Consumer Finance Monitor (Season 7, Episode 1): A Look at a New Approach to Consumer Contracts

Speakers: Alan Kaplinsky and Andrea Boyack

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. I'm your host, Alan Kaplinsky, 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 about anything pertaining to consumer finance, don't forget about our blog, consumerfinancemonitor.com. Goes under the same name as our weekly podcast show. Big difference is that our blog got launched on July 21st, 2011 at the same time that the CFPB became operational. Our weekly podcast show, we've been doing now for over five years.

There's a lot of content on our blog. We publish anywhere from two to five articles a day. It's very, very active, so make sure you subscribe to the blog if you're not subscribed already. If you want to get on the list for our webinars, you can visit us at ballardspahr.com. We do a lot of webinars during the course of the year. If you like our podcast show today, please let us know about it. You can leave us a review on Apple Podcasts, Google Play, Spotify, or whatever platform you use to get your podcasts. Also, please let us know if you have any idea for another topic that we should consider covering or speakers that we should consider as guests on our show. So let's turn to our program today, and I have a very special guest that I'm about to introduce to you.

And our guest's name is Andrea Boyack. She is the Floyd R. Gibson Endowed Professor of Law at the University Missouri School of Law, and she's written and published extensively in the areas of consumer law and housing issues. Her recent article, which is going to be the subject of today's podcast show, is called The Shape of Consumer Contracts, and it will be published in a forthcoming volume of Denver Law Review. It is available already on SSRN, which is a website where people put their articles out there before they've actually been published.

They're not final articles that are on that website, they are subject to change. But that's how I found out about Andrea's author and that. And after reading her article that really did pique my interest. She's also co-authored a law school casebook and is currently working on a follow-up article to the Shape of Consumer Contracts and a book exploring six different conceptions of housing. She's the current chair of the American Association of Law School Section on Creditors and Debtors Rights, and she received her law degree at Virginia School Law and before entering academia, she practiced law for over a decade in New York City and Washington, DC. So, Andrea, a very special and warm welcome. I'm delighted that you've joined us today.

Andrea Boyack:

Thank you so much, Alan. I'm really, really happy to be here. This is an exciting opportunity for me as well.

Alan Kaplinsky:

Absolutely my pleasure, Andrea. So we have a lot to cover today. I wish we had hours to do it, because there is a lot I would love to get into with you. But the first thing I want you to do for our listeners, if you would, is give a 10,000-foot overview of what the article's about. Very generally, and then we'll start digging a little bit deeper.

Andrea Boyack:

Okay. Well, I start with talking about a problem that's been written about for many, many years and has recently become even more acute. That's the problem of fit, that our contract law doesn't fit the consumer transactional relationship, that it's based on this ideal of contracting parties that both have the power to shape and to define the ultimate content of their contract. And that really doesn't exist in a situation today where terms are not exactly chosen or authored by both parties. One party provides

all of a boilerplate provision and the consumer party clicks, I accept, or proceeds with a transaction, and our legal system has conflated the concepts of the consumer agreeing to the transaction as the consumer assenting to all of those boilerplate terms, which have mushroomed lately since they've been digitized, and I don't think, and many other people don't think that that's legitimate. And so my article came out of this problem and tried to figure out a way to get around that.

Alan Kaplinsky:

We're going to get into the problem in a little more detail and then find out about your, what I would call a pretty radical solution. I'm not using that pejoratively; I'm using it to describe a major change in the area of consumer contract law. So let me push back on one thing that you said in terms of there being a problem out there. You've identified a problem. I'm not sure your constituents would agree with you, because no consumer wants to negotiate every contract that he or she enters into every time he or she buys some goods or subscribes to something or borrows money or leases a car. Consumers are happy to just put their name on the dotted line and be done with it and they really don't worry too much about it except in the very few cases where a dispute arises. So what's the big deal, Andrea?

Andrea Boyack:

Well, I think that one thing that I really focus on is the difference between things in the boilerplate provisions that the consumer would want to have be part of the transaction. I call it the transactional infrastructure or constructive terms, they construct the transaction. And in that context, Alan, I think you're right. I think that consumers generally would like there to be some rules of the game. We don't want transactional chaos, and for a long time people defending the blanket assent concept applied to boilerplate have pointed to the problem of transactional chaos as a way to say that the transactional boilerplate needs to all be enforceable.

But there are things within most company's boilerplate that I think consumers would object to if they had the time and the advice to consider that. And so my objection is not to, let's throw all terms out with the bathwater, but to let's look at this and figure out which terms are being basically snuck into the transaction because the boilerplate's within the sole control of the companies, and how can we better conceive of what the contract is, so it actually reflects what both parties mutually assent to.

