and you can read it on the web, I would love to get comments from particularly industry focused lawyers.

I am open to persuasion on particular parts of the scope. I meant without persuasion that I've not fully recognized the objections. One thing we haven't talked about at all is sort of user created content on the web. Doesn't that need written contracts to govern IP rights? I say some kind of a little bit of a hand wavy set of things in the article about that right now, maybe not fully satisfactory. Once I feel like I've fully vetted the objections, probably later on this year, I am going to suggest it I think to the Uniform Law Commission folks and see how it goes. What would it be like to run it up the flagpole? I have gotten some inquiries from state legislatures. I'm not sure how serious they were. They said, "I saw this thing you've written. Are you serious?" And which I say, "Well, I am, but not yet. I don't feel comfortable yet, but I really understand the scope of objection."

Alan Kaplinsky:

What about the CFPB? Have you vetted the idea with them?

David Hoffman:

Well, I'm not particularly interested in national solutions to what I think of as ... I mean, so the answer is I have not. I think of the CFPB as an agency that has a lot on its plate, has a lot of strong challenges to the core of its authority that they're currently dealing with. And I really think of this as a state based solution and it would only work as a state based solution. I don't think that we should do big policy stuff like this, do unelected branches at the federal level. I think we ought to be doing this, if we're doing it at all, as a state based experimental regime that has the advantages and disadvantages of state based regimes. It won't go too long because you can always have the other states that you can incorporate your context in.

Alan Kaplinsky:

The problem that I see, Dave, with a state based kind of approach is that, let's say California enacts a statute like that, but the other 49 states do not. What does an out of state company do? Are they going to have to in California, just change their entire process? And each of the 50 states could have a different version of the statute. And I'm just wondering if you're going to propose something like this. Aren't you better off doing it at the federal level where you can preempt state law?

David Hoffman:

So I think that one thing you'd say, of course, is conflict of all principles do solve more of these problems than you might give them credit for. So to the extent that we have an out of state company trying to do business in California, and they have a contract that's governed by their own state law, which would be true under most conflict of law principles, that contract would be enforceable, even if California consumers touched the contract. Right? So we know, and this is sort of the things that we worked out in other kinds of spheres of contractual regulation, like for example, non-competes. You can have out of state companies how have remote employees, who might be headquartered or might sometimes do business in California, but the state of the contract governs.

So actually, I think that the problem here is a little bit more constrained than we might worry about. That's the kind of thing you have to think a little bit more about. The other thing I'd say is if it was really true that in the event that this got traction, and California wouldn't just be California, we know that there'd be a consortium of states that follow California.

Alan Kaplinsky:

It won't start in California though.

David Hoffman:

It would start in California. It would start in California, it would go to Massachusetts, Oregon, Washington, New Jersey. This is how the non-competes look. This is how the non-disclosure stuff looked. It sort of spreads in political veins. Right? If it were true that this created a national problem, like there was a problem in consumer markets as a result, we would get them Congressional action. And that wouldn't be bad. I mean, one thing our Congress sometimes does is it reacts to crises as opposed to plan strategically in advance. If I manage to provoke a national crisis about the terms in $10 contracts, I mean, first of all, that would be amazing for my own conversations with my deans about raises. But it would also be actually a good conversation to have. It would be better for this to happen at the national legislative level, but that's never going to happen unless we get some sort of precipitating action.

What I don't think we should do is have this done at sort of the national administrative level. I think that's a concern. I don't think that's the way we ought to provoke a conversation about: What are effectively consumer protection problems that affect really small sale consumers at local levels?

