Consumer Finance Monitor (Season 7, Episode 47): An Empirical Study of Boilerplate in 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 podcast 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'm pleased to be moderating today's program. For those of you who want more information, don't forget about our blog ConsumerFinanceMonitor.com. We've hosted the 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 list for our webinars, please visit us at ballardspahr.com.

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Today, I'm very pleased to be joined by a person who's been a guest on our show before, and I'm referring to Andrea Boyack. And let me just give you a little bit of information about Andrea's background in case you didn't hear the earlier podcast, which I'm going to tell you about as well. So Andrea Boyack is a professor at universe of Missouri Law School, and she was from Washburn University School of Law where she was the Norman R. Pozez Chair of Business & Transactional Law and co-director of the school's business and Transactional Law Center.

Professor Boyack has written and published extensively in the areas of consumer law and housing issues, including pieces on tenants rights and eviction, consumer bankruptcy, housing integration and affordability, the foreclosure crisis, common interest, community governance, Fannie Mae and Freddie Mac. Professor Boyack is also the co-author of a widely used case book called Real Estate Transactions: Problems, Cases, and Materials published by Aspen Publishing Company. She also is currently working on a book that explores six different conceptions of housing. It's entitled, Framing Housing Law and Policy. She has published numerous additional scholarly articles and law reviews and journals, including an article that was the subject of our podcast show on January 4th of this year. If you haven't listened to that podcast show, I encourage you to do that and maybe the podcast show today will whet your appetite to listen to the earlier podcast show because it discusses another law review article that is already published in the Denver Law Review Volume 101 called The Shape of Consumer Contracts.

What we're going to focus on today is what I would describe as a companion law review article that's being published separately in the Iowa Law Review. It's called Abuse of Contracts: Boilerplate Erosion of Consumer Counterparty Rights.

Let me just say before I finally say hello to Andrea that this is really a hot topic and you don't have to take my word for it or Andrea's word for it, but it's a big focus of the CFPB and we'll, later in our program toward the end, we'll talk about what the CFPB is doing with respect to the issue that we're going to be focused on today, namely boilerplate provisions that under which consumers waive various rights as opposed to what Andrea would call the constructive provisions of a contract, which actually detailed the various terms of the contract.

So first of all, Andrea, a very warm welcome to you. I'm delighted to have you back on our show.

Andrea Boyack:

Thanks, Alan. It's great to be here. Appreciate it.

Alan Kaplinsky:

Okay. Before we dive into your newest law review article, I'd like you to give just a quick refresher to those people in our audience that perhaps haven't listened to your January 4th podcast, which I hope they do because they're all archived on the Ballard Spahr website.

Andrea Boyack:

Okay, well, great. My first piece, actually, these pieces did grow up together. I had the first piece being really focusing on the theoretical discomfort that contract law has with the reality of the way consumer contracts are currently being entered into and drafted and went through why the Justificatory theories behind contract law don't seem to really justify enforcing consumer contracts the same way. I talk about the difference between contracts between two parties that both have input into the contracts content, and I called those horizontal parties, almost thinking of people shaking hands. Then I juxtapose that with the kind of contract that most consumers enter into every day. Where they have zero input into the contract's content, no power to shake the contract and the relationship between the parties is really not sort of among equals kind of agreement, it is rather a vertical shape where the company drafts and provides the terms and the consumer only has the choice to either take them or walk away.

And in that contract, I also point out that there are different types of terms in the online contracts, terms and conditions, and many of the terms have to do with the specific relationship between the consumers. When things are going to be delivered or how much is going to be paid and refund rights or such things. But that there are also, in every online terms of conditions that I've ever seen, there's a bunch of general provisions boilerplate. In the boilerplate, there are provisions that look at first glance to a consumer to be fairly standard, but what they actually do is change the default rule that would apply to consumers with respect to dispute resolution, with respect to allocations of liability, with respect to what damages would be available and with respect to modifications of the contract. So the first piece really focused on the theory and the concept and the problem, and talked a little bit about how treating and considering the effectiveness of the constructive terms, which as you mentioned is the term I plucked out of my head to use for the terms that actually construct the infrastructure for the transaction, how that doesn't necessarily mean that courts need to address the effectiveness of the destructive terms in the same way, and I suggest that perhaps the destructive terms rather than being presumptively enforceable, should be presumptively unenforceable.