Alan Kaplinsky:

So you're not urging at all the idea that consumers ought to be able to negotiate their individual contracts. What you're saying is they, I guess may be able to negotiate to some extent. Maybe, maybe not. Some of the, what I think you refer to in your articles as the constructive terms, I think. The things like price, I assume, interest rate on the loan, monthly payment if we're talking about a loan. When you're talking about foundational terms or constructive terms, is that the type of thing that you're referring to?

Andrea Boyack:

So yeah, constructive terms would be things like the price. They're the things that the consumer pays attention to. What is the content, what is the good or the service that I'm getting, how much am I going to pay for it? What are maybe the renewal terms possibly. But there are a lot of other things in the boilerplate that have nothing to do with the transaction, and in fact, if you yanked them out of the boilerplate, it would not impact the actual exchange that's going on at all. It wouldn't affect the commercial interaction of the parties. And those I would call destructive terms because the only real function of them is to destroy the otherwise applicable legal default rules.

Alan Kaplinsky:

I guess, and tell me if you agree with this or not, in many instances there is no written contract. Consumer goes into Walmart or any retail store and buys some goods and goes to the checkout counter, may pay cash for them, may use a credit card in which case there is a credit card agreement, but very often it's not, that doesn't have anything to do with the retailer, it's provided by some third party bank and there is no contract really.

Andrea Boyack:

So I think you're right. I think that in many cases there still might not be a written contract, but today we actually have an interesting phenomenon in that more and more of contracts or interactions that would not be governed by any sort of writing previously, 50 years ago, 20 years ago, are now governed by online terms and conditions in particular. I mean even if you go to Walmart and you look on the back of your receipt, they might say that your various rights are defined by the terms and conditions on the website. I don't know if that's true for Walmart in particular. I don't mean to call them out, but that could absolutely be true in many cases, so the back of the paper receipt. Or that perhaps when you order something online to go pick up. By ordering it online, you're agreeing to be bound to that company... Or this is the idea, is that you have manifested some sort of assent to having that entire relationship with the company be governed by those private rules of the game that are authored by the company that are on their website.

Alan Kaplinsky:

Yeah. No, I think you're right. Things have changed of course very dramatically in the way consumers buy goods and services these days. They're very frequently doing everything online, and when they do business online, there almost always are contract terms and it could very well include an arbitration provision with a class action waiver, which I know is one of the, what you call a destructive term. I don't agree with you on that, but we'll get to that in a little bit.

But if you're going in person and you're going out shopping, not very often... You'll get a receipt when you buy something, but I haven't very often found any kind of language on the back that deals with the contract. So if you have a problem with what you bought, I think the uniform commercial code or the common law probably already applies to those kinds of transactions. But so really it's the online... Or if you're going to rent a car, of course there'll be a huge rental contract you'll enter into, or if you're buying a car, there'll be a contract, and sometimes there are two contracts. But let's focus on the situations where there is a contract, because that's what you're really focused on in your article.

Andrea Boyack:

So when you say a contract, Alan, I'm sorry to break in, but what you really mean is a written set of terms and conditions that the company has authored.

Alan Kaplinsky:

Yes, that's exactly what I mean. Thanks for clarifying that. So companies, obviously, if they call their counsel to get advice and they say they're extending credit on their website or on an app or they're going to be offering some other product or service, they'll say... It'll ask their lawyer, "Should there be a contract?" And the lawyer will say, "Sure there should be, because if you don't have a contract, you're going to be relying upon the backdrop of the, so-called common law," and then you'd have to describe that to your client if he or isn't a lawyer. Or you're relying upon certain statutes which would apply, like the uniform commercial code dealing with warranties that might apply. But if you have a contract, there is the right to limit those things. And I would say to the client, "I'll prepare a contract for you and we'll, to the extent permitted by applicable law, we'll put in it all the waivers that are possible."

So the consumer waives his or rights. No consumer ever reads the contract, it's the last thing they want to do, right? When they're ordering anything online, they're happy to get the product and they want to get through the transaction as quickly as they can. So there's a lot of efficiency to be gained through what I would call the tried and true method of contracting online. It's sufficient to have one contract, to know what's in that written contract, because you can read it. If I had to say to my client, "You don't have a written contract, there is the common law and there are statutes that'll fill the gaps," my client will say, "Well, tell me about all that." And I'll say, "Have you've got about 10 hours?" And we can go through limitations on liability, dispute resolution, all these destructive terms. How do you answer that, Andrea? I know I've given you a lot there.

Andrea Boyack:

Yeah, it was like a 12-part question, but I'll do my best. Let me start with the concept of efficiency, right? Because one of the real reasons we even have a contract system is efficiency. It justifies why we enforce an agreement that A and B privately craft,

otherwise we just have public law. But this is private law and the reason we do that is because it creates supposedly a win-win. So I think we're using efficiency for several different things here and so let me carve those up. And the first one is the contract enforcement is efficient, and it's efficient because theoretically contracts always create wealth, because theoretically both parties have elected to engage in the exchange and therefore every contract should be a win-win. And so the more contracts we have, the more they're enforced, the better off for the entire society, because they grow the pie basically.

