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Arbitration and Consumer Credit

Christopher R. Drahozal[*]
Peter B. Rutledge[**]

Abstract

This paper uses a newly available database of consumer credit card agreements to take the first, in-depth empirical look at why credit card issuers use arbitration clauses. Based on a sample of credit card agreements made available by 298 issuers under the Credit Card Accountability Responsibility and Disclosure Act of 2009, it finds that while most credit card loans outstanding (95.1%) are subject to cardholder agreements with arbitration clauses, the substantial majority of credit card issuers (247 of 298, or 82.9%) do not use arbitration clauses in their credit card agreements. The paper also finds that credit card issuers are more likely to use arbitration clauses when they (1) specialize in making credit card loans; (2) make riskier credit card loans; and (3) have a larger credit card portfolio. Conversely, issuers are less likely to use arbitration clauses when they are (1) mutually owned (i.e., credit unions) rather than shareholder-owned (i.e., banks); and (2) are located in states in which class arbitration waivers are unenforceable. These empirical findings have potentially important implications for a number of timely policy questions, such as: what sorts of options are available to consumers who wish to obtain a credit card that is not subject to an arbitration clause; how increased regulation of arbitration (whether by Congress or by the Consumer Financial Protection Bureau) might affect the market for consumer credit; and how businesses are likely to respond to the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*.

I. Introduction

The credit card industry has been at the heart of the debate over consumer arbitration. Credit card agreements are regularly cited as examples of consumer contracts that always, or almost always, include arbitration clauses.[1] At a congressional hearing on whether "the credit

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[1] *E.g.*, Arbitration Fairness Act of 2009, H.R. 1020, § 2(3), 110th Cong. (2009) (finding that consumers "must often give up their rights as a condition of ... getting a credit card"); Public Citizen, Forced Arbitration: Unfair and Everywhere 3 (Sept. 14, 2009), *available at* http://www.citizen.org/documents/UnfairAndEverywhere.pdf (reporting that "the use of foreced arbitration remains rampant," citing credit card agreements as an example); Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*, 109 COLUM. L. REV. 689, 747 (2009) ("A binding arbitration clause is a staple of credit card agreements ....").

card industry [is using the Federal Arbitration Act] to quash legal claims" — itself an illustration of the focus of the consumer arbitration debate on credit cards — Congressman Steve Cohen stated that "[n]early every credit card issuer includes an arbitration agreement in [its] ... contracts with cardholders."[2] Arbitrations seeking to collect credit card debts have been the subject of reports by consumer groups,[3] a congressional investigation,[4] and a highly publicized consumer fraud suit by the Minnesota Attorney General.[5] Indeed, proponents of the Consumer Financial Protection Bureau (CFPB) cited credit card arbitrations as one of the reasons the CFPB was needed.[6] Because Congress has directed the CFPB to study the use of pre-dispute arbitration clauses in consumer financial services contracts[7] — including credit card agreements — and authorized the Bureau to regulate consistently with its findings in the study,[8] the public policy focus on credit card arbitration is likely to continue.

Despite this attention, only limited empirical evidence has been available on the use of arbitration clauses in credit card agreements. The difficulty of obtaining credit card agreements has hampered empirical research,[9] such that studies have focused only on the very largest credit

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[2] See *Federal Arbitration Act: Is the Credit Card Industry Using It to Quash Legal Claims?*: Hearing Before the House Subcomm. on Comm'l and Admin. Law of the House Comm. on the Judiciary 1-2, 111th Cong. (2009), *available at* http://judiciary.house.gov/hearings/printers/111th/111-39_49475.PDF; *see also* Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 158 n.6 (2006) (referring to "the few credit card companies that do not compel arbitration"); Memo to Elizabeth Warren: How to Protect Consumers (Sept. 17, 2010), available at http://blogs.reuters.com/reuters-wealth/2010/09/17/memo-to-elizabeth-warren-how-to-protect-consumers/ (quoting David Arkush, director, Public Citizen's Congress Watch division) ("Nearly every consumer lender puts a clause in the standard-form contract saying that the consumer can never sue the company, for anything.").

[3] *E.g.*, Public Citizen, The Arbitration Trap: How Credit Card Companies Ensnare Consumers (Sept. 2007), *available at* http://www.citizen.org/documents/ArbitrationTrap.pdf.

[4] Arbitration Abuse: An Examination of Claims Files of the National Arbitration Forum, Staff Report of the Domestic Policy Subcommittee Majority Staff, House Oversight and Government Reform Committee 12 & ex. A (July 21, 2009), available at http://www.clarksvilleonline.com/wp-content/uploads/2009/07/Report-on-National-Arbitration-Forum.pdf.

[5] Consent Judgment, Minnesota v. National Arbitration Forum, Inc., No. 27-CV-09-18550 (Minn. Dist. Ct. July 17, 2009), *available at* http://pubcit.typepad.com/files/nafconsentdecree.pdf.

[6] *E.g.*, *Creating a Consumer Financial Protection Agency: A Cornerstone of America's New Economic Foundation*: Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs 79, 88, 111th Cong. (2009) (prepared statement of Travis B. Plunkett, Legislative Director, Consumer Federation of America), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg54789/pdf/CHRG-111shrg54789.pdf; Professors of Consumer Law and Banking Law, Statement in Support of Legislation Creating a Consumer Financial Protection Agency 5-6 (Sept. 29, 2009), *available at* http://digest.stjohns.edu/download.axd/6d40215c03a249ec91f0e455
bdd262f2.pdf?d=Professors%20of%20Consumer%20Law%2010-05-09_1000.

[7] Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a), Pub. L. 111-203 (2010) (directing CFPB to study and report to Congress on the use of pre-dispute arbitration clauses in consumer financial services contracts).

[8] *Id.* § 1028(b) (authorizing the CFPB to regulate pre-dispute arbitration clauses "if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers. The findings in such rule shall be consistent with the study conducted under subsection (a).").

[9] *See*, *e.g.*, Amy Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 145 (2010) ("[I]t was notably difficult to obtain contracts of consumer credit contracts in order to analyze their inclusion of arbitration clauses.... [Credit card companies] rarely include or made available their full form contract terms."); Linda Demaine & Deborah Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 60 (2004) ("[O]ne coauthor acquired four credit cards while conducting the study, as that was the only means by which to obtain the clauses used by these businesses."); Public Citizen, *supra* note 1, at 3, 5 ("[S]everal credit card

card issuers.[10] As a result, little is known about the use of arbitration clauses in the credit card market as a whole. Moreover, the detailed empirical analysis of arbitration clause use that has been done for other types of contracts — franchise agreements,[11] executive employment contracts,[12] and corporate acquisition and finance contracts[13] — has not been possible for credit card agreements.

Enhancing our empirical understanding of the use of arbitration clauses in credit card agreements is important and timely for at least two reasons. First, with the CFPB authorized to study and possibly regulate arbitration clauses in credit card agreements (and other consumer financial services contracts),[14] a fuller understanding of why issuers use arbitration clauses can provide insights into how issuers might respond to such regulation — i.e., might issuers respond by reducing the supply of credit? Second, the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*,[15] holding that the FAA preempts state court decisions finding class arbitration waivers unconscionable, has led some to predict that all consumer contracts will soon include arbitration clauses.[16] A better understanding of why credit card issuers use arbitration clauses will help in evaluating such predictions.

This paper uses a newly available database of credit card agreements to take the first, in-depth empirical look at why credit card issuers use arbitration. We start in Part II by considering the reasons credit card issuers might use arbitration to resolve disputes with cardholders.[17] Financial institutions generally prefer courts over arbitration for resolving disputes with

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companies told us that we had to apply for a credit card and be approved before we could see their terms.... Only three of the 10 credit card providers we queried would share the contractual language of their arbitration clauses with us.").

[10] *E.g.*, Theodore Eisenberg, Geoffrey P. Miller, & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2008); Public Citizen, *supra* note 1, at 5-9.

[11] Christopher R. Drahozal & Keith N. Hylton, The Economics of Litigation and Arbitration: An Application to Franchise Contracts, 32 J. LEGAL STUD. 549 (2003).

[12] Randall Thomas, Erin O'Hara, & Kenneth Martin, Arbitration Clauses in CEO Employment Contracts: An Empirical and Theoretical Analysis, 63 VAND. L. REV. 959 (2010).

[13] Theodore Eisenberg & Geoffrey P. Miller, The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies, 56 DEPAUL L. REV. 335 (2007).

[14] While Congress also might regulate consumer arbiration, such as by passing the Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011), that seems unlikely given Republican control of the House of Representatives.

[15] 131 S. Ct. 1740 (2011).

[16] *See* Ian Millhiser, Supreme Court Nukes Consumers' Rights In Most Pro-Corporate Decision Since Citizens United, ThinkProgress: Justice (Apr. 27, 2011), *available at* http://thinkprogress.org/justice/2011/04/27/176997/scotus-nukes-consumers/ ("After *Concepcion*, it is only a matter of time before nearly every credit card provider, cell phone company, mail-order business or even every potential employer requires anyone who wants to do business with them to first give up their right to file a class action."); *see also* Brian T. Fitzpatrick, *Supreme Court Case Could End Class-Action Suits*, S.F. CHRON. (Nov. 7, 2010), *available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/11/06/INA41G6I3I.DTL ("Once given the green light, it is hard to imagine any company would not want its shareholders, consumers and employees to agree to such provisions [arbitration agreements with class action waivers]."); Nathan Koppel, Will Federal Consumer Bureau Ride to the Rescue of Class Actions?, WSJ Law Blog (Apr. 29, 2011), *available at* http://blogs.wsj.com/law/2011/04/29/will-federal-consumer-bureau-ride-to-the-rescue-of-class-actions/ ("Class-action bans are already pretty common in certain industries, such as consumer credit and cell phones, and they are about to become much more common, lawyers say.");

[17] *See infra* text accompanying notes 22-47.

borrowers. Courts provide greater certainty than arbitration for such disputes (which typically involve only the failure to pay) and (for secured loans) offer expedited foreclosure procedures in the event of default. By comparison, litigation is less attractive for credit card issuers because credit card loans are unsecured (making collection actions in court less useful) and involve standardized contracting on a very large scale (making cardholder class actions more likely). Accordingly, the legal literature has identified two main reasons credit card issuers might use arbitration clauses: to reduce the risk of being subject to a cardholder class action; and, more generally, to reduce the process costs of resolving disputes.

On either view, one would expect credit card issuers to be more likely to use arbitration clauses when facing a higher risk of disputes with cardholders. Part III examines possible indicators of a heightened dispute risk and sets out our predictions for when issuers will be more (or less) likely to use arbitration clauses.[18] Consistent with this analysis, we expect credit card issuers to be more likely to use arbitration clauses when they (1) specialize in making credit card loans; (2) make riskier credit card loans; (3) rely more heavily on fee income; and (4) are located in states with a legal environment favorable to class actions. Conversely, we expect credit card issuers to be less likely to use arbitration clauses when they are (1) mutually owned (rather than shareholder-owned); and (2) located in states in which class arbitration waivers are unenforceable. We also predict that the size of the issuer's credit card portfolio likely matters, although it might make issuers either more or less likely to use arbitration.

Our empirical results are largely consistent with these predictions. Part IV describes our methodology,[19] while Part V sets out our findings.[20] In summary form, those findings are as follows:[21]

- While most credit card loans outstanding (95.1%) are subject to cardholder agreements with arbitration clauses, the substantial majority of credit card issuers (247 of 298, or 82.9%) do not use arbitration clauses in their credit card agreements. Consumers who wish to obtain a credit card that is not subject to an arbitration clause may have more options for doing so than is commonly believed, although those additional options will tend to be with smaller credit card issuers.

- As predicted, credit card issuers are more likely to use arbitration clauses when they (1) specialize in making credit card loans; (2) make riskier credit card loans; and (3) have a larger credit card portfolio. These findings suggest that increased regulation of consumer arbitration might induce issuers to diversity their portfolios away from credit card loans or simply reduce their volume of outstanding credit card loans, or might make issuers less willing to lend to high-risk consumers. If so, then increased regulation of arbitration clauses could reduce the supply of credit to consumers, particularly high-risk borrowers.

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[18] *See infra* text accompanying notes 48-67.

[19] *See infra* text accompanying notes 68-96.

[20] *See infra* text accompanying notes 97-109.

[21] In addition to analyzing the sample as a whole, we also examine separately the factors that explain why banks and why credit unions use arbitration clauses. Given the small number of credit unions that use arbitration clauses, the results for bank issuers track the results for the sample as a whole (because most of the variation in credit card use is among banks), while our results for credit union issuers are largely inconclusive.

- Conversely, also as predicted, issuers are less likely to use arbitration clauses when they are (1) mutually owned (i.e., credit unions) rather than shareholder-owned (i.e., banks); and (2) are located in states in which class arbitration waivers are unenforceable. This latter finding suggests that, on the margin, issuers likely will respond to *Concepcion* (which makes class arbitration waivers more broadly enforceable) by increasing their use of arbitration clauses. But the significance of other factors in explaining the use of arbitration clauses provides a limit on that increase. As a result, predictions that all issuers will begin using arbitration clauses are unsupported.

II. Credit Card Loans and Arbitration Clauses

Contracts between the financial institutions that issue credit cards (issuers) and the consumers who make purchases using credit cards (cardholders) are standard form contracts drafted by issuers. The issuer determines itself whether to include an arbitration clause in the cardholder agreement; cardholders have little or no opportunity to negotiate the standardized terms.[22] This part examines why credit card issuers might include arbitration clauses — i.e., contract out of the litigation default rule[23] — in their cardholder agreements.[24]

A credit card agreement is a specialized form of loan agreement, and, as a general matter, arbitration is not well suited for resolving disputes between lenders and borrowers. Typically, borrowers default on loans because they are unable or unwilling to pay, not because of a dispute over how to interpret a vague or ambiguous contract.[25] Courts have substantial experience and

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[22] Although it is common to refer to pre-dispute arbitration clauses in consumer form contracts as resulting in "mandatory" arbitration, that is a misnomer. Mandatory arbitration, as the term traditionally has been used, is arbitration required by law rather than by contract. *See* IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 17.1.2.2, at 17:8 (Supp. 1999). As Richard Speidel has explained:

> Where ... the very issue is the genuineness of consent or the harshness of the alternatives to consent, using such terms as compulsory or mandatory in such circumstances is, at best, highly confusing. At worst, it constitutes question-begging: The very question at stake where such questions arise is whether whatever consent to arbitrate as has been manifested should or should not be given full contractual effect. To call the arbitration compulsory or mandatory is to answer by label, not by attention to the facts and by analysis. It is far better to call these terms "pre-dispute" arbitration agreements.

Id. at 17:8-17:9.

[23] The default means of dispute resolution is litigation. Unless parties agree otherwise, any dispute will be resolved in court. *E.g.*, Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83, 135 n.270 (1996).

[24] Our focus is on pre-dispute arbitration agreements (arbitration clauses) because the vast majority of consumer (and employment) arbitrations arise out of such agreements. *See* Searle Civil Justice Institute, Consumer Arbitration Before the American Arbitration Association 101 (Mar. 2009) ("[V]irtually all of the 301 cases in the case file sample — 290 (or 96.3%) — arose out of pre-dispute agreements; 11 (or 3.7%) arose out of post-dispute agreements to arbitrate."); Lewis L. Maltby, *Out of the Frying Pan, into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 319 (2003) ("AAA found only 6% (69/1148) of their 2001 employment arbitrations were the result of post-dispute agreements. In 2002, the frequency of post-dispute agreements was even lower, 2.6% (29/1124).").

[25] William W. Park, *Arbitration in Banking and Finance*, 17 ANN. REV. BANKING L. 213, 215-16 (1998) ("A debtor's default usually results from simple inability or unwillingness to pay, rather than any honest divergence in the interpretation of complex or ambiguous contract terms.").

expertise in dealing with such cases, in which the law and contract are likely to be clear.[26] In addition, for secured loans, the judicial system provides an expedited procedure that enables the lender to foreclose on its security interest in the event of default.[27] Using arbitration instead of litigation would add uncertainty, delay, and cost.[28] Thus, the empirical reality is that commercial loan agreements and similar contracts typically do not include arbitration clauses.[29]

Credit card loans differ from commercial loans in at least two key respects. First, credit card lending is mass contracting.[30] Credit card issuers extend credit to millions of borrowers on identical terms for numerous small purchases. Second, credit card debt typically is unsecured debt.[31] Issuers do not hold rights to collateral on which they can foreclose in the event of default.[32] Instead, they must pursue borrowers personally to collect past-due amounts.

These characteristics make collection actions in court less practical for credit card loans than for other types of loans. As Todd Zywicki explains:

> The unsecured status of credit card loans makes them riskier and more difficult to collect than secured consumer loans.... Unsecured credit card lenders ... cannot

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[26] Mark Kantor, *OTC Derivatives and Arbitration: Should Counterparties Embrace the Alternative*, 117 BANKING L.J. 408, 411 (2000) ("Many such jurisdictions have developed summary procedures for resolving court disputes about promissory notes and other debt instruments and New York and London in particular have developed reputations as experienced, impartial forums for financial disputes.").

[27] Park, *supra* note 25, at 216; Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 98 ("A court order is a preliminary step to repossession of collateral by a sheriff or to a judicial foreclosure sale of collateral. Arbitration of lenders' claims relating to collateral would be an additional step the lender would have to take before going to court to get the necessary order.").

[28] Keith N. Hylton, *Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 231 (2000) ("Most loan contracts are relatively clear, and courts have a great deal of experience with them. An arbitration regime would risk diluting this predictability, which in turn could reduce deterrence benefits."); *see also* Kantor, supra note 26, at 411 ("[L]enders have actively avoided forums in which there was any risk that a sympathetic story might move the decision-maker toward leniency not found in the terms of the financing contract. The distaste for arbitration has reflected apprehension by banks that arbitral tribunals might make decisions based on notions of equity, rather than strictly enforcing negotiated contractual terms.").

[29] Kantor, *supra* note 26, at 411 (2000) ("U.S. commercial banks have almost uniformly preferred court submission clauses to arbitration clauses in their credit agreements."); Park, *supra* note 25, at 215 ("In contrast to the commercial and insurance communities, bankers have traditionally preferred judges over arbitrators."); William W. Park, *When the Borrower and the Banker Are at Odds: The Interaction of Judge and Arbitrator in Trans-Border Finance*, 65 TUL. L. REV. 1323, 1323 (1991) ("Arbitration has been relatively rare, even ill-favored, in financial dispute resolution."); *see also* Eisenberg & Miller, *supra* note 13, at 350 table 2 (only 2.31% of credit commitments included arbitration clauses).

[30] *See* David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 448 (2003) ("[T]he private lawmaking that is put in place through contracts involves mass contracting in which uniform rules are incorporated across countless transactions, binding millions of parties ...."; citing consumer credit cards as an example).

[31] Todd J. Zywicki, *The Economics of Credit Cards*, 3 CHAP. L. REV. 79, 125 (2000) ("Although there has been some development of secured credit cards in recent years, most credit card debt is unsecured.").

[32] Secured credit cards, which are secured by a deposit with the issuer, are a relatively rare exception. See Angela Littwin, Testing the Substitution Hypothesis: Would Credit Card Regulations Force Low-Income Borrowers into Less Desirable Lending Alternatives?, 2009 U. ILL. L. REV. 403, 448 n.249 ("There is a product known as a secured credit card, but it does not actually offer the borrower any credit. The putative borrower must send the issuer a deposit in the amount of the borrower's line of 'credit.' The borrower may then charge up to the amount she has on deposit, as though she had an unbanked debit card.").

> avail themselves of the debtor's collateral, but must instead pursue the debtor through collection remedies....
>
> These problems are further exacerbated by the fact that the amounts owed by debtors to particular credit card issuers are often relatively small.... The fact that any one creditor often will be owed a relatively small amount of money makes it likely that the creditor will not find it cost-feasible to pursue the debtor for collection, as the transaction costs of collecting, such as court costs and attorneys' fees, will often make the project infeasible.[33]

Thus, the reasons banks typically prefer courts over arbitration for enforcing commercial loan agreements — greater certainty for collection actions and the availability of expedited foreclosure proceedings — are much less important for credit card loans.

Conversely, the mass contracting nature of credit card loans increases the susceptibility of issuers to class actions brought on behalf of cardholders. When using their credit cards, large numbers of consumers are acting under similar if not identical contracts and subject to similar if not identical business practices. If a dispute arises over those terms or practices, a large number of consumers likely will have similar disputes. Moreover, the consumers may be able to assert claims under generally applicable state and federal consumer protection statutes (such as the Truth-in-Lending Act).[34] For both of these reasons, credit card issuers are much more susceptible to class actions than commercial lenders.[35]

Arbitration clauses reduce the likelihood that issuers will be subject to class relief. A cardholder who has agreed to arbitration is not a proper party to a class action in court.[36] As such, attorneys have counseled their clients (including credit card issuers) to use arbitration clauses to reduce their risk of being subject to class actions.[37] Moreover, issuers commonly

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[33] Zywicki, *supra* note 31, at 126.

[34] *E.g.*, 15 U.S.C. § 1640.

[35] Other consumer lenders also engage in mass contracting, and some respond by using arbitration clauses. For example, one study found significant use of arbitration clauses in a sample of private student loan contracts. National Consumer Law Center, Paying the Price: The High Cost of Private Student Loans and the Dangers for Student Borrowers 28 (Mar. 2008), *available at* http://www.studentloanborrowerassistance.org/ blogs/wp-content/www.studentloanborrowerassistance.org/uploads/File/Report_PrivateLoans.pdf ("Sixty-one percent of the loan notes in our survey contained mandatory arbitration clauses."). The same is no longer true (if it ever was) for home mortgages, although not because of actions by lenders. *See* Fannie Mae, Announcement 04-06, at 4-5 (Sept. 28, 2004), available at http://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2004/04-06.pdf ("[M]ortgage loans that are subject to mandatory arbitration are ineligible for sale to, or securitization by, Fannie Mae."); Freddie Mac, Combatting Predatory Lending (last visited May 11, 2011), *available at* http://www.freddiemac.com/corporate/citizenship/protecting_consumers/predlend.html ("Our previously implemented anti-predatory lending practices include ... [n]ot investing in mortgages originated on or after August 1, 2004, that contain mandatory arbitration clauses."); 15 U.S.C. § 1639c(e)(1) ("No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction.").

[36] E.g., Zawikowski v. Beneficial Nat'l Bank, 1999 WL 35304, at 2 (N.D. Ill. Jan. 11, 1999); Hunt v. Up N. Plastics, 980 F. Supp. 1046, 1047 (D. Minn. 1997); Collins v. Int'l Dairy Queen, Inc., 169 F.R.D. 690, 694 (M.D. Ga. 1997); Ex parte Green Tree Fin. Corp., 723 So. 2d 6, 10 & n.3 (Ala. 1998).

[37] Alan S. Kaplinsky & Mark J. Levin, Excuse Me, But Who's the Predator? Banks Can Use Arbitration

include "class arbitration waivers" in their arbitration clauses.[38] If enforced, a class arbitration waiver precludes the case from proceeding on a class basis in arbitration.[39] Together, an arbitration clause and a class arbitration waiver may make class relief altogether unavailable.[40] Because of the prevalence of class arbitration waivers in credit card (and similar) agreements, Eisenberg, Miller, and Sherwin conclude that "concern over class actions remains the most likely explanation for the prevalence of arbitration clauses in consumer agreements."[41]

So what about the other reason commonly given for using arbitration clauses — that arbitration reduces the process costs of resolving disputes? The legal literature is full of general statements to the effect that arbitration is cheaper and faster than litigation.[42] Whether arbitration is cheaper and faster than litigation for resolving credit card disputes is a tougher case to make, however.[43] The vast majority of credit card disputes involve attempts by issuers to recover unpaid credit card loans, and in most of those cases consumers simply do not show up to defend

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Clauses as a Defense, BUS. L. TODAY 24, 24 (May/June 1998), at 24, 24; see also Edward Wood Dunham, The Arbitration Clause as Class Action Shield, 16 FRANCHISE L.J. 141, 141 (1997).

[38] Eisenberg et al., *supra* note 10, at 884 (finding that "every consumer contract with an arbitration clause also included a waiver of classwide arbitration"). Their findings, of course, are limited to the types of contracts they studied, which consisted of telecommunications and consumer financial services contracts. *Id.* at 881-82. By comparison, companies in other industries regularly include arbitration clauses but not class arbitration waivers in their consumer form contracts. *See* Searle Civil Justice Institute, supra note 24, at 103 (finding in sample of AAA consumer arbitrations that almost 65% (190 of 299, or 64.5%) did not arise of out an arbitration clause that included a class arbitration waiver).

[39] *See infra* text accompanying notes 61-66.

[40] In this paper we are examining why credit card issuers use arbitration clauses. We are not addressing, and take no position on, the normative implications of permitting credit card issuers (or other businesses) to use arbitration clauses to reduce their susceptibility to class relief.

[41] Eisenberg et al., supra note 10, at 894; see also Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, Mandatory Arbitration for Customers but Not for Peers: A Study of Arbitration Clauses in Consumer and Non-Consumer Contracts, 92 JUDICATURE 118 (2008). For the reasons explained *supra* note 38, the Eisenberg et al. study "does not support broad generalizations about businesses' motivations for using consumer arbitration clauses" but instead is limited to the industries studied (which includes credit card issuers). Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 475-76 (2010).

[42] E.g., Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 280 (1995) ("[Arbitration] is usually cheaper and faster than litigation ....") (quoting H. R. Rep. No. 97-542, at 13 (1982)); Kathryn A. Sabbeth and David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 827 (2009) (describing "prevailing wisdom" as "that arbitration is faster and cheaper than litigation," although criticizing research on which such view might be based).

[43] An additional problem is that as of December 31, 2009 — when issuers reported the cardholder agreements studied here to the Federal Reserve — neither the National Arbitration Forum (NAF) (formerly the leading provider of debt collection arbitration services for credit card issuers) nor the American Arbitration Association (AAA) (the leading American provider of arbitration services generally) would administer credit card debt collection arbitrations. The NAF had agreed to stop administering new consumer arbitrations in settling a consumer fraud suit brought against it by the Minnesota Attorney General. *See* Consent Judgment, ¶ 3, Minnesota v. National Arbitration Forum, Inc., No. 27-CV-09-18559 (Minn. Dist. Ct. July 17, 2009), *available at* http://pubcit.typepad.com/files/nafconsentdecree.pdf. The AAA had implemented a moratorium on most consumer debt collection arbitrations, based on its "experiences administering debt collection arbitrations" and "its consideration of a number of policy concerns that have been raised" about such arbitrations. *See Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debts*: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. On Oversight, 111th Cong. (July 22, 2009) (testimony of Richard W. Naimark on Behalf of the American Arbitration Association), *available at* http://oversight.house.gov/images/stories/documents/20090722112616.pdf.

against the claim.[44] As such, the process costs to consumers of such disputes would seem to be negligible, regardless of the forum. From the issuers' perspective, arbitration requires an additional step before the issuer can use garnishment or another creditors' remedy to collect the debt: the arbitration award must be confirmed — i.e., turned into a court judgment. The added step in arbitration has led some to suggest that process costs in debt collection arbitrations might actually be higher, rather than lower, than in litigation.[45]

Even if arbitration has higher process costs in debt collection (i.e., issuer-plaintiff) cases, it may be that it reduces process costs for the rarer (but potentially much more expensive) cases brought by consumers — typically class actions — by even more. If so, then this reason for using arbitration clauses (reduced process costs) overlaps with the previous one (reducing the risk of class relief).[46] On either view, however, issuers that face a higher risk of disputes occurring would be more likely to use arbitration clauses.[47]

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[44] *E.g.*, Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASTINGS BUS. L.J. 77, 96 (2011).