Now, as I was working on that article, it occurred to me that one thing that hadn't really been focused on quite as much was the reality of what those terms said in the context of the destructive terms. And so this new piece is an empirical study where we went through 100 different companies online terms and looked for whether or not they had these destructive terms and then tracked how common they were.

Alan Kaplinsky:

Yeah. Let's focus a little bit on the terminology that you use throughout the article. When you talk about a consumer, does that mean just somebody that's either borrowing money or purchasing goods and services for personal purposes or household purposes, or is it broader than that? Does it encompass small businesses?

Andrea Boyack:

Alan, that is a great question and I struggled with the terminology here because consumer means different things to different people. Some employment lawyers believe that consumer doesn't include employees and perhaps should include employees, but I use consumer in my piece for lack of a better term, to be very broad. What I'm talking about is individuals who are dealing with companies in the context where they have this vertical relationship, so it could be an employer to an employee or it could be somebody actually acquiring goods and services for their personal use, or it could be someone obtaining a loan, something like that. But I'm not really looking at small businesses, although it's an interesting point. There may be some similarities between the concerns for individual consumers and small businesses.

Alan Kaplinsky:

And you use the word boilerplate a lot, and is that complete? And then you use the term destructive terms. Well, first of all, why don't you tell us when you talk about boilerplate, what do you mean?

Andrea Boyack:

I am using boilerplate similar way as Peggy Radin did in her book Boilerplate, where she talked about the online terms and conditions that aren't necessarily changeable from deal to deal that they just kind of get put in at the end of all of the online terms. Boilerplate actually as a term goes back to when contracts were printed and it was like they'd have all the terms and conditions stuck together on one printing plate and they'd stick it on the printer and nothing would change. This of course, has to do with online contracts, but the term means the non-changeable standard terms that come along with the consumer entering into the relationship with the company. And then destructive terms is more narrow than that. I'm just talking about the terms that specifically waive the rights that the consumer would otherwise have at law.

Alan Kaplinsky:

So you're not opposed philosophically to boilerplate provisions. In general, you are concerned about a subset of boilerplate provisions and you call that destructive terms. Can you give us just a very, we're going to dig a little bit more into each of the categories that you're referring to, but in general, what do you mean by destructive terms?

Andrea Boyack:

So destructive terms, I actually group into three groups, but you could make an argument that there are some other things that would fit under the rubric of destructive terms. And the definition again would be a term that operates to modify or eliminate the consumer default rights, but does not pertain to the actual transactional facilitation that the constructive terms would. So as I mentioned, if you have a contract where you're, say, getting a streaming service and the amount you pay every month and what that gives you and other sorts of things may would go into the category of constructive terms. This is one of the things that some people push back on when folks say, "Hey, these standard form contracts shouldn't be treated as contracts." They say, "We have to have some terms for the way the relationship works."

And so I guess I'm saying fine, I give you that. I think that's true. I think we do need some terms to explain how this relationship works and it makes sense because the consumer is likely to look at those terms and consider what kind of payment am I making and what sort of subscription am I getting. But there are other terms, they've sometimes been called by some other people, sneak in waivers, they're terms that exist, pull apart from the way their relationship will work, that if you took those terms right out of the contract, the efficacy of the transaction would not be affected at all. These terms simply operate to change the default rights. So my categories are things like dispute resolution, so waiver of class action lawsuits, waiver of jury trials, maybe a shortened period under which any sort of claim has to be brought.

Another category would be limitations on company liability. We're not going to be liable for X, Y and Z, and you agree to that. And then there would be another category that would be limitation on damages. Of course, contract law provides a way to calculate damages, but allows people to agree to calculate them in a different way. Some of these destructive terms, cap damages or specifically waive certain types of damages. And then the last kind of term are terms that permit the drafting party, the company, to unilaterally make changes to all the other terms. So in a way, if you have that last category, it might not even matter if you have the first three because the applicable terms could always be revised to include any of those.

Alan Kaplinsky:

Yeah. Now, you mentioned the outset as you were discussing giving us an overview of the article that this was an empirical study that you conducted, and I take it involved looking at a bunch of, I think it was 100 types of contracts, online contracts that you pulled off the internet, and you looked for various categories of terms. Tell us a little bit about that. I mean, obviously we don't want to get into the names of all the companies because that would embarrass the number of people.