Alan Kaplinsky:

Right, right, right. I don't know whether you've been following what the CFPB has been doing in this area, but very recently, they proposed a regulation that would create a registry of contract terms that are adverse to consumers, I guess is the best way to put it. In the proposed regulation, they set forth a whole litany of terms that, not that they're banning right now, but if you're using those terms, they want those companies to be named and shamed. That's the proposal that the CFPB will put on its website, X, Y, Z corporation in their credit card agreement, have the following terms. And you'd have to highlight the things where consumer rights were being undermined in some fashion, things like an arbitration provision, a choice of venue provision, or for that matter, anything where you try to undermine a statutory right through a contract provision. So they are little by little getting into not just disclosure that they're concerned about, but they are very focused on contract terms. And they're moving into that area.

David Hoffman:

Yeah. I get it. I think it's interesting to think about how to use reputational constraints in markets, particularly reputational constraints that turn on things that consumers don't always themselves care about. That's sort of an interesting strategy. I guess that my reaction to that is I'm skeptical that this will be effective at changing firms' practices after a little while. So it's not the same as a disclosure regime exactly, but it has the connection with the disclosure regime is that people have to do something with that information. They have to continue to keep doing something over time. So I think a lot about tobacco packaging, which used to be just a warning label, then became a really graphic picture. And then it turns out after a while, the graphic picture didn't have the same effect that it did in the beginning. And you have to always be changing and evolving your regulatory strategies if you want to keep shocking the market with new information.

Alan Kaplinsky:

So Dave, we're drawing toward the end of our show today. But what did I forget to tell you, or ask you, I should say? Are there any other important issues about your idea here that we ought to vet before we call it a day?

David Hoffman:

I think that the most interesting question that the article leaves really unresolved, and I would love to get feedback from your listeners about what they think about it, is: Is it true? Is it true or is it not true that these really small-scale contracts, the terms are helping firms? Or are they really just kind of inserted thoughtlessly? I've got some evidence in the article that's not particularly compelling one way or the other, which suggest that firms are not benefiting from these really small stake contract terms. And I would love to hear from your listeners about how they, if they're lawyers, how they justify it or they don't justify. Are there times where they've said, "Don't worry about having a term in this contract. Don't worry about having a written contract. We can go without"?

Are there times where they really think it does matter? And again, I think that there's lots of arguments for written contracts after I've talked the field for 20 years. I think contracts are amazing. I think that written contracts can be risk mitigating. They can be value enhancing at the higher levels of the market. But I would love to hear from folks. What I would say is, the article gestures at the kind of evidence we would want, but it's just a gesture. So not something you've missed, you've been extremely thorough, but it's really something I've missed.

Alan Kaplinsky:

Yeah. Have you vetted the idea with your law students if you teach a contracts course?

David Hoffman:

Yeah. So this is an idea I've been floating for the better part of a decade, and I get the same response I think you gave me, which is you can't possibly mean that. How could you possibly mean that? And because they're my law students, by the end, they have to agree that I'm right. And they often say, "Oh, you've really convinced me." But that doesn't mean that I actually have. And so I'm interested in hearing feedback from the listeners here, and also, from you, Alan. You're really the innovator in this area more than I do. You actually produced something that actually changed the world.

Alan Kaplinsky:

Thank you. I think that's a compliment. So Dave, I want to thank you very much for being a part of our program today. And this was a different kind of program than what we typically report on. But I found your article very, very interesting. And by the way, I think I told you this, but I found out about it on the Consumer Law and Policy Blog. They actually did a little writeup on it, and that's what led me in your direction. So thank you again, Dave.

David Hoffman:

Thank you so much. This was really fun to get to talk to you, and I learned from you and I always do. Thank you.

Alan Kaplinsky:

Yeah. And so to make sure that you don't miss any of our future episodes, make sure you subscribe to our show on your favorite podcast platform, be it Apple Podcasts, Google, Spotify, wherever you access your podcasts. And don't forget to check out our blog, consumerfinancemonitor.com, for daily insights of the consumer finance industry. And if you have any questions or suggestions for our show, please email us at podcast@ballardspahr.com. And stay tuned each Thursday for a new episode of our show. I thank all of our listeners for downloading our program today, and I hope everybody has a good day.