[45] Stephanie Francis Ward, *They Dun Them Wrong: Suits Challenge Use of Mandatory Arbitration Clauses to Pursue Debtors*, ABA J., July 2008, at 16, 18 ("Philadelphia attorney [Alan] Kaplinsky says, 'I think it's a question of cost,' mentioning a credit card client that tried debt collection arbitration and eventually decided the process did not save money. 'The collection costs were just as high if not higher than going through court,' Kaplinsky says."). On the other hand, to the extent that creditors obtain payment without relying on remedies such as garnishment, if arbitration provides more opportunities to negotiate with borrowers, it might reduce the need to use the additional step of confirmation and thus avoid the increased process costs that would otherwise result.

[46] Moreover, to the extent the arbitration clause contains a carve-out for small claims, the carveout may reduce the process costs associated with run-of-the-mill collection cases by preserving for the company the flexibility to choose the most efficient forum for those cases. This possible use of the small-claims carveout turns the existing jurisprudence on its head. Most courts consider the small-claims carveout in cases in which consumers challenge the enforceability of an arbitration clause used in conjunction with a class arbitration waiver. In such cases, the company cites the small-claims carveout in its defense of the clause, noting that the carveout enables the consumer to vindicate his or her individual claim in court without incurring the process costs of arbitration. *See, e.g.*, Cicle v. Chase Bank USA, 583 F.3d 549 (8th Cir. 2009).

[47] For a risk-based analysis of arbitration in the employment setting, see Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 ORE. L. REV. 861 (2004).

III. Credit Card Issuers and Arbitration Clauses

As discussed in Part II, credit card issuers likely use arbitration clauses to reduce the risk of class actions and (perhaps) to reduce process costs from disputes. In this part, we examine various factors that distinguish among issuers, seeking to identify issuers that are more likely to have disputes with their customers (including class actions) and thus more likely to use arbitration clauses. The factors we consider are various facets of the issuer's business strategy, its size, and its organizational form (shareholder versus mutual ownership). We also discuss how the governing legal regime is likely to affect whether an issuer uses an arbitration clause.

A. Business Strategy

Financial institutions can follow different strategies with their credit card business, which might affect their choice of the means of dispute resolution. We consider three possibilities: (1) the issuer specializes in making credit card loans (as opposed to engaging in a more diversified banking business); (2) the issuer makes riskier credit card loans; and (3) the issuer structures its credit card pricing in an attempt to enhance its fee income.

First, issuers may follow a business strategy of specializing in making credit card loans to the (relative) exclusion of other forms of banking business. Issuers that specialize in making credit card loans may have less information about their borrowers than more diversified issuers, who deal with borrowers in other contexts than simply issuing credit cards. Specialized issuers may also have weaker relationships with their customers, who deal with the issuer only when paying their credit card bills rather than in other aspects of their financial dealings. Both of these factors may increase the likelihood of disputes (including class actions) against a specialized issuer, giving it a stronger incentive to use arbitration clauses — both to hold down process costs and to reduce the risk of class actions.

Second, some issuers may follow a business strategy of making riskier credit card loans (not unlike subprime lending in the mortgage market). To the extent that riskier loans results in more defaults, one might expect this strategy to result in more disputes — including both collection actions brought by the issuer and defensive actions (including class actions, potentially as counterclaims) brought by defaulting borrowers. As such, one would expect issuers making riskier loans to be more likely to use arbitration clauses.

Third, some issuers may follow a business strategy of increased reliance on fee income (from late payment and other fees) relative to interest income, perhaps to enhance the stability of their earnings. Press reports and academic studies have found such a trend in the banking industry in general.[48] Such a business strategy might increase disputes with customers (who tend

[48] Eric Dash, *Bank Fees Rise as Lenders Try to Offset Losses*, N.Y. TIMES (July 1, 2009), *available at* http://www.nytimes.com/2009/07/02/business/02fees.html; Marc Anthony Fusaro & Nicholas G. Rupp, It's Not Just How Much You Pay, But Also How You Pay: Empirical Evidence from the Banking Industry 48 (working paper Sept. 2007), *available at* http://www.ecu.edu/cs-educ/econ/upload/ecu0710.pdf. The Credit CARD Act of 2009 may have made this strategy less attractive, *see* The Pew Health Group, A New Equilibrium: After Passage of Landmark Credit Card Reform, Interest Rates and Fees Have Stabilized 1 (May 2011), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Credit_Cards/Report_Equilibrium_web.pdf

to dislike fees[49]) and might be more likely to give rise to claims under consumer protection statutes, if, for example, issuers are more likely to violate the Truth in Lending Act when setting fee levels than when setting interest rates. If so, then issuers that follow such a strategy would be more likely to use arbitration clauses than issuers that do not.

B. Size

Larger issuers (i.e., those that make a larger volume of credit card loans) have greater potential cost savings from using arbitration (assuming arbitration is, in fact, cheaper than litigation). Likewise, large issuers may be more attractive targets for class actions, as the amount at stake in a class suit — all else equal — will be larger for larger issuers. For both of these reasons, we would expect larger credit card issuers to be more likely to use arbitration clauses than smaller issuers.

That said, it may not be the size of the issuer but rather the amount at stake relative to the size of the issuer that determines an issuer's choice of arbitration. Even if large issuers are more attractive targets for class actions, the amount at stake in a class action might be less relative to the size of the issuer for large issuers than for small or mid-sized issuers. If so, class actions would be more likely to be "bet-the-company" cases for small or mid-sized issuers, such that those issuers would be more likely to use arbitration clauses than large issuers.

C. Organizational Form

Not all credit card issuers are banks. Of the top 100 issuers of Visa and MasterCard credit cards, forty-nine are credit unions — although the aggregate market share of those forty-nine credit unions is quite small.[50] Anecdotal reports suggest that credit unions may be less likely to use arbitration clauses in their cardholder agreements than banks.[51] This section considers why that might be.

Credit unions differ from banks in two fundamental ways.[52] First, unlike banks, credit unions are mutually owned firms — that is, they are owned by their members (depositors) rather

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("interest rates and fees [on consumer credit cards] have stabilized since the Act's new reforms have taken effect"), but most provisions of the Act did not take effect until after the time period studied here.

[49] Fusaro & Rupp, *supra* note 48, at 3.

[50] *See 50 Largest Visa & MasterCard Credit Card Issuers*, 942 NILSON REPORT 10-11 (2010); *Second 50 Largest Visa & MasterCard Credit Card Issuers in the U.S.*, 943 NILSON REPORT 10 (2010); Adam J. Levitin, The Credit C.A.R.D. Act: Opportunities and Challenges for Credit Unions 6 (2009), *available at* http://www.law.georgetown.edu/faculty/levitin/documents/LevitinCreditCARDActandCreditUnions.pdf ("Although 47 of the 100 largest card issuers in the United States are credit unions, they accounted for only 1.76% of outstandings at the end of 2008 and 1.25% of dollars transacted in 2008.").

[51] *E.g.*, *2009 Credit Card Survey Collects Facts on Rates, Fees*, CONSUMER ACTION NEWS (Summer 2009), at 1, 5, http://www.consumer-action.org/downloads/english/CA_News_CC_09.pdf (reporting that among issuers who responded, ten banks included arbitration clauses in cardholder agreements while three did not; one credit union included an arbitration clause in its cardholder agreement while four did not).

[52] Note also that there are differences in tax treatment between banks and credit unions.

than by shareholders.[53] As a result, capital market pressures to enhance returns to shareholders are not present for credit unions. If the credit union's mutual ownership structure results in less effective oversight of managers, credit unions (1) may be less likely to act opportunistically toward their depositors by making risky investments;[54] (2) may be "less likely to use contracts that take advantage of consumer biases" than banks;[55] and (3) have less incentive to minimize costs than banks.[56]

Second, to be eligible for membership in a credit union, an individual must fall within the credit union's "field of membership" — described by the Treasury Department as follows:

> Generally, a field of membership may consist of a single group of individuals that share a common bond; more than one group, each of which consists of individuals sharing a common bond; or a geographical community. A common bond may take one of three forms: an occupational bond applies to the employees of a firm; an associational bond applies to the members of an association; and a geographical bond applies to individuals living, working, attending school, or worshipping within a particular defined community.[57]

Bank customers are subject to no such limitations, although some banks might focus their marketing efforts on particular groups or communities. As a result of the common bond

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[53] U.S. Dep't of Treasury, Comparing Credit Unions with Other Depositary Institutions 7 (Jan. 2001), *available at* http://www.ncua.gov/Resources/Reports/special/TresRpt.pdf; Eric Rasmusen, *Mutual Banks and Stock Banks*, 31 J.L. & ECON. 395, 395 (1988).

[54] HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 253 (1996) ("Presumably part of the impetus for the formation of MSLAs [Mutual Savings and Loan Associations] was the same as that for the formation of mutual savings banks: asymmetric information in the management of savings accounts by investor-owned banks. Depositor ownership, like the nonprofit form of the mutual savings banks, mitigated the hazard of opportunistic conduct by the bank."). The empirical data are consistent with this view. *Id.* at 257 ("In fact, the best empirical evidence from the 1980s tends to confirm what one would expect about the relative efficiency of mutual banks and investor-owned banks. ... Investor-owned banks ...were more likely than mutual banks to invest in an inefficient portfolio of assets — and particularly in a portfolio of assets that was excessively speculative.").

[55] Ryan Bubb & Alex Kaufman, Consumer Biases and Firm Ownership 3 (Oct. 26, 2009), *available at* http://www.people.fas.harvard.edu/~akaufman/papers/BubbKaufman_ConsumerBiases.pdf:

> The differences between the contracts of investor-owned firms on the one hand, and mutually owned and nonprofit firms on the other, induce sorting of customers between firm ownership types based on their perceptions of their biases. Customers who believe they are relatively unbiased and therefore can avoid the penalties used by firms, including *naïve* customers who in fact are vulnerable to these penalties, will be attracted by the low-up-front prices charged by investor-owned firms. In contrast, customers who are aware of their vulnerability to penalties, whom we refer to as *sophisticated*, will tend to patronize mutual and nonprofit firms in order to avoid paying the penalties that subsidize the low up-front prices charged by investor-owned firms.

Cf. Edward L. Glaeser & Andrei Shleifer, *Not-for-Profit Entrepreneurs*, 81 J. PUB. ECON. 99, 100 (2001) ("Our key point is that such [non-profit] status weakens his incentive to maximize profits. This commitment to weaker incentives is valuable in markets where entrepreneurs might be able to take advantage of their customers, employees, or donors, since it reduces their interest in profiting from such opportunities.").

[56] On the other hand, if less effective oversight permits credit union managers to benefit personally from cost reduction, they may have at least as strong of an incentive to minimize costs as managers of shareholder-owned banks. The same result may follow to the extent credit union managers receive utility from pursuing the credit union's institutional mission.

[57] U.S. Dep't of Treasury, *supra* note 53, at 7.

requirement, credit unions likely have better information about borrowers than banks, mitigating adverse selection issues in making loans.[58] As such, one would expect credit unions to have lower charge-off rates on loans (including credit card loans), which is the case.[59]

These differences suggest a number of possible reasons why organizational form might affect the use of arbitration clauses — i.e., why banks (shareholder-owned issuers) might be more likely than credit unions (mutually owned issuers) to use arbitration. First, because credit union members must share a common bond while bank customers need not, banks may have less information about, weaker relationships with, and thus more disputes with their customers. Second, banks may be more likely to adopt contract terms that are unfavorable to consumers, again resulting in more disputes and making arbitration more attractive. Third, if banks have stronger incentives to minimize costs, and if arbitration is cheaper than litigation, banks would tend to prefer arbitration. Fourth, if banks have an incentive to make riskier loans, the resulting greater likelihood of disputes may make arbitration clauses more attractive to banks.[60]

D. Legal Regime

The legal enforceability of class arbitration waivers might affect whether issuers include arbitration clauses in their cardholder agreements. At the time of the agreements we studied (December 31, 2009), courts were divided on the enforceability of class arbitration waivers.[61] Some courts upheld class arbitration waivers.[62] Other courts held class arbitration waivers unenforceable (usually on unconscionability grounds) and invalidated the entire arbitration clause.[63] Others held class arbitration waivers unenforceable and struck them from an otherwise unenforceable arbitration clause, with the result that the case proceeded in arbitration but on a

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[58] HANSMANN, *supra* note 54, at 259 ("The members' common bond [in credit unions] serves to mitigate the risks of adverse selection and moral hazard in making consumer loans."); *id.* at 253 ("Adverse selection and moral hazard are the obvious explanations. A group of workingmen presumably had better information than an investor-owned bank about which of their friends and fellow workers would be good risks for a loan, and they could use this information to determine who should be permitted to join the mutual. Further, when times are hard a borrower will be less inclined to default on a loan when he knows that his friends and neighbors will bear the loss.").

[59] *Compare* Federal Reserve Statistical Release, Charge-off and Delinquency Rates on Loans and Leases at Commercial Banks, http://www.federalreserve.gov/releases/chargeoff/chgallnsa.htm (last visited Jan. 12, 2011) (reporting quarterly charge-off rates from the first quarter of 2009 through the first quarter of 2010 ranging from 7.62% to 10.12%) *with* David Morrison, *CU Card Charge Offs Up, Delinquencies Slightly Down In First Quarter*, CREDIT UNION TIMES (June 17, 2010), available at http://www.cutimes.com/News/2010/6/Pages/CU-Card-Charge-Offs-Up-Delinquencies-Slightly-Down-In-First-Quarter.aspx ("An analysis of NCUA data conducted by Asset Exchange, a leading CU card analysis firm and brokerage, found card charge-offs running at an annualized rate of 4.6%, up from 4.1% in the first quarter of 2009.").

[60] Although organizational form likely influences and is correlated to some degree with certain aspects of the issuer's business strategy described *supra* text accompanying notes 48-49, that correlation does not appear to distort our results. *See infra* text accompanying note 105.

[61] The Supreme Court's decisions in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011), and *Stolt-Nielsen S.A. v. AnimalFeeds Int'l, Inc.*, 130 S. Ct. 1758 (2010), alter this description in important ways, but were not decided until after the time period studied here. *See also infra* text accompanying notes 108-109.

[62] *E.g.*, Kaneff v. Delaware Title Loans, Inc, 587 F.3d 616, 624 (3d Cir. 2009) (holding class arbitration waiver not unconscionable).

[63] *E.g.*, Omstead v. Dell, Inc., 594 F.3d 1081, 1087 (9th Cir. 2010).

class basis.[64] Because at least some businesses prefer to avoid arbitration on potential "bet-the-company" issues like the availability of class relief,[65] a significant number of arbitration clauses include non-severability clauses that invalidate the entire clause if the class arbitration waiver is unenforceable.[66] We expect that issuers operating in states in which courts have held class arbitration waivers to be unenforceable to be less likely to include arbitration clauses in their cardholder agreements.[67]

More generally, the legal regime in which the issuer operates also might affect its decision whether to include an arbitration clause in its credit card contract. To the extent issuers are using arbitration clauses to reduce the likelihood they will be subject to class actions, one might expect them to be more likely to use an arbitration clause when they do business in a jurisdiction that is seen as particularly favorable to class actions.

E. Summary

In sum, this analysis gives rise to the following predictions, which are summarized in Table 1. Issuers will be more likely to use arbitration clauses, all else equal, when: (1) they specialize in credit card lending; (2) they make riskier credit card loans; (3) they rely more heavily on fee income; and (4) they are located in a state with a legal environment favorable to class actions. Issuers will be less likely to use arbitration clauses, all else equal, when: (5) they are mutually owned (i.e., credit unions); and (6) they are located in states in which courts have held class arbitration waivers unenforceable. Our prediction for the size of the issuer is indeterminate: (7) large issuers could be either more or less likely to use arbitration, depending on whether the relative stakes of class actions differ by the size of issuer.

[INSERT TABLE 1 ABOUT HERE]

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[64] *E.g.*, Muhammad v. County Bank of Rehobeth Beach Del., 912 A.2d 88, 100-01 (N.J. 2006) (severing invalid class arbitration waiver).

[65] Christopher R. Drahozal & Quentin R. Wittrock, *Franchising, Arbitration, and the Future of the Class Action*, 3 ENTREPREN. BUS. L.J. 275, 294-96 (2009).

[66] Eisenberg et al., *supra* note 10, at 885.

[67] *See* The Future of Arbitration: Conference Summary (Mar. 17-18, 2011), available at http://www.law.gwu.edu/ News/2010-2011Events/Documents/ArbitrationConferenceSummary.pdf (citing attorney who represented credit card companies to the effect that credit card companies would not use arbitration clauses unless they could also use class arbitration waivers).

IV. Sample and Data

A. Sample

The Credit Card Accountability Responsibility and Disclosure Act of 2009 (Credit CARD Act) requires credit card issuers to provide their cardholder agreements to the Federal Reserve Board,[68] which in turn makes them available on the Federal Reserve web site.[69] Our sample consists of 298 credit card issuers that filed the credit card contracts they were using as of December 31, 2009, with the Federal Reserve.[70] As such, our findings necessarily are limited to that particular point in time — i.e., as of December 31, 2009. The sample comprises 85 shareholder-owned credit card issuers and 212 mutual issuers,[71] and includes 75 of the 100 largest Visa and MasterCard issuers as reported by the Nilson Reports.[72]

We used the issuing bank rather than the individual credit card agreement as the unit of analysis for two reasons.[73] First, almost every issuer (293 of 298, or 98.3%) specified the same dispute resolution method (arbitration or litigation) for all of its submitted credit card agreements. Presumably the cost savings from standardizing contract terms and dispute resolution methods for the issuers exceeded any benefit from tailoring the means of dispute resolution to particular groups of cardholders. Second, issuers were not consistent in the number of credit card agreements they submitted to the Federal Reserve. One large issuer, for example, submitted only a single sample credit card agreement, while the issuer that submitted the second most agreements was not even among the top twenty-five largest issuers as measured by credit card loans outstanding. As a result, using agreement level-data would provide little additional information while distorting the sample through inappropriate weighting of the observations.

[68] Credit Card Accountability Responsibility and Disclosure Act of 2009, § 204(a), 123 Stat. 1734, 1746-47 (May 22, 2009) (codified at 15 U.S.C. § 1632(d)(3)); 12 C.F.R. § 226.58.

[69] Board of Governors, Federal Reserve System, Consumer Credit Card Agreements Search, http://www.federalreserve.gov/creditcardagreements/ (last visited May 20, 2011).

[70] We limited our sample to the issuers with agreements available as of August 1, 2010. As a result, we excluded from the sample two agreements that evidently were submitted to the Federal Reserve (or at least made available by the Federal Reserve) after that date. We also excluded (i.e., they are not included in the 298 issuers studied) the following: thirteen finance companies that were not regulated as banks; four credit unions that were not federally insured; two credit unions that merged during 2009; two banks for which call report data were not available; seven issuers that reported zero credit card loans outstanding in their December 31, 2009, call report; and one bank that conducted all credit card operations through a subsidiary that was included in the sample. (For the latter bank, we used call report data from the subsidiary but used data for the parent for other variables.) In addition, five pairs of issuers that each shared a common parent company were consolidated, so that five issuers replaced the previous eight. *See infra* text accompanying notes 77-79.

[71] The shareholder-owned issuers included federal-chartered and state-charted banks, as well as federal savings banks. We also classified as a shareholder-owned issuer a savings & loan owned by a bank holding company. All but one of the mutual issuers were credit unions; the other was a mutual savings bank. *See* Hansmann, *supra* note 54, at 263.

[72] It is not clear why the remaining issuers did not file their cardholder agreements with the Federal Reserve.

[73] For a paper using card level-data to examine credit card pricing, see Bubb & Kaufmann, *supra* note 55.

B. Data.

We collected the dispute resolution clauses from cardholder agreements available on the Federal Reserve web page.[74] In coding the dispute resolution clauses, we faced three complications. First, several major card issuers settled an antitrust suit (alleging that they colluded with other issuers to include arbitration clauses in their cardholder agreements) by agreeing not to use arbitration clauses for three-and-a-half years.[75] For two of those issuers, the settlement apparently is reflected in the cardholder agreements provided to the Federal Reserve, while for others it is not.[76] Because the settling issuers included an arbitration clause in their cardholder agreements prior to settling the litigation, we coded those two observations as providing for arbitration. Alternatively, we ran the regressions with those two observations excluded; the results were identical in all material ways with the results reported in Part V.

Second, several sets of issuers were subsidiaries of the same bank holding companies.[77] In most, but not all, of those cases, the issuers used identical dispute resolution clauses in their cardholder agreements.[78] To avoid double counting, we consolidated the issuers with a common parent and that used the same dispute resolution clause into a single observation.[79] We treated issuers that shared a common parent but that used different dispute resolution clauses as separate observations.

Third, some issuers, particularly small issuers, do not prepare their own cardholder agreements but instead purchase form cardholder agreements from third parties.[80] For those

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[74] In the handful of cases in which the issuer submitted agreements with different dispute resolution clauses, we coded the agreement according to which form of dispute resolution the majority of agreements specified. If there was no majority form, we coded the agreement according to what form of dispute resolution was provided in the agreement governing a general, as opposed to specialty, credit card.

[75] Ross v. Bank of America, N.A. (USA), No. 05 CV 7116 (WHP) (THK), Declaration of Andrew T. Semmelman (May 21, 2010) (Chase Card Services), http://www.arbitration.ccfsettlement.com/documents/files/Ross%20v%20BOA%20Final%20Approval%20Motion%20Decl%20of%20Andrew%20Semmelman.pdf; Ross v. Bank of America, N.A. (USA), No. 05 CV 7116 (WHP) (THK), Declaration of Caroline P. Hillmar (May 21, 2010), http://www.arbitration.ccfsettlement.com/documents/files/Ross%20v%20BOA%20Final%20Approval%20Motion%20Decl%20of%20Caroline%20Hillmar.pdf.

[76] *E.g.*, *2009 Credit Card Survey Collects Facts on Rates, Fees*, CONSUMER ACTION NEWS (Summer 2009), at 1, 5, http://www.consumer-action.org/downloads/english/CA_News_CC_09.pdf (Chase and Capital One). It may be that Chase removed its arbitration clause in response to the NAF consumer fraud litigation instead. *Id.* Regardless, it does not affect the results here.

[77] To identify issuers that were members of the same bank holding company, we used the National Information Center web site, *available at* http://www.ffiec.gov/nicpubweb/nicweb/NicHome.aspx (last visited June 16, 2011).

[78] For example, American Express Bank and American Express Centurion Bank used identical arbitration clauses in their credit cardholder agreements.

[79] We also consolidated the other data for the issuers into a single observation. The only variables for which consolidation proved problematic were the legal environment variables (state class action rank and class arbitration waiver unenforceable). In three of the five cases, the two related issuers both were located in the same state and chose matching state laws to govern the agreement. In one case, however, the two issuers, although located in the same state, chose different state laws, while in another case the two issuers were located in different states and choose different state laws. We coded the variables affected by the conflicting states consistent with the larger of the two issuers.

[80] *E.g.*, CUNA Mutual Group, LOANLINER Document Solutions: LOANLINER Consumer Documents,

issuers, we cannot be sure whether they purchased the form *because* it included an arbitration clause or *in spite of* the fact that it included an arbitration clause. We created a dummy variable equalling one when the cardholder agreement clearly indicated that it was a third party form,[81] and used that variable as a control in the regressions.

We identified the organizational form of the issuer from information provided on the Federal Reserve web page. Data on credit card loans outstanding come from the December 31, 2009 Call Reports filed by financial institutions with the appropriate federal regulator.[82] To come up with total credit card loans for an issuer, we added the securitized credit card loans reported by the issuer to the credit card loans outstanding that remained on the issuer's books.[83] In all cases we used the log of total credit card loans in the regressions. We used three alternative measures of the extent of issuer specialization in credit card loans: credit card loans as a percent of total assets, calculated using call report data; credit card loans as a percent of total loans, calculated using call report data; and a dummy variable for when an issuer is classified by the FDIC as a "credit card institution" — defined as one in which more than fifty percent of the institution's assets are loans, and more than fifty percent of the loans are credit card loans.[84] As a measure of the riskiness of the issuer's credit card portfolio, we calculated the rate at which the issuer charged off credit card loans net of recoveries, using data from the issuer's call report.[85] The measure is not ideal because it measures risk ex post rather than ex ante, but it was the best measure available.[86]

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available at http://www.cunamutual.com/portal/server.pt?open=514&objID=429766&mode=2#Article1a (last visited May 31, 2011).

[81] It may be that other agreements also were based on forms but did not so indicate on the face of the agreement.

[82] In most cases, the data collected on credit card loans outstanding were consistent with data reported by the Nilson Report. *See* 942 NILSON REPORT at 10-11 (2010); 943 NILSON REPORT at 10 (2010). In the cases in which the data were not consistent, we verified the call report data by examining reports shortly before and shortly after the December 31, 2009 report. We do not expect perfect correspondence between call report data and that in the Nilson Reports, at least in part because the Nilson Reports includes commercial credit card loans in its totals and call report data are limited to consumer credit card loans. Jonathan Zinman, Where Is the Missing Credit Card Debt? Clues and Implications, 55 Rev. Income & Wealth 249, 257 (2009).

[83] Of the issuers in our sample, sixteen reported having securitized credit card loans outstanding as of December 31, 2009.

[84] FDIC, Institution Directory Help: Frequently Asked Questions (last visited Jan. 10, 2011), *available at* http://www2.fdic.gov/idasp/definitions.asp?SystemForm=ID&HelpItem=inFlags; *see* FDIC, Find an Institution (last visited Jan. 10, 2011) (Specialized Categories: Credit Card Institutions), *available at* http://www2.fdic.gov/idasp/main.asp.

[85] Mark Furletti, Measuing Credit Card Chargeoffs: A Review of Source and Methods 3 (Sept. 2003), *available at* http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2003/Measuring

Chargeoffs_092003.pdf. For a handful of issuers, we used their consolidated credit card loans outstanding as the denominator in calculating the net charge-off rate to counteract the possibility that charge offs on foreign credit cards were included in the numerator. *Id.* at 8. For issuers that file a Thrift Financial Report (TFR), income items such as chargeoffs and recoveries are reported only on a quarterly basis rather than on a calendar-year-to-date basis. Office of Thrift Supervision, Memorandum for Chief Executive Officers from Thomas A. Barnes 2 (Feb. 15, 2011), available at http://www.ots.treas.gov/_files/25379.pdf. To annualize the data we multiplied the numbers from the fourth quarter of 2009 by four.