And that's why you would want to have contracts, you should say, if both parties choose the contract, then they're *pareto optimal* efficient. They make both parties at least somewhat better off and they don't make anyone worse off. That presumption works a lot better in a situation where both parties have the ability to have some input into the contract terms. I think it's very hard to claim credibly that we know contracts that are authored by one company and other people's choices - If I want that good or service - I have to acquiesce to those terms. Those are really *pareto optimal* contracts. Not to say the exchange itself isn't something that the consumer wants, but if they don't know and understand and price out some of the things that they're waiving along with getting the good, they might actually be engaging in an exchange that either transfers wealth from them to the company, or just creates wealth for the company and some of the harms to them are balanced out, and there's just not that same sort of invisible hand guarantee that we're achieving something efficient in those contracts.

I do agree with you though that in the context of transactional efficiency, it makes a lot of sense, for example, to just say, "We're going to make it very easy for people to enter into a contract. You're going to click a button." And you're right, like everyone else in the world, it's annoying If I have to scroll all the way to the bottom and then type my name in, instead of just click a button and, like everyone else in the world, I rarely, if ever, will read the terms. I mean Judge Posner even said he never read the terms.

But therein is the problem, right? We want low transaction costs, we want low barriers to interaction, but does that really mean we have to give up all control over our rights as consumers to the company and just delegate to them the ability to define how we would resolve our disputes or what sorts of things they would be liable for or what kinds of remedies we can get or even what our agreement terms of... rules of the game are in the future. The way that the contracts are written now, is they don't just set up the structure of the exchange. They include all those other things. I don't know if those things are efficient. So even efficient contract making doesn't justify having the content of that contract potentially work against the interest of the consumer.

Alan Kaplinsky:

So I'm going to say two things in response to what you've just said. Number one, is there is value to the company - I think you would concede this point - in being able to use its standard form contracts and to include whatever waivers of rights, no consequential damages, all kinds of limitations you and I are familiar with since we read these things. I read them, because I'm usually giving advice to a client about something.

So there is value that the company would be giving up if we switch to your idea, which just in a second, we're going to segue into that so our listeners can fully understand what you're advocating. And from the consumer standpoint, I'm going to say something I said right at the beginning of our show, and that is the consumers don't care. I mean if you were to interview consumers and you said to them... None of them read the contract, "Well why don't you read it?" They say, "I don't care what's in there. All I care about are the price, the interest rate, the term, things like that. I don't care about those other things. I'm not going to worry about that."

Andrea Boyack:

Let me push back on the idea that consumers don’t care. I think they don’t care. I agree. However, the reason they don’t care is because-

Alan Kaplinsky:

You're saying they should care.

Andrea Boyack:

No, I'm not even saying they should care. I'm saying that they... What does it benefit them to care? They can't control what it says anyway. In fact, the only difference between a consumer who sits down and spends 10 years of their life reading through all of the terms, and those who don't, is that the one who actually knows what's said, knows exactly in what way their rights have been changed and the other one doesn't. But both consumers are in the same situation in terms of what the actual language says.

The consumer logically... I mean people really say, "Oh, those consumers should read their terms and conditions. I should read them." And I think we're all feeling guilty. "Oh, I say I read and agree and I know I really didn't read and agree," but it's illogical to read, because you can't change it anyway. And so you're right, the consumers logically say, "Okay, why should I spend my time reading these terms? I cannot even do it." And I think it's a problem when we condition people to think that all of the rules that govern their life are completely out of their control.

It trickles beyond commercial relationships to other things, but we are conditioning people as a society to think you don't have control. And it's really strange when that's the effect of contract law, when the whole point of contract law is to empower people to make their own rules. And we aren't empowering consumers to make their own rules. We're empowering companies to impose the rules that they like on their customers.

Alan Kaplinsky:

Well now let's get into your proposal. We've alluded to it so far by talking about the foundational or constructive terms and the destructive terms, but describe if you will, exactly what your proposal consists of.

Andrea Boyack:

Okay, sure. I think the best way to think about it is in three steps and three conceptual redefinitions of things in contract law. And the first one is to recognize explicitly that we are dealing with completely differently shaped contracts in the realm of these online terms and conditions contracts, compared to the classic ideal of offer, acceptance, offer, counteroffer, counteroffer that you learn in the very first part of your 1-L [*first-year law school*] contracts class. And I like to call the difference of that between a horizontal contractual relationship and a vertical contractual relationship. Henry Sumner Maine back in the 1860s wrote this great treatise where he talked about how society had become richer and freer and more mobile because we have been moving from a society where your legal rights were based on who you were, status, to a place where legal rights were defined by what you chose, that would be contract.