Andrea Boyack:

Well, not to embarrass anybody, but if anyone is interested, I have in the piece not only a lot of nice charts showing the numbers that were drawn from the data that we got, but also an appendix that details each and every company's standard forms that we looked at. But basically, I hired two research assistants and the three of us pulled up 11 different companies in 1, 2, 3, 4, 5, 6 different broadly defined industries that were retail. So companies that were selling goods, computer and browsing types of companies, people that were selling software and hardware like Google, oh, I said a word, sorry, and entertainment streaming. So these streaming services for both music and movies and television type shows, financial services. So people offer companies offering loans and other sorts of financial services to the consumers, social media, the platforms where people are posting for their friends and the public, and then travel and transportation, which had to do with airlines and folks, maybe those websites that arrange for travel.

So just the reason I broke it into the six categories is to see if we saw trends in the different categories because if you talk about all companies across the board, bank A doesn't compete with streaming service B, they are in completely different areas. So we had 100 of these different companies, and for each one we went through meticulously all that fine print that nobody wants to read, and we read it. And we searched and mined it to basically extract some sort of fossil dig to extract the terms that fit those categories I mentioned. And then we coded them and we included some samples in the appendix as well, so you can see how they actually read. And that was the way that we could see how many of each of the industries and the 100 companies together, how many of them contained a mandatory arbitration clause?

How many of them waived jury trial? How many of them had a class action waiver or a limit on the timing for bringing dispute or a choice of form? How many of them had an integration clause that said whatever representation somebody told you before this contract, they are not relevant, you can't bring them in because this contract is the sum total of the representations the company's making. How many had warranty disclaimers because there are implied warranties at law and they can be normally disclaimed expressly, waivers of privacy and then caps or limits on types of damages, and finally that unilateral modification clause. And so we track all of this stuff. Yeah.

Alan Kaplinsky:

Yeah. Well, let me try to clarify a point that I'm curious about, and that is what you're talking about when you're referring to destructive terms, they're not necessarily, and maybe they're never actually violations of law, they're not things in the contract that are contrary to a statute or the common law.

Andrea Boyack:

That's absolutely right.

Alan Kaplinsky:

Yeah. So you would say they are legal, somebody could give a legal opinion that these provisions are generally enforceable.

Andrea Boyack:

Sure, absolutely. And Alan, if you and I sat down and hammered out a contract back and forth, I do not think there'd be any problem including most of these terms if we both had input into the contract. But that goes back to the first article, in the special context where the consumer has no power to shape the contract and no input, I think it's a context in which these terms which are legal for people to agree to vary the legal defaults, but in this case, we don't really have an agreement to vary the defaults. We have an agreement to do a transaction, but not to necessarily, and destroy is a loaded word, I realize that, but to waive, to change the default legal rights for dispute resolution, liability, allocations, damages and modifications.

Alan Kaplinsky:

I would just mention that one other thing that is somewhat related to what we're talking about, the CFPB issued a circular a few months ago, not that long ago, and I'm trying to, as I'm talking to you, dig out the site for it.

Andrea Boyack:

Is this the rule to establish public registry?

Alan Kaplinsky:

Oh no, that's something actually-

Andrea Boyack:

Oh, that's something else?

Alan Kaplinsky:

That's related to what your article is all about. We'll talk about that later. But in Circular 2024-03, and basically in a nutshell, what it does is it makes it a violation of the deception prom of UDAP, which is Unfair and Deceptive and Abusive Acts and Practices to include in a consumer financial services contract, anything that is contrary to federal or state law. So you can't put in a contract that the consumer waives a certain right that's unwaivable you can't even use, which is I consider very conventional drafting prefatory language that says something like, except where prohibited by applicable law, blah, blah, blah, blah, blah. So that's something different. That's not what your article is all about. So let's now dig into some of these categories.

Andrea Boyack:

Before we get there, Alan, let me just say, I think the CFPB is approaching the same problem from a different angle. They're actually trying to pass regulations, and I'm not saying we necessarily need to have a regulatory body saying this term is illegal, this term is illegal, something along that line. That's what they do in Europe. I'm saying that perhaps we need to be more attentive to the common law, judicial treatment of these particular categories, and then my opinions about that are informed by this data. So anyway, go ahead.

Alan Kaplinsky:

Yeah, okay. So let's talk about, you've alluded to the categories and let's just touch upon them a little. One is the modification of dispute resolution legal defaults, which is assume a fancy way of saying arbitration provisions, right?

Andrea Boyack:

Well, arbitration is one, but it's not the only one. You also have things like choice of forum, for example, which might not be the choice of an arbitral forum. It could be choice of Southern Florida.