[86] By comparison, Bubb and Kaufman used the type of credit card (Gold or Platinum card, Student card, Secured card, etc.) to control for the riskiness of the loan. Bubb & Kaufman, *supra* note 55, at 20 (describing measure as "a coarse proxy for borrower characteristics such as creditworthiness"). That approach would not be meaningful here because in almost all cases the issuer specified the same means of dispute resolution for all credit cards it issued. *See supra* text accompanying notes 74-75. Moreover, that approach implicitly assumes that the risk

Following Fusaro and Rupp, we used several alternative measures of issuer reliance on fee income (the issuer's service charge ratio, gross revenue ratio, and net revenue ratio), again derived from call report data.[87] These data are problematic for our purposes for two reasons. First, the data available from the issuers' call reports often are not directly comparable across types of institutions.[88] For example, credit unions report credit card fees in the "fee income" item on the call report, while banks report credit card fees together with credit card interest under the general heading of "interest income."[89] Second, several of the measures used by Fusaro and Rupp include forms of non-interest income not directly relevant to a bank's credit card operations.[90] Accordingly, although we use the measures, we do so cautiously and skeptically.

Rankings of state liability systems by the U.S. Chamber of Commerce provided a measure of business perception of how favorable the state legal environment is to class actions.[91] While the Chamber rankings have been criticized on various grounds,[92] their most significant limitation is that they measure business perception of the legal environment rather than the actual legal environment. Because we are examining business behavior, the perception of the decision makers (even if it does not match up with reality) is useful to us.

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profiles of customers at different issuers are the same for each type of card. To the contrary, credit unions appear to make lower risk credit card loans than banks — the default rate on credit cards issued by credit unions is consistently lower than the default rate for credit cards issued by banks (which is the case in our data as well). *See supra* text accompanying note 59.

[87] An issuer's service charge ratio equals its service charges divided by the sum of service charges and net interest. An issuer's gross revenue ratio is its noninterest income divided by the sum of noninterest income and total interest, while its net revenue ratio is its noninterest income divded by the sum of noninterest income and net interest income. Fusaro & Rupp, *supra* note 48, at 8-9. Two issuers reported negative noninterest income; for those issuers, we coded the item as missing.

[88] To enhance comparability between data from bank call reports and data from Thrift Financial Reports (TFR), we relied on Office of Thrift Supervision, TFR-to-Call Report Mapping (Feb. 15, 2011), *available at* http://www.ots.treas.gov/_files/4830092.pdf. We are unaware of any similar reconciliation between bank call reports and credit union call reports.

[89] *Compare* National Credit Union Administration, Call Report Form and Instructions 35 (2009) (requiring reporting of "[f]ees charged for services (i.e., overdraft fees, ATM fees, credit card fees, etc.)" as "fee income") *with* FDIC, Line Item Instructions for the Consolidated Report of Income, at RI-4 (2009), available at http://www.fdic.gov/regulations/resources/call/crinst/2009-12/1209RI_123009.pdf [hereinafter Call Report Instructions] (requiring reporting of "fee income on credit cards" to be combined with credit card interest, except for annual fees paid by credit cardholders, which are to be reported as non-interest income). Comparable data are not available on the TFR, so we coded this item as missing for the issuers reporting on that form (hence the noticeably smaller number of observations in regressions when we use the service charge ratio variable. *See infra* Tables 4 & 6.

[90] Call Report Instructions, *supra* note 89, at RI9-RI12 (defining non-interest income to include trading revenue, securities brokerage fees, investment banking commissions, and income from insurance activities, in addition to service charges on deposit accounts).

[91] U.S. Chamber Institute for Legal Reform, 2010 U.S. Chamber of Commerce State Liability Systems Ranking Study 25 table 12 (Mar. 9, 2010), available at http://www.instituteforlegalreform.com/images/stories/documents/
pdf/lawsuitclimate2010/2010FullHarrisSurvey.pdf ("Treatment of Class Action Suits and Mass Consolidation Suits") (results of survey "based on interviews with a nationally representative sample of 1,482 in-house general counsel, senior litigators or attorneys, and other senior executives who are knowledgeable about litigation matters at public and private companies with annual revenues of at least $100 million").

[92] Theodore Eisenberg, U.S. Chamber of Commerce Liability Survey: Inaccurate, Unfair, and Bad for Business, 6 J. EMP. LEGAL STUD. 969 (2009).

For the legal status of class arbitration waivers, we relied on a scorecard prepared by Alan Kaplinsky of the Ballard Spahr law firm.[93] Kaplinsky represents credit card issuers in class actions and in disputes over the enforceability of arbitration agreements. While we did not verify the status of each of the states as classified by Kaplinsky (aside from making sure the court cases were decided prior to December 30, 2009), again we are interested more in business perception than reality. Classification of a state's decisions by a leading attorney in the field provides a better measure of that perception than our own classifications of those decisions.

The data on legal considerations are subject to an important limitation: our coding necessarily assumes that an issuer's decision whether to use arbitration is based on a single state's legal environment, when most (although not all) of the issuers in the sample operate in multiple states. Thus, we coded the legal variables based on the single state identified by the issuer when filing its credit card agreements with the Federal Reserve.[94] Ideally, we would use instead some measure that is weighted by the amount of business the issuer does in each state, but unfortunately such a measure is not available. As an alternative way to identify the most relevant legal regime, we used the state whose law was specified in the choice-of-law clause in the cardholder agreement, if any.[95]

One final note: we do not have data on the litigation history of the issuers in the sample.[96] Data on class action filings in state court, which would be most relevant for the smaller issuers in the sample, are largely unavailable. If we were to measure litigation history using only class action filings in federal court, we would bias our results. Instead, we use proxies for the risk of litigation, as described in Part IV, for which data are available for all issuers in the sample.

Summary statistics. Table 2 provides summary statistics for each of the variables we consider in our analysis.

[INSERT TABLE 2 ABOUT HERE]

V. Empirical Results

The question we are interested in is why some credit card issuers include arbitration clauses in their cardholder agreements while others do not. We first present some simple

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[93] Alan S. Kaplinsky, Scorecard on Where Federal and State Appellate Courts and Statutes Stand on Enforcing Class Action Waivers in Pre-Dispute Consumer Arbitration Agreements 40-41 (May 17, 2010) (final tally of court decisions), http://www.ballardspahr.com/alertspublications/legalalerts/~/media/Files/Alerts/2010-05-25_SCGrantsReviewofClassActionWaivers.ashx.

[94] Another weakness of the data is that this state may be the location of the bank's corporate headquarters rather than its principal place of business.

[95] All of the cardholder agreements in the sample with arbitration clauses also included choice-of-law clauses. Of those clauses, 43 of 52 (or 82.7%) identified the same state as the Federal Reserve filing. Roughly two-thirds (162 of 247, or 65.6%) of the cardholder agreements without arbitration clauses included choice-of-law clauses. Of those clauses, 157 of 162 (or 96.9%) identified the same state as the Federal Reserve filing.

[96] We also do not know the identity of counsel who prepared the cardholder agreement.

descriptive results detailing the use of arbitration clauses by the issuers in our sample. We then estimate two sets of models: the first set using the entire sample of issuers and the second set restricting the sample to banks. (We do not report separate results for credit union issuers because too few credit unions in the sample used arbitration clauses to provide meaningful results.)

A. Descriptive Results

Our descriptive results confirm in part commonly held views on the use of arbitration clauses in credit card agreements, but also refute those views in part as well. Initially, the substantial majority (95.1%) of credit card loans outstanding by issuers in our sample (including securitized loans) were subject to cardholder agreements with arbitration clauses.[97] This finding is driven by the largest credit card issuers, all of which used arbitration clauses, and is consistent with frequent statements in the legal literature that most credit card agreements include arbitration clauses.[98]

By contrast, only 17.1% (51 of 298) of the issuers in our sample used arbitration clauses in their cardholder agreements. This finding strongly refutes some statements to the effect that most issuers use arbitration clauses.[99] Such statements are simply incorrect. Most credit card *agreements* include arbitration clauses because most large issuers in the sample used arbitration clauses. But the substantial majority of *issuers* in the sample, many although not all of which have relatively small credit card portfolios, do not use arbitration clauses. This finding suggests that consumers who want to obtain a credit card without agreeing to arbitration may have more options for doing so than commonly believed, albeit typically with smaller issuers.

Finally, our data confirm that credit unions are much less likely than banks to include arbitration clauses in their cardholder agreements. As Table 3 shows, 50.0% (43 of 86) banks in our sample included arbitration clauses in their cardholder agreements, while only 3.8% (8 of 212) of credit unions did so. Thus, credit unions use arbitration clauses at a much lower rate than banks, and provide a substantial portion, although not all, of the credit card options for consumers who wish to avoid arbitration clauses.

[INSERT TABLE 3 ABOUT HERE]

B. Regression Models

The regression results are largely consistent with our predictions. We first report our results for the entire sample and then for all bank issuers (excluding credit unions).

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[97] The credit card loans outstanding (including securitized credit card loans) as of December 31, 2009, for issuers in our sample totalled $664,734,709,600, of which $632,040,637,900 (95.1%) were by issuers that included arbitration clauses in their cardholder agreements.

[98] *See supra* note 1.

[99] *See supra* text accompanying note 2.

1. Full Sample

Table 4 presents the results from probit regressions using the entire sample of credit card issuers, with marginal effects reported in Table 5.[100]

[INSERT TABLES 4 & 5 ABOUT HERE]

The coefficents on variables for the extent to which the issuer specializes in credit card loans,[101] the riskiness of the issuer's credit card portfolio, and the size of the issuer all have the expected sign and are statistically significant at the five percent level. As expected, issuers that tend to specialize in credit card lending, and issuers that make riskier credit card loans, and large issuers all are more likely to use arbitration clauses.[102] By comparison, none of the measures of fee income has a statistically significant relationship with the use of arbitration clauses.

Issuers located in states in which courts had held class arbitration waivers unenforceable are less likely to use arbitration clauses, as compared to issuers in states that have upheld class arbitration waivers or that have no decisions on point. The coefficient again is statistically significant at the five percent level and of the expected sign. By comparison, whether the state in which the issuer is located is seen as favorable to class actions has no statistically significant relationship. As an alternative way of identifying the relevant state, we used the state identified in the choice-of-law clause, if any, in the cardholder agreement and reestimated the models accordingly. The results are virtually identical to those in Table 4, with two exceptions: the coefficent on the state class action rank variable, while similar in magnitude, is statistically significant at the five percent level; and the sample size is much smaller, because a number of cardholder agreements do not have a choice-of-law clause.[103] We believe the statistical significance of the state class action rank variable likely is an artifact of the change in sample size rather than the use of a different state legal environment, however, and so give it little credence.[104]

Consistent with Table 3, credit unions were less likely to use arbitration clauses than banks, even after controlling for various confounding factors. Indeed, as can be seen in Table 5,

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[100] The dummy variable controlling for when the issuer used a third party form was not significant in any of the models. Alterantively, we reestimated the models after dropping the observations for issuers that used a third party form. The results were the same as those in Table 4 in all material respects.

[101] As indicated *supra* text accompanying note 84, we use alternative measures of the extent an issuer specializes in credit card loans: credit card loans as a percent of total assets, credit card loans as a percent of total loans, and a dummy variable equalling one if the issuer is identified as a credit card institution by the FDIC. Of these measures, only credit card loans as a percent of total loans was not statistically signficant. As between the other two measures, we prefer the continuous variable (credit card loans as a percent of total assets) to the dichotomous one (whether the issuer is a "credit card institution").

[102] The results thus are inconsistent with the possibility that small and mid-sized issuers may higher relative risks from class actions than large issuers.

[103] *See supra* note 95.

[104] We restricted the sample to those issuers with choice-of-law clauses and then reestimated the model using the original state specifications (those that were the basis of Table 4). The results were similar to those using the states specified in the choice-of-law clauses, suggesting that it is the change in sample rather than the change in legal environment that is driving the results.

organizational form appears to have a larger effect on the use of arbitration clauses than many other variables, such as whether the issuer specializes in credit card loans or is in a state that holds class arbitration waivers to be unenforceable. However, we are not able to determine from our results why it is that credit unions are less likely to use arbitration clauses than banks — whether it is the different incentives facing credit union management or the closer relationship between credit unions and their customers. Sorting out those competing effects is a useful topic for future research.

Overall, then, we find that issuers are more likely to use arbitration clauses in their credit card agreements when they (1) specialize in credit card loans; (2) have a riskier credit card portfolio; and (3) make more credit card loans. Conversely, issuers are less likely to use arbitration clauses when they (1) are mutually owned; and (2) are located in a state that has held class arbitration waivers unenforceable.

2. Bank Issuers

Table 6 presents the results from probit regressions using a sample restricted to bank issuers; marginal effects are reported in Table 7. The results essentially track the results for the full sample (excluding the variables for mutual ownership and for use of a third party form, neither of which had any variation for the observations in the restricted sample). To summarize: banks are more likely to use arbitration clauses in their credit card agreements when they (1) specialize in credit card loans; (2) have a riskier credit card portfolio; and (3) make more credit card loans; and are less likely to use arbitration clauses when they are located in a state that has held class arbitration waivers unenforceable. Essentially, because so few credit union issuers in the sample use arbitration clauses, most of the explanatory force of the variables (with the exception of the organizational form variable) is a result of the bank issuers.[105] In addition, these results give us some degree of confidence that the results of the models for the full sample are not distorted by a high degree of collinearity between the organizational form variable and the various business strategy variables.

[INSERT TABLES 6 & 7 ABOUT HERE]

[105] And because so few credit union issuers in the sample use arbitration clauses, we do not report the results of the probit regressions.

C. Policy Implications

Several of our findings have potentially important implications for the policy debate on consumer arbitration. Our conclusions necessarily are qualified by uncertainties inherent in empirical research and the limitations of our data.

First, in determining the appropriate degree of regulation of arbitration clauses in credit card (and other consumer credit) agreements, one important consideration is the possible effect of such regulation on the supply of credit. Studies have found that regulating lending practices (such as through interest rate caps) can reduce the supply of credit, making credit less available for the most marginal consumers.[106] Our findings here — that issuers are more likely to use arbitration clauses when they specialize in credit card loans, make riskier credit card loans, and simply make more credit card loans — suggest that regulating arbitration clauses might have the same effect. It might discourage issuers from making credit card loans under circumstances when they would prefer to use arbitration clauses but no longer can.[107]

Second, a number of commentators have predicted that the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*[108] — holding that the FAA preempts state court decisions finding class arbitration waivers unconscionable — will result in businesses including arbitration clauses in all their consumer contracts. Our finding that issuers are less likely to use arbitration clauses when located in states that (prior to *Concepcion*) had held class arbitration waivers unenforceable suggests that the use of arbitration clauses will increase as a result of *Concepcion*. But the significance of other variables in the model (the riskiness of the credit card portfolio, the degree of specialization in credit card loans, the size of the issuer, and the issuer's organizational form) suggests that not all credit card issuers are likely to use arbitration clauses following the decision in *Concepcion*.

Table 8 illustrates the point more simply. It shows the use of arbitration clauses by issuers in three groups of states: states that have held class arbitration waivers unenforceable; states that have held class arbitration waivers enforceable; and states that had no decision on the issue as of December 31, 2009. Very few issuers located in states that had held class arbitration waivers unenforceable (only 5 of 97, or 5.2%) used arbitration clauses. But even in states that had held class arbitration waivers enforceable, the substantial majority of issuers (80 of 103, or 77.7%) did not use arbitration clauses.[109] No doubt the greater certainty that class arbitration

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[106] Michael Staten, The Impact of Credit Price and Term Regulation on Credit Supply 1 (Jt. Center for Housing Studies, Harvard U. Feb. 2008), *available at* http://www.jchs.harvard.edu/publications/finance/understanding_consumer_credit/papers/ucc08-8_staten.pdf ("Four decades of empirical research in the United States shows that ... rate ceilings are worse than ineffective at protecting consumers. A binding rate ceiling actually reduces the amount of credit available to consumers."); Oren Rigbi, The Effects of Usury Laws: Evidence from the Online Loan Market 29 (June 2010), *available at* http://www.aeaweb.org/aea/2011conference/program/retrieve.php?pdfid=425 ("[B]orrowers who were restricted under their original [interest rate] cap benefit from the increase in the cap and the marginal borrower benefits the most.").

[107] We find support in our data for this possible disadvantage of regulating consumer arbitration clauses. Our data do not enable us to evaluate whether this disadvantage outweighs any possible advantages of such regulation.

[108] 131 S. Ct. 1740 (2011).

[109] It might be that the issuers that did not use arbitration clauses were larger issuers and more likely to do business in other states (and thus less likely to be concerned abou the law of the state in which they were located).

waivers will be upheld following *Concepcion* will make arbitration clauses more attractive, as might the publicity given to the use of arbitration clases in response to the decision. But given our empirical findings, it appears unlikely that *Concepcion* will result in all consumer contracts — or even all credit card agreements — containing arbitration clauses.

[INSERT TABLE 8 ABOUT HERE]

VI. Conclusions

Using a sample of credit card agreements newly available under the Credit Card Accountability Responsibility and Disclosure Act of 2009, this paper examines empirically why credit card issuers include arbitration clauses in their cardholder agreements. It finds that while most credit card loans outstanding (95.1%) are subject to cardholder agreements with arbitration clauses, the substantial majority of credit card issuers (247 of 298, or 82.9%) do not use arbitration clauses in their credit card agreements. Thus, consumers who wish to obtain a credit card that is not subject to an arbitration clause may have more options for doing so than is commonly believed, although typically with smaller credit card issuers.

The paper finds further that credit card issuers are more likely to use arbitration clauses when they (1) specialize in making credit card loans; (2) make riskier credit card loans; and (3) have a larger credit card portfolio. These findings suggest that increased regulation of consumer arbitration — making arbitration clauses less attractive or altogether unavailable — might induce issuers to diversity their portfolios away from credit card lending or make issuers less willing to lend to high-risk consumers, adversely impacting the supply of credit.

Conversely, issuers are less likely to use arbitration clauses when they are (1) mutually owned (i.e., credit unions) rather than shareholder-owned (i.e., banks); and (2) are located in states in which class arbitration waivers are unenforceable. The latter finding suggests that, on the margin, issuers likely will respond to *AT&T Mobility LLC v. Concepcion* by increasing their use of arbitration clauses. But the significance of other factors in explaining the use of arbitration clauses provides a limit on that increase. As a result, predictions that all issuers will begin using arbitration clauses as a result of *Concepcion* are unsupported.

In fact, the opposite appears to be the case: the average amount of credit card loans outstanding for issuers that did not use arbitration clauses was $142,519,427, while the average amount for issuers that used arbitration clauses was $18,040,820,040, over 125 times larger. The more likely explanation is simply that the issuers are small ones that perceive little risk of being subject to a class action.

Table 1. Predictions

	Predicted Sign
Specialization in credit card lending	Positive
Riskier credit card loan portfolio	Positive
Greater reliance on fee income	Positive
Located in state that is favorable to class actions	Positive
Mutual ownership	Negative
Located in state in which class arbitration waivers are unenforceable	Negative
Larger credit card loan portfolio	Positive or Negative

Table 2. Summary Statistics

	Mean	Median	Std.Dev.	Min.	Max.
Arbitration Clause	0.171	0	0.377	0	1
Credit Card Institution	0.054	0	0.227	0	1
Credit Card Loans/Total Assets	0.083	0.044	0.153	0.000	1.004
Credit Card Loans/Total Loans	0.133	0.070	0.221	0.000	1.000
Net Chargeoff Rate	0.049	0.037	0.049	0.000	0.532
Service Charge Ratio	0.172	0.166	0.102	0.000	0.670
Gross Revenue Ratio	0.292	0.270	0.143	0.005	0.997
Net Revenue Ratio	0.372	0.360	0.143	0.005	0.998
log Credit Card Outstandings	11.097	10.848	1.971	5.384	18.751
Mutual Ownership	0.711	1.000	0.454	0	1
Class Arbitration Waiver Invalid	0.326	0	0.469	0	1
State Class Action Rank	25.841	23	14.555	1	50
Third Party Form	0.198	0	0.399	0	1

Table 3. Use of Arbitration Clauses in Cardholder Agreements by Banks and Credit Unions

	Arbitration Clause	No Arbitration Clause
Banks	43 (50.0%)	43 (50.0%)
Credit Unions	8 (3.8%)	204 (96.2%)
Totals	51 (17.1%)	247 (82.9%)

Table 8. Use of Arbitration Clauses in Cardholder Agreements by Issuers in States Holding Class Arbitration Waivers Unenforceable

	Arbitration Clause	No Arbitration Clause
Class Arbitration Waiver Held Unenforceable	5 (5.2%)	92 (94.9%)
Class Arbitration Waiver Held Enforceable	23 (22.3%)	80 (77.7%)
No Decision on Enforceabilty of Class Arbitration Waiver	23 (23.5%)	75 (76.5%)
Totals	51 (17.1%)	247 (82.9%)

TABLE 4. Probit estimates: ALL ISSUERS
Dependent variable: ARBITRATION CLAUSE

	(1)	(2)	(3)	(4)	(5)	(6)
Constant	-2.043** (0.678)	-1.690** (0.690)	-2.189** (0.702)	-2.0769** (0.710)	-2.118** (0.735)	-1.829** (0.621)
Credit Card Loans as a Percent of Total Assets	1.499** (0.691)			1.463** (0.702)	1.964** (0.751)	1.459** (0.709)
Credit Card Institution (dummy)		1.00736** (0.497)				
Credit Card Loans as a Percent of Total Loans			0.631 (0.520)			
Net Chargeoff Rate	7.905** (2.384)	7.177** (2.348)	7.790** (2.297)	7.834** (2.400)	9.507** (2.921)	7.432** (2.530)
Gross Revenue Ratio	-0.392 (0.762)	-0.652 (0.756)	-0.631 (0.759)			
Net Revenue Ratio				-0.251 (0.742)		
Service Charge Ratio					1.965 (1.660)	
Credit Card Loans Outstanding (log)	0.114** (0.0526)	0.0957* (0.0556)	0.140** (0.0511)	0.115** (0.0531)	0.0890 (0.0557)	0.105** (0.0529)
Mutual Ownership (dummy)	-1.358** (0.257)	-1.3767** (0.255)	-1.364** (0.256)	-1.339** (0.254)	-1.583** (0.315)	-1.278** (0.244)
Class Arbitration Waiver Invalid (dummy)	-1.101** (0.367)	-1.137** (0.359)	-1.079** (0.365)	-1.086** (0.363)	-0.954** (0.359)	-0.740** (0.300)
State Class Action Rank	0.0146 (0.00842)	0.0166* (0.00858)	0.0134 (0.00832)	0.0144 (0.00840)	0.00986 (0.00872)	
Third Party Form (dummy)	-0.215 (0.411)	-0.266 (0.412)	-0.213 (0.410)	-0.210 (0.409)	-0.0553 (0.391)	
n	292	289	292	292	280	297
McFadden's pseudo-R^2	0.467	0.446	0.458	0.466	0.475	0.447
Log pseudo-likelihood	-72.10	-72.00	-73.31	-72.19	-63.98	-75.38

Robust standard errors in parentheses
* indicates significance at the 10 percent level
** indicates significance at the 5 percent level

TABLE 5. Marginal Effects After Probit: ALL ISSUERS

	(1)	(2)	(3)	(4)	(5)	(6)
Credit Card Loans as a Percent of Total Assets	0.232* (0.120)			0.227* (0.122)	0.274** (0.122)	0.240** (0.128)
Credit Card Institution (dummy)***		0.252 (0.181)				
Credit Card Loans as a Percent of Total Loans			0.970 (0.0843)			
Net Chargeoff Rate	1.221** (0.473)	1.061** (0.433)	1.198** (0.455)	1.214** (0.476)	1.327** (0.546)	1.225** (0.515)
Gross Revenue Ratio	-0.0606 (0.117)	-0.0964 (0.111)	-0.0971 (0.117)			
Net Revenue Ratio				-0.0389 (0.114)		
Service Charge Ratio					0.274 (0.221)	
Credit Card Loans Outstanding (log)	0.0176** (0.00828)	0.0142* (0.00825)	0.0215** (0.0084)	0.0177** (0.00837)	0.0124 (0.00781)	0.0173** (0.00864)
Mutual Ownership (dummy)***	-0.302** (0.0697)	-0.299** (0.0682)	-0.303** (0.0691)	-0.298** (0.0688)	-0.362** (0.08513)	-0.292** (.0616)
Class Arbitration Waiver Invalid (dummy)***	-0.138** (0.0349)	-0.136** (0.0335)	-0.135** (0.0351)	-0.137** (0.0348)	-0.111** (0.0319)	-0.105** (0.0333)
State Class Action Rank	0.00226 (0.00138)	0.00246* (0.00135)	0.00206 (0.00135)	0.00224 (0.00138)	0.00138 (0.00128)	
Third Party Form (dummy)***	-0.0304 (0.0513)	-0.0352 (0.0465)	-0.0300 (0.0511)	-0.0298 (0.0515)	-0.00754 (0.0517)	

Standard errors in parentheses

* indicates significance at the 10 percent level

** indicates significance at the 5 percent level

*** dy/dx is for discrete change of dummy variable from 0 to 1

TABLE 6. Probit estimates: BANK ISSUERS
Dependent variable: ARBITRATION CLAUSE

	(1)	(2)	(3)	(4)	(5)	(6)
Constant	-1.860** (0.768)	-1.608** (0.793)	-1.974** (0.805)	-1.801** (0.814)	-1.849** (0.827)	-1.961** (0.710)
Credit Card Loans as a Percent of Total Assets	1.429* (0.763)			1.395* (0.769)	1.717* (0.907)	1.438* (0.780)
Credit Card Institution (dummy)		0.798 (0.529)				
Credit Card Loans as a Percent of Total Loans			0.625 (0.594)			
Net Chargeoff Rate	7.238** (2.548)	6.389** (2.461)	7.070** (2.407)	7.163** (2.509)	9.324** (3.771)	6.495** (2.489)
Gross Revenue Ratio	-0.671 (0.912)	-0.855 (0.893)	-0.931 (0.901)			
Net Revenue Ratio				-0.659 (0.885)		
Service Charge Ratio					1.114 (2.636)	
Credit Card Loans Outstanding (log)	0.138** (0.0600)	0.129** (0.0647)	0.162** (0.0595)	0.137** (0.0601)	0.101 (0.0664)	0.128** (0.0591)
Class Arbitration Waiver Invalid (dummy)	-1.443** (0.451)	-1.428** (0.439)	-1.378** (0.459)	-1.441** (0.452)	-1.402** (0.528)	-1.186** (0.386)
State Class Action Rank	0.00343 (0.0126)	0.00475 (0.0127)	0.00140 (0.0123)	0.00309 (0.0127)	-0.00004 (0.0139)	
n	84	81	84	84	71	86
McFadden's pseudo-R^2	0.336	0.302	0.319	0.335	0.361	0.310
Log pseudo-likelihood	-38.68	-39.17	-39.63	-38.69	-31.44	-41.11

Robust standard errors in parentheses
* indicates significance at the 10 percent level
** indicates significance at the 5 percent level

TABLE 7. Marginal Effects After Probit: BANK ISSUERS

	(1)	(2)	(3)	(4)	(5)	(6)
Credit Card Loans as a Percent of Total Assets	0.569* (0.304)			0.556* (0.306)	0.683* (0.360)	0.574* (0.311)
Credit Card Institution (dummy)***		0.303* (0.179)				
Credit Card Loans as a Percent of Total Loans			0.249 (0.237)			
Net Chargeoff Rate	2.884** (1.012)	2.515** (0.982)	2.819** (0.957)	2.854** (0.996)	3.706** (1.482)	2.591** (0.991)
Gross Revenue Ratio	-0.267 (0.363)	-0.341 (0.356)	-0.371 (0.359)			
Net Revenue Ratio				-0.263 (0.353)		
Service Charge Ratio					0.443 (1.0478)	
Credit Card Loans Outstanding (log)	0.0549** (0.0240)	0.0516** (0.0258)	0.0647** (0.0238)	0.0546** (0.0240)	0.0401 (0.0265)	0.0512** (0.0236)
Class Arbitration Waiver Invalid (dummy)***	-0.507** (0.118)	-0.494** (0.112)	-0.486** (0.123)	-0.506** (0.119)	-0.500** (0.143)	-0.429** (0.114)
State Class Action Rank	0.00137 (0.00503)	0.00190 (0.00506)	0.000558 (0.00492)	0.00123 (0.00506)	0.000158 (0.00553)	

Standard errors in parentheses

* indicates significance at the 10 percent level

** indicates significance at the 5 percent level

*** dy/dx is for discrete change of dummy variable from 0 to 1

Contract and Choice
by
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Abstract:* This paper contributes to an ongoing debate, afoot in academic, legal and policy circles, over the future of consumer arbitration. Utilizing a newly available database of credit card agreements, the article offers an in-depth examination of dispute resolution practices within the credit card industry. In some respects, the data cast doubt on the conventional wisdom about the pervasiveness of arbitration clauses in consumer contracts and the presence of unfair terms. For example, the vast majority of credit card issuers do not utilize arbitration clauses, and by the end of 2010, the majority of credit card debt was not subject to such an agreement. Likewise, while the use of class waivers is widespread in arbitration clauses, most clauses lack the sorts of unfair procedural terms for which arbitration is often criticized. The upshot of these and other findings is that consumers, in some respects, have more choice in their contracts than the literature suggests. Our work also responds to the suggestions of some scholars that businesses favor arbitration clauses in their consumer contracts but not their business-to-business agreements. On the contrary, our research suggests that the difference may not be as dramatic as previous research suggests. These results hold important implications for ongoing policy debates, including the work of the newly minted and controversial Consumer Financial Protection Bureau ("CFPB"). The CFPB has been charged with studying and, if appropriate, regulating the use of arbitration clauses in credit card agreements. Our findings signal a note of caution and suggest that a blanket prohibition on the use of arbitration clauses would be difficult to defend under principles of administrative law.