And when you think about the way that it's moved on from the mid 20th century to today, you could argue that a lot of our rights today are not based on contract as understood in 1861, meaning you've chosen them, but based on who you are, you're the borrower, you are the buyer, you're the subscriber. And in the situation where we've moved from status to contract and then kind of back to status, maybe we need to use something different than your traditional contract to analyze what those rights are.

So that difference of a relationship from being what I call a horizontal relationship, and I think of two people coming at the same level and interacting and negotiating, to what most of our contracts are today, which are vertical, almost like a hierarchical relationship. That's the first step. The second step would then be realizing that you don't necessarily need to treat agreeing to be part of a relationship, as the exact same thing as agreeing to all of the terms in the boilerplate, that decoupling of those two concepts. And that is kind of radical. You don't see that much. In fact, almost all of the consumer protections just seem to assume that they're the same and then come after that. But I address the problem at an earlier stage: What is the contract? And if the contract does not include all of the boilerplate, then you have a much different set of problems going forward.

Alan Kaplinsky:

Okay, so as I understand it, what you would do, is the foundational terms, the constructive terms, there would be a written contract that describes them, that the customer would indicate his or her assent to.

Andrea Boyack:

Well, I don't know if it would necessarily be written. I mean it could be written, it could be just the notation of how much something is listed for sale or how much the amount is. But there would be some, what I call the constructive terms, the transactional infrastructure stays there, is intact.

Alan Kaplinsky:

Yes, in effect, you're not suggesting any change in the law with respect to how those terms end up getting agreed to, whatever the law would already provide with respect to foundational terms, you're not touching that. What you're touching is the rest of the contract or the, what you call the destructive terms. Sometimes it's called the boilerplate. All it consists of if you see a written contract, most of the contract falls into that category.

And I guess what you're saying is your idea is for there to be no written boilerplate anymore or written destructive terms and instead you would import into the contractual relationship, whatever law would exist in the absence of a written contract. Or as we lawyers would say, the common law of contracts or statutes either at the federal or state level, which... It specifies what the law is to cover certain kinds of situations that can crop up, dealing with what warranties end up applying. Because I assume you would... Although maybe you wouldn't. I mean when it comes to a warranty, particularly if you're buying a car, that's in a gray area, isn't it? I would say that's a foundational term.

Andrea Boyack:

I mean sometimes you buy the warranty separately.

Alan Kaplinsky:

Well sometimes you do, but usually you get... That's usually an additional purchase. You usually get a manufacturer's warranty for some shorter period of time, and that's all in writing. What do you do with that? That doesn't fit neatly into this bifurcated type of contract world that you discussed.

Andrea Boyack:

I guess I'm just trying to say, okay, look, there's different sources of law, different sources of rules. If you and I are entering into some agreement to do something, as you mentioned, there's the common law background. There are any statutes that might apply to that particular situation. And then there is the rule that we craft ourselves as contracts. And in the classical conception of contracts, unless there's something that is made non-waveable, a non-derogable right or something in the statute, you can change the statute defaults and you can change the common law defaults based on our mutual agreement. I think that's great. I think that's wonderful. But should we give a unilateral pronouncement that exact same power as a mutual agreement? And that's where I have a really hard time justifying treating a unilateral articulation of what I wish our agreement was, the same way as something that truly is assented to. And, therefore, you have things that will be determined based on the defaults unless there's some additional way for there to actually be a manifestation of assent.

And you could have that, you could say if you want to arbitrate, we'll send you a hundred-dollar gift certificate and you can send us a letter or drop us an email and we could have that. You could have that for a warranty or something as well if you want to have a warranty. And the UCC warranties are implied unless waived, I understand that, but you could say, "If you want to waive the warranty, we'll give you a discount or something," but that way you have an affirmation, an actual assent manifestation with respect to things that deviate from the defaults.

Alan Kaplinsky:

Okay, and I neglected to describe it, you have what I would describe as... You would give the consumer a right to opt in to certain things that you might call destructive terms like an arbitration agreement, a limitation on liability, a limitation, let's say, on a disclaimer of, what's a very typical disclaimer of the warranty of merchantability or fitness for a particular purpose. Would you have a whole series of opt-ins for each boilerplate provision and a price attached to, or would a consumer be able to say, "Look, I'd like to opt into all that stuff if you can knock $10 off the price."

Andrea Boyack:

Even if that's what we did, I think there'd be a better way to justify enforcement of that than the way we do it now. However, I think by isolating those particular things, we're going to raise the consideration by regulators about whether they should even be allowed. And so maybe some things will not be allowed or they'll allow you to waive warranties to a certain extent or something. And maybe that can be dealt with on the regulatory side. I'm not trying to say, "Let's get rid of the consumer or the company's freedom of contract." What I'm really trying to say is, "Let's preserve the consumer's freedom of contract," that if they're going to be waiving all these rights, they should do that knowingly and intentionally and in exchange for some consideration.