Alan Kaplinsky:

Yeah. Right. Right. Right. Okay. And that would be one of the categories that you have a problem with. You and I of course will disagree about that, but that could be the subject of another entire show. We could debate whether arbitration is a good or a bad thing for consumers, but we won't get into that. Is there anything more you want to add on that category, like to run through each one quickly?

Andrea Boyack:

Yeah. Well, actually one of the things that surprised me is I actually expected to find more arbitration, mandatory arbitration clauses in the contract. There was overall 60 some percent, I'm looking now 66% of all the contracts, so only two thirds had arbitration. Those really did vary quite a bit over the sector, the financial services was much lower, and perhaps that's because of this regulatory concern and oversight that you have going on at the federal level.

Alan Kaplinsky:

So you mean I still have a fairly robust large market out there to where I can get clients to adopt arbitration, right?

Andrea Boyack:

Well, I mean, I guess I'm not saying hurry up, you still have a third of the market left, but there is only two thirds. I found that surprising because you hear so much about arbitration in the news that I thought it would be even more ubiquitous.

Alan Kaplinsky:

Yeah, I am really surprised that, I know you did a scoring, which we'll talk about in a little bit. You alluded to it already. That the financial services sector scored the best on having the least amount of destructive terms, and I mean that's a result that surprises me a bit.

Andrea Boyack:

Yeah. What would be really interesting is to actually try to figure out, and this is beyond the scope of this paper, but to figure out why there are those industry differences. Is it because that industry has decided not to pursue certain of these types of waivers or is it because of existing regulation or fear of new regulation or there was the idea that it was competition? I'm not sure that that really is evidenced by the data, but that is a really interesting question that I'm not even sure how to figure out. But I would be interested in knowing.

Alan Kaplinsky:

Well, I think part of it is the fact that they're may be more heavily regulated, and I think you mentioned that in your article, than some of the other industries such as retailers or software providers, particularly consumer finance is very, and well actually all of banking is heavily regulated. Maybe that's the reason.

Andrea Boyack:

If you took the financial services industry out of the study, actually the rest of it would look even worse by comparison because you have a lot more of these destructive terms in the other industries which aren't as heavily regulated. And I guess I don't know if that means that we should have more regulation or not. And that's just what the data shows.

Alan Kaplinsky:

So the second category that you end up tracking is limitations on company liability. What kinds of things are you talking about there? Saying something like you can't get any punitive damages, complete waiver of that?

Andrea Boyack:

No, that would actually go under the third category with respect to how much you could recover. This really focuses on for what you can recover, so the basis of recovery rather than the measure of recovery. And there are lots of different subcategories that one talk about here, but I just chose three. One of them that's probably most well known among people and also has been in the news a lot, has been privacy waivers, that they have a waiver in the boilerplate that says, you can't sue us because your information has been distributed in certain ways. So there's a affirmative limit on any liability basis that stems from privacy. And usually there's a privacy policy that sets forth what they expect to do with your types of information. And sometimes you affirmatively say, yes, I recognize that, but I know that's been in the news quite a bit lately, and it's actually very common to have a privacy waiver.

94% of the surveyed standard forms has that kind of waiver. And there's a fairly uniform distribution among the industries. They're slightly fewer in the financial services industry and slightly more in the computer and browsing service industry, which makes sense, but that there's a very common to have privacy waivers. And another one would be waivers of other kinds of implied warranties, which I found interesting because one would think that certain industries have more implied warranties than others. If I'm a retailer and I'm selling goods, I'm going to be covered by the UCC, which provides an implied warranty of merchant ability for merchant sales. And so the retail industry has a clear implied warranty that the UCC does permit to be waived expressly. But I was wondering, in some of these industries, what are these warranties that you are waiving in the travel industry or social media? You're not really dealing with a good, so maybe there are other warranties or maybe this is just a way to foreclose a claim that there's some other warranty. And in that way it goes along with the integration clauses with the disclaimer of any liability based on statements outside of the contract itself. So if there was an ad or a salesperson said something that wouldn't open the company up to liability.

Alan Kaplinsky:

Although on that one, generally, I mean I think the genesis of that provision, at least in part is the automobile dealer. Somebody comes in to buy a car and the dealer talks about all kinds of great features in the car, and you then get the car and it's lacking that, and you go back to the dealer and say, "Well, the salesman told me it had a special surround sound system." And he says, "Well, I don't know what the dealer told you, but the contract says all that goes out the window." But in the online context, I would think there certainly be a lot less of that kind of a problem because you don't typically have a conversation with somebody.