Arbitration clauses in consumer contracts have been the subject of much recent controversy. Central to this controversy has been the argument that consumers lack meaningful choice in deciding whether to accept arbitration as a precondition to their purchase of a good or service. This criticism has not been isolated to academic debates but has emerged in judicial, legislative, and regulatory debates over the future of arbitration. [110]

In the judicial sphere, a recurring refrain has been that arbitration agreements, particularly when coupled with a class waiver, are "unconscionable" and, thus, unenforceable under Section 2 of the Federal Arbitration Act. A finding that an arbitration clause (indeed, any contract provision) is unconscionable typically requires both substantive unconscionability — unfairness in a particular provision or provisions of the contract — and procedural unconscionability — absence of meaningful choice by one party.[111] Some courts find sufficient procedural

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[110] *See infra* text accompanying notes 2-16 & 26.

[111] *See, e.g.,* 1 Domke on Com. Arb. § 8:30 (rev. ed. Apr. 2011) ("The unconscionability of an arbitration provision has both 'procedural' and 'substantive' elements."); Thomas H. Oehmke, 1 Commercial Arbitration § 20:19 (rev. ed. Nov. 2011) ("An agreement can become unconscionable and unenforceable where it is both

unconscionability from the fact that an arbitration clause is in a standard form consumer contract, without regard to actual market conditions;[112] others require consideration of whether the consumer had "meaningful choice" when entering into the contract.[113]

In *AT&T Mobility LLC v. Concepcion*, a sharply divided Supreme Court held that the FAA preempted application of California's unconscionability doctrine to make an arbitration clause in a consumer contract coupled with a class-arbitration waiver unenforceable.[114] But the decision hardly heralds an end to the controversy surrounding the use of such clauses in consumer contracts. AT&T's clause contained a number of distinctive features such as attorney fees for prevailing plaintiffs and a "reward" formula; other arbitration clauses lack such features.[115] California's rule was a blunt tool, amounting to a *per se* invalidation of class action waivers in arbitration clauses; by contrast, other states employ more nuanced unconscionability tests to class waivers.[116] Other features of arbitration clauses such as discovery and remedy limits also have been subject to attack in litigation and academic criticism.[117] Indeed, before *Concepcion* even has hit the United States reports, several lower courts have invalidated arbitration clauses in consumer contracts, assuring continued battles over the decision's sweep.[118]

In the legislative sphere, Congress has considered a variety of bills that, to various degrees, would invalidate predispute arbitration agreements in consumer contracts.[119] As with

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procedurally and substantively unconscionable, though both of these elements need not be present to the same degree."); Richard A. Lord, 21 Williston on Contracts § 57:15 (4th ed. May 2011) ("The courts are split on whether a party must show both procedural and substantive unconscionability to establish a valid defense to the attempted enforcement of an arbitration agreement, although most courts require a showing of both.") (footnote omitted); II Ian Macneil *et al.*, Federal Arbitration Law § 19.3.

[112] *E.g.*, Shroyer v. New Cingular Wireless Servs., 498 F.3d 976, 985 (9th Cir. Cal. 2007) ("a contract may be procedurally unconscionable under California law when the party with substantially greater bargaining power 'presents a "take-it-or-leave it" contract to a customer--even if the customer has a meaningful choice as to service providers'") (quoting Douglas v. United States Dist. Court, 2007 U.S. App. LEXIS 17061, at *10 (9th Cir. 2007) (per curiam)).

[113] *E.g.*, Pendergast v. Sprint Nextel Corp., 592 F.3d 1119, 1135 (11th Cir. 2010) ("To determine whether a contract is procedurally unconscionable under Florida law, courts must look to: (1) the manner in which the contract was entered into; (2) the relative bargaining power of the parties and whether the complaining party had a meaningful choice at the time the contract was entered into; (3) whether the terms were merely presented on a 'take-it-or-leave-it' basis; and (4) the complaining party's ability and opportunity to understand the disputed terms of the contract.").

[114] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

[115] *Id.* at 1744.

[116] *Gordon v. Branch Banking and Trust*, 419 Fed. Appx. 920 (11th Cir. 2011); *Jones v. DirecTV, Inc.*, 381 Fed. Appx. 895 (11th Cir. 2010); *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119 (11th Cir. 2010); *Pleasants v. American Exp. Co.,* 541 F.3d 853 (11th Cir. 2008); *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007); *Caley v. Gulfstream Aerospace Corp.,* 438 F.3d 1359 (11th Cir. 2005); *Jenkins v. First American Cash Advance of Georgia, LLC*, 400 F.3d 868 (11th Cir. 2005).

[117] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Guyden v. Aetna, Inc.,* 544 F.3d 376 (2d Cir. 2008); *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006); *Caley v. Gulfstream Aerospace Corp.,* 428 F.3d 1359 (11th Cir. 2005); *Morrison v. Circuit City Stores, Inc.,* 317 F.3d 646 (6th Cir. 2003).

[118] *Brown v. Genesis Healthcare Corp.,* 2011 WL 2611327 (W. Va. 2011). *See also Chen-Oster v. Goldman, Sachs & Co.*, 2011 WL 2671813 (S.D. N.Y. 2011); *Rivera v. American General Financial Services, Inc.,* 2011 WL 3687624 (N.M. 2011); *Brown v. Ralphs Grocery Co.,* 197 Cal. App. 4th 489 (Cal. Ct. App. 2011).

[119] *See, e.g.,* 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11028(a)(2), 116 Stat. 1758, 1836 (2002) (codified at 15 U.S.C. § 1226(a)(2) (2006)), a 2006 statute exempting

the above-described unconscionability challenges, one premise of these legislative efforts is that the consumer lacks a meaningful choice in deciding whether to accept arbitration as a precondition to their purchase of a good or service.[120] Congress has already enacted some specialized bills, including most recently a provision of the Dodd-Frank financial reform law that prohibits predispute arbitration clauses in certain residential, mortgage agreements.[121] Previously, Congress enacted a little known law that prohibited the use of arbitration clauses in consumer credit agreements with members of the armed forces.[122] More comprehensive legislation, such as the Arbitration Fairness Act (which, in relevant part, would invalidate predispute arbitration agreements in *all* consumer contracts), remains on the congressional agenda.[123]

Finally, in the regulatory sphere, interested parties eagerly await proposed rules from the newly created Consumer Financial Protection Bureau ("CFPB"). The legislation creating that CFPB vested it with authority to issue rules regulating the use of arbitration clauses in consumer financial services contracts, including credit card agreements.[124] Before the CFPB can regulate, however, the CFPB must study and report to Congress on the use of pre-dispute arbitration clauses in such contracts.[125] The study has not yet been done, although the architect of the CFPB, Harvard Professor Elizabeth Warren, has been an outspoken critic of the practices of credit card companies, including their use of arbitration clauses in credit card agreements.[126]

The continued controversy in all three arenas – judicial, legislative, and regulatory – over the use of arbitration clauses in consumer contracts necessitates systematic thinking about the principles underlying the controversy. Whether directed at class waivers or some other feature of arbitration clauses in consumer contracts, arguments against them take two different forms. In some instances, these arguments rest on a normative proposition that a particular feature (or combination of features) of an arbitration clause should render the clause unenforceable. We call these "Type I challenges." A familiar reply to these "Type I challenges" has been that the consumer retains adequate alternatives. If the consumer prefers not to waive her right to a class action, she is free to choose another product provider, one whose form contract does not contain an arbitration clause or whose contract contains an arbitration clause but without the offensive

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members of the military and their dependents from arbitrating consumer credit disputes, John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, sec. 670(a), § 987(f)(4), 120 Stat. 2083, 2267-68 (2006) (codified at 10 U.S.C. § 987(f)(4) (2006)), and a 2008 enactment that restricts the use of arbitration clauses in livestock and poultry production contracts, Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, sec. 11005, § 210, 122 Stat. 923, 1357-58 (to be codified at 7 U.S.C. § 197c). *See generally* Peter B. Rutledge & Anna W. Howard, Arbitrating Disputes Between Companies and Individuals: Lessons From Abroad, 65 Disp Res. J. 30, 32 (Feb.-Apr. 2010).

[120] Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. § 2 (2011).

[121] 15 U.S.C. § 1639c; Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 1414 (2010).

[122] 10 U.S.C. §§ 987(e)(3), (f)(4).

[123] Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011).

[124] 12 U.S.C. §§ 5481, 5518

[125] Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 1028(a) (2010).

[126] *Who's Watching the Watchmen: Before the Committee on Oversight and Government Reform*, 112th Cong. (2011) (statement of Elizabeth Warren, Secretary of the Treasury, Consumer Financial Protection Bureau); Elizabeth Warren, *Unsafe at Any Rate,* 11 Democracy 8 (2007).

provision.[127] Because the consumer retains a modicum of choice, the consumer's choice of the particular agreement is voluntary and not the result of overreaching by the company. The plausibility of this response rests in part on an empirical proposition about the use of arbitration clauses within a given industry.

In other instances, the argument against arbitration clauses sweeps more broadly. Some attacks on arbitration clauses posit *both* that an arbitration clause contains the offending provisions *and* all (or most) contracts for a particular consumer good contain that provision. For example, in one recent case, currently before the Florida Supreme Court, a consumer challenged the enforceability of an arbitration clause contained in his cell-phone agreement with Sprint /Nextel on the grounds that it contained a class arbitration waiver.[128] The consumer alleged that the offending provision was especially pernicious because, he alleged, all of Sprint's competitors in the Florida cell phone market *also* included class arbitration waivers in their subscriber agreements. Like the Type I challenge, these challenges rest on a normative premise about the social desirability of a particular procedural right. They also rest critically on a positive premise – namely that the use of arbitration clauses within the industry is so pervasive in the relevant market that the consumer is effectively denied a meaningful choice. [129] We call these "Type II challenges."

This Article addresses the empirical premises underlying both types of arguments in an industry that has been at the center of the controversy over consumer arbitration — the credit card industry. As to Type I arguments, we consider the extent to which arbitration clauses employ particular features that have generated controversy, whether class arbitration waivers, remedy limitations, or something else. As to Type II arguments, we consider the pervasiveness of arbitration clauses among firms within an industry. To test these empirical questions, we again mine a rich (and largely untapped) database of credit card agreements. [130] This database allows us to take an exceptionally thorough snapshot of the dispute resolution choices made within the credit card industry. As noted above, that industry has been a central, though certainly not the only, battleground in these judicial, legislative and regulatory debates. Our empirical study examines, among other things, the frequency with which arbitration clauses are utilized, the features employed in those clauses and the extent to which the drafter utilizes safeguards (like small-claims carve outs) to offset some effects of the arbitration clause. While our findings are unavoidably industry-specific, they carry implications for the wider debates and offer a model for future empirical research.

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[127] *Brief of Defendants-Appellees Sprint Solutions, Inc. at 20, Pendergast v. Sprint Solutions, Inc.,* 592 F.3d 1119 (11th Cir. 2010) (No. 09-10612-H), 2009 WL 5862576.

[128] *Pendergast v. Sprint Solutions, Inc.,* 592 F.3d 1119, 1135 (11th Cir. 2010).

[129] Lisa B. Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. DISP. RES. 1, 24 n. 111 (2008) ("I recognize some scholars would argue that there is consent to form contracts or adhesive arbitration clauses in personnel manuals because the prospective consumer or employee can simply walk away. *However, when growing numbers of services providers and employers adopt these practices, there are no meaningful alternatives*.") (emphasis added).

[130] Drahozal & Rutledge, *Contract and Procedure*, 92 Marquette L. Rev. __ (2011); Drahozal & Rutledge, *Arbitration and Consumer Credit*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1880180.

Our findings chart new ground. In some respects, they dispel certain misconceptions about the use of arbitration clauses within the industry; in other respects, they confirm the conventional wisdom. Perhaps most significantly, our research demonstrates that, contrary to widespread belief, the use of arbitration clauses among firms in the industry is not widespread – *fewer than twenty percent of the credit card issuers employ arbitration clauses*. When measured not by firms but, instead, by the volume of credit card loans, the figure is larger but still, as of December 31, 2010, less than half — only 48% of the outstanding credit card loans in the industry are held by firms using arbitration clauses (down from 95% as of December 31, 2009, as a result of a civil settlement under which several banks agreed to suspend their use of such clauses). Consumers who wish to avoid arbitration clauses in their credit card agreements have many more options than commonly believed.

Our findings on the terms of such clauses are equally revealing. *Nearly seventy percent of firms employing such clauses included some form of small-claims carve out such as that provided by the arbitration clause in Concepcion*. (As a practical matter, the proportion is likely even higher, because essentially all of the clauses provide for either the American Arbitration Association or JAMS to administer the arbitrations, and the Due Process Protocols followed by those providers also require a small-claims carve out.) This finding casts doubt on criticisms that arbitration clauses *completely* foreclose a right of access to Court. At the same time, other findings support the view that arbitration reconfigures how court is accessed – specifically, the unavailability of the class mechanism. Nearly 95% of arbitration clauses in our sample employ class waivers; when measured not by firms but instead by loan volume, the figure jumps to 99%.

Finally, our findings address ideas discussed by Ted Eisenberg, Geoff Miller, and Emily Sherwin about the comparative utilization of arbitration clauses in consumer contracts and other sorts of contracts. According to Eisenberg, Miller, and Sherwin, companies support the use of arbitration clauses in the consumer context because they are an effective device for avoiding class actions, but they generally eschew such clauses in their contracts with other businesses. Contrary to this view, *our research does not identify any clear difference in the utilization of arbitration clauses with respect to consumer credit card and bank account agreements as opposed to business agreements*. Admittedly, our findings are modest – they are based on a limited sample set in a single industry. Nonetheless, they suggest that the Eisenberg, Miller, and Sherwin proposition cannot be automatically accepted and, at a minimum, demands further examination.

These findings carry important implications for the ongoing judicial, legislative, and regulatory debates in this field. On the judicial front, they suggest that the empirical premises underpinning the Type I and, especially, the Type II challenges demand closer examination. Blunt judicial rejection of arbitration clauses (or arbitration clauses with particular features) can overlook the more nuanced, sophisticated practices of companies (like AT&T and some banks) that attempt to ensure that arbitration does not deprive consumers of a meaningful choice. On the legislative front, our findings lend further support to our previously stated view that legislative debates in this field can suffer from flawed empirical premises about the use (or non-use) of arbitration clauses; the variation within the credit card industry suggests that the use of arbitration clauses reflects firm-specific considerations, perhaps in reaction to various economic realities, that Congress must understand more fully before it acts. Finally, on the regulatory

front, our findings sound a note of caution to the current work of the CFPB. Much like Congress, the CFPB must ensure that it pays close examination to the empirical record, including gaps therein, and does not react to extreme anecdotal evidence unrepresentative of the broader industry practice.

This paper develops the foregoing arguments in three parts. Part I reviews the literature on the use of arbitration clauses in consumer contracts, paying particular attention to the increased importance of empirical legal research in this field. Part II discusses our findings on the use of arbitration clauses within the credit card industry, including a detailed examination of the provisions of credit card arbitration clauses (such as the role of carve-outs and opt-outs from arbitration and the extent to which such clauses employ controversial features such as remedy limitations), and variations in patterns based on the type of account. Part III explores the implications of our research for the above-described judicial, legislative, and regulatory debates as well as the ongoing academic research in this field.

I. **Background & Literature Review**

The literature on the use of arbitration clauses in consumer contracts developed in response to several strands of Supreme Court jurisprudence in the 1980's and 1990's. One line of decisions stretched the Federal Arbitration Act into state court proceedings and limited the ability of states to refuse enforcement on arbitration clauses under their consumer protection laws. The Court held in *Southland* that Section 2 of the Federal Arbitration Act (setting forth a substantive standard governing the enforceability of domestic arbitration agreements) applied in state court.[131] It subsequently held in *Dobson* that Section 1 of the Federal Arbitration Act (setting forth an interstate commerce requirement) represented an expansive exercise of Congress's power to regulate interstate commerce rather than the more narrow conception of Congress's commerce power that prevailed at the time of the FAA's enactment of 1925.[132] A second line of decisions interred the nonarbitrability doctrine and required Congress to speak clearly if it wished to declare a class of transactions nonarbitrable. Decisions such as *McMahon* and *Rodrigues de Quias* accomplished this result in the securities context, and subsequent decisions like *Gilmer* set forth a framework that governed federal statutory claims generally.[133] These lines of decisions made possible the widespread use of arbitration clauses in consumer contracts[134] and spawned several eras of academic literature on the topic.

Early scholarship on arbitration clauses in consumer contracts was decidedly not empirical.[135] For example, one early critic could confidently declare that "[b]y requiring

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[131] *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

[132] *Allied Bruce Terminix, Cos. v. Dobson*, 513 U.S. 265 (1995).

[133] *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

[134] To state the obvious, our focus here is on domestic practice in the United States. As one of us has noted elsewhere, practices in Europe and the rest of the world are quite different. *See* Rutledge & Howard, *Arbitrating Disputes Between Companies and Individuals: Lessons from Abroad*, 65 Disp. Res. J. 30 (Feb.-Apr. 2010).

[135] For exemplary literature, see Paul D. Carrington & Paul H. Haagen, Contract and Jurisdiction, 1996 Sup. Ct. Rev. 331; Paul D. Carrington, Regulating Dispute Resolution Provisions in Adhesion Contracts, 35 Harv. J. on Legis. 225 (1998); Sarah Rudolph Cole, Incentives and Arbitration: The Case Against Enforcement of Executory

customers and employees, through standardized contracts across entire markets, to agree in advance to submit all potential violations of common-law and statutory rights to arbitration — where defense costs and judgments will on the whole be less than under a regime of judicial enforcement — corporate defendants have begun to deregulate themselves."[136] Such arguments provided the intellectual basis for the Type I challenges described above. But they hardly offered a bulwark to protect against the typical response to the Type I challenge ("If consumers do not like arbitration clauses (or arbitration clauses with particular features), then purchase another product."). Nor did such arguments offer any support for the Type II challenge (that is, a statement about the pervasive use of arbitration clauses or arbitration clauses with objectionable features in a particular industry).

Of course, early pioneers in this field of scholarship could hardly be faulted for the lack of empirical support. Good empirical evidence about the use of arbitration clauses – whether within a particular industry or across industries – was extraordinarily hard to come by. Ordinarily, companies were not obligated to disclose their arbitration agreements systematically in a form usable by researchers. While their customers received copies of the contracts, others could not readily obtain them. To the extent such agreements were available, this was only because the agreement was published in some form (such as a judicial opinion in a case challenging the agreement) or because the agreement was included as part of a disclosure obligation designed to serve some other purposes (such as disclosure obligations under franchise or securities laws).

The next generation of scholarship sought to fill this gap in the literature through some old-fashioned gumshoeing. Some researchers tried to contact companies and request copies of their arbitration agreements. Amy Schmitz's research into the credit card and cellular telephone industries made an important contribution in this regard.[137] Other scholars went one step further and, in a bit of self-sacrifice for the sake of knowledge, went about obtaining products (such as credit cards) in order to have access to those agreements. An especially important contribution

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Arbitration Agreements Between Employers and Employees, 64 UMKC L. Rev. 449 (1996); Paul H. Haagen, New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration, 40 Ariz. L. Rev. 1039 (1998); David S. Schwartz, Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration, 1997 Wis. L. Rev. 33; Richard E. Speidel, Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived Its Welcome?, 40 Ariz. L. Rev. 1069 (1998); Jeffrey W. Stempel, Bootstrapping & Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent, 62 Brook. L. Rev. 1381 (1996); Jean R. Sternlight, As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?, 42 Wm. & Mary L. Rev. 1 (2000) [hereinafter Sternlight, Class Action]; Jean R. Sternlight, Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration, 74 Wash. U. L.Q. 637 (1996)

[136] Schwartz, 1997 Wis. L. Rev. at 132. A steadfast critic of arbitration clauses in consumer and employment contracts, Professor Schwartz has also been highly skeptical of the view that the policy debates described in Part I should be resolved on empirical grounds at all. For a recent exposition of this view, see Schwartz, *Claims Suppressing Arbitration: The New Rules*, 87 Ind. L.J. __ (forthcoming 2012) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1761675).

[137] Schmitz 15 Harv. Negotiation L. Rev. 115, 143-50 (2010) (credit card and cell phone) (small sample sizes); Schmitz, 7 Nev. L.J. 37 (2007) (telecommunications contracts); Schmitz, Curing Consumer Warranty Woes through Regulated Arbitration, 23 Ohio St. J. Disp. Res. 627 (2008) (telecommunications contracts). *See also* Mark C. Weidermaier, Arbitration and the Individuation Critique, 49 Ariz. L. Rev. 69, 85 (2007) (reviewing agreements in 32 AAA awards and finding 5/16 consumer agreements contained class waivers but none of 16 employment agreements contained such a provision)

to this literature was the pathbreaking work of Linda Demaine and Deborah Hensler, who sought to undertake one of the first inter-industry studies of the use of (and the terms of) arbitration clauses in consumer contracts.[138] This permitted some more robust albeit tentative conclusions such as their finding that thirty percent of arbitration clauses in consumer contracts contained class action waivers. Studies like Demaine and Hensler's helped to build the empirical architecture by which the positive premises of Type I and Type II challenges could be meaningfully assessed.

While studies like Demaine and Hensler's made an important contribution to the literature, they too suffered from shortcomings. Many studies of this generation suffered from unusually small sample sets, thereby precluding any statistically significant results. Moreover, the data gathered through the studies was unavoidably unsystematic. Researchers who attempted to contact companies necessarily were at the mercy of voluntary compliance by the companies. Researchers who attempted to obtain the products necessarily were limited by the amount they were willing to pay (one can only have so many credit cards!). Finally, much of this research tended to be limited to a single point in time and did not permit any sort of meaningful assessment of trends over a longer time span. Despite these shortcomings, this generation of research provided an important template for further empirical scholarship.

Most recently, scholars have sought to develop more rigorous sets of empirical data to evaluate more systematically the use of arbitration clauses in consumer contracts and other settings.[139] The work of renowned empirical scholar, Ted Eisenberg, has been critical in this regard. In a series of papers co-authored, in various combinations, with Geoffrey Miller and Emily Sherwin, Eisenberg compared consumer contracts with business contracts in securities filings by publicly traded companies. [140] This enabled Eisenberg and his co-authors to conclude, in relevant part, that 75% of financial services and telecommunications companies utilized arbitration clauses in consumer agreements. Such findings finally offered the empirical tools to assess the response to the Type I challenges and also laid the intellectual groundwork for the Type II challenges that make claims about the pervasive use of arbitration clauses (or arbitration clauses with specific terms) within a particular industry.

While pathbreaking, Eisenberg's research is not foolproof. Elsewhere, one of us has explained the limited explanatory value of some of Eisenberg's findings.[141] Moreover,

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[138] Demaine & Hensler, 67 L. & Contemp. Probs. 55 (2004) (finding arbitration agreements in two-thirds of consumer contracts in banking industry) (also small sample size) (finding 30% of arbitration agreements contain class action waivers)

[139] For examples of scholarship outside the consumer context, see Drahozal & Whittrock, Is There a Flight From Arbitration, 37 Hofstra L. Rev. 71, 108 (2008) (severability provisions in franchise agreements); Drahozal & Whittrock, Franchising, Arbitration and the Future of Class Action, 3 E Bus L. J. 275 (2009) (frequency of class waivers in franchise contracts);; Schwalb & Thomas, An Empirical Analysis of CEO Employment Contracts: What do Top Executives Bargain For?, 63 Wash. & Lee L. Rev. 231 (2006) (41.6% of CEO contracts contained arbitration clauses).

[140] Eisenberg et al., Arbitration's Summer Soldiers, 41 U. Mich. J. Legal Reform 871, 882-83 (2008) (finding that 75% of financial services and telecommunications companies used arbitration clauses in consumer agreements and 93% used arbitration clauses in employment agreements); Eisenberg et al, Mandatory Arbitration for Customers but not for Peers, 92 Judicarture 118 (2008)(recycling Michigan data); Eisenberg & Miller, Flight from Arbitration, 56 DePaul L. Rev. 335 (2007) (use of arbitration clauses in material contracts in SEC filings).