Alan Kaplinsky:

Well, let's talk about knowing waiver. You're, I think, assuming that consumers have... That they're fairly bright, that they're smart, they're savvy, and that's something I doubt. You're dealing with... Even I think sophisticated people who aren't lawyers, maybe even some lawyers, wouldn't know, have any idea what the implied warranty of merchantability or fitness for a particular purpose is.

So in order for a consumer to make a knowing election, and, "I'm going to opt into all these waivers," you'd have to educate that consumer and how's the company going to educate the consumer? I mean, practically speaking. You could have a multi-page document talking about each paragraph, boilerplate paragraph in the agreement. "If you want to opt into this, we're going to give you $10 and this is what you're opting into. You are not going to have certain rights that you would have under the law." Consumers are going to say, "What are you kidding me? I just want to buy the goods or the services and be done with it. I don't want to get involved. It's too complicated," is what I'm saying. You've substituted, Andrea, another regime I think, that is too complicated for the average consumer.

Andrea Boyack:

So you mean we've substituted the default common law for the company's boilerplate?

Alan Kaplinsky:

Yeah, and I like the idea of you're allowing the consumer to opt into it. I like it theoretically, but I worry about how practical it is when you're dealing with consumers who aren't that educated, they're not lawyers, how are they going to understand that they're making... "Yes, I'll take an extra $10 or I'd rather pay less money for the goods or services or the subscription and I'll give up that right that you've described." Consumers, number one, don't want to do it, don't have the time for it, and are not savvy enough to make a smart election.

Andrea Boyack:

So I think that this is a problem of consumer protection, but it's not the problem I'm really talking about, right? This is a problem generally. I mean, you have consumers forming contracts all the time, even not boilerplate contracts that are bad for them. And we have a very low threshold of capacity to contract. We don't require you to speak English, we don't require you to be literate, let alone go to law school. We don't even require you to have passed the third grade. All we require is that you're of age and you're not basically mentally unstable. And if that's true, you can enter into whatever stupid contract you want. And we do have some protective doctrines, but they're fairly light in most cases because we say you have manifested assent, you are bound to those terms even if they're bad for you.

There is of course a lot of good reasons that we should help protect people from entering into harmful contracts. And maybe it's a big effort. I know the CFPB has tried a lot to look into financial literacy, for example, and ways to try to help people. There's some work to be done with disclosures that make things easy to understand, like let's put up at the front the exact amount you're going to owe if you pay just the minimum payment on your credit card.

Alan Kaplinsky:

You don't believe in... Disclosures isn't... That's not going to solve your problem. And our whole consumer protections, most of the federal consumer protection laws, they typically use disclosures as a substitute for saying to consumers, "No, you can't do that," or "A company can't do that." If the company wants to do something, as long as it's disclosed, it seems to be. But do you say that doesn't work?

Andrea Boyack:

I don't think it's enough, right? Because I think that first of all, you're usually not going to be effective in your disclosures, especially if the disclosures can be included in lengthy terms. This is the problem that you have in all kinds of disclosures, even the SEC, if it goes on for pages and pages and pages, not sophisticated people are not going to be able to pick up on all of those, and even sophisticated people probably need a lot of advice to assess what's going on there. And what ends up happening is the disclosure requirements, even if they weren't required, companies would still disclose, because it's a wonderful way to manage risk.

"I'm going to tell you a whole bunch of stuff." And then later on when you say, "Hey, this happened," you say, "Well, right there on page 62, column four, I said it could." And so that's great. So it's not effective and in fact can actually help companies manage their own risks as opposed to protect the consumers from the risks. But then also, even if you could come up with effective disclosures, that in itself isn't good enough if there aren't consumer choices, because then the consumer, again, can know what's happening, but they don't have any power to stop it.

Alan Kaplinsky:

Well, what about regulation? All right, you don't like disclosures. I understand that. Disclosures sometimes work, sometimes they don't work, but usually the things that get disclosed are what you would call the... Under the Truth and Lending Act, there's something called the Schumer Box where you've got to disclose what I'd call the salient terms of a contract, what you would call the constructive terms. And maybe it helps consumers shop around to get the better interest rate, but nobody shops around to get the best liability provision or dispute resolution provision. I don't know. I've never met a soul that would do that. But let's talk about regulation. So there's a lot of regulation as a backdrop. We have, first of all, we've got the UDAAP. The unfair deceptive acts and practices laws, which are sometimes called mini FTC laws that exists I think in 49 or 50 states. If you engage in unfair or deceptive acts of practices, you are subject to a whole range of penalties and the contract could be void, or... There's all kinds of bad things that happen to companies that violate those statutes.