Andrea Boyack:

One would think that's true, although it might not just be a face-to-face conversation, it could be in marketing materials or something. And you do always have the possibility of suing for fraud. States are split on whether or not this kind of integration clause will bar a fraud claim saying they told me there was surround sound and there's not surround sound. I mean something like that may or may not be depending on the jurisdiction, a claim that you can still make. But I mean, I guess I'm wondering if you're not having statements outside of the contract, why do you need to have that sign of waiver if it's not a question of controlling or allocating the risk that your salespeople are going rogue and their promises?

Alan Kaplinsky:

Right. Okay. So then we get to limitations on remedies, which my example was you can't get punitive damages or consequential damages. And some other thing I've seen along.

Andrea Boyack:

Right. So I've grouped this differently than the basis of recovery because this doesn't have to do with for what the company's liable, it only has to do with how much the company might have to pay. And so I tracked these, categorized them in two different ways and many contracts had both. One of them is a limit on type of damages, which is extremely common. And the other one is a cap, like a dollar cap or an actual monetary top level ceiling on what can be recovered. And the limits on types of damages. You're right, it's like no punitive, no consequential damages. It goes ahead and has a whole list of different types of damages that will not be covered in any sort of damage award. The caps on the damages they range, some of them are dollar caps, you can't get more than $100. And some of them, the more common approach is to cap the recovery at a refund of the monies that the consumer has paid either in total or over the past, name a time period. So you can get a month, you can get six months of your money back, but a refund is the only real remedy you have, even if there is liability.

Alan Kaplinsky:

Right. Now let's get to the fourth one. Because I do have something I want to focus on, but you call it pre-authorization for unilateral modifications to contract terms. When you were looking at that type of a provision, I take it that you were seeing situations where a company could just change the terms willy-nilly, and it didn't really matter whether there was any notice of it or that the consumer continued to do business with the company, doesn't there as a matter of contract law, and this is the question I'm going to ask, if you have that kind of a contract that really just says one party has got the right to change the terms at any time for any reason, is that really a contract, any new terms, or is it an illusory contract that if one party can change it, where's the contract? I mean, that's my concern.

Andrea Boyack:

Yeah, it's a weird situation because that's the exact example that I give my students about what's an illusory promise. I promise to do X if I feel like it. And that's not a commitment. And so if you have a commitment that has the loophole of I can change my commitment at any time, that could be absolutely undermining of the whole point of contracts. I mean, one of the main reasons that we enforce contracts is the reliance interest that people have relied on a promise and it's hard to rely on a promise that hasn't been made or to rely on a promise that the other party can change at will. But I was surprised, not completely surprised, because I had read some other studies that were being done at the same time. There was another study that looked at 500 different contracts just at the unilateral modification clause, and they found that all but four or five had that in it.

Well, when we looked at 100, every single one had the ability to change the terms. So on the one hand, it seems to undercut the whole concept of relying on contracts and the contracts being mutual assent, but courts have enforced these clauses with the reasoning that, well, when you signed up for this service or whatever, you agreed to basically delegate your right to amend the contract to the other party, and the other party does have some good faith limits on what they can do. They can't change things just to screw you over. So that is sufficient to create an avenue for that company to act unilaterally to modify. Now, I did break them down further to see which companies asserted that there was a right to without any sort of affirmative notice. They'd say things like, "Hey, come back and check the website periodically to see what your contract is."

And then there were other ones that to see whether or not the consumer had the right to opt out of modifications. And I saw that in certain industries, but not really in other industries. The only industry that appeared in is... Yeah, it was just with FTC telecom things. And I think that's because of a regulation once again. So consumers can opt out, but it means they have to walk away from the deal completely. I see why companies want to have the ability to change them. I mean, there could be nefarious reasons, but there also could be just the fact that, hey, these relationships, if I'm signing up for a social media account, I could have that account for decades and things change and we might need to change the contract.

Alan Kaplinsky:

Well, just to give you a simple example in the industry that I deal with all the time, banking and consumer finance, if you have a credit card issuer that has issued credit cards at a fixed rate of interest and then interest rates start going through the roof like they did in the past several years after the pandemic, from an economic standpoint, if you don't change the terms, you're going to be out of business, going to start, your cost of money is going to exceed the rate that you can charge on your credit card. But there are, at least in the financial services area, there are limitations on what you can do. The Truth in Lending Act has limitations on changing terms on credit card accounts. That's part of the, so-called CARD Act that got enacted a decade or so ago. And there are state laws, even jurisdictions like Delaware and South Dakota, which have become havens for credit card issuers, they have provisions that tell you how you can go about changing state law. But once you get out of the heavily regulated area, I guess it's more like the wild wild west, right?