[141] Drahozal & Ware.

Eisenberg's dataset necessarily constrains his findings in two distinct ways. They are limited to a single point in time and, therefore, do not lend themselves to a more dynamic analysis. They also offer, at best, an incomplete snapshot of the industry. To the extent Eisenberg draw his data from contracts attached to SEC filings, it necessarily misses contracts that are not attached to those filings, either because the companies are not subject to reporting requirements or because the company's reporting requirements do not extend to particular contracts that might shed more light on a company's practices.

Given the state of the literature, the natural next step is to develop an empirical assessment of arbitration clause practices in consumer contracts that does not suffer from the shortcomings in Eisenberg's data. This enables a fuller assessment of both the response to the Type I challenge and the validity of the Type II challenge, described above. The next section explains how the Credit CARD Act of 2009 provided such a mine of data with respect to practices in the credit card industry.

II. What Do Arbitration Clauses in Credit Card Agreements Look Like?

This Part undertakes a comprehensive examination of the use of arbitration clauses in credit card agreements.[142] It first examines trends in the use of arbitration clauses: to what extent do issuers provide for arbitration of disputes and to what extent can cardholders opt out of the obligation to arbitrate? It then takes a detailed look at the provisions included in arbitration clauses in credit card agreements. Finally, it compares the use of arbitration clauses in business credit card and deposit account agreements to the use of arbitration clauses in consumer credit card and deposit account agreements.

A. Sample

The Credit Card Responsibility, Accountability, and Disclosure Act (Credit CARD Act) of 2009 requires all issuers to provide electronic copies of their consumer credit card agreements to the Federal Reserve,[143] which, in turn, is to "establish and maintain on its publicly available Internet site a central repository of the consumer credit card agreements received from creditors."[144] Our sample consists of 293 credit card agreements submitted by issuers to the Federal Reserve as of December 31, 2009 and 2010,[145] and made available via the Internet.[146]

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[142] As such, this study is an "inter-firm study" — it compares the use of arbitration clauses across firms in a single industry (although the part of the study examining carve-outs from arbitration, *see infra* text accompanying notes __-__, is an "intra-contract" study because it looks at the use of arbitration to resolve different types of disputes within the same contract). *See* Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight from Arbitration?*, 71 HOFSTRA L. REV. 71, 80 (2008).

[143] Credit Card Accountability, Responsibility, and Disclosure Act of 2009, Pub. L. No: 111-24, § 204(a), 123 Stat. 1734, 1746-47 (May 22, 2009) (codified at 15 U.S.C. § 1632(d)(2)).

[144] *Id.* (codified at 15 U.S.C. § 1632(d)(3)); *see* Board of Governors of the Federal Reserve System, Consumer Credit Card Agreements Search, http://www.federalreserve.gov/creditcardagreements/ (last visited July 26, 2011).

[145] The starting point for the sample is the sample used in Christopher R. Drahozal & Peter B. Rutledge, *Arbitration and Consumer Credit* 15 (2011) (for credit card agreements as of December 31, 2009). To that sample we added new issuers submitting credit card agreements as of December 31, 2010 (which were filed prior to June 1, 2011), and identified agreements from issuers in the original sample that had been updated as of December 31, 2010.

We collected the arbitration clauses, if any, from the credit card agreements and classified the provisions of the clauses as described throughout this part.[147]

We report our findings by number of issuers and by market share of the issuer, as measured by its share of the dollar value of credit card loans outstanding for all issuers in the relevant sample. Data on the amount of credit card loans outstanding come from the December 31, 2009, and December 31, 2010, call reports filed by issuers with the appropriate federal regulators. Our sample is limited to those issuers for which such data is available.[148]

The number of observations reported in the discussion that follows varies. When we examine the use of arbitration clauses, we use the full sample of 293 credit card agreements. When we examine the terms of arbitration clauses as of December 31, 2010, we use a sample of 47 issuers that included arbitration clauses in their credit card agreements as of that date.[149] When we examine the change in the terms of arbitration clauses between 2009 and 2010, we

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We also excluded five issuers for which credit card agreements no longer were available as of December 31, 2010.

Issuers almost always specified the same form of dispute resolution in each credit card agreement they submitted to the Federal Reserve — i.e., when an issuer used an arbitration clause, it typically used an identical clause in all of its agreements. In the handful of cases in which an issuer submitted credit card agreements specifying different forms of dispute resolution or with different arbitration clauses, we used the most common form in our analysis. For further discussion, see *id.* at 16 n.74. The one exception is HSBC, which settled an antitrust suit by agreeing to use arbitration clauses in its credit card agreements for three-and-one-half years. *See infra* text accompanying notes __-__. The standard HSBC credit card agreements provided to the Federal Reserve for December 31, 2010, do not contain arbitration clauses, consistent with the settlement. But those agreements are outnumbered by specialty credit card agreements that HSBC apparently administers for merchants, which do include arbitration clauses. Because the standard HSBC agreement does not include an arbitration clause, and because HSBC has agreed not to use arbitration clauses, we coded HSBC as not using arbitration as of December 31, 2010.

[146] At the time we collected the data, the credit card agreements were available on a web page maintained by the Federal Reserve. *See* Board of Governors, Federal Reserve System, Consumer Credit Card Agreements Search, http://www.federalreserve.gov/creditcardagreements/ (last visited May 20, 2011). Subsequently, responsibility for making credit card agreements publicly available has shifted to the Consumer Financial Protection Bureau, which now posts the agreements on its web page. Consumer Financial Protection Bureau, Credit Card Agreement Database, http://www.consumerfinance.gov/credit-cards/agreements/ (last visited February 11, 2012).

[147] Issuers are only required to update their filing if they amended the credit card agreement during the quarter. 12 C.F.R. § 226.53(c)(3). Accordingly, when the most recent filing available on the Federal Reserve web page was for December 31, 2009, we also used that filing for December 31, 2010.

[148] As a result, our sample is limited to financial institutions (almost always banks and credit unions) and does not include nonfinancial institutions. *See* Mark Furletti & Christopher Ody, Measuring U.S. Credit Card Borrowing: An Analysis of the G.19's Estimate of Consumer Revolving Credit 15 (Apr. 2006), *available at* http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2006/DG192006April10.pdf (describing "complexities of gathering data on the revolving consumer loans owed to nonfinancial businesses").

We did not include two new issuers in the sample that reported zero dollars in credit card loans outstanding as of December 31, 2010. By comparison, several issuers that had nonzero amounts of credit card loans outstanding as of December 31, 2009, reported zero credit card loans outstanding as of December 31, 2010. We kept those issuers in the sample, although they obviously affected only the number of agreements and not the market share calculations.

[149] Two credit unions indicated in their credit card agreements that disputes were subject to arbitration under the terms of an arbitration clause included in the credit union membership agreement. Because disputes under the credit card agreement were subject to arbitration, we included the two credit unions as issuers that used arbitration clauses. But because the arbitration clause itself was not available, we treated those credit unions as missing when analyzing the terms of credit card arbitration clauses.

limit the sample to the 39 issuers that had arbitration clauses in both of those years, so that we can focus on changes in the terms while holding the use of arbitration constant.

B. Trends in the Use of Arbitration Clauses

Until recently, credit card agreements have been a standard example of a consumer contract that always, or almost always, includes an arbitration clause. Most often, commentators (accurately) stated that most credit card *agreements* included arbitration clauses.[150] Less often (and less accurately), commentators sometimes stated that most credit card *issuers* included arbitration clauses in their credit card agreements.[151] The limited empirical evidence in support of those statements focused on the very largest credit card issuers,[152] which, given the degree of concentration in the credit card market, provided a reasonable view of what most credit card agreements included. But because the studies focused on the very largest issuers, they provided little evidence of what most issuers did.

In this section, we provide a broader view of trends in the use of arbitration clauses in credit card agreements.[153] First, we examine the use of arbitration clauses across a broad range of issuers. Second, we look at the extent to which arbitration clauses in credit card agreements carve certain types of claims or disputes out of the obligation to arbitrate. Third, we consider the

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[150] *E.g.*, Arbitration Fairness Act of 2009, H.R. 1020, § 2(3), 110th Cong. (2009) (finding that consumers "must often give up their rights as a condition of ... getting a credit card"); Public Citizen, Forced Arbitration: Unfair and Everywhere 3 (Sept. 14, 2009), *available at* http://www.citizen.org/documents/UnfairAndEverywhere.pdf (reporting that "the use of forced arbitration remains rampant," citing credit card agreements as an example); Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*, 109 COLUM. L. REV. 689, 747 (2009) ("A binding arbitration clause is a staple of credit card agreements ....").

[151] *See Federal Arbitration Act: Is the Credit Card Industry Using It to Quash Legal Claims?*: Hearing Before the House Subcomm. on Comm'l and Admin. Law of the House Comm. on the Judiciary 1-2, 111th Cong. (2009), *available at* http://judiciary.house.gov/hearings/printers/111th/111-39_49475.PDF ("Nearly every credit card issuer includes an arbitration agreement in [its] ... contracts with cardholders.") (remarks of Congressman Steve Cohen); *see also* Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 158 n.6 (2006) (referring to "the few credit card companies that do not compel arbitration"); Memo to Elizabeth Warren: How to Protect Consumers (Sept. 17, 2010), available at http://blogs.reuters.com/reuters-wealth/2010/09/17/memo-to-elizabeth-warren-how-to-protect-consumers/ (quoting David Arkush, director, Public Citizen's Congress Watch division) ("Nearly every consumer lender puts a clause in the standard-form contract saying that the consumer can never sue the company, for anything.").

[152] *E.g.*, Theodore Eisenberg, Geoffrey P. Miller, & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 881 (2008); Public Citizen, *supra* note __, at 5-9.

[153] Prior to enactment of the Credit CARD Act of 2009, *see supra* text accompanying notes __-__, credit card agreements were difficult for researchers to obtain. *See*, *e.g.*, Amy Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 145 (2010) ("[I]t was notably difficult to obtain contracts of consumer credit contracts in order to analyze their inclusion of arbitration clauses.... [Credit card issuers] rarely include or made available their full form contract terms."); Linda Demaine & Deborah Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55, 60 (2004) ("[O]ne coauthor acquired four credit cards while conducting the study, as that was the only means by which to obtain the clauses used by these businesses."); Public Citizen, *supra* note __, at 3, 5 ("[S]everal credit card companies told us that we had to apply for a credit card and be approved before we could see their terms.... Only three of the 10 credit card providers we queried would share the contractual language of their arbitration clauses with us.").

extent to which credit card agreements permit consumers to opt out of the arbitration clause. Our data, although the most recent data available, predate the Supreme Court's decision in *Concepcion*, so that we are not able to examine how credit card issuers responded to that decision.

1. Use of Arbitration Clauses

As of December 31, 2009, most credit card agreements included arbitration clauses but most credit card issuers did not use arbitration clauses. As shown in Table 1, 95.1% of the dollar value of outstanding credit card loans in the sample was subject to credit card agreements with arbitration clauses. But only 17.4% of credit card issuers in the sample included arbitration clauses in their credit card agreements.[154] A minority of very large issuers used arbitration clauses; the majority of much smaller issuers did not.

Table 1. Use of Arbitration Clauses in Credit Card Agreements (2009 & 2010)

	Contracts as of 12/31/09		Contracts as of 12/31/10	
	Number of Clauses	% of credit card loans outstanding	Number of Clauses	% of credit card loans outstanding
No Arbitration Clause	242 (82.6%)	4.9%	250 (85.3%)	52.0%
Arbitration Clause	51 (17.4%)	95.1%	43 (14.7%)	48.0%
Totals	293 (100.0%)	100.0%	293 (100.0%)	100.0%

In mid-to-late 2009, two events occurred that had a significant effect on the use of arbitration clauses in credit card agreements. First, in July 2009, the National Arbitration Forum settled a consumer fraud lawsuit with the Minnesota Attorney General by agreeing to stop administering new consumer arbitration cases.[155] Prior to the settlement, the NAF had the largest

[154] Based on the sample used in Drahozal & Rutledge, *Consumer Credit*, *supra* note __, at 20 & table 3, we reported that, as of December 31, 2009, 51 of 298 issuers (17.1%) used arbitration clauses and 247 of 298 issuers (82.6%) did not; and that 95.1% of credit card loans outstanding were subject to arbitration clauses while 4.9% were not. These results differ marginally from the results reported in Table 1 because of the slight difference in the samples used. For the results reported in this article, the sample is limited to those issuers for which we had information as of both December 31, 2009, and December 31, 2010. Credit card agreements were not available as of December 31, 2010 for five issuers that had provided credit card agreements to the Federal Reserve as of December 31, 2009 (none of which included arbitration clauses), so we excluded those issuers from the sample.

[155] Consent Judgment, Minnesota v. National Arbitration Forum, Inc., No. 27-CV-09-18550 (Minn. Dist. Ct. July 17, 2009), *available at* http://pubcit.typepad.com/files/nafconsentdecree.pdf. At the same time, but unrelated to pending or threatened litigation, the American Arbitration Association announced a moratorium on administering most consumer debt collection arbitrations. *See Arbitration or Arbitrary: The Misuse of Mandatory Arbitration to Collect Consumer Debts*: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. On Oversight, 111th Cong. (July 22, 2009) (testimony of Richard W. Naimark on Behalf of the American Arbitration Association), *available at* http://oversight.house.gov/images/stories/documents/20090722112616.pdf.

caseload of consumer arbitrations (almost all debt collection arbitrations) in the United States.[156] Second, in December 2009, four of the largest credit card issuers settled a pending antitrust suit (*Ross v. Bank of America*) by agreeing to remove arbitration clauses from their consumer and small business credit card agreements for three-and-one-half years.[157] Bank of America, Capital One, Chase, and HSBC were the settling defendants; other large issuers — Citibank and Discover Bank (with American Express and Wells Fargo alleged to be co-conspirators but not named as defendants) — remain in the case and continue to use arbitration clauses.[158]

Table 1 illustrates the effect of those two events on the use of arbitration clauses in credit card agreements.[159] The percentage of issuers using arbitration clauses declined from 17.4% on December 31, 2009, to 15.0% on December 31, 2010.[160] More dramatically, the percentage of credit card loans subject to arbitration clauses declined from 95.1% to only 48.0%.[161] In the

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[156] Complaint ¶ 3, Minnesota v. National Arbitration Forum, Inc., No. 27-CV-09-18559, (Minn. Dist. Ct. July 14, 2009), *available at* http://www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf.

[157] Stipulation and Agreement of Settlement with Bank of America, N.A. (USA) (N/K/A/ FIA Card Services, N.A.) and Bank of America, N.A., ¶ 3, Ross v. Bank of America, N.A., (USA), No. 05-cv-7116 (S.D.N.Y. Feb. 23, 2010), available at http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-bank-of-america.pdf; Stipulation and Settlement Agreement with Capital One Bank (USA), N.A. and Capital One, N.A., ¶ 3, Ross v. Bank of America, N.A., (USA), No. 05-cv-7116 (S.D.N.Y. Feb. 23, 2010), available at http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-capital-one.pdf; Stipulation and Agreement of Settlement with JPMorgan Chase & Co. and Chase Bank USA, N.A., ¶ 3, Ross v. Bank of America, N.A., (USA), No. 05-cv-7116 (S.D.N.Y. Feb. 23, 2010), available at http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-chase.pdf; Stipulation and Agreement of Settlement with HSBC Finance Corp. and HSBC Bank Nevada, N.A., ¶ 3, Ross. v. Bank of America, N.A., (USA), No. 05-cv-7116 (S.D.N.Y. Feb. 24, 2010), available at http://www.arbitration.ccfsettlement.com/documents/files/2010-02-24-stip-and-agreement-with-hsbc.pdf.

[158] *See* First Amended Class Action Complaint ¶¶ 45-58 & 69-77, Ross et al. v. Bank of America, N.A., (USA), No. 05-cv-7116 (S.D.N.Y. June 4, 2009), available at http://www.arbitration.ccfsettlement.com/documents/files/2009-06-04-1st-amended-complaint.pdf.

[159] We are not able to separate out the relative importance of the two events, nor are we able to identify which is the cause and which is the effect. Chase announced in July 2009 that it would no longer file new credit card arbitration cases against consumers, and Bank of America announced in August 2009 that it would stop using arbitration clauses in its credit card and other consumer agreements. *See* Kathy Chu, *Bank of America Ends Arbitration of Credit Card Disputes*, USA TODAY ONLINE, Aug. 13, 2009, *available at* http://www.usatoday.com/money/industries/banking/2009-08-13-bank-of-america-no-arbitration_N.htm. The settlements by Chase and Bank of America in *Ross* were not announced until November and December 2009, at around the same time as the settlements by Capital One and HSBC. *See JP Morgan Chase to Scrap Arbitration*, CARDLINE, Nov. 27, 2009; *B of A Reaches Settlement in Cardholders Arbitration Case*, SNL BANK WEEKLY (Southern ed.), Dec. 21, 2009; *Capital One Agrees to Drop Arbitration Clause from Credit Card Agreements*, SNL BANK WEEKLY (Southern ed.), Dec. 28, 2009; *HSBC Settles Suit over Arbitration*, BOSTON GLOBE, at 10 (Jan. 5, 2010).

[160] The sample used in preparing Table 1 does not include 39 issuers for which agreements as of December 31, 2009, and two issuers for which such agreements were not available by our cut-off date for collecting that data. *See* Drahozal & Rutledge, *Consumer Credit*, *supra* note __, at 15 n.70. Of the 334 issuers for which we have credit card agreements as of December 31, 2010, 49 (14.7%) of the agreements included arbitration clauses while 285 (or 85.3%) did not. Out of the total credit card loans outstanding for those 334 issuers, 47.8% were subject to arbitration clauses as of December 31, 2010, and 52.2% were not.

[161] In July 2010, the Pew Health Group reported finding a "dramatic drop in arbitration clauses" in credit card agreements: "In March 2010, only 10 percent of bank cards indicated a cardholder was subject to arbitration, ... down from 68 percent in 2009." The Pew Health Group, Two Steps Forward: After the Credit CARD Act, Credit Cards Are Safer and More Transparent—But Challenges Remain 19 (July 2010), *available at*

aggregate, eight fewer issuers used arbitration clauses at the end of 2010 than at the end of 2009. Ten issuers switched away from arbitration (including the four settling issuers), while two switched to arbitration.[162]

2. Carve-Outs

Parties do not always agree to arbitrate all disputes that arise under their contract. Even if the contract includes a broad arbitration clause, the parties may agree to exclude, or "carve out," certain claims from arbitration.[163] Some courts are skeptical of carve-outs, which might permit one party to bring its claims in court while requiring the other party to arbitrate its claims. The California Supreme Court, for example, has held that nonmutual carve-outs are unconscionable, unless the business can show a "reasonable justification" for the nonmutual provision — i.e., a justification grounded in something other than the [business's] desire to maximize its advantage based on the perceived superiority of the judicial forum."[164]

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http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Credit_Cards/PEW-CreditCard%20FINAL.PDF?n=1231 [hereinafter Pew Health Group (2010)]. As of May 2011, the percentage of bank cards reported by the Pew Health Group as subject to arbitration clauses was 14%, still well below the percentages we find. Pew Health Group, A New Equilibrium: After Passage of Landmark Credit Card Reform, Interstate Rates and Fees Have Stabilized 2 (May 2011), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Credit_Cards/Report_Equilibrium_web.pdf.

The difference results from the fact that the Pew Health Group collects its data from the disclosure documents available on issuer web pages, not the cardholder agreements themselves. Pew Health Group (2010), *supra*, at 32 ("Data in this report is based on an analysis of application disclosures provided by credit card issuers at the time a consumer applies for a credit card."). Not all issuers disclose the use of arbitration clauses in their disclosure documents; as a result, the Pew Health Group numbers understate the extent of arbitration clause use. *Compare*, *e.g*., Card Agreement, Citi® Platinum Select®/AAdvantage® Visa Signature® Card 9-13, available at https://www.citicards.com/cards/acq/cmaView.do?PID=204&cma=true&locale=en_US (last visited July 25, 2011) (including arbitration clause) *with* Citi Disclosures, Citi® Platinum Select®/AAdvantage® Visa Signature® Card, available at https://www.accountonline.com/ACQ/DisplayTerms?sc=4XKIWAC1215EZZZZZZW&app=UNSOL&siteId=CB&langId=EN&BUS_TYP_CD=CONSUMER&DOWNSELL_LEVEL=0&BALCON_SC=&B=S&DOWNSELL_BRANDS=&t=&d=&uc=&AMEX_PID_AF_CODE=&AAPID= (last visited July 25, 2011) (not mentioning arbitration clause).

Using the same sample of twelve bank issuers as the Pew Health Group, we find that as of December 31, 2010, 58.3% of the issuers (7 of 12) used arbitration clauses and 49.5% of the credit card loans outstanding for those issuers were subject to arbitration clauses.

[162] One of the issuers that we classified as switching to arbitration had submitted multiple agreements to the Federal Reserve as of December 31, 2009, one of which included arbitration clauses and the rest of which did not. Because the majority of the clauses submitted for 2009 did not include arbitration clauses, we classified the issuer as not using arbitration. By comparison, all of the clauses submitted by the issuer for 2010 did include arbitration clauses.

[163] *See*, *e.g*., Drahozal & Wittrock, *supra* note __, at 113-14.

[164] Armendariz v. Foundation Health Psychcare Servs., Inc., 6 P.3d 669, 694 (Cal. 2000); *see* Bridge Fund Capital Corp. v. Big Bad 1, LLC, 622 F.3d 996, 1005 (9th Cir. 2010) ("The only business justification offered by Fastbucks for the non-mutual judicial remedy provision was its need to seek provisional remedies, which is insufficient under California law to justify non-mutuality (because California law protects parties' rights to seek provisional remedies in court regardless of any arbitration clause that may cover the parties' dispute."); Fitz v. NCR Corp., 13 Cal. Rptr. 3d 88, 105 (Cal. App. 2004) ("NCR's concern that arbitration may not always meet its legitimate dispute resolution needs is not a proper business justification for the exception."); Mercuro v. Superior Ct., 116 Cal. Rptr. 2d 671, 677-78 (Cal. App. 2002) (rejecting asserted business justification for carve-out of claims for injunctive relief); *see also* Christopher R. Drahozal, *Nonmutual Arbitration Agreements*, 27 J. CORP. L. 537, 552-55 (2002) (discussing possible business justifications for carve-outs).

In some industries, carve-outs are common. Over half of the arbitration clauses in a sample of franchise agreements, for example, included multiple carve-outs, such as for trademark disputes, interim measures, or injunctive relief.[165] In credit card agreements, carve-outs are somewhat less common.[166]

Far and away the most common carve-out in credit card arbitration clause is for small claims (defined either by the dollar amount sought or by the claims being brought in small claims court). Of the issuers studied, 32 (of 47, or 68.1%) excluded small claims from arbitration. Most of the agreements that did not exclude small claims were from small issuers (the 15 issuers not including a small claims carve-out comprised only 1.6% of credit card loans outstanding, while the 32 including a small claims carve-out comprised 98.4% of credit card loans outstanding).

The form of the exclusion varied. As Table 2 shows, the most common type of carve-out (21 of 47, or 44.7% of issuers; 65.6% of credit card loans outstanding) excluded both issuer and consumer claims in small claims court from arbitration. A smaller group (7 of 47, or 14.9% of issuers; 31.5% or credit card loans outstanding) limited the exclusion to consumer claims.[167] The remaining four carve-outs (8.5% of issuers; less than 1.5% of credit card loans outstanding) used dollar cut-offs (ranging from $5000 to $25,000) and usually applied to both consumer and issuer claims.

Table 2. Small Claims Carve-Outs (2010)

Type of Provision	Number of Clauses	% of credit card loans outstanding
Cardholder small claims	7 (14.9%)	31.5%
Issuer and cardholder small claims	21 (44.7%)	65.6%
Under $5000; issuer and cardholder	1 (2.1%)	0.0%
Under $7500; issuer and cardholder	1 (2.1%)	0.0%
Under $15,000; issuer and cardholder	1 (2.1%)	0.1%
Under $25,000; issuer and cardholder	1 (2.1%)	1.2%
No provision	15 (31.9%)	1.6%

[165] *E.g.*, Drahozal & Wittrock, *supra* note __, at 113-14.

[166] As an extreme example, one (but only one) small issuer in our sample (of 47, or 2.1%; 0.0% of credit card loans outstanding) gave itself the option to arbitrate while requiring the cardholder to arbitrate. Typically, however, carve-outs are more narrowly tailored to exclude only certain types of claims from arbitration.

[167] As explained in Drahozal & Rutledge, *Consumer Credit*, *supra* note __, at 9 n.46, if claims brought by issuers in small claims court are excluded from arbitration, a small claims exclusion may permit issuers to avoid arbitration for many of its claims.

Relatedly, five issuers (of 47, or 10.6%; but 51.4% of credit card loans outstanding) excluded debt collection claims from arbitration. (Four of the five also excluded issuer and cardholder small claims cases from arbitration.) One clause (of 47, or 2.1%; 0.0% of credit card loans outstanding) by a very small issuer sought to obtain a similar result by expressly providing that the issuer's filing of a debt collection action does not waive its right to demand arbitration in the event the cardholder files a counterclaim.[168] Whether a court would honor such a no-waiver provision is uncertain.

Other types of carve-outs are less common in credit card arbitration clauses. Nine issuers (of 47, or 19.1%; 3.8% of credit card loans outstanding) excluded from arbitration claims for interim relief, such as preliminary injunctions and attachments. Twelve issuers (of 47, or 25.5%; 11.2% of credit card loans outstanding) excluded repossession and other self-help remedies, while six issuers (of 47, or 12.8%; 3.6% of credit card loans outstanding) excluded claims in bankruptcy.

3. Opt-Out Provisions

Some courts consider whether cardholders have the ability to opt out of an arbitration clause in deciding whether the clause is procedurally unconscionable.[169] As can be seen in Table 3, most arbitration agreements in our sample (35 of 47, or 74.5% of issuers; 76.3% of credit card loans outstanding) do not include an opt-out provision. [170] The amount of time in which the

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[168] IBERIABANK, Cardholder Credit Card Agreement and Additional Disclosures (Dec. 31, 2010) (copy on file with authors):

> *No Waiver:* You and we agree that bringing a lawsuit, counterclaim, or other action in court shall not be deemed a waiver of the right to demand arbitration of any Dispute brought by the other party. As an example, and not by way of limitation, if we file a lawsuit against you in court to collect a debt and you file a counterclaim against us in that lawsuit, we have the right to demand that the entire Dispute, including our original lawsuit against you and your counterclaim against us, be arbitrated in accordance with this arbitration provision.

[169] *See* Circuit City Stores, Inc., v. Ahmed, 283 F.3d 1198, 1200 (9th Cir. 2002); Circuit City Stores, Inc., v. Najd, 294 F.3d 1104, 1108 (9th Cir. 2002); *see also* Hoffman v. Citibank (South Dakota), N.A., 546 F.3d 1078, 1085 (9th Cir. 2008) (remanding for district court to determine whether cardholder had meaningful ability to opt out of arbitration clause; court to consider "issues such as how much additional time the expiration date cutoff typically provides, how many customers exercise their ability to opt out and whether other banks use similar provisions"). *Compare* Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101, 1106-07 (9th Cir. 2003) (finding employee had no "*meaningful* opportunity to opt-out of the arbitration program" when "management impliedly and expressly pressured [the employee] not to opt-out"), *cert. denied*, 540 U.S. 1160 (2004).