And then there are very specific more directive regulations that say a company can't include such a provision in a contract. So you've got these general statutory provisions, you've got the common law of unconscionability. The common law, which also says you can't enforce a contract that's against public policy. You've got all these other tools that are available. I'm going to get to the Restatement of Consumer Contracts in a minute, because I know you have a bone to pick with them, but what's wrong with just using the existing common law and federal and state statutory law that's already available to deal with provisions that are unfair, deceptive, unconscionable, abusive? That's another thing that the CFPB has that tool in its arsenal.

Andrea Boyack:

So let me talk first about the regulation. I think regulation can work to a point, but there's two problems with it. And first of all is you're always regulating problems that came up in the past. It's almost impossible to regulate things in the future. We saw this after the Financial Crisis. You had lots and lots of pages written to regulate things to the way that they went wrong in the past, but there's no way to anticipate what's going to go on in the future. So regulation always has a little bit of a whack-a-mole feel to it where something might pop up somewhere else that we haven't really focused on. And as we know, sometimes it takes a long time to have regulation put in, to pass laws. Sometimes legislative bodies aren't functioning the way that they should. And I think it's good to have some regulation, but I don't see it being necessary to have regulation to protect people against contracts if what's being called a contract shouldn't be even called a contract, then you won't need to have the regulation to protect it.

Alan Kaplinsky:

Oh wow. Now you're talking my language because here you're giving something of value to the industry. I think what you're saying is a trade-off for your idea would be the companies would no longer have to worry about state UDAAP laws or these vague doctrines of unconscionability because that would be the benefit the companies would get for agreeing that they can't have boilerplate written provisions.

Andrea Boyack:

Right. Well, here's the thing is that one of the reasons why the companies don't like the Restatement, which you mentioned before, and we talked about a little bit previously when you and I chatted, that nobody seems to like it on either side, but the companies say it creates a lot of uncertainty to have the possibility of unconscionability hanging over their heads. And I don't think you need to depend, you don't need to lean so heavily on unconscionability or Doctrine of Reasonable Expectations or regulation if you define the contract in a more justifiable way based on the things that the consumer actually manifested assent to as opposed to just whatever the company wanted to throw in this kitchen sink boilerplate.

Alan Kaplinsky:

Okay. Well, let's talk about... You mentioned very briefly the Restatement of Consumer Contracts, and I was a member of the Board of Advisors from the very beginning of that project until the very end. And you pointed out nobody was happy with it except the reporters. They, I'm sure were quite pleased that they were able to get this through the ALI. Describe to our listeners what the Restatement does. Why was there a need for a restatement of consumer contracts when you already had a general restatement of contracts dealing with contracts in all kinds of contexts?

Andrea Boyack:

Right. Well, contracts is extremely broad as we know. It can cover everything from mergers among big companies to these consumer contracts and everything in between. But I think that there's been, as I mentioned, this sense growing from the early 20th century, that our contract law ideals didn't really match up that well with the way that people were entering into these contracts of adhesion. And I think that that disconnect became even more pronounced when you had more and more online contracting. That's why there's been debates about should browsewrap be enforceable and should shrinkwrap be enforceable, and what happens if you have these end-user license agreements? Do they work? And I think there were people both on the side of pushing for contractual certainty and consistency from state to state and knowing what was going to be considered the contract and what wasn't. And also from the side of people who felt that consumers were being just pulled along into contracts without their autonomy being involved.

I think both sides wanted to get some clarity. And that's probably the genesis of this. Now I feel like I'm a little out of my depth telling you exactly how the sausage was made, especially because you were in the sausage factory and I was standing on the outside. But I'll tell you from the outside, it was an interesting process, that I sat there watching it go through iterations and not getting very far. Then I saw in 2019 there being a draft that was disseminated and people just pounced on it. And you had a lot of criticisms of that draft in the press, by scholarly luminaries - Mel Eisenberg just said it “drove a dagger through the heart of consumer contracts” - and you had people... I think 23 state attorney generals wrote a letter about it, and it was in the news, like the mainstream news caring about the ALI, which was bizarre.

And then all of a sudden we had the vote in 2019 and it didn't pass. And then we had the pandemic, so everything quieted down for a while. And I found it very interesting in 2022. It was the oddest thing. I was doing research on this and I called up people who were on the ALI and I said, "Hey, can you send me the most recent draft?" And they said, "We're not allowed to." I was like, "What are you talking about?" I mean the ALI wasn't guarding nuclear secrets. I mean this is something that's describing the law. Why can't we see the draft? And they said, "We've been instructed to keep it confidential." And so it was very hard to even know what was being discussed until there was a vote and they finally were able to get it passed, maybe because they didn't disclose it.