Andrea Boyack:

It sort of is. On the other hand, some people are really, really focused on this one particular problem as if this problem is the biggest of the issues that people have with the power to define the boilerplate. But on the other hand, we've already given the company a complete free hand to craft the boilerplate the way they want to begin with. And so I don't think it, it's not that many more bridges to me to give them the rights to change it. Either way, they're the ones in charge of it. It just though hammers home the point that it doesn't matter if you read this stuff, which is funny because a lot of the consumer advocates say, oh, what we need to do is make sure people are reading the forms. But so what? You read the form, first of all, you had no choice about what it says. So even if you don't like it, you can't do anything about it except for opt out of the whole transaction. And also if you read the form and you see that there's a unilateral modification clause, which there is in every form, then it could change tomorrow. You don't know what it's going to say. How did reading even help the consumer?

Alan Kaplinsky:

Yeah. Well, in your article Andrea at one point you talk about, well, what about a company compensating a consumer for agreeing to waive a certain right. And that reminded me of something that some of my clients did. Not many of them, but some of them gave consumers the option of agreeing to arbitration or no arbitration, and you can go to court if you have a dispute, and they would say to the consumer, if you agree to arbitration, you'll have a slightly lower interest rate or there'll be some other benefit will provide to you, but if you reject it and you go to court, you're going to pay a higher interest rate.

What's wrong with that as an idea? What we found, I mean interestingly enough, as I said, I didn't have any clients do it, but we found that most consumers would opt for the benefit to get the better economic term. They didn't care that much about whether they were subject to arbitration, I guess because when you enter into a contract, you're not thinking of you're going to get into dispute down the road. But what's your thought about that kind of an idea? And I guess you could extend my idea about arbitration to other terms. You could make all these different waivers optional, and if the people agree to the waiver, you give them some benefit.

Andrea Boyack:

Well, in my first piece, I talk about this a little bit and I say that I don't have as big of a problem if there truly is a choice that the consumer has between agreeing to waive rights in exchange for something and proceeding with the transaction without the waiver. My biggest concern comes from the fact that there isn't a choice that you either have to take the transaction with the waiver or leave the transaction altogether. It would definitely provide a better legal basis to argue that the waiver is enforceable if it's made an exchange for something and there was a voluntary choice. Now you still have the same problems that you have in any kind of consumer contract where people are not represented and they don't really, as you said, they can't really estimate very accurately what their likelihood is of doing this or that they might not understand what arbitration means. There was a study that tried to figure out how people perceived a mandatory arbitration clause, even if they were told you have that and something like half of the people didn't even know that that precluded a trial, that they thought they just gave them a choice, even though the word mandatory is there.

So yes, people misunderstand, they're not terribly financially literate or legally literate and they have those heuristic biases, but I don't see that problem being a contract problem. That's a problem in any contract. We give people the freedom to make stupid contracts, at least at that point they're making the contract. And if we have concerns about overreach or terms that we think are bad for public policy, then I think that that needs to be addressed in a different way than in saying that's not actually a contract. It is a contract, maybe a bad contract.

Alan Kaplinsky:

Right. So you talked a little bit earlier about the grading that you gave to certain companies, and what are your observations of that? I think you mentioned that financial services came out relatively better than some of the other industries, but are there any other observations you have?

Andrea Boyack:

Well, one observation is that you don't have a very wide variation on the grading. And the way I did the grading is it was a very simplistic way just to sort of show how one might take this kind of information and package it in a way that consumers could look at and immediately get at least a little bit of information. It was just simply a quantitative thing. How many of these types of waivers do you have? And the more you have, the higher the score. So the higher score would be a more extensive waiver of the default rights, but at least it gives the consumer something to go off of.

Except for the financial services sector, almost all the other sectors, the top high score was pretty much the highest you could possibly get, meaning that the companies that had a lot of dispute resolution waivers also had a lot of liability limitations, had a lot of damage waivers, and the lower scores were not that much lower. It's not like you had an enormous range, but this fit with everything that we had found that there is a fair amount of consistency from company to company and even from sector to sector, although as you mentioned, the financial sector is slightly less affirmatively waiving a lot of the consumer rights and possibly because of litigation. And so this was simply to show that there is a possibility of increasing consumer awareness by having some kind of ranking system. And I guess like you said, sort of name and shame the companies who have a lot of waivers. And it also allowed me to say, hey, what's going on in these different industries are more competitive industries showing a greater variation in how many they waive? And we really didn't see that the retail industry is probably the most competitive of the ones we looked at. And they were among the worst, if not completely average in terms of how much they changed the default consumer legal rights. So I don't think it indicates that industry competition has made the boilerplate content more consumer friendly.