[170] Of those that do, the clause in the Discover Bank cardholder agreement is illustrative:

> You may reject the Arbitration of Disputes section but only if we receive from you a written notice of rejection within 30 days of your receipt of the Card. You must send the notice of rejection to: Discover, PO Box 30938, Salt Lake City, UT 84130-0938. Your rejection notice must include your name, address, phone number, Account number and personal signature. No one else may sign the rejection notice for you. Your rejection notice also must not be sent with any other correspondence. However, if you previously had the chance to reject an arbitration agreement with us but did not, you may not reject it now. Rejection of arbitration will not affect your other rights or responsibilities under this Agreement or your obligation to arbitrate disputes under any other account as to which you and we have agreed to arbitrate disputes. If you once sent us a rejection notice on a different account or card, you must send us a new rejection notice or else this arbitration agreement will apply to any disputes with us relating to your other accounts or

cardholder can exercise the right to opt out varies from 30 days (the most common — 7 of 47, or 14.9% of issuers; 17.4% of credit card loans outstanding) to 60 days (4 of 47, or 8.5% of issuers; 6.2% of credit card loans outstanding).

Table 3. Cardholder Agreements Permitting Opt Out of Arbitration (2010)		
	Number of Clauses	% of credit card loans outstanding
Right to Opt Out — within 30 days	7 (14.9%)	17.4%
Right to Opt Out — within 45 days	1 (2.1%)	0.2%
Right to Opt Out — within 60 days	4 (8.5%)	6.2%
No Right to Opt Out	35 (74.5%)	76.3%

C. Provisions of Arbitration Clauses

By agreeing to arbitration, parties agree to a form of dispute resolution that differs from litigation in court. Parties retain the ability to customize the arbitration process to a large degree, as discussed more in this and following sections. But even if the parties do not customize the process, arbitration still differs in important ways from court: juries are not available;[171] discovery tends to be more limited;[172] and courts do not review awards on the merits, but rather only on the limited grounds set out in the governing arbitration statute.[173]

Many of the clauses in the sample gave cardholders notice (almost always in capital letters and bold type) of those differences. All but two of the clauses (45 of 47, or 95.7%; 99.9% of credit card loans outstanding) notified cardholders that by agreeing to arbitration they were giving up any right to a jury trial.[174] The majority of the clauses also notified cardholders that

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cards.
Discover Bank, Cardmember Agreement 5 (Dec. 31, 2010) (copy on file with authors).

[171] *See*, *e.g.*, Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 5 (1997).

[172] *See*, *e.g.*, 3 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW 34.1 at 34:2 (1994 & Supp. 1999) ("Limitations on discovery ... remain one of the hallmarks of American commercial arbitration, including arbitration under the FAA. Avoidance of the delay and expense associated with discovery is still one of the reasons parties choose to arbitrate.") (footnotes omitted).

[173] *See* 9 U.S.C. § 10. Courts are split on whether manifest disregard of the law, which provides a very slight degree of merits review for arbitration awards, remains available as a ground for vacating an award. Kulchinsky v. Ameriprise Fin'l, 2011 U.S. Dist. LEXIS 75917, *19 n.8 (E.D. Pa. July 14, 2011) (noting that "Courts of Appeals are presently divided on the issue"). For the leading cases, see Stolt-Nielsen SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 93-95 (2d Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 1758 (2010); Citigroup Global Markets Inc. v. Bacon, 562 F.3d 349, 355-56, 358 (5th Cir. 2009): Coffee Beanery, Ltd. v. WW, L.L.C., 2008 U.S. App. LEXIS 23645, at *4 (6th Cir. 2008); Comedy Club Inc. v. Improv West Assocs., 553 F.3d 1277, 1290 (9th Cir. 2009); Frazier v. CitiFinancial Corp., 604 F.3d 1313, 1324 (11th Cir. 2010).

[174] One other clause (of 47, or 2.1%; 0.1% of credit card loans outstanding) informed parties generally that

both the availability of discovery (28 of 47, or 60.0%; 41.6% of credit card loans outstanding) and the right to appeal (29 of 47, or 61.7%; 53.5% of credit card loans outstanding) were more limited in arbitration than in court. (In addition, five clauses (of 47, or 10.6%; but 38.8% of credit card loans outstanding) provided notice that the procedures in arbitration were simpler and more limited than in court, without being specific as to what those procedures were.) Finally, 43 clauses (of 47, or 91.5%; but 99.9% of credit card loans outstanding) informed cardholders that they could not be a party to a class action in court if the dispute was subject to an arbitration clause.

Parties to an arbitration agreement may modify these typical characteristics of arbitration or otherwise define the arbitration process in their arbitration clause. The rest of this section examines the extent to which credit card agreements in our sample contain provisions that: (1) set out the governing arbitration law; (2) select a provider to administer the arbitration; (3) delegate certain decisions to the arbitrators; (4) provide a minimum recovery to a prevailing cardholder; (5) contain possibly "unfair" provisions; (6) regulate the costs of arbitration; and (7) establish an arbitral appeals panel or address the scope of court review of awards.

1. Governing Arbitration Law

In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, the Supreme Court held that parties can incorporate state arbitration law by reference into their contract, even if the provision of state arbitration law otherwise would be preempted by the FAA.[175] If the parties so agree, the provisions of the state arbitration law are treated as part of the arbitration agreement, and are to be enforced by courts under the FAA as part of the parties' agreement.

So understood, this aspect of *Volt* is unexceptional. To illustrate: under well settled FAA preemption principles, a state law that precludes arbitrators from resolving claims under a particular state statute (such as a franchisee protection statute) would be preempted.[176] But the FAA certainly does not preclude the parties themselves from agreeing to exclude claims under the state franchisee protection statute from their arbitration agreement. Thus, if the parties' agreement incorporates by reference state arbitration law to define the scope of their agreement, then courts will enforce the agreement so construed.

The more difficult issue is deciding when the parties have agreed to incorporate state arbitration law by reference into their agreement. In *Volt*, the Supreme Court did not decide that issue, instead deferring to the California court's interpretation of a general choice-of-law clause in the contract as constituting the parties' agreement to state arbitration law.[177] Following *Volt*,

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they were waiving their right to litigate in court, without being more specific.

[175] 489 U.S. 468, 479 (1989) ("Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward.").

[176] *E.g.*, Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

[177] 489 U.S. at 474 ("Appellant acknowledges, as it must, that the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review."). The Supreme Court did decide that, on the facts of the case, the FAA did not preempt the state court's interpretation. *Id.*

numerous lower courts construed general choice-of-law clauses as incorporating state arbitration law.[178] Given how frequently parties include choice-of-law clauses in their contracts, the result was to substantially restrict the scope of FAA preemption. In subsequent cases, however, the Supreme Court rejected that interpretation of a general choice-of-law clause. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, the Court refused to construe a general choice-of-law clause (which specified New York law as the governing law) as "mean[ing] 'New York decisional law, including that State's allocation of power between courts and arbitrators, notwithstanding otherwise-applicable federal law.'"[179] Instead, as reiterated in *Preston v. Ferrer*, "the 'best way to harmonize' the parties' adoption of the AAA rules and their selection of [state] law is to read the latter to encompass prescriptions governing the substantive rights and obligations of the parties, but not the State's 'special rules limiting the authority of arbitrators.'"[180]

Data from the credit card agreements we studied, as shown in Table 4, are consistent with the view reflected in *Mastrobuono* and *Preston v. Ferrer* that parties do not ordinarily intend to incorporate state arbitration law, to the exclusion of federal arbitration law, into their arbitration agreements. Only one very small issuer (of 47, or 2.1%; 0.0% of credit card loans outstanding) in our sample contracted solely for application of a state's arbitration law to the arbitration proceeding. By contrast, 43 issuers (of 47, or 91.5%; 99.9% of credit card loans outstanding) specified that the FAA applies, ordinarily with either no mention of state law or expressly excluding the application of state arbitration law.[181]

Presumably the provisions specifying the governing arbitration law were included in response to *Volt* to make clear that parties were not trying to incorporate state arbitration law by reference. Such a wholesale rejection strongly suggests that, at least for credit card issuers, the contract interpretation in *Mastrobuono* and *Preston v. Ferrer* is more in accord with the parties' agreement.

Table 4. Governing Arbitration Law (2010)

Type of Provision	Number of Clauses	% of credit card loans outstanding
FAA	28 (59.6%)	75.9%
FAA and not state law	8 (17.0%)	7.0%
FAA and state law if applicable	6 (12.8%)	11.6%
FAA and state law	1 (2.1%)	5.3%

[178] *E.g.*, Mastrobuono v. Shearson Lehman Hutton, Inc., 20 F.3d 713, 717 (7th Cir. 1994), *rev'd*, 514 U.S. 52 (1995).
[179] 514 U.S. 52, 60 (1995).
[180] 552 U.S. 346, 363 (2008) (quoting *Mastrobuono*, 514 U.S. at 63-64).
[181] The other three, also very small, issuers had no provision on applicable arbitration law in their arbitration clause.

State law	1 (2.1%)	0.0%
No provision	3 (6.4%)	0.1%

2. Provider Rules

All of the arbitration clauses in the sample provide for administered arbitration — that is, arbitration in which an arbitration provider handles the administrative aspects of the case, makes available detailed rules governing the proceeding, and serves as an appointing authority if the parties cannot otherwise agree on an arbitrator. The arbitration rules promulgated by providers, which the parties incorporate into their arbitration agreement, also modify the default characteristics of arbitration.[182]

Table 5 lists the arbitration providers specified in the arbitration clauses in our sample as of December 31, 2009 and 2010.[183] The AAA is named as the exclusive provider in sixteen (of 39, or 41.0%; 16.3% of credit card loans outstanding) of the arbitration clauses as of December 31, 2010, and is listed as one of two or three permissible providers in an additional 16 (of 39, or 41.0%; 82.3% of credit card loans outstanding).[184] Two clauses (of 39, or 5.1%; 0.1% of credit card loans outstanding) name JAMS as the exclusive provider, and another 17 (of 39, or 43.6%; 82.3% of credit card loans outstanding) list it as one of two or three permissible providers. Two (of 39, or 5.1%; 0.1% of credit card loans outstanding) continue to name the National Arbitration Forum as the exclusive provider, despite the fact that it no longer administers consumer arbitrations.[185] One clause (of 39, or 2.6%; 0.0% of credit card loans outstanding) gives the

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[182] *See* Christopher R. Drahozal, *"Unfair" Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 728-31; Christopher R. Drahozal & Samantha Zyontz, Private Regulation of Consumer Arbitration 13-15 (2011) (describing provisions of AAA Consumer Due Process Protocol); *see also infra* text accompanying notes __-__.

[183] In reporting the arbitration providers specified in credit card arbitration agreements as of December 31, 2009, Christopher R. Drahozal and Peter B. Rutledge, *Contract and Procedure*, 94 MARQUETTE L. REV. ___, ___ Table 3 (2011), used a broader sample of issuers from the Federal Reserve web page, which both (1) included issuers that did not file call reports with federal banking regulators; and (2) did not consolidate related entities. Even so, the results are broadly consistent with those reported here using a narrower sample.

As noted previously, the sample of issuers included in Table 5 are those issuers that included arbitration clauses as of both December 31, 2009, and December 31, 2010. If the sample instead is expanded to all issuers with arbitration clauses as of December 31, 2010, the choice of arbitration providers is as follows: AAA or JAMS (15 clauses, 81.7% of credit card loans outstanding); AAA, NAF, JAMS (2 clauses; 0.5%); AAA (21 clauses, 16.3%); AAA or NAF (1 clause, 0.0%); JAMS (2 clauses, 0.1%); JAMS or NAF (1 clause, 0.0%); JAMS or NAMS (1 clause, 0.0%); NAF (3 clauses, 0.1%); a national organization with significant experience in consumer and financial disputes (1 clause, 1.2%).

[184] Two small issuers incorporated the AAA rules into their arbitration clause but did not specify that the AAA itself as the provider. Although we classified these issuers as choosing the AAA, their arbitration clauses might be construed as not specifying any provider.

[185] The unavailability of the NAF raises serious questions about the enforceability of an arbitration agreement that lists only the NAF to administer the arbitration. Courts currently are split on whether the use of NAF is integral to the arbitration agreement such that its unavailability makes the arbitration clause as a whole unenforceable. *Compare* Jones v. GGNSC Pierre LLC, 684 F. Supp. 2d 1161, 1168 (D.S.D. 2010) ("Under all of the circumstances, the Court finds no reason to believe the specification of the NAF rules was integral to the Arbitration Agreement. Thus, the Court finds that Section 5 of the Federal Arbitration Act authorizes and requires the Court to appoint an arbitrator."); Levy v. Cain, Watters & Assocs., 2010 U.S. Dist. LEXIS 9537, at *12 (S.D. Ohio Jan. 15, 2010) (same); *and* Adler v. Dell Inc., 2009 U.S. Dist. LEXIS 112204, at *11 (E.D. Mich. Dec. 3, 2009) (same) *with* Ranzy

parties a choice between JAMS and National Arbitration and Mediation,[186] a less well known provider, and another clause (1 of 39, or 2.6%; 1.2% of credit card loans outstanding) specifies only that the provider shall be "a national arbitration organization with significant experience in financial and consumer disputes."[187]

The data illustrate how credit card issuers responded to the National Arbitration Forum's ceasing all administration of new consumer arbitrations during July 2009.[188] A number of large issuers (reflecting 47.6% of credit card loans outstanding and subject to arbitration in the sample) still specified the NAF as a possible provider in the credit card agreements they filed with the Federal Reserve as of December 31, 2009.[189] By December 31, 2010, all of those issuers (with the exception of one, very small issuer) had replaced the NAF with JAMS as an approved provider. Even a year and a half after the NAF ceased administering new consumer arbitrations, a surprising number of issuers continued to include the NAF in their arbitration clauses. When the NAF is listed as one of multiple providers, the risks of not updating the arbitration clause are limited because the other provider continues to available. The persistence of the NAF in some credit card arbitration agreements for at least a year and a half after it was no longer available suggests that the costs of updating all of the issuer's arbitration clauses would exceed the benefits.

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v. Tijerina, 2010 U.S. App. LEXIS 17872, at **4 (5th Cir. Aug. 25, 2010) (unpublished opinion) (holding that because "designation of NAF as the sole arbitration forum is an integral part of the arbitration agreement," "a federal court need not compel arbitration in a substitute forum if the designated forum becomes unavailable"); Carideo v. Dell, Inc., 2009 U.S. Dist. LEXIS 104600, at *18 (W.D. Wash. Oct. 26, 2009) (same); *and* Carr v. Gateway, Inc., 944 N.E.2d 327, 336-37 (Ill. 2011) (same).

[186] *See* National Arbitration & Mediation, http://www.namadr.com/ (last visited July 28, 2011).

[187] First National Bank of Omaha, Cardmember Agreement 11 (Dec. 31, 2010) (copy on file with authors).

[188] *See supra* text accompanying notes __-__.

[189] This figure understates the market share of NAF prior to the July 2009, as all four of the issuers (Bank of America, Capital One, Chase, and HSBC) that settled the antitrust claims against them by removing arbitration clauses from their credit card agreements for a period of years listed the National Arbitration Forum as a provider in their arbitration clauses before the Settlement. *See* First Amended Class Action Complaint ¶ 121, Ross, et al. v. Bank of America, N.A., (USA), No. 05-cv-7116 (S.D.N.Y. June 4, 2009), available at http://www.arbitration.ccfsettlement.com/documents/files/2009-06-04-1st-amended-complaint.pdf.

Table 5. Choice of Provider (2009 & 2010)				
	Contracts as of 12/31/09		Contracts as of 12/31/10	
Provider(s)	Number of Clauses	% of credit card loans outstanding	Number of Clauses	% of credit card loans outstanding
AAA or JAMS	8 (20.5%)	30.6%	13 (33.3%)	81.8%
AAA NAF JAMS	3 (7.7%)	0.5%	2 (5.1%)	0.5%
AAA	15 (38.5%)	20.3%	16 (41.0%)	16.3%
AAA or NAF	6 (15.4%)	47.6%	1 (2.6%)	0.0%
JAMS	1 (2.6%)	0.1%	2 (5.1%)	0.1%
JAMS or NAF	1 (2.6%)	0.0%	1 (2.6%)	0.0%
JAMS or NAMS*	1 (2.6%)	0.0%	1 (2.6%)	0.0%
NAF	4 (10.3%)	0.8%	2 (5.1%)	0.1%
Nat'l org. w/ significant experience in consumer & financial disputes			1 (2.6%)	1.2%

Finally, only one arbitration clause in the sample expressly referred to the Consumer Due Process Protocol — a set of privately developed standards of fairness used by the AAA in administering consumer arbitrations.[190] (None referred to the JAMS Minimum Standards of Procedural Fairness.[191]). That clause stated that:

> This Provision is Drafted with intent to provide a "fair" alternative to the judicial system and its risks. This is not drafted in the same anti-consumer fashion as many bank and financial entity provisions that have been attacked as burdensome and overzealous by "advocates" such as Remar Sutton. The terms have been prepared in general accord with the equitable principles set forth in the "Consumer Due Process Protocol" of the American Arbitration Association.[192]

[190] National Consumer Disputes Advisory Committee, Consumer Due Process Protocol (Apr. 17, 1998), *available at* http://adr.org/sp.asp?id=22019.

[191] *See* JAMS, Consumer Arbitration Policy: Minimum Standards of Procedural Fairness (July 15, 2009), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Stds-2009. Pdf [hereinafter JAMS, Minimum Standards of Procedural Fairness].

[192] South Carolina Federal Credit Union, Credit Card Agreement and Disclosures ¶ 34 (Sept. 30, 2010) (copy on file with authors).

To the extent the clauses choose the AAA or JAMS as a provider, any arbitrations under the clauses are subject to the Consumer Due Process Protocol or the JAMS Minimum Standards of Procedural Fairness regardless of whether the clause expressly incorporates those standards.[193] And, as the discussion that follows suggests, the substantial majority of the clauses we studied appear to comply with those standards.[194]

3. Delegation Clauses

In *Rent-A-Center, West, Inc. v. Jackson*, the Supreme Court held that parties can agree by contract to delegate to the arbitrators the exclusive authority to rule on unconscionability challenges to the arbitration clause.[195] The so-called "delegation clause" in *Rent-A-Center* provided that:

> The Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.[196]

In the absence of such a delegation clause, an unconscionability challenge to the arbitration clause would be one on which courts would have the final say.[197]

Commentators predicted that after *Rent-A-Center* businesses would likely revise their consumer and employment arbitration clauses to include delegation clauses.[198] If so, courts would lose their ability to police arbitration clauses on unconscionability grounds, unless the court first held the delegation clause unenforceable.[199] And to do so, challenges to that clause

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[193] *See* American Arbitration Association, Rules Updates, Consumer Arbitrations: Notice to Consumers and Businesses, *available at* http://www.adr.org/sp.asp?id=24714&printable=true (last visited July 28, 2011); JAMS, Minimum Standards of Procedural Fairness, *supra* note __, at 2 ("JAMS will administer arbitrations pursuant to mandatory pre-dispute arbitration clauses between companies and consumers only if the contract arbitration clause and specified applicable rules comply with the following minimum standards of fairness.").

[194] *Compare* Tables 7-9 *infra with* Drahozal & Zyontz, *supra* note __, at 18-22.

[195] 130 S. Ct. 2772, 2779 (2010).

[196] *Id.* at 2775.

[197] *Id.* at 2778.

[198] *See*, *e.g.*, Jean R. Sternlight, The Role of Courts in Interpreting and Enforcing Arbitration Clauses: A Process Viewed Through Two Different Lenses 4-5 (2011) (paper prepared for conference on "The Future of Arbitration" (Mar. 17 & 18, 2011)), available at http://www.law.gwu.edu/News/2010-2011Events/Documents/Sternlight%20Submission.pdf (stating that "[i]t seems quite likely that in light of *Rent-a-Center* many companies will now draft clauses largely delegating to the arbitrator the question of whether the arbitration clause is enforceable," but adding that "it would not be surprising to see companies draft clauses in the mandatory arbitration context that require *courts* to determine the availability of class claims, and whether a class action prohibition is unconscionable, but require *arbitrators* to decide all other issues pertaining to the validity of arbitration clauses").

[199] Courts since *Rent-A-Center* are split on whether delegation clauses in consumer and employment contracts are unconscionable. *See* Howard v. Rent-A-Center, Inc., 2010 U.S. Dist. LEXIS 76342, at *15 (E.D. Tenn. July 28, 2010) (holding that "allowing arbitrators [to] determine their own jurisdiction is neither contrary to public policy nor unconscionable"); Chin v. Advanced Fresh Concepts Franchise Corp., 194 Cal. App. 4th 704, 710-11 (Cal. App. 2011) (asserting that "[t]here is substantial authority that a delegation clause in an adhesion contract is unconscionable," but refusing to invalidate clause because franchisee "makes no colorable claim that any other

had to be directed specifically to that clause, not the contract as a whole or the arbitration clause as a whole.[200] Our data provide an early look at whether credit card issuers have revised their arbitration clauses to include delegation clauses.

None of the arbitration clauses in our sample included the sort of definitive language ("The Arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve ...") that is in the *Rent-A-Center* arbitration clause. That said, the majority of the clauses in the sample, both before and after *Rent-A-Center*, do state that the arbitrators have the authority to rule on the validity of the arbitration agreement, which courts treat as comparable to the language in *Rent-A-Center*.[201] So defined, as of December 31, 2010, twenty (of 39, or 51.3%) of clauses included a delegation clause; and 52.6% of credit card loans outstanding in the sample were subject to a delegation clause.[202]

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provision of the arbitration provision is unconscionable"); *see also* Ontiveros v. DHL Express (USA), Inc., 79 Cal. Rptr. 3d 471, 480-81 (Cal. App. 2008) (holding that "the provision in the arbitration agreement giving the arbitrator exclusive authority to decide enforceability issues is unconscionable and, therefore, unenforceable," because when "one party tends to be a repeat player, the arbitrator has a unique self-interest in deciding that a dispute is arbitrable"), cert. denied, 129 S. Ct. 1048 (2009); Murphy v. Check 'N Go of California, Inc., 67 Cal. Rptr. 3d 120, 125 (Cal. App. 2007) ("[I]n this contract of adhesion, the provision for arbitrator determinations of unconscionability is unenforceable. Under the circumstances of this case, the judge is the proper gatekeeper to determine unconscionability.").

[200] The one exception is for the issue of whether the parties assented to the arbitration agreement. *See Rent-A-Center*, 130 S. Ct. at 2782 n.2 ("The issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded,' and, as in *Buckeye Check Cashing, Inc.* v. *Cardegna*, 546 U.S. 440 (2006), we address only the former.").

[201] Because none of the delegation clauses in our sample are as definitively worded as the clause in *Rent-A-Center*, our classifications of those clauses are broad ones. A court that construed these clauses narrowly might find that they did not fall under the holding in *Rent-A-Center.* To date, however, most courts construe language such as that in the clauses we studied as falling under *Rent-A-Center*, and we follow those decisions in our coding. *See*, *e.g.*, Momot v. Mastro, 2011 U.S. App. LEXIS 12602, at *14-*15 (9th Cir. June 22, 2011) (language in arbitration agreement providing that parties agree to arbitrate any dispute that "'arises out of or relates to ... the validity or application of any of the provisions of this Section 4' ... constitutes 'an agreement to arbitrate threshold issues concerning the arbitration agreement'" under *Rent-A-Center*).

[202] In reporting the use of delegation clauses in credit card arbitration agreements as of December 31, 2009, Drahozal and Rutledge, *Contract and Procedure*, *supra* note __, at ___ Table 2, used a broader sample of issuers from the Federal Reserve web page, which both (1) included issuers that did not file call reports with federal banking regulators; and (2) did not consolidate related entities. Even so, the results are broadly consistent with those reported here.

As noted previously, the sample of issuers included in Table 6 are those issuers that included arbitration clauses as of both December 31, 2009, and December 31, 2010. If the sample instead is expanded to all issuers with arbitration clauses as of December 31, 2010, the use of delegation clauses is as follows: anti-delegation (4 of 47 (8.5%) clauses; 29.1% of credit card loans outstanding); class exception (15 of 47 (31.9%) clauses; 12.8% of credit card loans outstanding); delegation (24 of 47 (51.1%) clauses; 52.7% of credit card loans outstanding); and none (4 of 47 (8.5%) clauses, 5.4% of credit card loans outstanding).

Table 6. Delegation Clauses (2009 & 2010)				
	Contracts as of 12/31/09		Contracts as of 12/31/10	
Type of Clause	Number of Clauses	% of credit card loans outstanding	Number of Clauses	% of credit card loans outstanding
Anti-Delegation	3 (7.7%)	12.5%	4 (10.3%)	29.2%
Class Exception	11 (38.2%)	26.5%	12 (30.8%)	12.8%
Delegation	22 (56.4%)	60.8%	20 (51.3%)	52.6%
None	3 (7.7%)	0.2%	3 (7.7%)	5.4%

Although not as common as delegation clauses, twelve (of 39, or 30.8%; 12.8% of credit card loans outstanding) arbitration clauses included a delegation clause that excludes issues of class arbitration from the scope of the clause. In other words, the clauses provided that arbitrators are to decide issues of the validity of the arbitration clause, except for issues related to class arbitration, which are to be decided by courts. Such clauses likely reflect an attempt to avoid the empirical reality that (at least prior to the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l*[203]) AAA arbitrators almost unanimously construed arbitration clauses as permitting class arbitration, even though almost no clauses expressly permit arbitration on a class basis.[204]

Four issuers (of 39, or 10.3%; but 29.2% of credit card loans outstanding) used an "anti-delegation clause" — expressly providing that the validity of the arbitration agreement shall be resolved only in court and not in arbitration. Finally, three of the clauses included no provision on point. But all three issuers did incorporate provider rules, which themselves include language giving arbitrators authority to rule on the validity of the arbitration clause, into their arbitration clauses. Given that most courts construe such provider rules as falling under *Rent-A-Center*,[205] these clauses effectively include delegation clauses, although not by express language.[206]

Interestingly, though, the use of delegation clauses declined slightly and the use of anti-delegation clauses actually increased after *Rent-A-Center*. Between 2009 and 2010, two issuers added a class exception to their arbitration clauses, and one (relatively large) issuer replaced its

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[203] 130 S. Ct. 1758 (2010)

[204] Drahozal & Rutledge, *Contract and Procedure*, *supra* note __, at __ (noting in addition that AAA arbitrators continue to construe arbitration clauses to permit class arbitration, although at a lower rate than before *Stolt-Nielsen*).