So I guess that secrecy worked, because we have this final version. But the way I see the final version from the outside -- and you can tell me if it looks different from inside the sausage factory -- is it seems to create this compromise in a way between

the consumer advocates and the people that focus on efficiency. And yet I think both sides gave enough that they both didn't like it, and the consumer advocates were upset because it endorsed basing consumer blanket assent on things that were very minimal passive acts like being on a website or just not breaking up a relationship with a company. If you continued the relationship, you were bound to... It was deemed assent to all the terms. But that was given in exchange for an endorsement of a more robust judicial oversight approach, sort of a bigger type of unconscionability. This may be a little more proactive, which the companies didn't like because they said, "Now we have all this uncertainty. We don't know what's binding and what isn't."

And that's why I look at it and I say, "Okay, I see the problem. I see where they came out with trying to solve it." But wouldn't there be a simpler, easier, more certain and more fair way if you just backed up and looked what exactly is going on in contracts instead of... Let's get back to the essentials. Why do we enforce contracts to begin with? How are these contracts different? And if they are different, then what exactly can we say people have assented to and committed themselves to be bound by?

Alan Kaplinsky:

So one of the destructive terms that you single out often in your article, are arbitration provisions, which is something very near and dear to my heart, because that's an area that I pioneered about 20 years ago. That has brought arbitration to the masses, I guess you could say. The CFPB, as you know, did a big study, took them several years, they had several field hearings, I testified at three different hearings on it. And at the end of the day they issued this magnum opus of a report, hundreds and hundreds of pages. And what's interesting to me is they didn't find enough evidence to conclude that they should ban consumer arbitration altogether.

They ultimately, as you know, decided to ban the use of class action waivers in consumer arbitration provisions, and that ultimately got overturned by Congress under the Congressional Review Act, but they didn't ban arbitration altogether and they spent a lot of time focusing on class actions and whether they were real value to consumers. And how do you compare that with the right to arbitrate? And one of the things, whenever somebody attacks consumer arbitration, that happens very often, particularly on some of the consumer blogs that I subscribe to, consumer law and policy blog, we always reply and we always throw back in the faces of the people attacking arbitration, the fact that in class action litigation, in the period of time the CFPB studied it, the average amount recovered by an individual, something like $34.

I mean it was an absolute pittance. Class actions for most consumers... The only people that really benefit from that, I believe, are the lawyers handling the cases if they can settle the cases quickly. Very often it'll take an individual settlement where the consumer might get a thousand dollars or $1,500 and the lawyer will get $50,000, maybe not even for drafting a complaint. So my quarrel with the people who are attacking arbitration is if it is a fair arbitration clause, it really works for consumers. The problem is it's been attacked so much by plaintiff's attorneys, by the media without really focusing on how... Going the arbitration route for consumers, if they're knowledgeable about it, is much better than going to court.

It's much, much better. And the data is there to support that. The problem is the lack of education. That seems to be if we could... And that's, of all the destructive terms that you identified, that's an area where academics, government agencies like the CFPB, the Federal Trade Commission, State Attorneys General, if they took a fair look at these arbitration provisions and said, "Well, instead of attacking them, let's educate consumers and tell them how they can do better if they have a dispute using arbitration," but nobody's ever done that.

Andrea Boyack:

Yeah, I'm not trying to demonize arbitration. I mean, in fact, the whole point is not to say this particular provision is always bad or not. I think that's the role for the regulation. And you're right, they've concluded that they're not going to ban all arbitration in consumer contracts. That was a determination. So it's still on the menu, but the question is, should it be on the menu that you're... You're given the menu like “this is what you're eating today,” or is it a menu that you can elect? Because I think... Well, and first of all, it's hard to get all the evidence about arbitration because some of it's a black box. And so we don't know the same way as you would for public court resolutions how things turn out for consumers. But that to this side, you could still have the idea that arbitration isn't off the table if it can be better justified. And so in a way, if you're a proponent of arbitration in agreements, the proposal I suggest actually is better because you won't have to live with this uncertainty of is the

arbitration potentially just going to go away? You could have this big pushback that it's unconscionable, but courts usually then will say, "Okay, just arbitrate whether the whole contract's unconscionable since you have an arbitration provision." If it doesn't come in unless it's elected to, then if it's elected to you know that it would be binding, and you could have a situation where you explain to people that it's binding.

And what's interesting is that because of the industry worry about arbitration clauses potentially being vulnerable, you have an increasing incidence of companies either where they're required to or just doing it proactively, providing in their boilerplate an opportunity for consumers to opt out. They say, "If you don't want to arbitrate, send a letter to us within 30 days of the first..."

Alan Kaplinsky:

We came up with that idea too.

Andrea Boyack:

It's a great idea because... Not to be jaded, but it's a great idea because it gives the illusion of choice. You have given the consumer the right to opt out, but they probably won't read the terms to know that they have the right to opt out. And although opting being deemed in just takes that click of a button to accept the whole transaction, opting out, you got to go get some paper and a pen and envelope and a stamp and write a letter and send it in. So if you just sort of flipped the default rule, then you could achieve the same kind of certainty without having them be snuck in to people that didn't make some sort of affirmation that they agreed to that being the resolution process.