Alan Kaplinsky:

I would agree with you on that, and I think the answer to that is when consumers are in the market for a loan or to buy goods or services, they don't care about that and they don't even read the contracts. All they care about are, in general, the pricing provisions. What's it going to cost them the interest rate, how much is it going to cost for the good or services that they're acquiring? But I want to ask you a question about your scoring. Isn't there some amount of double and triple counting there in that if somebody's got an arbitration provision almost always, well by its nature, they're going to have a jury trial waiver because that's part and parcel of an arbitration provision. You can't go to court at all, and most of them are going to have a class action waiver. So somebody, if you've got arbitration, you've already got three points against you, right?

Andrea Boyack:

Yeah. I mean tried, it was hard to figure out how to do a grading, and I certainly don't feel like this is the best and most accurate way to do it. I simply was showing an example. But the way I did it, I tried to group a score for each of those subparts and look at the combination of what they did. But you're correct, you do have a little bit of double counting because there are very few companies that include class action waivers but not arbitration classes.

Alan Kaplinsky:

And the reason for that is a lot less certainty as to whether they would be enforced. I used to call that a naked class action waiver. I've seen very few companies that will deploy that because there's not a lot of case law on it. And the cases that are out there, a good many of them say it's unconscionable or against public policy, et cetera. The other thing I am wondering, and this is just an observation, when I have drafted an arbitration provision for a bank or another consumer finance company, I bend over backwards for everything else in that arbitration provision to be very consumer friendly because I don't want anybody to be able to argue, I mean, I'm fine if they want to argue the class action waiver is invalid because the Supreme Court has said class action waivers and arbitration provisions are valid under the Fellow Arbitration Act.

Andrea Boyack:

Right, if they're linked together.

Alan Kaplinsky:

But I don't want to say, well, in this arbitration you won't be able to get something that you would be able to otherwise get in court. And we give consumers the right to opt out of arbitration if they act within a certain period of time, et cetera. So I would think at least some of the companies that use arbitration, while there's that double counting effect, some of these other things that you've talked about, I'd be surprised if they contain them as well because that's like saying challenge my arbitration provision on the fact that it's unconscionable.

Andrea Boyack:

Right? I think that you are absolutely correct that these arbitration provisions for the most part, I mean if they've, well-lawyered, have been drafted with a view of forestalling any kind of claim that they're substantively unfair, right? Because they are not substantively unfair, they're going to be enforceable under the FAA and are jurisprudence if we consider that a contract. And in fact, what would be interesting to do that would take a lot more sort of granular level analysis is to create some sort of ranking system that included some of the good things that are in the boilerplate because we did find some really interesting good things. There's an agreement to pay for the arbitral fees. There's an agreement to sweeten the pot if the company's done something wrong. And so a true accurate grading would look at both sides, not just what they've taken away, but what they've given. And I do want to recognize that that is out there.

I mean, if anyone is interested in looking at some of those, I have some in the appendix, but you can go through and look and see if arbitration really is so bad. And that kind of brings us back to what we've talked about briefly before and more extensively in our last conversation, is that there's a presumption among a lot of consumer advocates that arbitration provisions are anti-consumer. I'm not sure there's any evidence either way, because part of the problem is we can't get the evidence out because you don't have public results in arbitration the way you do in court. So the lack of data out there, it's the reason why I did this one, people were arguing whether or not there was consumer choice among terms in the marketplace. And I said, well, gosh, it looks like there isn't, but maybe we could get some data you could show that consumers do better or worse under arbitration. And if you had the situation where you mentioned before that consumers could be paid to waive arbitration provisions or not, so that became an actual choice, that would also give data about whether consumers really would prefer to choose arbitration in exchange for a discount, or if they would prefer to pay more and not waive their right to trial.

Alan Kaplinsky:

So Andrew, we're getting toward the end of our show, but there are two things I want to make sure we cover. And that is the newest article doesn't focus on what you see is a remedy for this problem of too many destructive terms, but your first article does mention something. So why don't we, if you could focus on that, I think that would be helpful.