[205] *See, e.g.*, Contec Corp. v. Remote Solution Co., 398 F.3d 205, 208 (2d Cir. 2005); Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1331–32 (11th Cir. 2005); FSC Secs. Corp. v. Freel, 14 F.3d 1310, 1312–13 (8th Cir. 1994); Apollo Computer, Inc. v. Berg, 886 F.2d 469, 472–73 (1st Cir. 1989). *But see* RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 5-10 cmt. e & reporter's note e (Tentative Draft No. 1, 2010).

[206] For the other arbitration clauses in our sample, the language in the clauses (including anti-delegation and class exception clauses) will control over the language in the provider rules.

class exception with an anti-delegation clause.[207] No issuers in our sample added delegation clauses to their arbitration clauses after *Rent-A-Center*.

Again, these results are early ones. The Supreme Court issued the *Rent-A-Center* decision on June 21, 2010, just over six months prior to December 31, 2010 filings we consider in this study. Given the slow speed of issuer response to the NAF's demise as a provider of consumer arbitration services,[208] it is too early to conclude that credit card issuers will not respond to *Rent-A-Center* by including delegation clauses in their arbitration clauses. So far, however, we find no such trend.

4. Minimum Recovery Provisions

The arbitration clause in *AT&T Mobility v. Concepcion* provided that a consumer who recovered more in arbitration than AT&T's last settlement offer would recover a minimum of $7500 and double attorney's fees.[209] The district court in that case found that "[b]ecause the arbitration provision provides sufficient incentive for individual consumers with disputes involving small damages to pursue (a) the informal claims process to redress their grievances, and (b) arbitration in the event of an unresolved claim, the subject provision is an adequate substitute for class arbitration."[210] The Supreme Court likewise referred to the provision in its opinion, characterizing the district court as finding that "the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action."[211]

[207] One issuer revised its credit card agreement in 2010 to collect all of the definitions in one section at the beginning of the agreement. As a result, it moved the definition of "claim" from the paragraph entitled "Arbitration" to a paragraph entitled "Definitions." The relevant language of the definition of "claim" — which included "the validity, enforceability or scope of this provision" — remained the same in the two agreements. But because of the location of the clause, instead of "this provision" referring to the arbitration clause (and hence making the provision a delegation clause), it now refers to the definitions section of the agreement (arguably making the provision no longer a delegation clause). Compare Fifth Third Bank, Select Card Alliance Agreement 1 (Dec. 31, 2010) (copy on file with authors) *with* Fifth Third Bank, Card Agreement for MasterCard® and Visa® ¶ 25 (Dec. 31, 2009) (copy on file with authors). In coding the provision, we took the view that the reorganization of the agreement likely was not intended to make a substantive change in the terms of the arbitration clause, and so coded it as including a delegation clause in both 2009 and 2010.

[208] *See supra* text accompanying notes __-__.

[209] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

[210] Laster v. T-Mobile USA, Inc., 2008 U.S. Dist. LEXIS 103712, at *38 (S.D. Cal. Aug. 11, 2008), *aff'd sub. nom.,* Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), *rev'd sub. nom.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

[211] 131 S. Ct. at 1753.

Only one clause in our sample (which predated the Supreme Court's decision in *Concepcion*) included a similar provision. The arbitration clause in the World Financial Network National Bank (WFNNB) credit card agreement provided for a "special payment" to a prevailing cardholder as follows:

> **14. Special Payment:** If (1) you submit a Claim Notice in accordance with Paragraph 30.B. on your own behalf (and not on behalf of any other party); (2) we refuse to provide you with the relief you request; and (3) an arbitrator subsequently determines that you were entitled to such relief (or greater relief), the arbitrator shall award you at least $5,100 (plus any fees and costs to which you are entitled).[212]

Although the amount of the "special payment" is less than that in the AT&T Mobility clause, the structure of the clause is the same: if the cardholder asserts a claim that the issuer does not pay, and the cardholder then recovers in arbitration at least as much as the amount claimed, the issuer will make a minimum payment that might exceed the cardholder's actual damages.[213] It remains to be seen whether additional issuers will incorporate such a clause into their arbitration agreement after *Concepcion*; our data are not able to answer that question.

5. "Unfair" Provisions

Courts and commentators have identified an array of provisions in arbitration clauses as "unfair" to consumers and employees.[214] This section examines the use of some of those provisions in credit card agreements.[215] The short answer is that, with the exception of class arbitration waivers, most of these types of provisions are rare or nonexistent in credit card agreements.

Table 7 lists a number of the types of provisions identified by courts and commentators as unfair or at least potentially unfair: clauses resulting in biased decision makers; class

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[212] *E.g.*, World Financial Network National Bank, Trek Bikes Credit Card Agreement ¶ 30.C.14 (Dec. 31, 2010) (copy on file with authors).

[213] We discuss the legal significance of this type of provision *infra* Part __.

[214] *See*, *e.g.*, Michael G. McGuinness & Adam J. Karr, *California's "Unique" Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61, 87-89 (listing types of provisions held unconscionable by California courts); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 638 (1996) ("The arbitration clauses are crucial in that they not only bar judicial relief but also may allow companies to select the arbitrators, set the arbitration in a location convenient for the company but not for the little guy, exclude certain recoveries such as punitive damages, shorten the statute of limitations, deny discovery and other procedural protections, and eliminate virtually any right of appeal."). *But see* Drahozal, *"Unfair" Arbitration Clauses*, *supra* note __, at 756-64 (arguing that "unfair" provisions might make consumers and employees better off, or at least are not unambiguously unfair).

[215] Some provisions alleged to be unfair (e.g., delegation clauses and exclusions from arbitration) have already been discussed. *See supra* text accompanying notes __-__. Others (e.g., provisions allocating arbitration costs and providing for arbitral appeals panels) are addressed in subsequent sections. *See infra* text accompanying notes __-__.

arbitration waivers; remedy limitations (such as waivers of punitive damages); shortened time limits for filing claims; distant hearing locations; limits on discovery; provisions precluding the cardholder from disclosing the existence of a dispute; and provisions denying a right to counsel or an in-person hearing. The list includes many if not most of the provisions most frequently challenged as unconscionable; those not included (e.g., provisions setting up a nonmutual arbitral appeals process and provisions dealing with arbitral costs) are excluded from this table only because of the greater variety of approaches reflected in such clauses (but "unfair" variations of those provisions are nonetheless rare[216]).

Table 7. Selected "Unfair" Provisions (2010)

Type of Provision	Number of Clauses	% of credit card loans outstanding
Biased arbitrator selection mechanism	0 (0.0%)	0.0%
Biasing arbitrator qualifications	0 (0.0%)	0.0%
Class arbitration waiver	44 (93.6%)	99.9%
Remedy limitations	3 (6.4%)	1.2%
Time limits for filing claims	2 (4.3%)	0.0%
Potentially distant location for hearing	2 (4.3%)	0.1%
Discovery limits	1 (2.1%)	0.2%
Denies right to counsel	0 (0.0%)	0.0%
Nondisclosure provision	1 (2.1%)	5.7%
Lack of in-person hearing	2 (4.3%)	0.0%

The only type of provision in this list of "unfair" provisions that is common in credit card agreements is a class arbitration wavier, the provision at issue in *Concepcion*. Of the arbitration clauses in the sample, 44 or 47 (or 93.6%) and covering 99.9% of the credit card loans outstanding waived any right to class arbitration. Because arbitration clauses themselves preclude a party from being a member of a class action in court,[217] the vast majority of arbitration clauses in the sample would preclude cardholders from obtaining class relief.

216 *See infra* text accompanying notes __-__.
217 *See supra* text accompanying notes __-__.

By comparison, as already stated, the other types of "unfair" provisions in the list almost never appear in the arbitration clauses in the sample. None of the clauses in the sample contained a biased arbitrator selection mechanism, specified biasing arbitrator qualifications, or denied the right to counsel. Only three clauses (of 47, or 6.4% of clauses; 1.2% of credit card loans outstanding) included a limitation on the award of punitive damages). Only one clause included a nondisclosure provision, although it covered 5.7% of credit card loans outstanding. The other provisions listed in Table 7 – time limits for filing claims, potentially distant hearing locations, limits on available discovery, and restrictions on the availability of an in-person hearing — all are included in at most two clauses and apply to no more than 0.2% of credit card loans outstanding in the sample.

A few other points worth noting about provisions dealing with issues related to those listed in Table 7:

- Twenty-five of the clauses (of 47, or 53.2%; 44.4% of credit card loans outstanding) contained no provision requiring particular qualifications for arbitrators. Of the 22 clauses that did set out some sort of required qualifications: one (of 47, or 2.1%; 0.0% of credit card loans outstanding) required expertise in the subject matter of the dispute; one (of 47, or 2.1%; 1.2% of credit card loans outstanding) required that the arbitrator be a retired federal judge if a party so requests; while the remaining 20 (of 47, or 42.6%; 54.4% of credit card loans outstanding) required that the arbitrator be either a lawyer (with varying degrees of experience) or a retired judge or (one clause provided that "registered arbitrator" was an option as well).

- Although the substantial majority of arbitration clauses included class arbitration waivers, two (of 47, or 4.3%; 0.1% of credit card loans outstanding) contained no provision on the issue and one (of 47, or 2.1%; 0.0% of credit card loans outstanding) was silent on class arbitration while expressly authorizing consolidation of related claims.

- Slightly under half of the clauses (21 of 47, or 44.7%) from issuers with slightly more than half the market share (53.6%) contained an "anti-severability provision." Such clauses provide that if a court invalidates the class arbitration waiver, the invalid waiver should not be severed from the rest of the arbitration clause, with the result that the entire arbitration clause is unenforceable and the case proceeds as a class action in court.[218]

- Two clauses (of 47, or 4.3%; 6.6% of credit card loans outstanding) provided by contract that constitutional restrictions on the award of punitive damages, which courts have held are not otherwise applicable to arbitration awards, would apply.[219]

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[218] *Class Actions in Arbitration—An Idea Whose Time Should Pass*, METRO. CORP. COUNSEL, Apr. 2006, at 25 (interview with Lewis Goldfarb); *see also* Patrick E. Gaas, *The Evolving Unpredictability of Class Arbitration*, FOR THE DEFENSE, June 2005, at 37, 39 ("[C]lass arbitration may be worse for the corporate defendant than class action litigation.").

[219] *E.g.*, MedValUSA Health Programs, Inc. v. Memberworks, Inc., 872 A.2d 423, 429 (Conn.), cert. denied, 546 U.S. 960 (2005); Hadelman v. DeLuca, 876 A.2d 1136, 1138-39 (Conn. 2005).

- Ten clauses (of 47, or 21.3%; 40.0% of credit card loans outstanding) provided that the arbitrator had the authority to award all remedies available under applicable law, and another five (of 47, or 10.6%; 6.4% of credit card loans outstanding) specified that all remedies that were available in court would also be available in arbitration. In one respect, those provisions might be seen as limitations on remedies that otherwise could be available in arbitration, because courts have held that arbitrators are not limited in fashioning remedies to the remedies courts can award.[220] On the other hand, given that arbitration clauses have been criticized as denying consumers remedies that would be available to them in court,[221] these provisions also might be seen as designed to protect the rights of cardholders by ensuring that the same remedies are available in arbitration as in court.

- Of the clauses in the sample, seven (of 47, or 14.9%; 40.1% of credit card loans outstanding) expressly provided that parties can be represented by counsel in arbitration; the rest of the clauses did not address the issue.

- Six clauses (of 47, or 12.8%; 52.2%% of credit card loans outstanding) expressly authorized the arbitrator to protect the confidentiality of customer information upon request.

6. Arbitration Costs

Because arbitration is private rather than public dispute resolution, parties to the arbitration proceeding must pay the full cost of the process.[222] Typically, when a party files a claim in arbitration, it must pay at least some of the administrative fees upfront and also put down a deposit to cover expected arbitrator's fees.[223] For larger claims, these upfront costs can exceed the costs of filing a comparable case in court. For smaller claims, both the AAA and JAMS cap the costs to consumers and provide for fee waivers in the event of hardship.[224] Nonetheless, a number of court decisions have invalidated arbitration agreements on the ground that they imposed excessive costs on consumers.[225]

Almost all of the arbitration clauses in our sample selected either the AAA or JAMS as the arbitration provider.[226] Arbitrations under those clauses are subject to the provider's cost schedule and rules governing costs, which thus provide the backdrop against which the more detailed provisions in the clauses are operating. Beyond those basics, most of the arbitration

[220] *See, e.g.*, Advanced Micro Devices, Inc. v. Intel Corp., 885 P.2d 994, 1001-02 (Cal. 1994).

[221] *E.g.*, Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 344-45 ("Commercial arbitration, at least as it is practiced in America, is a method of dispute resolution, but not necessarily a method of enforcing legal rights").

[222] By comparison, the public court system is subsidized by the taxpayers, so that parties do not bear anywhere near the full cost of the process. *See*, *e.g.*, Stephen J. Ware, *The Case Against Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 285 (2006).

[223] Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 737-39 (2006).

[224] *Id.* at 740-42; *see, e.g.*, JAMS, Minimum Standards of Procedural Fairness, *supra* note __, ¶ 7.

[225] Drahozal, *Arbitration Costs and Contingent Fee Contracts*, *supra* note __, at 752-57.

[226] *See supra* text accompanying notes __-__.

clauses in our sample address arbitration costs to some degree,[227] but the details of the provisions vary, as can be seen in Table 8.[228]

Only one clause in the sample (of 47, or 2.1%; 0.1% of credit card loans outstanding) went as far as the clause in *Concepcion* and provided that the issuer pays all arbitration fees. Another (1 of 47, or 2.1%; 5.9% of credit card loans outstanding) provided that the issuer would pay all fees when the cardholder makes a good faith request for assistance.[229] At the other end of the spectrum, none of the clauses in the sample required the cardholder and issuer to share costs equally. In its internal review of arbitration clauses for compliance with the Consumer Due Process Protocol, the AAA requires businesses to waive such cost-sharing provisions before it will administer consumer arbitrations seeking $75,000 or less, presumably because such provisions would impose higher costs on consumers than provided under the AAA's consumer arbitration fee structure.[230]

A handful of clauses capped the fees for which the cardholder is responsible — at a fixed dollar amount (3 of 47, or 6.4% of clauses; 1.4% of credit card loans outstanding); at the amount of court filing fees (1 of 47, or 2.1% of clauses; 13.4% of credit card loans outstanding); or for small claims (2 of 47, or 4.3% of clauses; 0.2% of credit card loans outstanding). A number of clauses addressed the circumstances under which the issuer would advance the upfront filing and arbitrators fees on behalf of a cardholder. (Fourteen (of 47, or 29.8%; 7.2% of credit card loans outstanding) contained no provision on point.) Again, the details varied widely, with the most common clauses providing that the issuer would advance arbitration fees for good cause (8 of 47, or 17.0%; 60.2% of credit card loans outstanding); would consider advancing the fees in good faith (4 of 47, or 8.5%; 13.5% of credit card loans outstanding); or simply would consider advancing the fees (10 of 47, or 21.3%; 4.1% of credit card loans outstanding). Finally, just under half the clauses (20 of 47, or 42.6%; 45.7% of credit card loans outstanding) dealt with how costs would be allocated at the end of the case, with the most common such provision stating that the issuer will reimburse the cardholder for his or her arbitration fees if the cardholder prevails or for good cause (3 of 47, or 6.4% of clauses; 38.8% of credit card loans outstanding).

[227] Five clauses (of 47, or 10.6%; 0.1% of credit card loans outstanding) contained no provision on arbitration costs, and one clause (of 47, or 2.1%; 5.7% of credit card loans outstanding) stated that costs were addressed in the provider rules.

[228] In addition, every credit card agreement in the sample but one (46 of 47, or 97.9%; 98.8% of credit card loans outstanding) permitted the issuer to recover its costs, typically including attorneys' fees, for it bringing a collection action to recover a past due debt. Such provisions typically are not found in the arbitration clause, and, indeed, are found in credit card agreements that do not have arbitration clauses as well.

[229] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011). Four clauses in the sample (of 47, or 8.5%; 38.7% of credit card loans outstanding) provided for the issuer to pay for one hearing day, while one clause (of 47, or 2.1%; 0.0% of credit card loans outstanding) provided for the issuer to pay for two hearing days.

[230] Drahozal & Zyontz, *supra* note __, at 20-21.

Table 8. Arbitration Costs Provisions (2010)		
Type of Provision	Number of Clauses	% of credit card loans outstanding
CAP ON ARBITRATION FEES?		
Issuer pays fees	1 (2.1%)	0.0%
Issuer pays fees on good faith request	1 (2.1%)	5.9%
Capped at court fees	1 (2.1%)	13.4%
Capped at $50/$125	3 (6.4%)	1.4%
Capped for small claims	2 (4.3%)	0.2%
No provision	39 (83.0%)	79.0%
TOTAL	47 (100.0%)	100.0%
WILL ISSUER ADVANCE FEES?		
Issuer pays fees	1 (2.1%)	0.0%
Issuer pays fees on good faith request	1 (2.1%)	5.9%
Will advance on request	2(4.3%)	6.0%
Will advance on request (capped at $250/$500)	3(6.4%)	0.7%
Will advance for good cause	8 (17.0%)	60.2%
Will advance if consumer pays amount of court filing fees (capped at $325/$500)	3(6.4%)	0.7%
Will consider advancing fees in good faith	4 (8.5%)	13.5%
Will consider advancing fees	10 (21.3%)	4.1%
Will pay if necessary for clause to be enforced[231]	1 (2.1%)	1.8%
No provision	14 (29.8%)	7.2%
TOTAL	47 (100.0%)	100.0%
HOW ARE FEES ALLOCATED AT END OF CASE?		
Loser pays	2 (4.3%)	0.0%
Costs allocated in award	4 (8.5%)	0.3%
Cardholder need not reimburse issuer above amount of court filing fees	1 (2.1%)	0.0%
Issuer will not seek to recover costs or fees	2 (4.3%)	0.1%
Issuer will reimburse up to $500	1 (2.1%)	0.0%
Issuer will reimburse up to $350 (or more if good cause)	1 (2.1%)	1.2%
Issuer will reimburse if cardholder prevails	2 (4.3%)	0.0%
Issuer will reimburse if cardholder prevails or good cause	3 (6.4%)	38.8%
Issuer will reimburse if cardholder prevails or in other specified circumstances	4 (8.5%)	5.3%
No provision	27 (57.4%)	54.3%
TOTALS	47 (100.0%)	100.0%

[231] One other clause provided that the issuer would pay if necessary for the arbitration clause to be enforced, but also stated that the issuer would pay if the cardholder made a good faith request. The latter provision is the basis for its classification in Table 8.

Provisions specifying the number of arbitrators also can affect the cost of the arbitration proceeding: three arbitrators will almost certainly cost more than one. Accordingly, in applying the Consumer Due Process Protocol, the AAA requires businesses to waive any contract provision requiring three arbitrators before it will administer consumer arbitrations seeking $75,000 or less.[232]

In our sample, none of the arbitration agreements imposed an across-the-board requirement that the parties use a three-arbitrator panel to decide the case. Sixteen agreements (of 47, or 34.0%; 57.9% of credit card loans outstanding) provided expressly for a single arbitrator, and twenty more (of 47, or 42.6%; 21.0% of credit card loans outstanding) seemed to do so implicitly by always referring to "the arbitrator" in the singular. By comparison, one clause provided that any dispute will be resolved by "one or more" arbitrators, and three clauses refer to the "arbitrator(s)," leaving open the possibility that more than one arbitrator would be chosen but not requiring it. One clause (of 47, or 2.1%; 0.2% of credit card loans outstanding) provided for a single arbitrator unless the claim is larger than $250,000, while three (of 47, or 6.4%; 13.4% of credit card loans outstanding) provided for three arbitrators only if the arbitration provider specified in the contract is unavailable, otherwise leaving the decision to the provider and its rules.

Table 9. Provisions Specifying Number of Arbitrators (2010)

	Number of Clauses	% of credit card loans outstanding
Single arbitrator	16 (34.0%)	57.9%
"The arbitrator"	20 (42.6%)	21.0%
One or more	1 (2.1%)	1.2%
"Arbitrator(s)"	3 (6.4%)	6.2%
Single arbitrator unless claim larger than $250,000	1 (2.1%)	0.2%
Specifies number only if provider unavailable	3 (6.4%)	13.4%
No provision	3 (6.4%)	0.1%

7. Appeals and Court Review

As noted above, a common characteristic of arbitration is that court review of awards is limited.[233] However, parties can set up an arbitral appeals process if they wish, appointing a

[232] *Id.* at 21.
[233] *See supra* text accompanying notes __-__.

panel of arbitrators to review the decision of the initial decision maker.[234] In consumer and employment cases, some courts have found provisions establishing arbitral appeals panels to be unconscionable when they are one-sided — i.e., structured so that only the business is likely to be able to appeal (such as by limiting appeals to cases in which an award exceeds a threshold dollar amount).[235]

Just under half of the arbitration clauses in the sample established an arbitral appeals process. Of the forty-seven clauses in the sample, twenty-four (51.1%; 23.9% of credit card loans outstanding) did not set up an arbitral appeals process (although of course the FAA Section 10 grounds for vacating awards remain available). Two of the clauses (4.3%; 0.1% of credit card loans outstanding) provided for an appeal if a right to appeal is available under the FAA, again, presumably adding nothing to the usual FAA grounds. But the remaining twenty-one clauses — 44.7% of the clauses but covering 76.0% of credit card loans outstanding — authorized an appeal to an arbitral appeals panel.

The triggering event for the availability of an appeal varied, as can be seen in Table 10. Nine clauses (of 47 or 19.1%; 57.4% of credit card loans outstanding) permitted an appeal upon request, making the right to appeal available to both issuers and consumers. Seven clauses (of 47, or 14.9%; 18.5% of credit card loans outstanding) permitted an appeal when the amount claimed exceeded a specified threshold (either $50,000 or $100,000). Given the added expense of an appeal, limiting its availability to higher stakes claims seems to make sense. And setting the threshold as based on the amount claimed permits either consumers (who might make claims exceeding the threshold) or issuers (who might be subject to claims exceeding the threshold) to appeal. By contrast, five clauses (of 47, or 10.6%) from small issuers (with 0.2% of credit card loans outstanding) specified the threshold (either $100,000 or $200,000) based on the amount awarded rather than the amount claimed. These provisions, while relatively rare, are potentially problematic under the cases cited above[236] because consumers are relatively less likely than businesses to be subject to such high stakes awards.

Interestingly, the arbitration clauses studied included a varying degree of provisions that might affect the scope of court review. In *Hall Street Associates, LLC v. Mattel, Inc.*, the

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[234] For example, JAMS has an optional appeals process in its arbitration rules, although parties must opt in to the process by agreement. *See* JAMS Optional Arbitration Appeal Procedure (June 2003), *available at* http://www.jamsadr.com/rules-optional-appeal-procedure/.

[235] *See* Little v. Auto Stiegler, Inc., 63 P.3d 979, 985 (Cal.) (holding unconscionable provision limiting arbitral appeals to awards exceeding $50,000), *cert. denied*, 540 U.S. 818 (2003):

> From a plaintiff's perspective, the decision to resort to arbitral appeal would be made not according to the amount of the arbitration award but the potential value of the arbitration claim compared to the costs of the appeal. If the plaintiff and his or her attorney estimate that the potential value of the claim is substantial, and the arbitrator rules that the plaintiff takes nothing because of its erroneous understanding of a point of law, then it is rational for the plaintiff to appeal. Thus, the $50,000 threshold inordinately benefits defendants.

See also Gibson v. Nye Frontier Ford, Inc., 205 P.3d 1091, 1098 (Alaska 2009) (same); Saika v. Gold, 56 Cal. Rptr. 2d 922, 927 (Cal. App. 1996) (holding that provision limiting arbitral appeals to awards exceeding $25,000 violates public policy). *Compare* Monex Deposit Co. v. Gilliam, 671 F. Supp. 2d 1137, 1146 (C.D. Cal. 2009) (rejecting unconscionability challenge to three-member arbitral appeals panel when review permitted for all awards); Marshall v. John Hine Pontiac, 287 F. Supp. 2d 1229, 1232-33 (S.D. Cal. 2003) (same).

[236] *See supra* text accompanying notes __-__.

Supreme Court held that parties cannot expand the scope of federal court review by contract, refusing to enforce a provision in the arbitration agreement stating that: "The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."[237]

Table 10. Provisions Establishing an Arbitral Appeals Panel (2010)		
	Number of Clauses	% of credit card loans outstanding
Upon request	9 (19.1%)	57.4%
Claim over $50,000	2 (4.3%)	1.8%
Claim over $100,000	5 (10.6%)	16.7%
Award over $100,000	4 (8.5%)	0.1%
Award over $200,000	1 (2.1%)	0.0%
If right to appeal under FAA	2 (4.3%)	0.1%
No provision	24 (51.1%)	23.9%

One clause in the sample might run afoul of *Hall Street*. The USAA Bank Credit Card Arbitration Addendum (1 of 47, or 2.1%; 4.9% of credit card loans outstanding) provided that:

> The arbitrator's decision ... may be judicially reviewed on all grounds set forth in 9 U.S.C. § 10, as well as on the grounds that the decision is manifestly inconsistent with the terms of the Agreement or any applicable laws or regulations.[238]

The standard of review echoes the "manifest disregard of the law" vacatur ground, which is of uncertain validity under the FAA.[239] If manifest disregard review is no longer available, this provision would have the same flaw as the one in *Hall Street*: it would specify a vacatur ground not listed in Section 10 of the FAA.[240] If manifest disregard continues to be available, the provision would be superfluous.

Other clauses might affect the scope of court review indirectly, by requiring the arbitrator to follow the law or to make decisions supported by substantial evidence. Both the California Supreme Court and the Texas Supreme Court have construed such provisions as limitations on the arbitrators' authority, and held that courts can vacate an award for excess of authority when

[237] 552 U.S. 576, 579 (2008).

[238] USAA Credit Card Agreement Arbitration Addendum ¶ A.14 (Dec. 31, 2010) (copy on file with authors).

[239] *See supra* note __.

[240] The provision might still have effect if the vacatur action is brought in state court instead of in federal court. *See infra* text accompanying notes __-__.

arbitrators fail to comply with those provisions (i.e., make an error of law or decide without substantial evidence support).[241] By contrast, some federal courts have rejected this mechanism for obtaining court review of arbitral awards as an attempt to evade *Hall Street*,[242] even though its use long pre-dates that case.[243] Alternatively, rather than attempts to expand the scope of court review, these sorts of clauses might be attempts to ensure that arbitrators do not ignore the law or facts in their decisions (or to reassure cardholders and courts that substantive legal rights remain available in arbitration).

In our sample, the substantial majority of clauses (37 of 45, or 74.5%; 94.0% of credit card loans outstanding) contained some requirement that the arbitrators follow the substantive law in making their awards. The verbal formulations varied slightly (*e.g.*, "must apply"; "must follow"; "shall follow"; "shall resolve"; "will apply"; "will render"), but the substance of the provisions appears to be identical. By comparison, arbitration clauses providing that the arbitrators were bound by the facts or were required to have substantial evidence for their decisions were much rarer. Only three clauses (of 47, or 6.4% of clauses in the sample, and 0.1% of credit card loans outstanding) provided that the arbitrators were bound by the facts, and two more (of 47, or 4.3%; 0.0% of credit card loans outstanding) required the award to be supported by substantial evidence. At bottom, clauses requiring the arbitrators to follow the law are common in the sample, while clauses addressing the facts are uncommon.