Alan Kaplinsky:

Yeah. Okay. How do you implement your idea practically speaking? In other words, what would it take? Let's say you've got some really good traction once you publish the article in the University of Denver Law Review. Are you going to need laws to be passed in each state and what would the laws say? What about a federal law?

Andrea Boyack:

Yeah, I don't think that this would involve any statute. I think this is just the courts taking a look with fresh eyes at the contract and using the idea of assent in its true meaning, form, right? We were going to look at say what actually has been assented to and having the gumption to pull apart the idea of agreement to a contract and agreement to the terms. And we did have to provide that by statute in the context of the UCC § 2-207, where when you had dueling boilerplates, the Article 2 says, "Okay, we're not going to necessarily have one boilerplate be winner takes all. We'll allow them to work together." This is not exactly that situation, but it's similar in that the UCC conceives of a reality where agreeing to the transactional relationship is a separate question to agreeing to what the contract is. And if courts use the same reasoning to analyze these consumer contracts, I think that they would get to the same baseline that I suggest.

Alan Kaplinsky:

But Andrea, courts have to follow the law, right? They're not legislators, they can't make up a law. You would agree to me, this would be a radical change in the way the courts have typically reacted when deciding whether to enforce a contract. They look at the written document including the boilerplate, and if there is an attack on a provision based on unconscionability or UDAAP, they'll decide that issue. But you're talking about something revolutionary. What judge is going to go off in that direction, unless there's a statute that involves saying that either banning boilerplate from written contracts or saying it won't be enforceable if you include certain destructive provisions?

Andrea Boyack:

I mean, I think you could probably get there faster if you passed a statute, but I still don't think that it's impossible to get there without it. Because if you go back to the pure concept of what assent is, and you see the places where we've diverged from that, but if you can go back to before that, you can say, "Hey, there is not agreement to terms that you didn't see that you

never had the opportunity to elect, that we maybe need to have a different way of fitting this new reality of contracting of the online contracting with consumers into our contract system."

I mean, you look back at the Justice Stevens dissent in the Carnival Cruise case in the nineties, and he points out all of these exact same problems with that law and seems to say, "You don't have assent to these terms here. They paid for things first. They didn't have the opportunity to reject things. You can't just have a company impose their terms." And so in a way, it wouldn't be a completely unprecedented interpretation. It would just be a resurrection of the true core concepts of contract law.

Alan Kaplinsky:

Well, I'm going to end with this because we're about at the end of our program. You would agree there is a well-established common law doctrine, that everybody is bound by a contract that they sign, regardless of whether they read it or not. And regardless of whether they understood it or not, they're bound. I mean, that's the law. So a judge who wanted to go in your direction and do it through taking a fresh look at the meaning of assent, there'd be a whole body of law that judge would have to ignore, I think. I'll give you the final say.

Andrea Boyack:

I think once again, we are assuming that all of the boilerplate is what they've signed, right? That is the contract. I think it's a little bit easier to try to claim that if someone is actually signing the bottom of page, as opposed to saying, "If you click here, you agree to the boilerplate." And part of the... To me, what really hits that home is the fact that 100% of the online boilerplate provisions that I've reviewed have a provision in it that says the contract includes our terms now, plus any terms that we add or change in the future. And in that case, that's really strange, if you take that and try to fit it into traditional contract law.

You mean you've agreed to whatever the other party says is the contract in the future. And I think it's just as hard for a court to find deemed assent by proceeding with the transaction to all the now and future terms that a company wants, as it would be for the court to say, "Hold on, assent has to be bounded somewhere, and we think it should be bounded based on the terms that relate to the infrastructure of the transaction, not terms that exist solely to protect the company or increase the company's profit.

Alan Kaplinsky:

Okay. We've come to the end of our show, Andrea, and first and foremost, want to thank you very much for taking the time to be on our program today. I'll be very interested in seeing your follow-up article that I know you're in the process of writing right now. And as I said, it was a pleasure having you on the program.

Andrea Boyack:

Thank you so much, Alan. It was great to be here.

Alan Kaplinsky:

And I want to thank all of our listeners today. And to make sure that you don't miss any of our future episodes, subscribe to our podcast show on your favorite podcast platform, be it Apple Podcasts, Google Play, Spotify, our website, ballardspahr.com or wherever you listen. Don't forget also to check out our blog, consumerfinancemonitor.com for daily insights on the consumer finance industry. And if you have any questions or suggestions for our show, please email them to us at podcast, that's singular, podcast@ballardspahr.com. And stay tuned each Thursday for a new episode of our show. Thank you very much for listening and have a good day.