Andrea Boyack:

Sure. So in the first article, I did talk about a two-step method to address this issue. And the first is to separate out the question of whether or not the consumers have chosen the relationship, and whether or not the consumers have chosen the terms, meaning the terms that are not part of the infrastructure of the relationship. And then the next part would be to determine whether or not there has been a voluntary waiver in exchange for something. And that kind of leads back to what we talked about before with possibly providing a way for consumers to opt out of things if they choose and have something in exchange, which I find is an interesting way to solve the contract legal problem. Again, maybe not the actual practical reality of what people do because they're not advised. But the other thing that I'd mentioned in the second article in the one coming out in Iowa is that gathering this data actually suggests a couple improvements that can be made to, and one of them has to do with recognizing that we don't have a wide variability from company to company with respect to these destructive terms, that undercuts consumers, even if they read them, can choose because you can't choose between A and B if all you have is A and A.

Then the other thing is that the idea that we were just talking about for grading, that there is a way that somebody looking at the content of the boilerplate could make that more transparent, could make it more easily known by the consumer, and then possibly that would improve the ability for there to be some market impact.

So there was just a hint of a possible place to go with this because it was mostly focused on the empirical study, but I do think that increasing consumer choice and knowledge about their waivers is the key out of the contract conundrum that we have to apply voluntary choice law to something that doesn't involve a voluntary choice in many cases.

Alan Kaplinsky:

Yeah. Well, let's wrap it up by talking about the idea that the CFPB has put on the table. In January of this year, they proposed the idea of a public registry for non-banks that are supervised by them, not all non-banks and not banks. And the reason people wonder why didn't they cover banks, for example, they didn't have the statutory authority under Dodd-Frank to create a registry of banks, and it's very clear only the largest banks in the country or those have over 100 billion in assets are subject to supervision by the CFPB. All the other ones that are subject to supervision by whoever the principal financial prudential regulator is, the comptroller, the Fed, the FDIC.

But in January, they came out with this proposed reg. They haven't yet finalized it yet. Those of us in the industry refer to it colloquially as the name and shame registry, and it would require non-banks under CFPB supervision to register terms and conditions in their contracts that might waive or limit consumer rights terms that limit how consumers may exercise their rights handle disputes or engage in class action lawsuits. And basically, all the things that are covered in your article are part and parcel of this, and if they ever finalize it and it doesn't get challenged in court or it gets challenged in court and CFPB wins in court, there will be a registration requirement. There will be public access to the contract terms that need to be red flagged initially by the companies, and it'll be all spread out on a website. What's your reaction to that? Good idea, I would think, right?

Andrea Boyack:

I think it's a good idea. I think it's very similar to the idea that I have had with respect to gathering this data, that if you increase transparency, that improves the ability to argue that consumers are really choosing, and if it's really a name and shame, if the companies are ashamed to have a particular provision in their contract that's a non-negotiable provision, then perhaps it shouldn't be there. I mean, not to be flippant about it, but if it's something that you're really trying to hide from your consumer contract and counterparty, that's a red flag to me right there. And it's interesting that the CFPB obviously doesn't have the right to require that people do things outside of certain industries, but there's nothing to stop some consumer advocacy watchdog or something. You have rankings for various different products, why couldn't they rank different contracts and go in and say, here are our A plus contracts, here are the D minus contracts. And that way if consumers wanted to, they could go and look at that list provided by some third party completely private entity.

Alan Kaplinsky:

I'm surprised Consumer Reports hasn't done that.

Andrea Boyack:

Yeah, I mean, they could, absolutely they could. If they can tell you whether, which washing machine is good, why can't they tell you which boilerplate provisions are good? And maybe part of it is now they don't have that much variation, but it might lead to market variation because maybe, just maybe there might be a benefit to varying. Right now you don't have a benefit. You have what they call as the lemons hypothesis where if you can control what something says, why wouldn't you just make it the best for you and the worst for the other side? Again, I'm not saying that everything is the worst for the other side, and we do have some competition, but I don't think that we have competition among companies with respect to the terms with the price, with the service. Yes, but there's little understanding of the terms and there's very little variation.

Alan Kaplinsky:

Right. Well, Andrea, we've come to the end of our program sadly, because there's a lot I would love to continue discussing with you, but I really want to thank you very much for being our guest today on the program and talking about your latest law review article that's going to be published in the University of Iowa Law Review in the very near future. So thank you.

Andrea Boyack:

Oh, thank you, Alan, for having me, was a delightful conversation. I wish you well.

Alan Kaplinsky:

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