C. Arbitration Clauses in Business Credit Card and Deposit Account Agreements

A study by Eisenberg, Miller, and Sherwin compared the use of arbitration clauses in business-to-consumer contracts to the use of arbitration clauses in business-to-business contracts, finding that while commonly providing for arbitration in their consumer contracts, businesses showed "a clear preference for litigation over arbitration in their business-to-business contracts."[244] The difference between the two groups of contracts was substantial, with 76.9% of consumer contracts including arbitration clauses and only 23.7% of business contracts from the same companies including arbitration clauses.[245]

A limitation of their study, however, is that it compared very different types of contracts: consumer cell phone and financial services (e.g., credit card) contracts with business transactional (e.g., merger and financing) contracts.[246] Indeed, because their sample consisted of contracts filed as attachments to SEC filings, by definition (i.e., as defined by SEC regulations dictating when such contracts must be filed[247]), the contracts in the sample were ones that were

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[241] Cable Connection, Inc. v. DirecTV, Inc., 190 P.3d 586, 606 (Cal. 2008); Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84, 97 (Tex. 2011).

[242] *See* Wood v. Penntex Res. LP, 2008 U.S. Dist. LEXIS 50071, at *20–21 (S.D. Tex. June 27, 2008) ("This reading would impermissibly circumvent *Hall Street*.").

[243] *See* Christopher R. Drahozal, *Contracting Around* Hall Street, 14 LEWIS & CLARK L. REV. 905, 912-16 (2010).

[244] Eisenberg, Miller, & Sherwin, *supra* note __, at 876.

[245] *Id.* at 883 Table 2.

[246] Some of the business contracts included in their sample, such as licensing agreements, included arbitration clauses at a higher rate. *Id.* at 878.

[247] Christopher R. Drahozal & Stephen J. Ware, *Why Do Business Use (and Not Use) Arbitration Clauses?*, 25

out of the ordinary course of business for the companies, the sorts of contracts one would least expect to include arbitration clauses.[248]

In this section, we undertake a different comparison between consumer and business contracts, one that avoids this limitation of the Eisenberg, Miller, and Sherwin study but one that has its own limitations. Here, we compare the use of arbitration clauses in consumer credit card agreements (as described above) and consumer deposit account agreements with the use of arbitration clauses in business credit card and deposit account agreements. As such, we compare comparable (in many cases identical) contracts entered into by consumers and businesses, avoiding the limitation of the Eisenberg, Miller, and Sherwin study.

But our approach has its own limitations. First, unlike for consumer credit card agreements,[249] no statute requires issuers to make business credit card and deposit account agreements available online. Some do, but many do not. Accordingly, our sample is both limited in size and non-random. Second, the business credit card agreements we studied are between issuers and "small businesses," not large businesses. The same may also be true for the deposit account agreements we studied, although it is less obviously so. None of the agreements is individually negotiated, however; they are all form contracts. Of course, the definition of small business varies widely, with businesses of annual revenues up to at least $25 million included at the upper end of the spectrum.[250] But, even so, we do not compare businesses of identical or even similar bargaining power. Third, we do not know to what extent businesses are able to negotiate changes to the terms of the standard credit card and deposit account agreements we are studying. Similarly, we do not know whether, if the agreements permit cardholders to opt out of the arbitration clause, businesses cardholders are more likely to opt out than consumer cardholders. But for either reason it may be that the provisions we are observing are not the provisions of the actual contracts entered into between business and issuers. Subject to these limitations, our results follow.

OHIO ST. J. ON DISP. RESOL. 433, 458-59 (2010).

[248] *Id.* at 463-67.

[249] *See supra* text accompanying notes __-__.

[250] *See* Board of Governors of the Federal Reserve System, Report to the Congress on the Use of Credit Cards by Small Businesses and the Credit Card Market for Small Businesses 16 (May 2010), *available at* http://www.federalreserve.gov/newsevents/conferences/sbc_smallbusinesscredit.pdf ("Each issuer that Board staff spoke with had a unique definition of the term 'small business.' Definitions were based on annual revenue and the number of employees. The maximum revenue to be considered a small business ranged from $5 million to $20 million, and the employee limit ranged from 10 to 100."); Susan Herbst-Murphy, Getting Down to Business: Commercial Cards in Business-to-Business Payments 11 (Mar. 2011), *available at* http://www.philadelphiafed.org/payment-cards-center/publications/discussion-papers/2011/D-2011-Commercial-Cards.pdf ("There is no universally accepted definition of small business.... MasterCard's website defines small businesses as those with less than $10 million in revenues, while Visa's site indicates a higher threshold of $25 million. Bank issuers of Visa and MasterCard cards are not obliged, however, to use the network definition, nor is there consistency from one bank to the next on the parameters determining 'small business.' What is considered a small business by one banking organization might be classified as middle market by another.").

1. Business Credit Card Agreements

To obtain business credit card agreements (or information about the terms of those agreements), we reviewed the web pages of issuers that used arbitration clauses in their consumer arbitration agreements as of December 31, 2009.[251] We focused on those issuers that used arbitration clauses in their consumer credit card agreements because we are interested in whether issuers that required consumer cardholders to arbitrate disputes also required business cardholders to arbitrate disputes. Only eight of the issuers made available copies of their business credit card agreements online. An additional eight of the issuers provided disclosure statements for business credit card agreements. However, as discussed earlier,[252] issuers do not always disclose the use of arbitration agreements in their credit card disclosure documents. If the disclosure document indicates that the agreement includes an arbitration clause, we can be confident that it does so. But if the disclosure document is silent, we cannot assume that the agreement does not include an arbitration clause.

Our findings are summarized in Table 11.[253] Two of the sixteen issuers were among the settling defendants in *Ross v. Bank of America*, and so have agreed to remove arbitration clauses from their consumer and small business credit card agreements.[254] Our findings are what would be expected given the settlement: one issuer's business credit card agreement does not have an arbitration clause and the disclosure statement of the other does not mention arbitration.

Table 11. Use of Arbitration Clauses in Business and Consumer Credit Card Agreements

Arbitration Clause in Consumer Credit Card Agreement?		Arbitration Clause in Business Credit Card Agreement?	
As of 12/31/09	As of 12/31/10	As of 5/1/11	Number of Issuers
YES	NO	Yes	0 (0.0%)
		No	1 (50.0%)
		Uncertain	1 (50.0%)
		TOTAL	2 (100.0%)
YES	YES	Yes	8 (57.1%)
		No	4 (28.6%)
		Uncertain	2 (14.3%)
		TOTAL	14 (100.0%)

251 The documents we obtained were ones posted on the issuers' web pages as of May 2011. We do not know whether the issuers' consumer agreements might have changed between December 31, 2010 (the latest date for which we have data) and May 2011.

252 *See supra* note __.

253 We report only the number of agreements because we do not have data on business (as distinct from consumer) credit card loans outstanding.

254 Stipulation and Settlement Agreement with Capital One Bank (USA), N.A. and Capital One, N.A., ¶¶ 3(a) & 2(k), Ross v. Bank of America, N.A., (USA), No. 05-cv-7116 (S.D.N.Y. Feb. 23, 2010), available at http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-capital-one.pdf; Stipulation and Agreement of Settlement with JPMorgan Chase & Co. and Chase Bank USA, N.A., ¶¶ 3(a) & 2(k), Ross v. Bank of America, N.A., (USA), No. 05-cv-7116 (S.D.N.Y. Feb. 23, 2010), available at http://www.arbitration.ccfsettlement.com/documents/files/2010-02-23-stip-and-agreement-with-chase.pdf.

Of the remaining fourteen issuers, eight (or 57.1%) used arbitration clauses in their business credit card agreements, just as they did in their consumer agreements.[255] Four (or 28.6%), however, did not, and whether the remaining two used arbitration clauses is uncertain (the issuers provided only disclosure statements on their web pages and the disclosure statement did not mention arbitration). Thus, roughly twice as many of the issuers we studied used arbitration clauses in their business credit card agreements as did not. But, given that all of these issuers used arbitration clauses in their consumer credit card agreements, issuers appear less likely to use arbitration clauses in business credit card agreements than consumer credit card agreements (although definitive conclusions are impossible given the small sample size and other limitations of our data).

2. Business Deposit Account Agreements

Because the data are so limited for business credit card agreements, we also reviewed the web sites of the same issuers for business and consumer deposit account agreements. Fourteen of the issuers made their consumer and business deposit account agreements available online.[256] We added to the sample the deposit account agreements from another issuer, Amegy Bank of Texas. In our analysis of credit card agreements, we consolidated Amegy Bank with Zions Bank because they are commonly owned and used an identical arbitration clause. Here, we treat them separately because they used different deposit account agreements.[257] Accordingly, our sample includes fifteen issuers for which we have consumer and business deposit account agreements.

Table 12 summarizes our findings. Nine (of 15, or 60.0%) of the financial institutions in the sample used arbitration clauses in both their consumer and their business account agreements.[258] Conversely, four (of 15, or 26.7%) did not use arbitration clauses in either of the agreements. (Three of those agreements instead had a jury trial waiver; one had no provision.) Thus, thirteen of the fifteen (or 86.7%) financial institutions in the sample specified the same means of dispute resolution in their business deposit account agreements as in their consumer deposit account agreements.[259]

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[255] Of the three issuers for which we have agreements, two use identical arbitration clauses in their consumer and business credit card agreements, while one uses a somewhat simpler clause in its business credit card agreement.

[256] Although we do not include Citibank in the sample because a copy of its business deposit account agreement was not available on line, it appears that Citibank includes (or at least included) an arbitration clause in its business deposit account agreement (as it does in its consumer account agreement). *See* Citibank, N.A. v. Stok & Assocs., P.A., 2010 U.S. App. LEXIS 14912, at **2 (11th Cir. July 20, 2010) (per curiam) (unpublished opinion), *cert. dismissed*, 131 S. Ct. 2955 (2011).

[257] *See* Drahozal & Rutledge, *Consumer Credit*, *supra* note __, at 15 (describing when commonly owned issuers were consolidated in defining the sample).

[258] Indeed, the financial institutions often used the same deposit account agreements for both businesses and consumers.

[259] In all but one case, the arbitration clauses were identical for businesses as for consumers. The one exception is Wells Fargo, which included a different arbitration clause in its business account agreement than in its Consumer Account Agreement. *Compare* Wells Fargo, Business Account Agreement 4-6 (Sept. 24, 2010) (copy on file with authors) *with* Wells Fargo, Consumer Account Agreement 4-6 (Mar. 17, 2010) (copy on file with authors). That said, in substance the agreements were very similar, and the differences might be due to the differing effective dates on the copies available to us rather than any decision to treat business and consumer accountholders

Of the remaining two issuers, one — Bank of America — used arbitration for business disputes and not for consumer disputes.[260] Bank of America had announced in July 2009 that it was removing arbitration clauses not only from its consumer credit card agreements but also from other consumer contracts, including bank account agreements.[261] Unlike its settlement in *Ross*, which applied to both consumer and small business credit card agreements,[262] the more general change of practice by Bank of America evidently did not apply to business deposit account agreements.

The other issuer — Zions Bank — provided in its deposit account agreement that either party had the option to use arbitration to resolve "consumer disputes," defined as consumer claims seeking less than $75,000.[263] The option to arbitrate did not apply to business claims or consumer claims above $75,000. For all claims, the agreement included a jury trial waiver and a class action waiver.[264]

Table 12. Use of Arbitration Clauses in Business and Consumer Deposit Account Agreements (2011)

	Number of Financial Institutions
Arbitration clause in both agreements	9 (60.0%)
No arbitration clause in both agreements	4 (26.7%)
Arbitration clause in business agreement; jury trial waiver in consumer agreement	1 (6.7%)
Jury trial waiver in business agreement; arbitration clauses in consumer agreement (claims under $75,000)	1 (6.7%)

* * * * *

Overall, subject to the limitations described above,[265] we find that the business credit card and deposit account agreements in our sample are less likely than consumer credit card and deposit account agreements to include arbitration agreements — although in the case of deposit

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differently.

[260] *See* Bank of America, Deposit Agreement and Disclosures ¶ XXIV(E) (June 19, 2010) (copy on file with authors) ("This section on arbitration applies to business accounts ...."); *id.* ¶ XXIV(B) ("JURY TRIAL WAIVER FOR PERSONAL ACCOUNTS").

[261] *See* Chu, *supra* note __ ("In the industry's latest shift away from controversial forced arbitration clauses, Bank of America said Thursday that it will no longer require credit card, *bank account* and auto loan customers to sign away their right to sue.") (emphasis added); Robin Sidel, *Bank of America Ends Arbitration Practice*, WALL ST. J. ONLINE, Aug. 14, 2009, *available at* http://online.wsj.com/article/SB125019071289429913.htm (same).

[262] *See supra* text accompanying notes __-__.

[263] Zions Bank, Deposit Agreement 13 (July 2010) (copy on file with authors).

[264] The agreement added that if a court holds the jury trial waiver unenforceable, "any party hereto may require that said dispute be resolved by binding arbitration." *Id.*

[265] *See supra* text accompanying notes __-__.

account agreements the difference is slight. That said, the difference we find is much less dramatic than that found by Eisenberg, Miller, and Sherwin. It may be that the two sets of findings bracket the actual relationship: the Eisenberg, Miller, and Sherwin findings might understate the degree of correspondence because they were comparing different types of contracts; ours might overstate the degree of correspondence because we do not compare parties with equal bargaining power.

III. Summary and Implications

This Part summarizes the findings in the previous Part and discusses their implications for legal doctrine, ongoing policy debates, and scholarship. After providing a brief summary, it considers four matters – (a) *Concepcion*, (b) legislative efforts to ban predispute arbitration agreements, (c) possible rules on consumer credit agreements issued by the Consumer Financial Protection Bureau, and (d) future avenues for empirical legal scholarship on arbitration.

The central empirical findings in the previous Part are as follows:

- Most credit card issuers (over eighty percent) do not include arbitration clauses in their credit card agreements. As of December 31, 2010, the majority of credit card loans outstanding (in dollar terms) are not subject to arbitration clauses. As discussed more below, consumers have a much greater degree of choice in whether to arbitrate disputes involving their credit cards than commonly believed.

- A sizable proporation of credit card arbitration clauses (68.1% of issuers; 98.4% of credit card loans outstanding) expressly permit cardholders to bring claims in small claims court. Most if not all of the others likely do so by providing for arbitrations to be administered by either the AAA or JAMS, subjecting the arbitration clause to the Consumer Due Process Protocol (or the JAMS equivalent). Roughly a quarter of the agreements studied permitted consumers to opt out of the arbitration clause at the time they enter into the agreement.

- Almost all of the credit card arbitration clauses in the sample opted to have the arbitration governed by the FAA, either without mention of state law or to the express exclusion of state law. This finding suggests that the Supreme Court correctly construed party intent in holding in *Mastrobuono* and *Preston v. Ferrer* that a general choice-of-law clause does not incorporate state arbitration law by reference into contract.

- Essentially all of the arbitration clauses in the sample provide for either the American Arbitration Association or JAMS to administer arbitrations arising under the credit card agreement. A handful have a vestigal reference to the National Arbitration Forum. As of the end of December 2010, then, credit card agreements provide for arbitrations to be administered by established, reputable providers.

- Despite predictions to the contrary, credit card issuers have not responded to the Supreme Court's decision in *Rent-A-Center West v. Jackson* by including delegation clauses in

their arbitration clauses. The reason for the lack of a response is uncertain. It may reflect simple inertia, a hesitance to give arbitrators authority over gateway issues, or the fact that courts have tended to construe institutional rules as reaching the same result, perhaps making an express provision allocating authority to the arbitrator unnecessary.

- While class arbitration waivers are ubiquitous in credit card arbitration clauses, other provisions asserted to be unfair to consumers are almost nonexistent. None of the arbitration clauses specifies a baised mechanism for selecting arbitrators. Only a handful of credit card arbitration clauses, almost always by issuers with very small market shares, include provisions limiting remedies or the time for filing a claim, specifies a potentially distant forum for the hearing, or limits discovery. Indeed, given the strong preference among credit card issuers for class arbitration waivers, one would expect them not to include other provisions in their arbitration clauses that might result in the clause (together with the class arbitration waiver) being invalidated.

- Only one clause in the sample included a minimum recovery provision of the sort used by AT&T Mobility. Courts so far have not limited *Concepcion* to arbitration clauses including such provisions. If they did so, our data suggest that the decision would (at least in the short run) have a very limited effect.

- Issuers often (although not always) include similar provisions in their business credit card and deposit account agreementts as in their consumer credit card and deposit account agreements. Issuers are more likely to include arbitration clauses in their consumer agreements, but (particularly in the case of deposit account agreements) the difference is slight. We discuss this finding more below.

To reiterate: these findings are limited to credit card contracts and arbitration agreements. Whether they can be generalized beyond the credit card context depends on how representative credit cards are Moreover, the findings necessarily are limited to the time periods studied. Whether the findings will continue to hold over time, or whether subsequent events (such as the decision in *Concepcion*) will alter remains to be seen.

These findings have potentially important implications for an array of legal, regulatory, and scholarly matters.

First, our findings suggest that contract law doctrines premised on a lack of consumer choice may not apply (or may apply only weakly) to the use of arbitration clauses in the credit card industry. Most credit card issuers do not include arbitration clauses in their credit card agreements, providing consumers with the ability to choose a credit card that does not require them to arbitrate disputes with the issuer. Moreover, like the AT&T Mobility clause in *Concepcion*, many clauses in our database contained some form of a small-claims carve out that mitigated the claims-discouraging effect of an arbitration clause combined with a class arbitration waiver. Not all courts are willing to consider the availability of market alternatives in ruling on whether a contract provision is unconscionable. But for ones that do our findings provide important data in evaluating the extent of such alternatives in the credit card industry.

Moreover, our findings also suggest a potential side benefit of *Concepcion*: it gives users of arbitration clauses with class arbitration waivers an incentive to make the rest of the arbitration clause as fair to consumers as possible. Indeed, *Concepion* could be viewed as providing a goal to which they can aspire, and it will be worth watching to see whether, in light of *Concepcion*, financial services companies (or other users of consumer arbitration clauses) shift toward a clause more closely resembling that used by AT&T.

We acknowledge several assumptions in our argument – that is, it depends on beliefs about a consumer's knowledge of her rights under the arbitration clause and a willingness to act based on that knowledge. In other words, the availability of credit card agreements without arbitration clauses may not make any difference to consumers who either do not know about arbitration or who are not willing to choose a different credit card issuer on that basis. Similarly, devices such as small claims carve outs and reward payments for prevailing parties help overcome concerns that arbitration clauses coupled with class waivers can discourage the pursuit of valid, small-stakes claims, but not if consumers, despite having these rights, do not pursue these claims because they never become aware of these opportunities.[266] Testing this proposition, of course, becomes a difficult empirical undertaking. One would need some way of measuring the extent to which consumers forego claims due to their ignorance about the provisions of their arbitration agreements. Some research has begun to delve into this area through the use of surveys testing how respondents react to a series of hypothetical cases.[267] This research holds forth some promise, but studying actual consumer behavior based on actual clauses would offer a more revealing method of testing the assumption on which our argument rests**.**

Second, our findings suggest that congressional efforts to restrict the use of arbitration clauses in certain contracts rest on some faulty empirical premises. As discussed above, Congress has enacted a series of laws prohibiting arbitration agreements in specialized industries such as automobile dealer agreements, credit card agreements with military personnel, poultry wholesale contracts, employment agreements with defense contractors and, most recently, certain residential mortgage agreements. More ambitiously, Congress currently is considering – and has considered for several years – the Arbitration Fairness Act, which would impose a blanket prohibition on arbitration agreements in consumer and employment contracts.

Like its more modest legislative predecessors, the Arbitration Fairness Act rests on a series of empirical premises about the use of arbitration clauses. For example, the current version of the Arbitration Fairness Act finds that: "[m]ost consumers and employees have little or no meaningful choice whether to submit their claims to arbitration."[268] Our research suggests that such sweeping generalizations about industry practices are, at best, misguided and, at worst, demonstrably wrong. Contrary to the above-quoted "finding" of the Act, arbitration clauses do

[266] *See* David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 U.C.L.A. L. Rev. 605 (2010); Donna Shetowski & Jeanne Brett, *Disputants' Preferences for Dispute Resolution Procedures: A Longitudinal Pre- versus Post-Experience Study*, 41 CONNECTICUT LAW REVIEW 63 (2008); Donna Shetowski, *Disputant's Preferences for Dispute Resolution: Why We Should Care and Why We Know So Little*, 23 OHIO STATE JOURNAL ON DISPUTE RESOLUTION 549 (2008).

[267] *See* Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 Harvard Negotiation L. Rev. 115 (2010).

[268] Arbitration Fairness Act, S. 987, 112th Cong. § 2(3) (2011).

not necessarily permeate entire industries (at least judged by the credit card industry as examined here). Even among firms that utilize such clauses, they do not employ a "one size fits all" approach. Instead, they display a diverse array of features, ranging from clauses with reward payments to clauses with "unfair" provisions that have sparked controversy among academic skeptics and consumer advocates.

Here too, our conclusion is measured. Just as our findings do not support a wholesale condemnation of arbitration clauses (as urged by measures such as the Arbitration Fairness Act) so too do they not amount to an unqualified endorsement of all clauses in whatever shape and form. Rather, our findings support a more nuanced case-by-case approach to testing the validity of arbitration clauses. That is precisely the sort of fact-bound, common law approach facilitated by Section 2 of the Federal Arbitration Act and the current doctrine. Whereas wholesale prohibitions like the Arbitration Fairness Act declare entire areas of contract off limits to arbitration regardless of the terms of the agreement, the Section 2 model enables courts to test particular clauses in light of their impact in a certain context, both respect to the nature of the contractual relationship and with respect to the claim affected by the clause. Additionally, in the context of statutory claims, a separate doctrinal defense – set forth in cases like *Mitsubishi* and *Gilmer* – allow courts to test whether a particular arbitration clause enables a plaintiff adequately to vindicate her statutory rights. To the extent courts conclude that a particular clause does not fulfill this purpose (as some courts recently have concluded[269]), this approach permits a more modest check on the use of arbitration clauses without the need for wholesale invalidation of those clauses. Our point here is not to defend a particular application of Section 2 or the *Mitsubishi/Gilmer* defense but, instead, merely to explain why, at a conceptual level, that model provides a superior, and more nuanced, method of regulating arbitration agreements to the blunt, empirically dubious approach typified by recent legislative enactments and pending bills.

Third, in the same vein, our findings should send a note of caution to the CFPB. As noted above, the CFPB has been vested with the authority to consider whether to regulate or even prohibit the use of arbitration clauses in credit card agreements. Whereas Congress has the authority at least to pass laws that result on faulty empirical premises, ´the CFPB's rulemaking authority does not sweep so broadly. Administrative agencies, unlike legislative bodies, are subject to important legislative and doctrinal constraints. Their rules cannot be irrational, nor can they be arbitrary and capricious.[270]

The results of our study suggest that a blanket prohibition on the use of arbitration clauses in consumer credit agreements would be difficult to defend under these standards of administrative law. Our study speaks directly to the practices of the industry that any CFPB rule would regulate. It demonstrates further that the practices within that industry vary widely. Some segments of the industry, especially credit unions, do not use arbitration agreements at all.[271] Moreover, among those industry participants employing such agreements, practices vary widely.

[269] *See, e.g., In re American Exp. Merchants' Litig.*, No. 06-1871-cv, 2012 WL 284518 (Feb. 1, 2012).

[270]*See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.,* 463 U.S. 29, 43 (1983); *Citizens to Pres. Overton Park, Inc. v. Volpe,* 401 U.S. 402, 413-14 (1971). Indeed, the statutory authority permitting the CFPB to regulate arbitration clauses in consumer financial services contracts requires that any regulation be consistent with the findings of the study it must first undertake.

[271271] We explore this phenomenon in greater detail in a separate paper. *See* Drahozal & Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study.*

When coupled with other data suggesting that arbitration produces results for consumers that are at least as favorable as those obtained in litigation, the case for wholesale prohibition is a difficult one. This is especially true given the complete dearth of empirical evidence suggesting that Congressional prohibition of arbitration agreements in certain discrete areas has somehow made consumers (or the analogous party in the allegedly inferior bargaining position) better off.

Here too, our conclusion is a measured one. While our research casts doubt on the case for wholesale prohibition, it does not necessarily disprove the case for targeted regulation. It may well be appropriate for the CFPB to consider regulating certain features of clauses (like remedy limitations or cost splitting provisions) to the extent those practices are employed within the industry. We do not take a position on that issue here, for we do not believe our empirical findings yield a clear answer to that question (other than suggesting that they are rare in credit card agreements). It may be that judicial interpretation of Section 2 provides an adequate mechanism for policing those agreements without the need for regulatory oversight. Moreover, voluntary self-regulation by the industry through the development of certain "best practices" protocols, similar to the due process protocols developed in the consumer, employment and health care contexts, may be superior to government oversight.[272] Ultimately, if CFPB wishes to regulate arbitration agreements in credit cards in a manner that stops short of outright prohibition, a more complete empirical case is needed.

Finally, our findings speak to the academic research in this area, especially the pathbreaking work of Professor Eisenberg and his various co-authors. Part I explained what we believe to be the limitations on the findings of Professor Eisenberg's research. Part II explained how our findings cast doubt on Professor Eisenberg's broad conclusion that companies such as banks systematically treat their consumer clients differently than their more sophisticated corporate partners. Our findings suggest that the differences in treatment are not as stark as Professor Eisenberg and his coauthors suggest. These findings, thus, cast doubt on whether companies are using arbitration clauses in their consumer contracts as a litigation-avoidance device as opposed to simply a reasonable tool to manage litigation risk. Our findings are by no means conclusive, as they have their own methodological weaknesses. But they do highlight the importance of comparing, to the extent possible, comparable types of contracts between businesses and consumers.

Conclusion

This paper has sought to contribute to the growing body of empirical scholarship on the use of arbitration clauses, particularly in the context of consumer agreements. Our analysis of arbitration clauses in credit card agreements has yielded important findings that, in some respects, challenge the conventional wisdom about those practices within the industry. Most centrally, contrary to the conventional wisdom, most industry participants do not employ such agreements, and, with the exception of class waivers, most agreements do not contain the sorts of provisions that have sparked so much controversy among academic skeptics and consumer

[272] For discussion of these protocols, see, e.g., Rutledge, *Arbitration and the Constitution* (Cambridge University Press forthcoming 2012); Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L REV. __ (forthcoming 2012).

advocates. While we find some variation in practices between consumer agreements and business agreements, those variations are not as stark as others have suggested. Our findings identify a possible side benefit of the Supreme Court's decision in *Concepcion* and sound a note of caution to lawmakers and regulators who are considering prohibition or regulation of arbitration clauses in these contexts.